



House of Commons
House of Lords

Joint Committee on
Human Rights

Freedom of Speech in Universities: Responses

Eighth Report of Session 2017–19

*Report, together with formal minutes
relating to the report*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Report

Background

1. In March 2018 we published a report on *Freedom of Speech in Universities*, which contained recommendations aimed at the Government, the Charity Commission for England and Wales and the Office for Students (OfS), as well as for individual universities and student unions.¹ In our Report we drew attention to incidents of interference with free speech rights at individual universities, and expressed concern that “the concept of safe spaces is either too broad or very vague” and that while there was a role for safe spaces, they could not extend to cover the whole of the University setting.
2. We were concerned about the clarity and consistency of guidance on free speech issued by various bodies with a role in regulating this individual university policies, including Government’s Prevent Duty Guidance and the Charity Commission guidance for charities in general and student unions in particular. We were also anxious to explore the role of the newly created Office for Students in securing freedom of speech in universities.
3. In evidence to the inquiry, the Minister of State for Universities, Science, Research and Innovation, Mr Sam Gyimah, announced that he was to hold a “free speech summit” with interested stakeholders, to “thrash out” where responsibilities lay and to make sure they did not cut across one another. We welcomed this in our Report. We have now received responses from the Government, the Charity Commission and the Office for Students, which we publish as appendices to this Report, together with a letter from the Minister on that free speech summit. We are pleased that the responses show that the bodies concerned are taking action on our Report, but there are a number of issues where we will be undertaking further monitoring, which we highlight in this supplementary report.

Response from the Government

4. The Government accepts our finding that the behaviour of some protesters and student groups may disrupt free speech, and that the complex web of rules and guidance on this matter may impede free speech, rather than supporting it.
5. The promised free speech summit was held on 3 May 2018, and resulted in the participants’ commitment “to developing a shared piece of guidance to ensure that there is a clear and common understanding of the legal responsibilities, rules and regulations around free speech.” The response notes that the EHRC will take the lead on developing guidance over the summer, and that the Committee’s guidance will assist it in taking swift action, to put together “a product” by autumn 2018.
6. **The key recommendation of our report was that coherent, consistent and accessible guidance material should be produced by January 2019 at the latest. The Government is displaying a welcome sense of urgency, and we trust it will succeed in its ambitious aim of having the guidance in time for the new university year. We will review that guidance when it is published this autumn. We agree with the Government that this**

1 Joint Committee on Human Rights, Fourth Report of Session 2017–19, [Freedom of Speech in Universities](#), HC 589/HL 111

issue cannot be addressed by guidance alone, but that development of this guidance will be a “first step in a process of exposing and addressing any and all factors which stand in the way of our universities being places of truly open and challenging discourse”.

7. In our Report we endorsed the need for Prevent as a strategy for preventing the development of terrorism, but expressed concerns about the definition of extremism, the clarity of the guidance, and repeated our earlier recommendation for an independent review of the Prevent duty.

8. While we are disappointed that the Government does not plan to amend the Prevent Duty guidance to clarify its application in the light of the judgement in *Salman Butt v the Secretary of State for the Home Department*,² we note that the overarching free speech guidance will cover how Prevent Duty guidance and Charity Commission guidance should be used in the context of freedom of speech. This may help to resolve problems identified with the Prevent Duty guidance. In addition, ***we accept that the Independent Commission for Countering Extremism will have identifying extremism and advising on new policies to tackle it as part of its remit. We are content that the Government is not pre-empting the advice of the Independent Commission by reviewing its definition of extremism, but recommend that if the Commission considers that the current definition is unsatisfactory it should say so clearly and publicly.***

9. While we continue to believe that an independent review of Prevent is necessary, we welcome the fact that Prevent will form part of the Government’s review of its wider counterterrorism strategy (CONTEST). We are pleased the Government and the OfS responses both refer to joint work to develop information sharing processes and ensure Prevent work strikes the right balance between security and transparency, and that the Government is publishing more information about Prevent. **We will keep the Prevent strategy under review, but clearly further substantive work on the Prevent Duty in higher education is likely to be deferred until various documents are published, including the OfS’s summary of Prevent Duty reports.**

10. We welcome the fact that the Government response makes it clear that it expects other regulatory bodies, such as the Office for Students and the Charity Commission to play their part in ensuring that free speech in universities is upheld and that, in holding the free speech summit, it has taken action to ensure this is done.

Office for Students

11. We very much welcome the fact that the OfS shares our concerns that there are disincentives for students to put on events which discuss topics include speakers that other groups may want to contest, and that this or onerous bureaucracy may be having a chilling effect which results in events never even taking place.

12. We understand that the OfS is both independent, and a new institution which needs to establish its ways of working. Moreover, the OfS needs to consider its general duty to have regard to the need to protect institutional autonomy. We note that the OfS will be

2 [2017] EWHC 1930 (Admin). The judgment affirmed the legality of Prevent Duty guidance, clarified the type of speech to which the guidance applied and explained that the Prevent Duty had to be balanced against the statutory duty to secure freedom of speech.

collecting data about complaints reaching the Office of the Independent Adjudicator, in addition to implementing a process for students, whistleblowers or others to report issues of concern to the OfS itself.

13. The Committee recommended that “the OfS should report annually on free speech in universities, including naming when universities are been non-compliant with the responsibility to secure free speech, under the Education Act 1986.” The OfS has not committed to report annually on free speech, but may do so from time to time. **We remain of the view that it would be helpful for the OfS to report annually on free speech issues, but this need not be as a stand-alone report: inclusion in the Annual Report would suffice.**

14. **We welcome the OfS’s commitment to publish regulatory action and to publish the reasons for this action being taken where there has been a breach of registration condition E2. We consider this meets our recommendation to indicate where universities have been non-compliant with their duty to secure free speech, although we would prefer it if such actions were also referred to in any discussion of free speech in an annual report or other document.**

Charity Commission

15. In the course of our evidence the Charity Commission for England and Wales undertook to review its guidance on *Protecting Your Charity from Harm* and of its publicly available staff operational guidance on student unions, which is internal staff guidance, but publicly available. Despite these welcome undertakings we have some concerns. Statements such as “We believe the charity law rules are very clear, but we recognise that trustees may find the judgements they may have to make in applying them, in a small number of occasions, challenging” suggest the Commission has not fully digested the evidence we had received on the chilling effect its guidance has had on freedom of speech.

16. We suggested that although charity law was a complex area, the Government should consider whether student unions should be regulated by the OfS rather than the Charity Commission. The Charity Commission tells us that at the free speech summit it “was recognised and agreed that, irrespective of regulator, students’ unions, Universities and other HEIs are charities and therefore subject to charity law.” The Commission, OfS and the Government responses all note that student unions support the status of student unions as registered charities (ie subject to Charity Commission regulation). As the OfS says “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.” The Charity Commission response notes it has developed a meaningful and constructive working relationship with the OfS and the NUS, and that it will work on the new guidance to be developed by the EHRC. **We will review the Charity Commission’s revision of its own guidance when it is issued to ensure that it supports the general guidance on free speech rather than undermining it.**

Conclusion

17. Overall, we welcome the constructive responses to our Report, and the consensus that the Article 10 right to freedom of speech in universities is important. We will keep progress made by the Government, the Charity Commission and OfS under review and will consider whether further action is needed.

