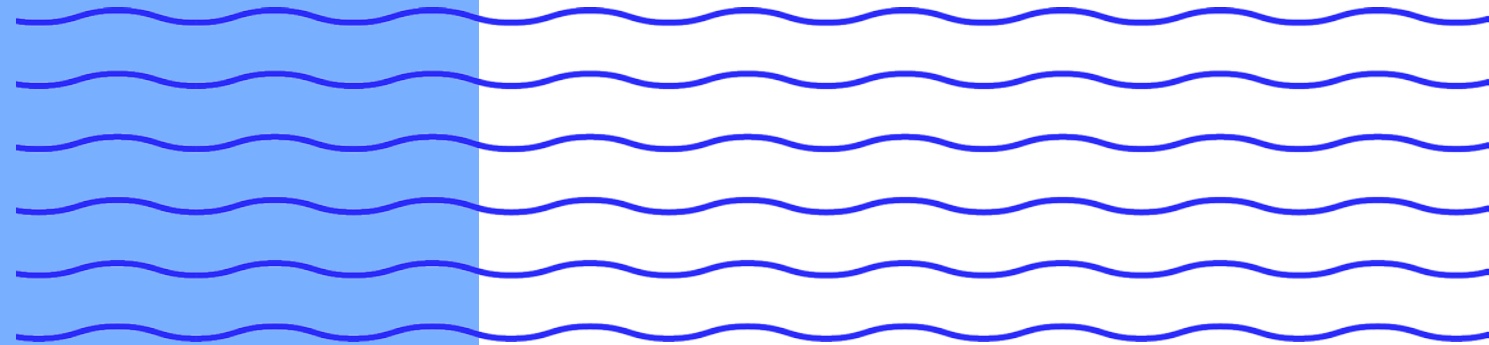
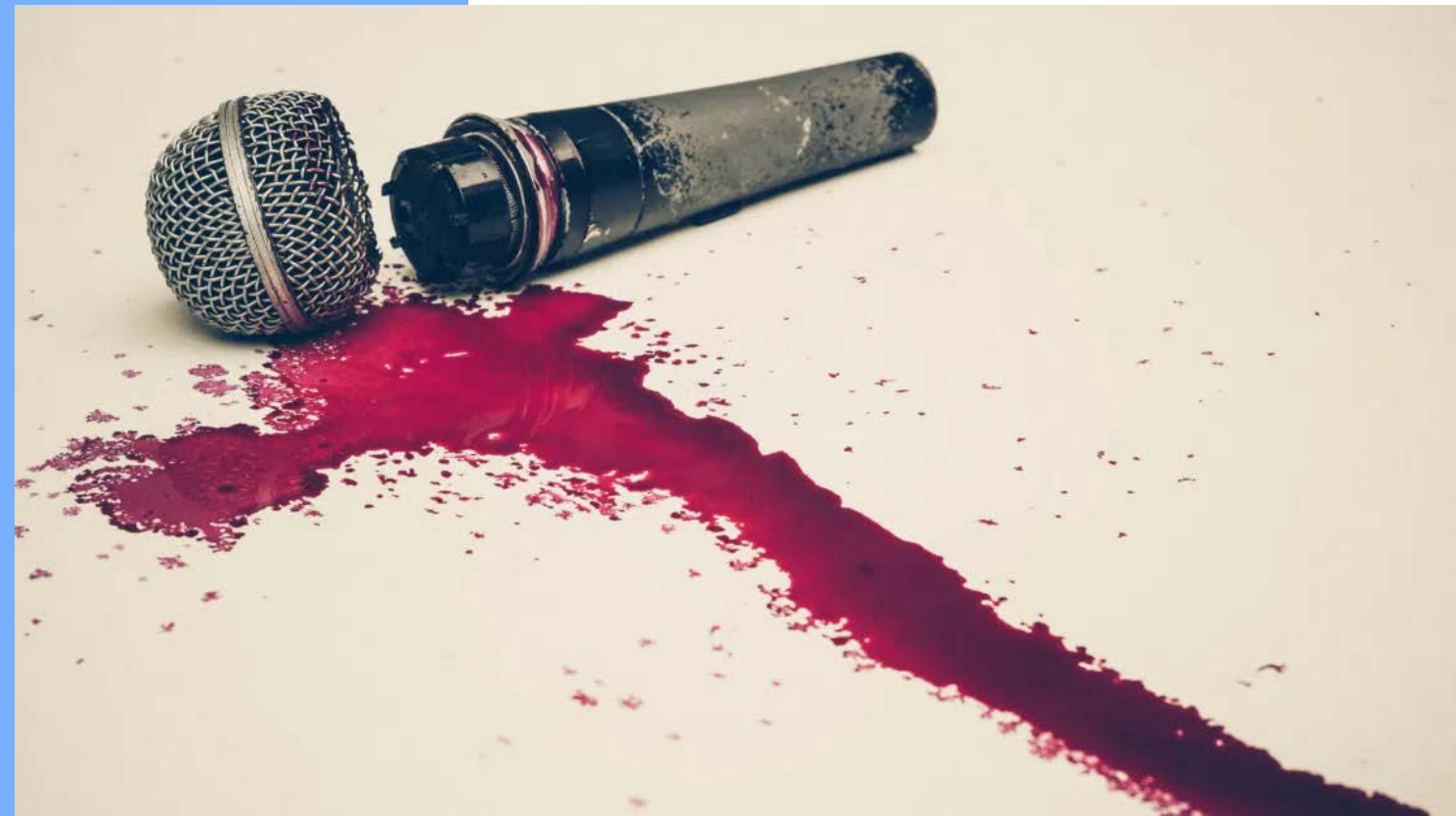


