



JOINT COMMITTEE ON HUMAN RIGHTS INQUIRY INTO FREEDOM OF SPEECH IN UNIVERSITIES

Written evidence submitted by the Charity Commission for England and Wales - January 2018

Education and the charity sector

1. The Charity Commission is the registrar and regulator of charities in England and Wales. Under the Charities Act 2011, charity is a legal status for bodies whose purposes which are recognised as exclusively charitable and are for the public benefit. Bodies which meet that definition and have an income of over £5,000pa, must register, unless they are exempt or excepted from registration. There are c170,000 registered charities, with a combined annual income of approximately £70 billion. The advancement of education is one of the 13 recognised charitable purposes under the 2011 Act and almost 90,000 registered charities in England and Wales have it as one or more of their purposes.

2. Under the current charity law framework, to be a charitable aim for the public benefit, education must be capable of being 'advanced'. This means to promote, sustain and increase individual and collective knowledge and understanding of specific areas of study, skills and expertise. The right to freedom of speech can be considered in many types of charities an important element in the advancement of education. However, this right is not an absolute right and can be lawfully restricted for a number of reasons, for example on grounds of national security, of protection of public order, or the protection of the rights and freedoms of others. It is also the case that charities need to satisfy the public benefit requirement, which means that they must also ensure that any benefit must outweigh any harm or detriment caused. Charities advancing education must also be neutral in their starting point and must not promote a particular point of view in order to comply with charity law requirements.

Regulatory framework for students' unions

3. Both Higher Education Institutions (HEIs) and Students' Unions (SUs) 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. They are charitable and governed by charity law, though the Commission has different relationships with HEIs and SUs based upon their legal status.

4. Most English universities and HEIs are "exempt charities", as specified in Schedule 3 to the Charities Act 2011. Exempt charities must comply with charity law but are exempt from registration with the Charity Commission. Under the Charities Act 2011, exempt charities must have a 'principal regulator' to regulate them as charities and in the case of most English universities and HEIs, the principal regulator is currently Higher Education Funding Council for England (HEFCE). Principal regulators have a duty to promote compliance with charity law by the charities they regulate. These exempt charities are still subject to the enabling, investigation and enforcement powers of the Charity Commission, although the Charity Commission must consult with the principal regulator before using any of its powers. The Charity Commission can only open a statutory inquiry if the principal regulator asks it to. As there was no suitable body to act as principal regulator at the time of the Act, universities and other HEIs in Wales as well as the colleges and halls of Cambridge, Durham and Oxford Universities are regulated by the Charity Commission and are not recognised as exempt charities, and so are registered as charities.

5. In terms of SUs, the Charities Act 2006 specifies that they are independent charities which must register with the Charity Commission if their income exceeds £100,000. SUs with an income of £100,000 or less are recognised as 'excepted charities' and, though not required to register or submit



annual returns, are still regulated by the Charity Commission. Prior to the 2006 Act, SUs had been regarded as administered by or on behalf of their university and thus considered exempt charities because of this relationship with their 'parent' HEI. Though they maintain a close relationship, the 2006 Act recognised the independence required of SUs in order to fulfil their function and this is reflected in the change of charity status.

6. Regardless of exempt status and principal regulators, all charities have to comply with the principles of charity law and general law. This regulatory position is clear and exclusive of, though supported by, the Statutory Prevent Duty. The Prevent Duty is placed on specified public authorities to have due regard to the need to prevent people from being drawn into terrorism contained in the Counter-Terrorism and Security Act 2015. This Duty applies specifically to the Higher and Further Education sector. SUs are not named as authorities subject to the duty. However because the duty has been placed on HEIs, SUs will at least indirectly be affected. For charities affected by the Prevent Duty, it is important to note that irrespective of whether the Prevent Duty existed, as charities subject to charity law, they were already required under charity law to discharge their legal duties and responsibilities to manage the risks from terrorism, extremism or other illegal conduct such as racial or religious hatred. This includes the risks arising from speaker events and publications, and internet and social media activity, with trustees required to respond responsibly and appropriately if incidents arise. The Charity Commission has previously written to trustees of SUs to remind them of this responsibility and offer to meet any student unions that would like further guidance and advice from the Charity Commission in this respect.