Appendix 1: Government Response

The Joint Committee on Human Rights published the report of its inquiry into Freedom of Speech in Universities on 25th March 2018. This document sets out the Government's response to the Committee's report.

Introduction

The Government welcomes the Committee's recognition of the importance of freedom of speech in universities. We support a number of its conclusions and recommendations. Many of the recommendations in the Committee's report are for bodies other than Government; in these cases we have commented where it is appropriate to do so.

Free speech plays a crucial role in generating rigorous debate, advancing understanding and allowing students to challenge conventional wisdom and discuss controversial subjects. The Government is strongly committed to protecting and promoting the right to lawful freedom of speech. We are grateful to the Committee for their work to establish the nature and extent of any threats or barriers to free speech on campuses.

In particular, we welcome the Committee's work to clarify that while there may not yet be widespread censorship, there are some genuine problems which must be addressed; in particular **the behaviour of some protestors and student groups, and the risk that a complex web of rules and guidance may impede free speech**. We recognise these challenges, and we are taking clear action to address them.

This is not something Government alone can solve. To begin a collective and collaborative approach to preserving free speech in higher education, **on 3 May 2018 the Universities Minister chaired a free speech summit**. The Minister brought together regulators, representative bodies and decision-makers in higher education, who committed **to developing a shared piece of guidance to ensure there is a clear and common understanding of the legal responsibilities, rules and regulations around free speech**. Attendees also agreed that this guidance would give practical advice and would set out a clear set of overarching principles for universities and student unions.

The Government's aspiration for this guidance is that it will provide much-needed clarity on the numerous issues which intersect with freedom of speech on campus, and which were rightly addressed by the Committee's report. Among these are no-platforming, the concept of freedom from harm, the use of safe spaces, protest, and fostering appropriate debate and challenge.

This guidance will be developed over the summer, with regular meetings between parties and involvement from the Universities Minister at key milestones, with the intention of bringing together a product by autumn 2018. We recognise that the Committee has produced its own guidance which we welcome. We trust this will enable us to take swift action in this respect.

The development of this guidance is the most recent and ambitious of a number of measures the Government has taken over the past year to safeguard free speech in universities. Last year we extended the duty in the Education (No 2) Act 1986 to cover all registered providers of higher education, and the Office for Students' (OfS) regulatory framework

includes a free speech public interest principle to enable the regulator to intervene with sanctions where issues arise. We have also set clear expectations of the OfS that it will work with the sector to make sure universities are upholding free speech.

The Committee was right to look at the issue of speakers and events. This is where many high-profile concerns have arisen, and where the most obvious risks of restrictions on the right to freedom of expression might come about. The Committee collected valuable evidence on the issues which might surround these events. However, **what the inquiry did not consider is the culture in our universities**. We are concerned that there may be a wider issue here. The JCHR's inquiry and the subsequent public discourse has begun to expose a deeply concerning tendency amongst some within universities to reject any viewpoints which do not conform to what is 'fashionable' or 'socially acceptable'. This can lead to those who wish to express dissenting views—perfectly lawfully—being deemed unwelcome on campus, and at worst feeling unsafe or threatened if they speak out. This risks the foundation of what universities are about: the free and frank exchange of ideas.

This goes far beyond the remit of the Committee's inquiry into the impact of legal limits and regulation on freedom of speech—it is about ensuring our universities have a genuine **diversity of thought**. We know that our universities are passionate about the principles of diversity of thought and free speech, but it is becoming clear that this is not always translating into practice. Government is committed to calling out this tendency towards a 'mono-culture' on campus, and we urge universities to counter censorious attitudes and groupthink wherever they arise.

We appreciate that this is an issue that cannot be addressed by guidance, or indeed by Government. We are confident that the proposed EHRC-led guidance will be a clear step towards resolving a number of the issues raised by the Committee; this is the first step in a process of exposing and addressing any and all factors which stand in the way of our universities being places of truly open and challenging discourse. We are committed to continue to work to make sure that all students feel free to lawfully express their views—whatever they may be—and that robust, rigorous debate remains a core part of the university experience for all students.

Responses to conclusions and recommendations

Factors inhibiting free speech

Recommendation 1

Any inhibition on lawful free speech is serious, and there have been such incursions, but we did not find the wholesale censorship of debate in universities which media coverage has suggested. There are real problems which act as disincentives for students to put on challenging events and whilst most student union officers who responded to our survey say they are confident that they and their companions can speak freely, such disincentives could be having a wider 'chilling effect', which is hard to measure. A much broader survey of students' opinion would be needed to assess levels of confidence amongst the student body as a whole. (Paragraph 37)

We are glad that the Committee did not find evidence of wholesale censorship on campus. We have been clear, however, that the number of events which go ahead is not a sufficient metric to establish whether there is an issue. We must also consider the events which may not go ahead in the first place, and those who may be deterred from speaking their mind.

As the Universities Minister told the Committee, we are particularly interested in establishing whether there is a broader culture of hostility to certain viewpoints which may act as a deterrent and impede free speech. We welcome the Committee's work to seek reliable evidence on this, and recognise that it is challenging to measure the extent to which this may be taking place.

We are pleased that the Committee's research corroborates the evidence of HEPI's 2016 survey, which showed that 83% of respondents did feel free to express themselves at university. At the Universities Minister's free speech summit, the EHRC said they were considering undertaking more research in this area.

The Committee heard some views which referenced a 'chilling effect' in relation to Prevent processes being applied inappropriately in order to shut down free speech. This would be a clear misapplication of Prevent, and the government has seen no evidence of this being the case. Further, the judgment in the Dr Butt case, which the committee references in its report, did not accept the evidence put forward by the claimant of a chilling effect. The Office for Students will continue to make sure universities are equipped to implement Prevent proportionately and appropriately without chilling free speech.

Recommendation 2

Student groups are not obliged to invite a particular speaker just because that person wants to speak at the university, or to continue with an invitation if they freely decide they no longer wish to hear from a particular person. Speakers are at liberty to decline to share a platform with those they oppose. Speakers can also decline to attend events if they do not wish to comply with conditions (including reasonable conditions such as lawful speech or being part of a balanced panel). None of these is an interference on free speech rights. But some of the activities are interferences with the right to freedom of speech. The imposition of unreasonable conditions is an interference on free speech rights. We do not, for example, consider it a reasonable condition that, if a speaker gives an assurance that their speech will be lawful, they be required to submit a copy or outline of their speech in advance. (Paragraph 41)

It is ultimately up to institutions to determine how they balance their duty to promote freedom of speech with their other legal obligations (such as duties under the Equality Act or the Prevent duty). This includes assessing and managing any risks associated with speaker events.

