



## **The Charity Commission’s Response to the Joint Committee on Human Rights report into Freedom of Speech in Universities**

The Joint Committee on Human Rights published the report of its inquiry into *Freedom of Speech in Universities* (HC 589 / HL Paper 111) on 25<sup>th</sup> March 2018. This document sets out the Charity Commission’s response to the Committee’s report.

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

We have copied our response to:

- The Office for Students, as the principal regulator of charities for Universities in England;
- The Department for Education, as the government department responsible for policy matters relating to education, and responding on behalf of Government centrally to the Committee’s report;
- The Department for Digital, Culture, Media and Sport, as the department responsible for policy matters relating to civil society;
- The Attorney General’s office, as the Attorney General has the responsibility to intervene in certain proceedings to protect charities in the public interest.

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## 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<sup>1</sup>. Its Director of Investigations, Monitoring and Enforcement and Head of Legal Services (Compliance) also gave oral evidence on 24 January 2018<sup>2</sup>, which was followed up with further written evidence<sup>3</sup>.

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 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.

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<sup>1</sup> [Written evidence from the Charity Commission for England and Wales \(FSU0093\)](#);

<sup>2</sup> [JCHR Oral evidence: Freedom of Speech in Universities, HC 589 Wednesday 24 January 2018](#)

<sup>3</sup> [Further written evidence from the Charity Commission for England and Wales \(FSU0109\)](#)



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)*

*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. We make further recommendations about this below. (Paragraph 85)*

*10. 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 students 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

*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

*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.