7. In addition, trustees should proactively safeguard and promote the well-being and welfare of their charity's beneficiaries and take reasonable steps to protect them, and others who come into contact with their charity, from harm. This is a key governance priority. It is essential that trustees have adequate measures in place to assess and address safeguarding risks; have adequate safeguarding policies and procedures appropriate for their charity's particular circumstances and which reflect both the law and best practice; and make sure that these policies and procedures are effectively implemented and regularly reviewed.

8. Any failure by trustees to manage safeguarding risks adequately would be of serious regulatory concern to the Charity Commission. We may consider this to be misconduct and/or mismanagement in the administration of the charity and it may also be a breach of trustee duty. The Charity Commission published its revised [Strategy for dealing with safeguarding issues in charities](#) in December 2017 which sets out its role and approach in dealing with safeguarding issues in charities.

9. The Charity Commission's guidance [The Essential Trustee: what you need to know, what you need to do \(CC3\)](#) explains the legal responsibilities and key duties of all trustees of charities in England and Wales, and what trustees need to do to carry out these duties competently. Those duties include that trustees have obligations to:

- act in line with the charity's purposes for the public benefit
- act in the charity's best interests
- act reasonably and prudently
- safeguard and protect the charity's assets, including its reputation; and
- ensure campaigning activities comply with the rules on political activities.



SUs and Freedom of Speech

10. In an educational context and as part of the learning process and in developing critical thinking skills, it is accepted that students will be engaged in analysis, discussion and debate on difficult and controversial issues. As set out in the Charity Commission's model charitable purposes for SUs, it is specifically recognised that SUs should provide "forums for discussions and debate for the personal development of its students".

11. Our [operational guidance on SUs](#), covering our policy and practice based on charity law, highlights the protections of freedom of speech and reinforces that the use of HEI and SU premises should not be denied to anyone because of their beliefs or politics. However, in order to manage compliance with charity law and the risks involved, if the purpose of an event or debate is educational then the charity should ensure that sufficient controls are in place to manage the event, and that issues are discussed in a balanced and reasoned manner with opposing views and opinions being expressed so that those in attendance can make up their own minds. The law is clear that educational or other activities by charities should not unlawfully interfere with other people's human rights or result in non-compliance with other legal duties, nor should those activities unlawfully interfere with the right to freedom of speech. So there is no reason in principle why as a result of charity law and its proper application, or by the actions of the Charity Commission, prudent and responsible charity trustees should not be able or willing to invite controversial speakers or carry out activities promoting free speech rights.

12. The Charity Commission is also alert to the tension that exists for charities in achieving a balance between complying with charity law requirements around protecting the charity's reputation and in ensuring compliance with human rights and general trustee duties in an educational context, while encouraging debates involving controversial topics and issues that reflect the voice of the students.

Protecting against extremism under charity law

13. There have been occasions when terrorists, and those with extremist¹ views who encourage and support terrorism and terrorist ideology, have used charity events, premises or activities to make those views known, or have used charities to promote, distribute or make available their literature. As well as enforcement, effective regulation places a strong emphasis on prevention and collaboration. In January 2013, prior to the implementation of the Prevent Duty, the Charity Commission published specific guidance for charities on managing the risks from extremism: [Protecting charities from abuse for extremist purposes](#). Updated on an ongoing basis, the guidance forms part of a broader '[Compliance Toolkit – Protecting Charities from Harm](#)' designed to give trustees the knowledge and tools needed to manage risks and protect their charity from harm. The risks of extremism vary from charity to charity, depending on the activities it carries out and who its beneficiaries are, but all charity trustees – including of HEIs and SUs – need to take reasonable steps to safeguard and protect the charity's assets, including its reputation; to act consistently in line with the charity's purposes for the public benefit; to act always in the charity's best interests; and to comply with the wider legal framework. The guidance explains the legal requirements for charities under both the criminal and charity law so trustees can properly discharge their duties in the interests of their charity. These are the legal requirements that the Charity Commission will hold trustees to account

¹ Extremism as defined in the UK Prevent Strategy and the Counter-Extremism Strategy is a vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs. Also included in extremism are calls for the death of members of our armed forces, whether in this country or overseas.



for if a regulatory concern arises in a charity. Following this guidance helps trustees demonstrate they are complying with their legal duties and responsibilities.