Government has a responsibility to protect the public from harms—in addition to terrorism—which extremists pose to our society. If extremism is left unchallenged we risk intolerance and bigotry being normalised, minorities being targeted and the isolation of communities. We are clear that challenging extremism does not mean banning lawful speech, but it does mean ensuring the right steps are taken to contest extremist narratives and make sure that those who wish to spread hatred do not go unchallenged. It also means ensuring that risks have been assessed effectively and appropriate mitigations put in

place—in particular where there is a significant risk that the speech may veer into unlawful harassment and discrimination, incitement to violence or terrorism. With this in mind, we believe that institutions should be free to determine if this includes an advance copy of a speech in certain circumstances, where the risk is highest.

The Charity Commission has also produced guidance (“Protecting Charities from harm: Compliance Toolkit”, Chapter 5) for student unions to identify and mitigate risks. The guidance recommends a ‘layered’ approach; the greater the risks identified by the trustees of an event or a speaker, the more stringent the mitigation that may be necessary. This guidance provides an illustrative list of possible mitigations, including the potential to ask for an advance copy of a speech—although the guidance is clear that it is not written or intended as a requirement.

As Government has made clear and will continue to make clear, higher education is a place where students should be exposed to a range of ideas, including those that may be controversial and unpopular—and where they learn to think critically and challenge those who they disagree with, not shut them down. We consider it a problem if there is a culture in universities where students refuse to hear from those with whom they disagree.

The Universities Minister will be undertaking a series of campus visits where he will engage directly with students on a number of issues. One of these topics will be the value of robust debate and challenge. We also welcome the involvement of the NUS in the recent free speech summit, and hope to continue this collaboration to facilitate respectful debate and a diversity of viewpoints on campus. Furthermore, we will publicly call out those who attempt to make certain viewpoints entirely unwelcome on campus, or who threaten, harass or ostracise those who express such unpopular viewpoints.

Recommendation 3

In our view, freedom of expression is unduly interfered with:

- **when protests become so disruptive that they prevent the speakers from speaking or intimidate those attending;**
- **if student groups are unable to invite speakers purely because other groups protest and oppose their appearance; and**
- **if students are deterred from inviting speakers by complicated processes and bureaucratic procedures.**

It is clear that, although not widespread, all these problems do occur and they should not be tolerated. (Paragraph 42)

We agree with the Committee’s conclusion in this area. The Universities Minister’s free speech summit considered how to address both the issue of potentially overcomplicated processes, and the overzealous opposition to speakers with unpopular views to the point that they are unable to speak. Sector partners including the Charity Commission, Office for Students, NUS, Universities UK, independentHE and GuildHE agreed to work together with Government and the European Human Rights Commission to develop a

single, unified piece of guidance that will serve to bring together and clarify the existing legal duties and guidance around free speech for all, including universities and student unions.

This guidance will set out core principles and expectations, and **is intended to make it significantly more difficult to hide behind processes and procedures in order to stifle free speech.**

We of course support the rights of students to protest legitimately. Peaceful protest itself is a legitimate form of freedom of expression. However, we expect institutions to take **appropriate disciplinary measures** in cases of violent protest or protest that shuts down free speech. This sort of protest is unacceptable. Allowing protests to keep those with unpopular or unfashionable views from speaking sends a message to students that only certain views are ‘acceptable’.

We expect universities to communicate clearly to students the value of lawful speech and the consequences for individuals who participate in violent protests. The Universities Minister’s summit agreed to consider principles around student protest when developing the new free speech guidance.

Recommendation 4

Students and student union representatives have the right to freedom of association and expression, which are protected by Article 10 and 11 of the ECHR, and can cover forms of peaceful protest. However, it is unacceptable for protestors to deliberately conceal their identities, break in with clear intention to intimidate those exercising their rights to attend meetings or to seek to stop events. Universities have a statutory duty to initiate disciplinary measures if individual students or student groups seek to stop legal speech, or breach the institution’s code of conduct on freedom of speech. The police should take appropriate action against individuals committing criminal acts in the course of protests. (Paragraph 50)

We welcome the Committee’s identification of this issue, and we strongly agree that this type of violent or intimidating behaviour is unacceptable.

The statutory free speech duty on universities does not require institutions to initiate disciplinary measures, but it does require them to take reasonably practicable steps to ensure freedom of speech, which may include disciplinary measures.

Recommendation 5

There are, quite properly, legal restrictions on speech. Where speech leads to unlawful harassment of individuals or groups protected by the Equality Act 2010, then this is contrary to the institution’s duty to have due regard to the need to eliminate discrimination, and would be unlawful. Mutual respect and tolerance of different viewpoints is required to hold the open debates that democracy needs. Nonetheless the right to free speech includes the right to say things which, though lawful, others may find offensive. Unless it is unlawful, speech should normally be allowed. (Paragraph 54)

We agree with the Committee that free speech must of course be balanced with statutory responsibilities such as the Equality Act 2010, and with other duties such as the Prevent

duty and health and safety legislation. The Committee has rightly noted that universities are bound by the Public Sector Equality Duty to have due regard to the need to eliminate discrimination—though this is a duty to have due regard to certain factors rather than to actually prevent unlawful harassment.

We expect institutions to facilitate free speech responsibly, and where appropriate put reasonable mitigations in place to ensure the safety and security of students, to fulfil their duties under the Equality Act, and to prevent extremist narratives from stoking hate. Nevertheless, in the vast majority of cases, we agree that lawful speech should normally be allowed.

Mutual respect and tolerance is crucial to holding a constructive debate. Real, meaningful freedom of speech is about more than just individuals expressing their own views or being deliberately unpleasant or controversial to ‘bait’ an audience, as we have seen with some speakers in recent years. In most cases, this behaviour is not unlawful and it is not for Government to intervene. Even where speech is deliberately unpleasant or controversial, that in itself is not grounds to censor it. However, we believe universities should see themselves as **having a responsibility to facilitate respectful, civil debate** wherever possible.

The OfS’s monitoring of the Prevent duty should pick up where legal duties are not being effectively balanced. Its new role in relation to freedom of speech will enable it to support institutions to promote and facilitate meaningful debate, and to investigate and intervene where institutions are not upholding the principle of free speech.

Recommendation 6

Whilst there must be opportunities for genuinely sensitive and confidential discussions in university settings, and whilst the original intention behind safe space policies may have been to ensure that minority or vulnerable groups can feel secure, in practice the concept of safe spaces has proved problematic, often marginalising the views of minority groups. They need to co-exist with and respect free speech. They cannot cover the whole of the university or university life without impinging on rights to free speech under Article 10. When that happens, people are moving from the need to have a “safe space” to seeking to prevent the free speech of those whose views they disagree with. Minority groups or individuals holding unpopular opinions which are within the law should not be shut down nor be subject to undue additional scrutiny by student unions or universities. (Paragraph 60)

We are pleased that the Committee shares the Government’s position on safe space policies—which is that while often well-intentioned, they stifle those who hold certain views. We also strongly agree that a ‘safe space’ policy cannot apply to an entire campus without restricting free speech.

