



UKLFI Charitable Trust Responses to OfS Consultation Questions

1. *Do you have any comments on the guidance in our proposed Regulatory advice relating to section 1 on the 'secure' duties and the 'code' duties?*

No

2. *Do you have any comments on the guidance in our proposed Regulatory advice relating to section 2 on free speech within the law?*

Yes.

1. Para 30 fails to recognise the cumulative impact of speech in academic contexts consisting of blood libels and other false propaganda against Israel, that creates an intimidating, hostile, degrading, humiliating and offensive environment for many Jewish students and academics, as well as other students and academics who have connections with and/or are supportive of or sympathetic to Israel. This is regrettably a situation that exists in many university faculties today. In our view paragraph 30 should recognise explicitly that the cumulative impact of speech that targets particular nations or groups for opprobrium may constitute an exceptional circumstance for this purpose, even if it is quite common.
2. Para 31 is liable to be misunderstood as stating that HEPs and FEPs can disregard the PSED in relation to freedom of speech. This is not correct. The PSED requires HEPs and FEPs that are public authorities or exercise public functions to have due regard to the matters set out in s.149 of the Equality Act when regulating or not regulating speech. This should be made clear in the advice.
3. The reference to "common law" in the last line of para 32 is inappropriate in relation to a matter of statutory interpretation. Also, the sentence wrongly suggests that veganism, gender critical belief and Scottish independence should be regarded in all circumstances as protected beliefs. This is not correct since all the Grainger criteria must be satisfied, including that it is genuinely held and is a

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belief and not simply a current opinion or viewpoint. We suggest that this line should read “These have been held by courts or tribunals in the circumstances of particular cases to include ...”

4. While Section 2 discusses restrictions on freedom of speech under the Equality Act, it does not mention other laws that restrict freedom of speech, including defamation law, data protection law, the Malicious Communications Act, s.127 of the Communications Act, the Online Safety Act ss.179-188, the Public Order Act, and the Terrorism Acts 2000 and 2006.

In our view some reference should be made to the fact that freedom of speech is restricted by various other legislation and laws, which need to be taken into account in determining whether speech is “within the law”.

3. *Do you have any comments on the guidance in our proposed Regulatory advice relating to section 3 on what are ‘reasonably practicable steps’? If you disagree with any of the examples in this section, please state reasons for thinking that the relevant legal duties do not apply to that example in the way that we have set out*

Yes.

1. In para 37, example 1 is liable to be interpreted as indicating that the failure to provide security and cancellation of the Ambassador’s talk likely constituted a failure to take reasonably practicable steps to secure freedom of speech only because security was provided for the talk by the activist to the debating society. This would be incorrect, since the failure to provide security and cancellation of the Ambassador’s talk likely constituted a failure to take reasonably practicable steps to secure freedom of speech irrespective of the activist’s talk and the security provided for it. The inclusion of the reference to the activist’s talk in this example is misleading or (at best) confusing and unnecessary. This reference should be removed.
2. Universities have claimed in a number of cases that freedom of speech was not restricted where a meeting was “postponed” as a result of a failure by the university to provide satisfactory security, on the basis that it was not “cancelled” altogether. However, postponement can be restrictive of freedom of expression, particularly where the speaker is from abroad and may not be visiting the UK again in the foreseeable future or where the expense of doing so would be a significant impediment. We think it would be helpful for example 1 or another example to point out that a university may fail to take reasonably practicable steps to secure freedom of speech if a meeting has to be “postponed” due inadequate security, even if it is not “cancelled”.

3. Universities have also objected unreasonably to security measures reasonably required to protect some speakers. For example, on one occasion a university first refused to provide a list of those attending a ticketed meeting with an Israeli Ambassador to his security staff to vet, on the ground that this would infringe data protection. The University then refused to accept the security staff's alternative proposal to check those attending with a hand scanner to ensure they were not carrying anything that could be used as a weapon. As a result, the meeting was postponed although it was eventually held on another occasion. In our view, the guidance should make clear that a university may fail to take reasonably practicable steps to secure freedom of speech by refusing to take or permit reasonable security precautions in the circumstances. This could be made the subject of an additional example.
4. *Do you have any comments on the guidance in our proposed Regulatory advice relating to section 4 on steps to secure freedom of speech? If you disagree with any of the examples in this section, please state reasons for thinking that the relevant legal duties do not apply to that example in the way that we have set out*

Yes

1. In paragraph 44, Example 3, we consider that a reference should be added to the need for universities to be alert to the risk that, in some countries, conditions of funding, such as accepting the basic principles of the ruling party, may not be applied overtly, and that reasonably practicable steps may include reasonable due diligence in this regard.
2. A similar point applies to Example 4 in para 45.
3. In example 5, we consider that the qualification "Depending on the circumstances" is unduly cautious. It is very difficult to imagine any circumstances in which it could be justified to require applicants for a lectureship in mathematics to demonstrate commitment to a particular political theory.
4. Regarding example 6 in para 51, we consider that it is normally acceptable for a university to clarify that a controversial view expressed by a particular student or member or staff does not represent the views of the university as a body, while at the same time as affirming the fundamental value of free speech of all its students and staff and that it will not succumb to any pressure to interfere with that freedom. We consider that the clarification that a particular view does not represent the view of the university as a body is wrongly deprecated in the example as it stands and submit that it should be changed to make it clear that this is not objectionable.

