Reclaiming free speech in academia

Proposed Office for Students guidelines make for an imperfect but promising start

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On 26 March 2024, the Office for Students (OfS) published their long-awaited provisional guidance relating to the "reasonably practicable steps" that institutions must take to secure free speech, as a result of implementation of the Higher Education (Freedom of Speech) Act 2023. As such, this indicates the very significant change in academic and institutional culture likely to result. A consultation has been opened in relation to the guidance, for which responses can be submitted until 26 May 2024. In this article, writing in a personal capacity, I want to consider the nature and implications of the new guidance in light of the unhappy culture relating to academic freedom and free speech on campus which has grown in the last decade-and-a-half.

A survey by the Committee for Academic Freedom revealed an alarming situation, in which universities are actively promoting highly partisan political agendas and putting significant pressure on academics to conform to these. Gender ideology has become institutionalised, with policies on Equality, Diversity and Inclusion (EDI) imposing absolutist positions on highly contested issues, about which I wrote earlier at length for this journal (see also this article on the roots of such thinking, and this article from Alumni For Free Speech on the huge amount spent on this by institutions in comparison to that on free speech), These brook no dissent, using ideological conformity when deciding appointments and promotions, and requiring various teaching also conform. Many academics live in regular fear of disciplinary measures if they dare to question any of this, and student complaints are sometimes weaponised in this respect. Furthermore, respondents noted huge biases in publication (with huge wider political bias amongst academics noted in other studies) leading to academics self-censoring and avoiding unorthodox positions on a range of subjects, in the knowledge that to do so makes it highly unlikely that their work will be published.

Recent events have further highlighted the problems, including the judgement from the employment tribunal brought by Criminology Professor Jo Phoenix against her former employer, the Open University (Phoenix now works at the University of Reading). This was damning about the conduct of the institution, and the mobbing campaign launched by 368 staff and postgraduates against Phoenix, an ugly phenomenon which has become too common in academia. There have also been a series of reports about the case of Michelle Shipworth, Associate Professor at the Bartlett School of Environment, Energy & Resources at University College London (UCL), who was removed from teaching a module as a result of complaints from students from China, and told that the courses "need to retain a good reputation amongst Chinese applicants" so as to be "commercially viable".

The implementation of the new Act will never be able to solve every problem, but the new guidance goes a long way in the right direction. There are, however, plenty in universities who are hostile to these and other aspects of the Act, as witnessed in an obfuscatory article by Jim Dickinson published almost as soon as the guidelines were made public. An earlier consultation by the OfS on the related free speech complaints scheme indicated a window of 30 days for institutions to deal with complaints internally, before complainants take them up with the OfS; this generated pushback from the Russell Group and Universities Alliance, who claim this will create a "hierarchy of complaints" and that 30 days is "an unrealistic timescale", though as Mathematics Professor at Queen Mary, University of London Abhishek Saha points out deftly in a recent article, a larger window will encourage "tactical delays" and provide a disincentive for complainants. What Saha is identifying is a form of "punishment by process" with which many who have faced complaints in universities will be familiar – long protracted processes generating major personal stress, a form of punishment in themselves. Oxford Music Professor Naomi Waltham-Smith, who has written on academic freedom whilst studiously avoiding engaging with the many actual cases which have transpired (a feature also of these King's College London principles), has attacked any external intervention as a "shameful attack on the democratic value of the university as self-founded and autonomously governed". She is echoing earlier sentiments by former Oxford vice-chancellor Louise Richardson about which I wrote here. Meanwhile, the general secretary of the University and College Union (UCU), Jo Grady (who one report claims supported the campaign against Stock), has responded to the guidance simply by calling for OfS to be abolished, using similar rhetoric to Waltham-Smith in calling it a vehicle for government "authoritarianism". It is bizarre to see both Grady and Waltham-Smith (who has also attempted to argue that academic freedom not be extended to those working outside their own field, with no indication who will gauge whether this is the case) take on the role of defenders of university managements. Moreover, there is no evidence that organisations claiming to represent parts of the sectors have consulted academics widely before issuing their views.