We fully support the objective of making sure that students feel safe and free to express themselves. As mentioned above, universities have an important role in creating the right environment to ensure this is the case, which includes not just a consideration of the speakers for an event, but also how protests will take place. We are clear that freedom of speech cannot be achieved through censorship or marginalising some groups to protect others; free speech must be for everyone.

The Government calls on student unions and universities to work together to empower students to challenge those with whom they disagree, and to facilitate civil and respectful discourse. We hope that the involvement of both NUS and UUK in the Universities Minister's summit and subsequent work will help to facilitate this.

It is not always an easy task, but exposing students to difficult and uncomfortable ideas is fundamental to the purpose of education. Through this process we help to equip young people with the skills to become productive, inquiring global citizens.

Prevent duty

Recommendation 7

We note the clarity brought by the judgment in *Salman Butt v Secretary of State for the Home Department*, which affirms the legality of the Prevent duty guidance for higher education, clarifies that the type of speech to which the guidance applies is that which risks drawing people into terrorism and explains how the Prevent duty has to be balanced against the statutory duty to secure freedom of speech. It is unfortunate that the Guidance is not clear on its face without users also having to separately know that they need to refer to the case law. We recommend that the guidance is brought up to date to reflect that judgment and that the Government review its definition of extremism in all official documents, in light of the judgment. (Paragraph 69)

We welcome the Committee's recognition of the judgment in the *Dr Butt* case. As the Committee's report states, this judgment affirms what has always been the case with the Prevent duty: that when complying with it, institutions must have particular regard to their existing duty to secure freedom of speech. This is explicitly set out in the Counter-Terrorism and Security Act 2015, and in the Prevent Duty Guidance, which the judgment recognised.

There is already significant support available to the higher education sector in interpreting and implementing the Prevent duty, which is one of a number of safeguarding duties, alongside protecting students from harassment, discrimination and abuse. In particular from the Department for Education's team of regional FE/HE coordinators, funded by the Home Office. They and HEFCE/OFS have communicated with institutions about the judgment and the clarification it provides, and will continue to do so. As set out in evidence to the Committee, HEFCE's monitoring of the Prevent duty has indicated that institutions are already balancing the Prevent duty with the duty to secure freedom of speech entirely adequately, and government support to the sector will continue to ensure this. There are currently no plans to amend the Prevent duty guidance.

With regard to the definition of extremism, in March 2018 we launched the independent Commission for Countering Extremism. This Commission will engage widely and openly on extremism and our core, shared values across the public sector, communities, civil society, families and legal and academic experts. Part of its role will be to identify extremism and advise the Government on new policies to tackle it, including whether there is a need for new powers. The Government won't pre-empt the advice of the independent Commission by reviewing its definition of extremism at this time.

In its first year, the Commission will also:

- publish a study into the threat we face from extremism, and the current response
- advise ministers on the Commission's future structures, work programme and the appointment of further commissioners. This advice will be informed by the Lead Commissioner's engagement with stakeholders.

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. (Paragraph 78)

We very much welcome the Committee's endorsement of the Prevent strategy, and the recognition that it a necessary part of the Government's work to reduce the threat from terrorism by stopping people from becoming radicalised.

In light of last year's terrorist attacks in Manchester and London, the Government's counter-terrorism strategy (CONTEST) is being updated to ensure that the police and security services have all the powers and Government support that they need. Prevent will form part of this review.

We agree with the Committee about the importance of transparency. As the report notes, last year we published data on referrals to Prevent and Channel for the first time, followed by further data published this year—and will continue to do so. Since the Committee's 2016 report, which rightly acknowledged that there are a number of myths spread about Prevent, we have also undertaken activity to enable members of the public to learn more about Prevent. For example, in May last year we published a document on the Safe Campus Communities website, setting out the process surrounding Channel, following feedback from universities that the Channel referral processes were poorly understood.

However, transparency must be balanced with security considerations. As Sir Michael Barber (OfS) told the Committee, there may be commercial, reputational and security risks associated with the publication of Prevent annual reports they receive from institutions. That is why the Information Commissioner supported HEFCE's decision not to share Prevent annual reports, a decision which government also supported. As Sir Michael Barber told the Committee, the OfS intends to keep this issue under review.

Furthermore, HEFCE has always published a sector-level summary of the reports for the purposes of transparency, and the OfS will continue this practice. We also are working with the OfS and other partners to better develop information sharing processes and ensure Prevent work strikes the right balance between security and transparency.

Universities and codes of practice

The following recommendations are for universities to consider and respond to as autonomous institutions. However, we have made some comments on the Committee's recommendations regarding Government's expectations and vision for the higher education sector.

Recommendation 11

Universities must strike a balance to ensure they respect both their legal duty to protect free speech and their other legal duties to ensure that speech is lawful, to comply with equalities legislation and to safeguard students. It is clearly easier to achieve this if debate is carried out in a respectful and open way. But the right to free speech goes beyond this, and universities need to give it proper emphasis. Indeed, unless it is clearly understood that those exercising their rights to free speech within the law will not be shut down, there will be no incentive for their opponents to engage them in the debate and therefore to bring the challenge that is needed to develop mutual understanding and maybe even to change attitudes. (Paragraph 91)

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. (Paragraph 93)

The context of each institution is different, and we strongly support their autonomy to develop codes of practice appropriate for their individual circumstances, including to determine what conditions may be reasonable to impose to allow free speech to go ahead. However, we recognise that there is significant variability in the approaches taken by institutions. We also accept the view of the Committee that in some cases, codes of practice may be overly complex and could risk engendering overcautious approaches to events.

The OfS is considering how it might support institutions to develop clear and effective codes of practice as part of its free speech role. As part of its role as Prevent monitor, the OfS will work with institutions to make sure codes of practice are appropriate and proportionate; they will also look at how key policies are disseminated. Additionally, the OfS is considering a thematic review around codes of practice as a first phase of its work to promote free speech.

We agree that codes of practice should facilitate freedom of speech. **This is their statutory purpose.** While—as Sir Michael Barber noted in his evidence—some bureaucracy is no doubt necessary to support the operations of an institution and to balance legal obligations, these codes should never be so onerous that they achieve the opposite of their aims by disincentivising speaker events.