5. In example 8 in para 56, we consider that the qualifications “Depending on the circumstances” and “may” are unduly cautious. It is very difficult to imagine any circumstances in which it could be justified to fire a member of catering staff for expressing pro-life views within the law.
6. In example 9 in para 60, we consider that the qualifications “Depending on the circumstances” and “may” are unduly cautious. It is very difficult to imagine any circumstances in which it could be justified to require candidates for academic promotions to submit a 500-word statement of evidence of commitment to University A’s work advancing equality of outcome – unless the purpose is simply to test the candidates’ ability to make a coherent argument and it is made clear that the commitment need not be genuine and need not be adhered to.
7. We consider that para 62 is unsatisfactory. First, the phrase “has the effect of” is vague and arguably very broad. Secondly the phrase “capable of restricting freedom of speech within the law, or academic freedom” is also far too broad.

The guidance should recognise that it is acceptable for a policy (etc.) that regulates speech to identify categories of speech that should be investigated further because there is a substantial risk, depending on the circumstances, that (a) they may breach the law or (b) while not themselves breaching the law, they may be racist and should be recorded for the purpose of assessing the prevalence or otherwise of particular racist views and hence the need for improved education in relation to those views.

Moreover, categories identified for the purpose of further examination need not include an objective element, if any necessary objective element is addressed when instances falling within them are further examined.

In particular, the IHRA working definition of antisemitism should be used in this way. It identifies examples that could constitute antisemitism, taking into account the overall context. It is therefore entirely consistent with HERA as amended for a university policy to incorporate the IHRA working definition while also making it clear that speech that is within the law must not be restricted even if (taking into account the overall context) it is antisemitic and should be recorded as such.

8. Policies regulating protests and demonstrations are referenced in paras 66a and 86d, but there is an important lacuna. Protests and demonstrations at universities against Israeli speakers and speakers who support or are sympathetic to Israel have been conducted in ways that have seriously restricted freedom of expression by the speakers as well as the right of audiences to hear them (which is also protected by Art.10 of the European Human Rights Convention).

This conduct has included intimidation of speakers; intimidation, harassment and obstruction of those wishing to attend meetings; occupation of venues where meetings were arranged; interruptions of meetings, going far beyond occasional heckling, so as to make it totally or substantially impossible for the speaker to communicate effectively with the audience; noise outside the meeting (often amplified) so that the speaker cannot be heard or only heard partially and with difficulty and distraction; and the generation of a hostile and threatening atmosphere, making it difficult or impossible to concentrate on what the speaker is saying.

The threat of disruption and potentially violence has led universities to impose restrictions and conditions on such meetings which themselves have significantly restricted freedom of speech. These have included, for example, requirements to hold meetings in obscure, out of the way locations (which reduce attendance, especially by those who are not already committed and thus have most to gain from hearing a different point of view), and insisting on neutral moderation by a member of the university's academic staff (which can be difficult, time-consuming and potentially impossible for a student society to meet, since many academic staff are hostile to Israel and unwilling to assist any meeting with a speaker who is supportive of Israel).

These restrictions must be seen in the context of an overwhelming scale of propaganda against Israel at many universities, which makes the impediments to communicating information and views supportive of Israel all the more detrimental. The imbalance thereby exacerbated contributes to rising antisemitism and hostile environments for Jewish people at universities and in society generally.

Universities have generally failed to take adequate measures to deter disruption of speaker meetings, such as making it clear to students and staff that conduct disrupting meetings will be severely punished and imposing serious penalties on students and staff who engage or encourage such conduct. In our view these are reasonably practicable measures which they are obliged to take to secure freedom of speech.

Reasonably practicable steps to ensure that protests do not restrict freedom of speech also include, in our view, requirements for reasonable advance notification of protests against speaker meetings or against other events that involving freedom of expression (for example, the showing of documentary films). This enables universities to give proper consideration to any security needs and to any conditions necessary to avoid disruption of the targeted meeting, for example measures preventing obstruction of entrances and ensuring that noise from the protest does not interfere with the meeting.