14. Although some views may not be the norm or traditional and may be controversial, this does not necessarily mean they cannot be promoted or supported by a charity. At one end of the scale there are views that constitute a criminal offence, for example by glorifying terrorism or inciting racial or religious hatred, which are not acceptable under any circumstances for charities to promote. Beyond that there are a range of views that may be acceptable within criminal law, human rights law and charity law and thus permissible for charities to promote and support as long as these are in furtherance of their charitable purposes and comply with the public benefit requirement, and that trustees have properly assessed and managed the risks to the charity.

Charities and campaigning and political activity

15. The Charity Commission's [Campaigning and political activity guidance for charities \(CC9\)](#) sets out what charities need to consider when campaigning or engaging in political activity.

16. The Charity Commission's guidance is clear that campaigning and political activity are legitimate and valuable activities for charities to take part in. They must, however, only be undertaken in the context of supporting the delivery of a charity's purposes, and there are limits as to what can be done in the context of charities under charity law.

17. A 2014 vote saw the NUS support the global Boycott, Divestment and Sanctions Movement (BDS) which "seeks to build international pressure against Israel through boycotts of specific companies, institutions and products, as well as campaigns against ties with targeted companies and sanctions against Israel" (NUS, 2015). NB both the no platform policy and BDS movement have been led by the NUS but do not extend to its member SUs, although similar policies have also been adopted by some of its constituent SUs.

18. The trustees of an SU charity considering whether or not they can legitimately endorse a motion relating to the BDS movement, for example, must be clear what this means in practice in terms of the nature and extent of the motion put forward and whether it can in principle be possible to do so, and must be able to explain how doing so furthers the charity's purposes and how it is consistent with their legal duties. However, it is difficult to see how a trustee board could come to a decision to pass such a motion. Furthermore, any action taken by trustees in implementing the motion carries a high risk of breaching the law, for example on the grounds of discrimination. This means that trustees should ensure that any action taken in support of that movement is in the best interests of the charity, that they have acted responsibly, that they have sufficiently identified and managed the risks posed in doing so, and have had due regard for their safeguarding responsibilities. This includes the impact on students and ensuring that any activity does not appear to be, and is not, discriminatory towards students of a particular faith or race. It is the responsibility of the trustees to ensure they act within the law and take steps to mitigate the risks of compromising the charity's independence and reputation.

19. The Charity Commission is working with a number of SUs to ensure that their activities surrounding freedom of expression which both enhance debate and challenge extremism, also comply with the law including respecting the public benefit requirement.

Regulatory action and cooperation

20. Where individuals who are known to have expressed controversial opinions in public, or when harmful views are given a platform by a charity, our regulatory focus is on the conduct of the trustees



and whether they are appropriately managing risks and properly furthering the purpose of the charity, acting lawfully and maintaining public trust and confidence. If a serious breach has occurred under charity law, regulatory action may need to be taken. This is likely to include in the first place providing regulatory advice and guidance and placing the trustees on notice that they need to take action to resolve the matter. In some cases action could include a compliance visit which may check that this has happened or in itself result in the Charity Commission requiring the trustees to take specific steps to further address or remedy the breach, such as by way of an action plan or an Official Warning. In the most serious cases an investigation may be opened even if the trustees are co-operating with us and the police. If the activities of concern do not stop, legal powers can be exercised against trustees to protect the charity. In some exceptional circumstances, the extent of any breaches may suggest that the organisation is not and has not carried out charitable activity and it may call into question whether the organisation is in fact or ever was a charity.

22. The Charity Commission collaborates positively and consistently with both the Department for Education (DFE) and HEFCE to coordinate their regulatory operations and formulate the regulatory policy framework within which they work. Across the three organisations, there is regular communication, including the regular sharing of information and co-ordination of action. These relationships are supported by [Memorandums of Understanding](#) which take account of existing processes and powers available to each regulator and are subject to periodic review. The Charity Commission will continue to work closely with DFE and HEFCE and forge a similar partnership with the Office for Students when it undertakes regulatory responsibility for the HE sector on 1 April 2018.

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