Recommendation 13

We welcome the fact that many universities are prepared to fund the security necessary to ensure controversial speakers can be heard in safety. Where feasible, if security is needed to ensure a legal event can proceed safely, it should be provided so the event can go ahead. Such security should be adequate according to the risks envisaged. Effective action should be taken against protestors who themselves go beyond the law. The more it is accepted that the right to protest is vital, but does not extend to intimidation or attempts to close events down, the less burdensome this will become. (Paragraph 95)

We would expect any risk assessment around a controversial event to include consideration of security requirements. The Prevent duty statutory guidance sets out an expectation that staff responsible for the physical security of an institution have an awareness of Prevent policies and procedures. Institutions are able to access advice and support in carrying out risk assessments effectively via the FE/HE Prevent coordinator networks.

*Role of the Office for Students**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. (Paragraph 98)

The OfS is an independent body, and as such it is for them to determine their approach to regulation. It is not the role of the OfS to enforce the free speech duty under the Education (No 2) Act. We understand that the Office for Students will be responding itself to the Committee on these recommendations.

However, the Office for Students does have a clear role in relation to free speech, which we absolutely expect it to exercise where appropriate. There is a public interest principle built into the conditions of registration for all registered institutions, which say that they have to uphold the principle of freedom of speech in their governing documents—and importantly, that they must deliver it in practice.

If it comes to the OfS's attention that an institution is not doing this—either through media reporting, whistleblowing or other means—they can investigate. If the institution isn't upholding the public interest principle this might be a breach of a registration condition—in which case in extremis the full suite of sanctions such as monetary penalties or suspension could come into play.

Furthermore, the Government has been clear in Ministerial statements, evidence to this Committee and in the Secretary of State for Education's guidance to the OfS published on 28 February that **we expect the OfS to champion and promote free speech.**

Charity Commission

Recommendation 9

Concerns on the part of student unions about Charity Commission powers, and about whether they risked 'ultra vires actions' (which appeared to be prompted by the Charity Commission's guidance) have more impact, and misunderstandings are more widespread, than we had anticipated. The Charity Commission is under a legal obligation to regulate charities, and does so through guidance, but its current approach does not adequately reflect the important role student unions play in educating students through activism and debate. Moreover, the generic guidance on protecting a charity's reputation does not place due weight on the fact that inhibiting lawful free speech can do as much damage to a student union's reputation as hosting a controversial speaker. We welcome the fact that the Charity Commission has told us it will reassess its approach [as below]. (Paragraph 85)

Recommendation 10

[...] The Charity Commission should be careful to ensure its actions are proportionate, are understood by student unions, and do not unintentionally inhibit lawful free speech. (Paragraph 86)

As the Universities Minister stated in his evidence to the Committee, we support the Charity Commission's commitment to refresh their guidance. We strongly agree that regulation should not unintentionally inhibit lawful free speech.

Following the Committee's inquiry, the **Universities Minister met with the Charity Commission's Chief Executive** to discuss their shared understanding of the issues around free speech. The Charity Commission will be closely involved with the development of the EHRC's free speech guidance.

Free speech summit

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. (Paragraph 100)

We are glad the Committee supports the Minister's approach to bringing together key players. The EHRC and other relevant partners were involved in the summit on 3 May 2018. As we have set out, this summit was the most significant Government intervention on free speech since the introduction of the statutory duty in the Education (No 2) Act 1986. Its key outcome was an agreement between sector leaders to work together to protect and promote free speech, and to make absolutely clear their shared commitment to the right to free expression.

We do believe it is right that student unions are treated as charities and that they remain regulated by the Charity Commission. The NUS and individual student unions are supportive of the status of student unions as registered charities, which has brought with it credibility and professionalisation.

However, the regulation of student unions and universities must be complementary and clear about the roles, responsibilities and remits of all parties. The Charity Commission and Office for Students will work closely together to make sure they are consistent and clear with regard to free speech. The Government strongly supports this collaborative approach and will continue to encourage it.

Recommendation 16

This dialogue, and intervention to ensure that the Government itself and associated regulatory bodies are working coherently, is long overdue. The Government should ensure that all relevant organisations are included in this process. Both the Prevent duty guidance for higher education institutions and the Charity Commission guidance to student unions should be reviewed. The Government should take the lead in encouraging all the bodies involved in this field to produce coherent, consistent and accessible guidance and material by January 2019 at the latest, paying full attention to the extent of universities' legal responsibilities to secure free speech. (Paragraph 101)

As we have stated earlier in our response, we have already made progress on this recommendation: all relevant partners in the sector have committed to collaboratively producing guidance, led by the ECHR, by autumn 2018. The Department for Education will coordinate and drive the development of this sector-led guidance. This will include reference both to the Prevent duty guidance and the Charity Commission guidance, and how they should be used in the context of freedom of speech.

Separately, as we have said, the Government's CONTEST counter-terrorism strategy is being updated, and Prevent will remain an integral part of it.

Conclusion

We have been clear that there is consensus between the Government and the Committee on the paramount importance of protecting free speech on campus and addressing those factors which may inhibit it. We will continue to be vocal defenders of the right to lawful free speech for everyone, and we see our role as helping universities with what they are best placed to do: fostering open debate and the free exchange of ideas. Clashes of views should be seen as positive, rather than something we want to rail against or stop.

We support a number of the Committee's recommendations, in particular those relating to the free speech summit, and we would echo some of the Committee's recommendations for universities and for the regulators. On those areas where we take a different view to the Committee, we trust that we have given a full account of the rationale for our approach.

We would like to thank the Joint Committee on Human Rights for its careful consideration of a range of issues affecting freedom of speech in universities and for its subsequent report and recommendations.

Appendix 2: Letter from Minister of State for Universities, Science, Research and Innovation

I am writing to update you on the steps I have taken to address the issues around free speech on campus since I gave evidence to the Joint Committee on Human Rights on 7 February.

You may recall that I committed during my evidence session to hold a free speech summit. I chaired this meeting Thursday 3rd May. My intention was to bring together leaders in the higher education sector to consider how we might simplify and clarify the complex web of guidance that surrounds freedom of speech in universities and student unions. I am pleased to say the summit was attended by representatives from the Charity Commission, the Office for Students, the National Union of Students, Universities UK, independentHE, GuildHE and the European Human Rights Commission.

All parties agreed to collaborate on a single, clear piece of guidance to universities and student unions, setting out core principles for protecting and promoting free speech, and bringing together existing guidance and legislation. I have requested the EHRC lead this work and report to me on progress over the summer. We aim to produce this guidance by Autumn 2018.

I would like to thank you for the work you and the Committee did to look into this issue. The Government will be responding to the recommendations from the inquiry shortly.

Rt Hon Sam Gyimah MP

Appendix 3: Office for Students Response

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' 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' 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.

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. (Paragraph 78)

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. (Paragraph 93)

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. (Paragraph 98)

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.

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.
(Paragraph 100)

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.

Appendix 4: Charity Commission Response

The Commission has focused its response on recommendations that are directly relevant to the Commission’s work and engagement with students’ unions.

Introduction

The Charity Commission is the independent regulator of charities in England and Wales.