A particular problem arises in cities where there is more than one university. We are aware of cases where students seeking to shut down a meeting at one of the universities have called on students at other universities to join in the action. Universities where the meetings were held have claimed that those responsible or mainly responsible for the disruption were students of another university over whom they did not have jurisdiction. In our view a reasonably practicable step which universities are obliged to take is to reach agreements with other universities in the same city to cooperate in ensuring that disruption of meetings at a university by students of another university will be effectively penalised by the latter university with the full assistance of the former university in providing information and evidence.

While our experience relates to these problems for Israeli and Israel-supporting speakers, where they are particularly serious, we believe that they have occurred also in other areas.

Para 86d of the draft guidance recognises that “protest must not shut down debate”, but this does not go nearly far enough. Universities must take reasonably practicable steps to ensure that protests do not restrict or impede freedom of speech by others, particularly speakers targeted by those protests and their audiences.

The advice will be seriously defective if it does not address this important issue by appropriate text and examples.

9. Para 72 refers to the pursuit of vexatious complaints or trivial investigations into other matters against individuals because of their lawful expression of viewpoints. In our experience, retaliatory complaints have been made against students who have made good faith complaints about antisemitism. Making a complaint about antisemitism (or anything else) is itself an exercise of freedom of speech and universities must take reasonably practicable steps to secure it.

Discouraging bona fide complaints of antisemitism or any other racism is highly undesirable and may constitute victimisation in breach of the Equality Act as well as HERA as amended.

We consider that the OfS guidance should make it clear that universities and their staff must not retaliate against bona fide complaints of antisemitism or other racism by vexatious or frivolous counter-complaints, and must take reasonably practicable steps to discourage such counter-complaints by their students.

10. Para 77d is liable to be misunderstood as stating that any offensive speech is allowed. The words “provided it does not breach any legal requirement” should be added.
11. Para 89 is wrong. The criteria for assessing security costs should take into account special needs to protect individuals, ideas, opinions and policies that are particularly vulnerable to efforts to suppress freedom of expression. In particular, the scale of antisemitism and hostility to Israel, and the intolerance of many antisemites and persons opposed to Israel, are such as to require more extensive security for many Israeli speakers, other speakers who express views supportive of or sympathetic to Israel, and bodies that support or are sympathetic to Israel.
12. In view of the matters mentioned above, the policy recommended in paras 91-92 and example 20 is likely to be unlawful of meeting costs up to a fixed and uniform limit, since it would be likely to discriminate against Jews, Israelis and Zionists (Zionism being a protected belief), by requiring security charges to be paid by organisers of meetings much more frequently for Israeli speakers, speakers supportive of or sympathetic to Israel and meetings of societies that are supportive of or sympathetic to Israel. We reserve the possibility of applying for judicial review if this recommendation is retained in the advice issued by the OfS and/or if such a policy is adopted or applied by a University or Student Union.
13. While research and teaching are discussed in paras 104-105 and 111-113, there is another major lacuna, regarding penalisation of particular viewpoints in the marking of coursework, dissertations, examinations and theses.

We have assisted victims of such penalisation in a number of cases where work has been failed or marked down because it expressed views that were not considered sufficiently critical of Israel. We are also aware of cases where students have been warned off addressing subjects which might show Israel in a favourable light or have steered clear of addressing them on their own initiative, because of the risk or fear of being adversely marked.

This situation seriously restricts academic freedom and freedom of expression relating to the Middle East that does not blame Israel. This restriction in turn reduces the available literature, which makes it more difficult for students to provide academic substantiation for their work unless it blames Israel. There is a vicious circle in which it is becoming more and more difficult to advance any views that do not conform to a prevailing propaganda that is deeply hostile to Israel and endorsed by academics that are often intolerant of alternative views or perceptions.

In our view, the advice will be seriously defective if it does not include text and examples addressing this issue.

5. *Do you have any other comments on our proposed Regulatory advice?*

See also below

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

No

7. *Do you have any comments on our proposed approach to recovery of costs?*

No

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

See above

9. *In your view, are there ways in which the objectives of this consultation could be delivered more efficiently or effectively than proposed here?*

Yes. The OfS should defer issuing guidance until it has gained more experience relating to the issues, particularly issues facing Jewish students and other students who are supportive of or sympathetic towards Israel.

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

We consider that this guidance as it stands will have the effect of facilitating hostility towards Jewish students.

11. *Do you have any comments about any unintended consequences of these proposals, for example, for particular types of provider, constituent institution or relevant students' union or for any particular types of student?*

Yes. As it stands, this guidance will contribute to the further suppression of accurate and fair scholarship regarding Israel and the Jewish people, thereby further restricting academic freedom and freedom of speech on an important and sensitive subject.