In the short introduction to the new guidance, the OfS encouragingly flags up four types of highly topical cases: foreign governments making uncritical adherence to their policies in teaching a condition of scholarships being granted (which relates to the case of Shipworth), similar processes from commercial entities in foreign countries sponsoring institutes, bans on "misgendering", and requirements to maintain a patriotic narrative when teaching British history (a clear nod in the direction of various comments made in the 2010s by then-Education-Secretary Michael Gove). Then the main consultation document makes clear the relationship of the new law to existing ones, in particular the statutory requirements of Section 43 of the 1986 Education (no. 2) Act. Elsewhere, freedom of speech and academic freedom are argued to be fundamental to higher education, the pursuit of knowledge and a "high quality education", with "vigorous debate" necessary especially for "difficult or contentious or discomforting topics". The definition of freedom of speech is given as:

> … the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the [European Convention of Human Rights] as it has effect for the purposes of the Human rights Act 1998) by means of speech, writing or images (including in electronic form)

Academic freedom is defined as in the Higher Education and Research Act 2017 (HERA), which the new Act amends:

> … the freedom within the law (a) to question and test received wisdom and (b) to put forward new ideas and controversial or unpopular opinions – without placing themselves at risk through loss of jobs or privileges, or likelihood of securing promotion, or other jobs being reduced.

The consultation document does make clear that the new Act does not protect unlawful speech, including harassment, victimisation, discrimination or incitement of religious or racial hatred. It also confirms that institutions have a duty to take reasonably practicable steps to secure all speech unless unlawful. Some have questioned this guidance from the OfS and have argued that the law also allows institutions to take proportionate measures to restrict speech under Art 10 (2) of the ECHR. This remains a contested area of law which may be determined in a future court case.

Key duties for academic institutions are then to take "reasonably practicable" steps to secure freedom of speech, to maintain a code of practice relating to this, and to promote the importance of freedom of speech within the law and academic freedom for staff. All of these constitute a major shift in requiring active steps from institutions rather than simply passive compliance, which is welcome. Student unions are also required to take such steps and maintain a code of practice.

All duties become conditions of registration for providers, while the OfS also has powers to monitor overseas funding received by providers, constituent institutions and student unions. The new general duties and functions of the OFS, extension of regulation and new complaints scheme will come into force on 1 August 2024, while provisions relating to new conditions of registration and monitoring of overseas funding will be from 1 September 2025. These dates are subject to the will of the Secretary of State for Education, which makes the situation somewhat unclear in the near-certain event of a new government by 2025. There are also proposals for the OfS to recover costs from institutions and student unions and/or impose monetary penalties.

Strong language is used when emphasising the requirement for institutions to place "significant weight" on freedom of speech, while academic freedom is recognised as "a very high hurdle" meaning that "there will be very limited room for a provider, constituent institution, or relevant students' union to create restrictions on lawful speech" as when an institution or union "has made a negative value judgement about the content of the speech". All of this indicates a marked shift in academic culture. But the real substance of the consultation is to be found in Appendix B, Regulatory advice 24: guidance related to freedom of speech. Here, there are 30 different examples given of potential situations (which from here I will refer to as RA24 followed by "E" and the number of the example in the document), with guidance on the "reasonably practicable steps" institutions should take. This is an indicative rather than comprehensive list, but certainly covers a lot of ground, and the cases here would likely be cited in the event of complaints being taken to the OfS. Otherwise, the document is structured according to broader themes, with definitions of freedom of

speech, details of the relationship of the Equality Act 2010 to the new provisions, including important sections (31-33) to the protection of belief.

Some of the examples are straightforward and absolutely welcome. RA24-E1 insists on equal provision of security for either an ambassador of an unpopular country or an activist opposing them. RA24-E8 makes clear there should be no sanctions against a member of catering staff who expresses legal pro-life views, regardless of whether students like these. RA24-E12 makes it clear that use of university internet facilities for transmission of material should only be controlled if the material is illegal, not because some find it offensive. RA24-E15 and E16 instruct institutions to avoid over-onerous processes prior to being allowed to host demonstrations or post fliers. RA24-E19 and E20 stop student unions using too vague concepts of "exceptional circumstances" to avoid paying security costs. While RA24-E21 requires that institutions are consistent between different types of organisations in this respect (using the examples of Islamic and Jewish societies). RA24-E24 deals with deeply opposed organisations holding events physically next to one another, thinking it is reasonable for institutions to try and find different premises for one of these.

Six examples relate to external interference or pressure from students with certain loyalties to external nations, governments or organisations. RA24-E3 and E4 relate to the first two examples in the introduction, with foreign governments or commercial entities trying to place limits on teaching and research as a condition of funding, while RA24-E23 relates to an ambassador attempting to persuade an institution to censor an academic who has criticised their country, leading a university to fail to support the academic's application for a research grant or to protest or take other action if a visa is revoked. Here the stipulations may seem draconian to some, requiring that the institutions terminate some arrangements. This could potentially mean some existing arrangements may have to be terminated, but this is a necessary and justified step, whatever the inconvenience. There are no financial and student satisfaction arguments which can justify such external political interference. RA24-E18 and E26 relate to students attempting to bring pressure either against an academic because of taking part in an external protest against a regime they support or against an external speaker for similar sentiments in a debate. In these cases, it is clear that creating lengthy investigations or cancelling events is unacceptable. RA24-E29 is the only case cited of an external partnership, in this case relating to accreditation, which is not necessarily related to anything outside of this country's borders. Here a university should not accept such accreditation if it requires adherence to the accreditation body's views on fossil fuel exploration, where that body has other links to the industry. A few more examples of this type would be welcome, especially as they relate to institutions with many links and partnerships with industry, public bodies, arts and heritage institutions, estates of individuals, and so on. An absolutely clear statement of the vitality of academics' critical independence and freedom in these contexts, and the requirements of academic institutions in the event the external partners might remove funding, limit access, and so on, is one of the major omissions from the document — it is implied from other examples but could be stated more clearly.