Universities, students’ unions and other Higher Education Institutions (HEIs) are charities and subject to charity law. Both HEIs and students’ unions across England and Wales form a vital part of the charity sector, having a significant positive impact on students, as well as wider communities and the general public. Based upon their legal status, the Commission has different relationships with HEIs and students’ unions. Most English universities and HEIs are “exempt charities”, where the Office for Students (OfS) is the principal regulator for charity law, but the Commission has some jurisdiction, and most Welsh Universities, students’ unions and some other HEIs are registered with the Charity Commission directly. All of them are charitable and governed by charity law.

The Commission submitted written evidence to the Committee as part of its inquiry.³ Its Director of Investigations, Monitoring and Enforcement and Head of Legal Services (Compliance) also gave oral evidence on 24 January 2018⁴, which was followed up with further written evidence.⁵

Students’ unions make up just over 120 of the 90,000 charities on our register that have ‘advancement of education’ as one or more of their purposes. Despite the fact that they are relatively small in number, students’ unions play an important role in the lives of hundreds and thousands of students, and have a positive impact on their wider communities through the immense amount of educational, volunteering and fundraising activities that they facilitate.

As we made clear in our evidence, by the very nature of their charitable status, **students’ unions and HEIs play an important role** in providing discussion and debate for personal development, encouraging students to develop political awareness, to debate, to challenge their own views and perceptions and to form views on political issues. They do so by encouraging free speech and by educating through activism and discussion. Some of their activities may also work in protecting against extremism and upholding important rights and democracy. We therefore agree with the Committee that freedom of speech should form part of students’ unions activities in carrying out their educational charitable purposes.

We welcome the Committee’s confirmation that “**freedom of speech is not absolute**” and must be within the limits of the law. We agree with the Committee’s comment that: “Universities must be places where **open and uncensored debate (within the law)** can take place so students can think for themselves and develop their own opinions on ideas

3 [\(FSU0093\)](#) Written evidence from the Charity Commission for England and Wales

4 Joint Committee on Human Rights, oral evidence: Freedom of Speech in Universities, [HC 589](#) [Wednesday 24 January 2018]

5 [\(FSU0109\)](#) Further written evidence from the Charity Commission for England and Wales

which may be unpopular, controversial or provocative.” As our evidence and existing guidance explains, a charity may choose to campaign on an issue or take a stance that not everyone agrees with. It may choose to host a speaker who espouses views that some beneficiaries or members of the public may find offensive or not agree with.

Controversial speakers can be invited and can form part of rigorous debate and discussion on a wide range of educational topics, providing that this is lawful and in line with their organisation’s charitable purposes.

The Commission does not have a statutory duty in relation to promoting free speech. The Commission’s role—to regulate against the charity law framework—is set by Parliament and the courts. We are a quasi-judicial body, and therefore we can neither seek to promote or inhibit freedom of speech in students’ unions, or in any other charity. **Our role is to support the trustees of students’ unions and HEIs** in making decisions to carry out, promote or facilitate these activities and, where needed, to hold them to account on behalf of the public for the decisions they make. If the Committee believes that the Commission’s approach in this regard should change, that is a decision for Parliament. Ultimately, we provide a level playing field, holding all charities accountable to charity law.

We welcome the Committee’s observation that **“the extent to which students restrict free speech at universities should not be exaggerated”** and **“it is not a pervasive problem”**. In our discussions with students’ unions, and with stakeholders, they, and we, are keen to ensure that the message is not lost that there are thousands of events and speakers’ platforms which freely, and without any restriction, take place in students’ unions and HEIs without complaint, issue or problem.

We have **already committed in our oral evidence, to review two Commission publications:**

- Chapter 5 of our guidance ‘Protecting your charity from harm’—which is for all charities, not just students’ unions and HEIs—to make sure it sufficiently stresses what charities can do and so has not lost an ‘enabling’ tone and is read in the manner in which it was originally intended—to support trustees to recognise, and then to manage and mitigate, risks to their charities, whether that applies to students’ unions or other types of charities.
- To conduct a review in totality of our internal staff guidance—Operational Guidance on students’ unions (OG48)—which was created in 2010 when students’ unions were required to register. This review will bring the guidance up to date to ensure it sufficiently reflects and supports relevant aspects which touch on the issue of freedom of speech when students’ unions carry out their activities and to ensure a clearer distinction is made between the trustees of students’ unions, and the obligations that are specific to them, as opposed to the student societies themselves and their broader membership.

More recently, we welcomed the opportunity to attend the Minister for Universities’ **free speech summit** and engage in discussion collectively with key stakeholders, including the OfS, the National Union of Students (NUS), the Equality and Human Rights Commission (EHRC), and Home Office about what the key issues were and how to support students’

unions and HEIs in this area. We are pleased that stakeholders have agreed to support new guidance led by the EHRC to act as a reference point of guidance for universities, students and students' unions on their respective rights and duties.

Finally, the Commission has already established a **meaningful and constructive working relationship with both the OfS, since its inception, continuing on that which we had with the Higher Education Funding Council for England (HEFCE), and the NUS.** We have jointly delivered training sessions recently for universities and students' unions with both organisations and will continue to do so.

Recommendations 9 and 10

Charity Commission's regulation of students' unions

The Charity Commission's approach to regulating free speech in student unions is problematic. The Commission's guidance is not easy to use, is in places unduly restrictive, could deter speech which is not unlawful and does not take adequate account of the importance of debate in a university setting. (Summary)

Concerns on the part of student unions about Charity Commission powers, and about whether they risked 'ultra vires actions' (which appeared to be prompted by the Charity Commission's guidance) have more impact, and misunderstandings are more widespread, than we had anticipated. The Charity Commission is under a legal obligation to regulate charities, and does so through guidance, but its current approach does not adequately reflect the important role student unions play in educating students through activism and debate. Moreover, the generic guidance on protecting a charity's reputation does not place due weight on the fact that inhibiting lawful free speech can do as much damage to a student union's reputation as hosting a controversial speaker. We welcome the fact that the Charity Commission has told us it will reassess its approach. We make further recommendations about this below. (Paragraph 85)

We understand that the Charity Commission may be impelled to act if other regulators or universities themselves do not. We also accept that in some cases a Charity Commission inquiry could be more appropriate than, for example, a police investigation. Nonetheless, the Charity Commission should be careful to ensure its actions are proportionate, are understood by student unions, and do not unintentionally inhibit lawful free speech. (Paragraph 86)

We welcome the Committee's recognition that the Charity Commission has a **legitimate role in the regulation of charitable students' unions, universities and other HEIs**, and the recognition of the duties that these charities have under charity law. The observation, in paragraph 25 of the report, regarding the similarities in charity law which apply to students' unions, with the safeguards in the free speech statutory duty which apply to universities, will be helpful.

As explained in greater detail in our written evidence, the Commission's Regulatory and Risk Framework is used as the starting point for considering our one-to-one regulatory engagement with all charities. This helps to ensure that our engagement is proportionate, accountable, consistent, transparent and targeted, as required by the 2011 Act.

We believe the **charity law rules are very clear, but we recognise that trustees may find the judgements they may have to make in applying them, in a small number of occasions, challenging.** The Commission's guidance is one of the key tools used to explain our regulatory approach to all charities, as well as to share best practice and also to provide practical advice on commonly occurring or challenging issues. Our guidance is written to enable and support all charities, not just students' unions and HEIs, to recognise and manage the risks that arise from some activities that may present higher risks and to make those, sometimes challenging, judgements. Our guidance should not be used, and is not intended ever to be used, to prohibit speakers with lawful, albeit unpopular, views.

It is not the Commission's role to make these decisions for trustees. We can only intervene in the administration of a charity in limited circumstances, when breaches have occurred. We therefore aim to support trustees in their own decision-making, and to ensure they are equipped to make those difficult decisions, and can demonstrate how those decisions have been taken.

The majority of our regulatory engagement is, and has been conducted through, open dialogue, outreach events, regulatory advice, guidance and action plans. We have not, to date, opened a statutory inquiry into any students' union or exercised any of our compliance powers. Rather, we have sought to support trustees with their decision-making and bring about any required changes through dialogue and written correspondence. The Commission has found that this open dialogue has been successful in bringing to light the challenges faced in particular situations, and in supporting the trustees of students' unions to carry out their activities.

We believe that the Commission's **regulation of students' unions, as with all charities, is appropriate and proportionate** and hope the case studies of our regulatory case engagement with students' unions in the previous two financial years, shared with the Committee in confidence, provided it with evidence of that assurance.

In our experience, students' unions value being charities and almost all have demonstrated an appetite to ensure their trustees understand charity law and their legal duties and responsibilities. The NUS has already produced useful guidance and we have worked collaboratively to be part of a large number of outreach events with the NUS, and HEFCE. Furthermore, we have already taken part in two OfS events since its creation on 1 April 2018, to discuss these issues and support students' union trustees. We have noticed a growing awareness in the trustees of students' unions about the need for good and transparent decision-making, especially given the high level of public interest and the potential for media reporting.

The status of student unions' as registered charities has also increased their professionalisation, so that they are run more effectively.

Guidance

The Commission's guidance is one of the key ways we regulate by education and advice to explain areas of charity law and practice, and to assist trustees in the practical application of key principles. The Commission aims to produce guidance that supports trustees to

comply with the law and manage risks, by making their own informed decisions. Our guidance also outlines best practice to ensure sufficient flexibility in decision-making whilst also providing clear standards against which trustees can consider their decisions.

Our guidance cannot be specific to individual categories of charity, as the Commission is responsible for regulating over 168,000 charities in a multitude of subsectors. Instead, our guidance focuses on the key risk-based principles of regulation and we often look to sector groups and umbrella bodies to produce sector-specific guidance, working collaboratively with them where appropriate.

Chapter 5 of our toolkit guidance *‘Protecting charities from harm: compliance toolkit,’* was designed in collaboration with charities to enable and support any charity to recognise and manage risks that may lead to harm in charities, including from speaking events. It was written to provide clarity about what steps trustees can take, in order to support these activities going ahead. The guidance applies to all charities, not just educational charities or students’ unions. It explains explicitly that different sections will be more applicable to some charities depending on the risks presented by the activities being carried out. Furthermore, the list of examples of ways in which trustees can mitigate risk, including those arising from speaking events, are designed to be illustrative.

We will reflect further on the Committee’s view that our guidance does not place due weight on the fact that inhibiting lawful free speech could damage a students’ union’s reputation. The Commission’s guidance is clear that students’ unions can invite speakers who may have controversial views—views that illicit strong feeling from the public and, as such, complaints to the Commission—to form part of rigorous debates and discussion on a wide range of topics. Indeed, the Commission’s guidance recognises the important role that charities have in challenging traditional boundaries, ‘group-think’ and encouraging the free exchange of views. We will, however, bear the Committee’s comments in mind when we review our guidance, to ensure our position is accurately explained.

We have had feedback that our guidance is helpful to trustees, who are managing events at the more challenging end of the spectrum towards unlawfulness, which may give rise to security risks. However, we have taken seriously the Committee’s observation that the Commission’s guidance is not easy to use and, in places, may be unduly restrictive. The Commission had not intended for any of its guidance to be interpreted as restrictive. It is also particularly concerned to ensure that its guidance is not read, or used, in a way that would prevent charitable students’ union from providing activities that are fundamental to their purposes, to provide forums for discussions and debate for the personal development of their students.

As part of the review referred to above, we will look to ensure we sufficiently stress **the positive and important role students’ unions and HEIs** have in the context of free speech and in educating through activism and discussion, as well as seeking to help those trustees who have to deal with a smaller number of more challenging decisions.

In addition, the Commission will look to embed or merge other existing guidance, including the new EHRC-led guidance produced as a result of the freedom of speech summit, to ensure as much consistency and clarity as possible.

Outreach with students' unions

The Commission does recognise that some charities will need advice and support that is specific to their sector, as well as our generic guidance. Over 100 students' unions were registered following the removal of exempt status in 2010 and the Commission sought to proactively engage with the NUS and students' unions directly, to provide training and advice on charity law issues. We recognise that being a trustee of any charity can be challenging, not least when the turnover of trustees can be quite high.

Since 2012, the Commission has held approximately 40 outreach events and one-to-one meetings for many students' unions and HEIs in England and Wales, with hundreds of participants. The purpose of these events was to improve trustees' knowledge and understanding of the legal duties and responsibilities of running a charity, with a view to promoting good standards of governance and financial and risk management. This included recognising and managing risks associated with speaker events and publications.

There has been a high level of engagement with the issues, by participants, across these events and the discussions have allowed them an opportunity to share experiences and discuss approaches and best practice.

Our analysis of feedback from the events organised by the Commission shows a consistently high level of satisfaction. We have noticed a growing awareness, in students' unions, of the need for good and transparent decision-making, especially given the high level of public interest and the potential for media reporting.

The Commission will look to conduct further outreach work in the coming year.

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. (Paragraph 93)

The Commission's guidance 'Protecting charities from harm: compliance toolkit, has been written to support all types of charity trustees to protect their charities from abuse. The guidance sets out to support trustees in their judgement, both to recognise, and manage risks, whilst ensuring that the charity continues to operate within its purposes. It is aimed to be a facilitative and practical document which contains clear steps on what to do when higher risk issues present themselves.

The guidance recommends a 'layered' approach so as not to confuse or overburden any charity trustee; the greater the risks identified by the trustees of an event or a speaker, the more steps they may need to consider taking. An advisory list of possible ways for trustees to mitigate risks in higher risk situations is included in the Commission's guidance. It is illustrative and includes a suggestion that trustees could ask a speaker to submit their speech in advance. It is not written, and was never intended to be, understood, as a requirement or a condition for all charities.