Five of the examples amount to attempts to avoid ideological vetting or control of staff or students. RA24-E9 is a clear response to the debate on EDI statements as a requirement for promotion, without necessarily dismissing these in all cases, only

those requiring adherence to contested points of view. RA24-E10 and E28 are very clear in opposing any type of requirement to promote or hold a particular political view (including the case mentioned before of a patriotic view of British history). RA24-E30 is a clear and essential directive against entrenched views of structural racism coming from Critical Race Theory, allowing for only a singular view, and imposing this through training. RA24-E5 appears straightforward, requiring institutions to withdraw requirements in job vacancies for commitment to a particular political theory, when this is unrelated to disciplinary competence in the appropriate area (the example given being mathematics). This may be more ambiguous, or at least argued to be so, in certain disciplines, especially those directly linked to identity politics (Gender Studies, Race Studies, Queer Studies, etc.), those which have terms like "decolonisation" or "social justice" in the titles of the jobs, or those in religious disciplines which may require a commitment to particular interpretations of the faith in question. I believe the guidance should go further here, indicating that institutions should not advertise positions which are clearly linked to a specific political ideology (or at least require clearer definitions of terms like the above which will allow for critical perspectives thereupon). It might be too much to ask that the OfS take a policy requiring institutional neutrality (a key aspect of the London Universities' Council for Academic Freedom principles), which would be the clearest way to preclude politicised appointments, but it should not be out of the question.

A whole nine examples relate to non-avoidance and non-censorship of controversial views, as already mentioned in the context of RA24-E8 and E23. RA24-E2 requires strong statements of support from an institution for an academic facing death threats because of comments about a particular religion (a wider phenomenon, not only in universities, rightly identified by the National Secular Society as a "de facto blasphemy law"), while RA24-E25 relates to threats of disruption of an event with a controversial speaker on animal experiments (as in the case of Colin Blakemore back in the 1980s). RA24-E22 similarly protects academics who might, for example, argue for a connection between a particular religion and violent crime, while on the other hand RA24-E14 warns against student unions trying to stop a Christian Society participating in a freshers' fair. RA24-E27 relates to those who might in a talk on political violence use "extreme and polarising" examples (but legal ones — so this would not cover for example statements of support for proscribed organisations), indicating an institution should not restrict the content of the talk.

But the other two examples are a little more complicated. RA24-E6 involves an academic who claims that "systematic racism" is embedded in Shakespeare's sonnets (as for example in the work of US academic Arthur L. Little Jr., for example in his book *White People in Shakespeare*, though no actual academic is named in the consultation document). This leads to a newspaper campaign against the academic in question, calling for his removal from a course. The wrong thing for their institution to do, according to the guidance, is to wait several weeks then issue a statement making clear their distance from this view. Rather, they should give a "clear, prompt and viewpoint-neutral response" on such occasions. However, this is harder to enforce when there is no wider requirement for institutional or departmental neutrality, as mentioned above.

RA24-E17 relates to the use of a portal to submit anonymous reports about having encountered 'problematic speech', which could restrict "open and lawful discussion

of controversial topics, including political topics and matters of public interest". I have not found a case where so vague a term as "problematic" is used; more common is that given for example by the University of Liverpool, encouraging reporting of "bullying, harassment, sexual misconduct, hate crime, assault or discrimination". While assault or sexual misconduct may be able to be defined reasonably clearly, possibly also discrimination, there are still major questions of the burden of proof here, while the terms bullying, harassment and hate crime have many meanings.

Harassment is defined by section 26 of the Equality Act 2010 and the Protection from Harassment Act 1997 and sections 20-30 of RA24 go into some length to clarify the duties of institutions under these Acts and how these duties interact with the duties under free speech law. Elsewhere (section 30) the guidance does indicate that "Speech in academic contexts will therefore not amount to unlawful harassment by virtue of the viewpoint or opinion that it expresses, except in the most exceptional circumstances." This could potentially be expanded with requirements for clearer definitions of other terms and measures to ensure fairness of process, though in an earlier statement OfS made clear their reluctance to avoid clear examples such as may prejudge a future case.