Our guidance emphasises a measured and proportionate approach—we know that most speakers and events will not require this higher level of risk management. Even where a students’ union does identify a speaker as carrying higher risk to the charity, it is their decision how best to manage and/or mitigate those risks.

The Committee’s observation is very pertinent here, as one of the principles underpinning freedom of speech:

If a speaker breaks the law, it is the speaker who is culpable. However, if those organising an event invite speakers who they might reasonably have suspected would use their platform to break the law (i.e. because they have done so previously) they may fall foul of the law themselves.

Some of the tools and suggestions in the Commission’s guidance are designed to support students’ unions, in exactly those circumstances, not to fall foul of that principle and to give them practical steps to manage those risks.

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. (Paragraph 100)

Freedom of Speech Summit

The Commission welcomed the opportunity to attend and participate in the Minister for Universities’ freedom of speech summit with other key stakeholders to engage in discussion collectively, including with the OfS, the NUS, the EHRC, and Home Office about where the key issues were and how to support students’ unions and HEIs in this area. We are pleased that stakeholders have agreed to support guidance led on by the EHRC to act as joint reference point of guidance for universities, students and students’ unions on their respective rights and duties.

The Commission believes that its engagement with the OfS and other relevant stakeholders, through the freedom of speech summit and subsequent discussions, will help ensure the Commission’s role, and the requirements of students’ unions and HEIs as charities, are better known and understood.

The Commission has previously worked collaboratively and closely with HEFCE in order to ensure that any regulatory intervention, where this has been needed, has not been duplicated or over-burdensome for students. We are pleased that, at both a strategic and operational level, this relationship is being continued with the OfS, where at both CEO and officials level, dialogue has been regular to date.

In the case of students' unions, the Commission has carried out outreach work with the NUS and students' unions and we will look to conduct further outreach work in the coming year.

The Regulator of Students' Unions

It is not for the Commission to take a view on whether or not students' unions should or should not continue to be charities or regulated by the Commission, or by another regulator; this would have to be a decision for Parliament.

What was recognised and agreed at the summit was that, irrespective of regulator, students' unions, Universities and other HEIs are charities and therefore subject to charity law. Our understanding is that the NUS and individual students' unions are supportive of the status of students' unions as charities, and of being regulated by the Charity Commission.

Regardless of who regulates students' unions, as long as they hold charitable status in law, the charitable law framework applies. Regulation by another body would not render students' union free from their duties under the charity law framework, unless this was also addressed as part of legislative amendments. Amongst their other objectives, principal regulators of exempt charities, such as the OfS, have a legal duty to promote compliance with charity law by the charities they regulate. The Commission works closely with all principal regulators to ensure there is a level playing field for charity regulation across the board. The Commission's regulatory guidance—including the guidance we are reviewing as part of our response to this inquiry—is relevant to all charities, not just students' unions.

Conclusion

The Commission is committed to ensuring that charitable students' unions, universities and other higher education providers are able to continue to challenge traditional boundaries, to encourage the free exchange of views and to host speakers with a range of opinions, whilst complying with their legal duties and responsibilities as charities. The Commission's role is to support the trustees of students' unions in their decision-making and, where needed, hold them to account, on behalf of the public for the decisions they make. It should be recognised that sometimes they have to make finely balanced and difficult decisions acting in the best interests of the charity.

As part of the Commission's current review of two pieces of guidance—Chapter 5 of our compliance toolkit 'Protecting your charity from harm' and our Operational Guidance on students' unions (OG48)—we will take into account the comments and observations of the Committee to ensure our guidance is as clear and easy to use as possible.

Following the recent summit, we will also collaboratively contribute to new guidance, being coordinated by the EHRC, which is acting as a single reference point to streamline and signpost information to universities, students and students' unions on their respective rights and duties on free speech.

We will also continue working constructively and collaboratively with the OfS, the Department for Education, the EHRC, Home Office, the NUS, students' unions and other stakeholders on these issues.

Declaration of Lords' Interests⁶

Baroness Hamwee

No relevant interests to declare

Baroness Lawrence of Clarendon

Chancellor of De Montfort University

Child at University

Baroness Nicholson

No relevant interests to declare

Baroness Prosser

No relevant interests to declare

Lord Woolf

Grandchild at University

Income from time to time for speeches, lectures, writing articles and contributing to books (including editing) on legal subjects

Arbitrator, Mediator, legal consultant and expert (practising from Blackstone Chambers)

Chief Justice (previously Consultant and President) of the Astana International Financial Centre (AIFC) Court

Visit to Astana, Kazakhstan, 24–29 June 2017, to attend the Astana International Financial Centre (AIFC) for the furtherance of the establishment of a Court and a Dispute Resolution Centre in Astana; five nights' accommodation and return flights provided by the government of Kazakhstan

Visit to Astana, Kazakhstan, 2–7 September 2017, to attend the Astana International Financial Centre (AIFC); fares and accommodation paid for by the government of Kazakhstan

Visit to Astana, Kazakhstan, 2–7 December 2017, to be sworn in as Chief Justice of the Astana International Financial Centre (AIFC) Court and for the swearing in of judges; costs met by the AIFC

Bencher, Gray's Inn

Previous Chancellor of Open University of Israel

Chairman of the Council, UCL

Lord Trimble

Lecturer in Law at Queen's University Belfast between 1968 and 1990

6 A full list of Members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Formal minutes

Wednesday 27 June 2018

Members present:

Ms Harriet Harman MP, in the Chair

Fiona Bruce MP	Baroness Hamwee
Ms Karen Buck MP	Baroness Nicholson
Joanna Cherry QC MP	Baroness Prosser
Jeremy Lefroy MP	

Draft Report (*Freedom of Speech in Universities: Responses*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 17 read and agreed to.

Four papers were appended to the Report.

Resolved, That the Report be the Eighth Report of the Committee.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

[Adjourned till Wednesday 4 July 2018 at 3.00 pm]

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report	Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis	HC 774 HL Paper 70
Second Report	Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018	HC 645 HL Paper 86
Third Report	Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill	HC 568 HL 87
Fourth Report	Freedom of Speech in Universities	HC 589 HL 111
Fifth Report	Proposal for a draft British Nationality Act 1981 (Remedial) Order 2018	HC 926 HL 146
Sixth Report	Windrush generation detention	HC 1034 HL 160
Seventh Report	The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards	HC 890 HL 161
Ninth Report	Legislative Scrutiny: Counter-Terrorism and Border Security Bill	HC 1208 HL 167
First Special Report	Human Rights and Business 2017: Promoting responsibility and ensuring accountability: Government Response to the Committee's Sixth Report of Session 2016–17	HC 686
Second Special Report	Mental Health and Deaths in Prison: Interim Report: Government Response to the Committee's Seventh Report of Session 2016–17	HC 753