Harassment or bullying are terms which might be used in opposition to one of the two examples relating to trans issues, RA24-E11, relating to a student handbook forbidding misgendering, a rule the guidance says the institution should remove. The other trans example, RA24-E7, is on the need to defend (though in a neutral manner) the rights of an academic who has published a blog defending the rights of trans people, leading to a response on social media calling for them to be dismissed (I have never seen such an example, but have seen numerous such cases relating to academic expressing defence of gender-critical perspectives).

Otherwise, two examples already mentioned, RA24-E6 and RA24-E18, require prompt responses by institutions, thus avoiding the 'punishment by process' mentioned earlier. The only other remaining example, RA24-E13, exhibits concern that a guidance document under the Prevent programme (for which the OfS have produced their own guidelines) requires that "good relations" must be fostered between those with a relevant protected characteristic and those who do not share it, possibly leading to restriction of reading lists. To deal with this satisfactorily requires more detailed consideration of reform of the Prevent programme, beyond the scope of this article.

The document also makes clear the requirement for training in freedom of speech and academic freedom for practically all academic staff with significant responsibilities, and a large percentage of professional staff. This will become a major new burden on many, and no doubt will be a shock, and possibly resented, by some. But the examples given earlier and many others demonstrate how this is a necessity.

Section 103 of the document makes clear the importance of safeguarding "the ability of academics to teach and communicate ideas that may be controversial or unpopular but lawful" and "opportunities for students to be exposed to such ideas", while sections 111-113 make clear that students, as well as academic staff, should not be penalised in any way for opinions and ideas. What however is not explicit is the actual freedom for individual academics to determine more broadly the methods and content

of their own teaching (relative to the stipulations in the specifications for modules they would teach). This is a complex area, for which space does not allow for proper consideration here, but a vital one for which more suggestions should be submitted as part of the consultation. Some of the constraints which the guidance attempts to avoid might be reintroduced through major top-down directives on teaching content (for example racial or regional quotas relating to reading lists, or other measures associated with "decolonisation"), or on particular modes of engagement and argument to be employed, some of which could limit such debate. Achieving an equitable balance between maximum autonomy for individual academics whilst ensuring coherence and consistency within programmes is far from easy; some further guidance should be given on ways to achieve this without the process being open to ideological abuse.

As mentioned above, there could be a stronger commitment to institutional neutrality, and greater clarity on all types of external partnerships. Reputational concerns are mentioned in passing, but these demand a section of their own. All-purpose stipulations that academics must not "damage the reputation of their institution" are also highly subjective and open to misuse, or those which relate to the "brand" of a particular institution or department, all serving to limit the range of thought, teaching and research which is carried out there. In particular, it should be made clear that an academic is under no obligation to concur with the views of others who work in the same institution, and is free to express or publish critiques of colleagues' work.

The Act itself includes duties to both secure (A1) and promote (A3) free speech. A3 is not covered in the guidance. The document indicates that some guidance on this may be developed in the future (there is insufficient time to complete this by 24 May), but nonetheless institutions must comply with such a duty from 1 August 2024. This needs to be borne in mind in relation to earlier-mentioned issues of institutional neutrality, and wider ones of governance structures.

There might also be something about the distinct but related concept of *artistic freedom*, for which the clearest and most meaningful definitions are those provided by UNESCO in 2017 (cited in the 2023 Council of Europe document *Free to Create: Artistic Freedom in Europe*). As many universities have arts departments, with staff and students working on practical artistic work as well as scholarship about art, this realm of activity also needs consideration in such a context. Indeed definitions of academic freedom themselves may need to be expanded to better account for the type of works that practice-based academics do, which do not necessarily adhere to the more established discursive frameworks.

The Director for Freedom of Speech, Cambridge philosopher Arif Ahmed, had compared the situation in universities (which he called "sheep factories") to that in the Soviet Union prior to taking up the position, and soon after taking up the position made clear how serious he continued to feel this situation to be. It is clear that a lot of thought and work has been put into these guidance by Ahmed and others, and they represent perhaps the most striking attempt to proactively insist upon a culture of free speech and academic freedom that has ever been seen, at least in the UK. Sadly, the act does not apply in Scotland, whose wretched new Hate Crime and Public Order (Scotland) Act 2024 could have serious deleterious effects upon freedom of speech.

But the guidance is inspiring and potentially hugely liberating for all who wish to secure the possibility of proper robust debate and critical thinking in higher education. The OfS must stand firm against high-level institutional pressure to water them down, and other political pressure from those with no real interest in or commitment to such values. In their current form, with perhaps a few extra modifications, expansions and clarifications, they stand to bring about a revolution in higher education in England and Wales.