The government's new free speech proposals and SUs

The new proposals, how they would impact SUs if effected what might happen next



WONKHE
SUs

This session

- What's the analysis?
- What are the proposals?
- What could/will happen next?
- What should SUs do now?



Background

Tom Slater

Beware the university campus
microaggression monitors

15 January 2020, 8:09am



History?

- Subject balance, performance measures, size of the sector, lifelong learning, academic standards, governance efficiency, FoS and SUs



The Development of Higher Education into the 1990s

Presented to Parliament by the Secretary of State for Education and Science,
the Secretary of State for Scotland,
the Secretary of State for Wales
and the Secretary of State for Northern Ireland
by Command of Her Majesty
May 1985

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Students

Student unions

7.13 Many student activities offer an opportunity to participate in the life of an institution and to carry responsibility for the conduct of affairs. These include the student union, but student unions have not always fulfilled those intentions. Their policies and actions have not always been representative of the student body as a whole.

7.14 Most student union funds come from the taxpayer or ratepayer. They were for many years funded through a separate union fee which was paid as part of the student award. This distanced the union from the institution of which it was constitutionally a part, and discouraged proper institutional oversight. In 1981, therefore, the Government placed the funding of the student union in the hands of the institution.

7.15 This change has been beneficial, but many unions still give grounds for concern because their policies are determined and implemented by a minute proportion of the union membership. In 1983 evidence of the misuse of public funds by student unions for causes not concerned with the welfare of students themselves led the Government's Law Officers to remind universities and other higher education institutions of the legal responsibilities of unions and their officers in the use of union funds.

7.16 The growth of sabbatical leave for union officers is also worrying. Only the president of a union used to be granted leave from his studies for his year of office, but this privilege is now often more widely extended so that too much influence over student affairs can be exercised by a smaller number of students enjoying sabbatical leave—in some instances for several years.

Freedom of speech

7.17 The taxpayer's money should not be used to fund unions that refuse a platform to speakers whose views are objectionable to some students although others wish to invite them, that prevent invited speakers from gaining a hearing, or that permit violence or the threat of violence to that end. Where these things happen they signal the withering away of the university or other institution as part of a free society in which all views may find free expression

within the law. The protection of the right of free speech and the preservation of institutions of higher education as a natural home of free speech are duties which students and institutions owe to society and to the future.

The Government's position

7.18 The Government does not wish to involve itself in matters that are constitutionally the responsibility of universities, polytechnics and other institutions. But it has a responsibility for how public funds are spent, and is bound to be concerned when it would appear that they are being misapplied. As far as possible it wishes to seek change through action by the responsible institutions. The Government will be consulting higher education interests as to how student union policies and actions might be made properly representative of their membership; whether, if that cannot be achieved, the automatic membership of students in student unions can still be justified; and whether the present numbers of sabbatical officers are needed in order to manage the legitimate activities of the unions. If it proves not to be possible to achieve satisfactory outcomes on these issues by voluntary action, the Government will consider how they might be addressed more directly.

7.19 The Government is already seeking the views of higher education interests on the case for, and practicalities of, limiting the public funding of student unions to expenditure on a permitted range of welfare, social and sports activities for students within the institution itself, and will consider what further steps may be appropriate.

7.20 The maintenance of freedom of speech will continue to be the duty of each institution. The CVCP and the Committee of Directors of Polytechnics should produce guidelines on best practice from which all could benefit. The Government will watch to see the results and, should unsatisfactory incidents continue to occur, will consider what further may be done, either at a general level or through approaches by the Education Departments to individual institutions.

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Feb 2021 Policy Paper

- Threads: Classic libertarians, social conservatism, feminism
- 15,000 words of analysis and proposals
- Based largely around 2 x Policy Exchange reports from 2019 and 2020
- “Students have been expelled from their courses, academics fired and others who have been forced to live under the threat of violence“

• **Government set to fine universities who 'cancel' people due to their views as ministers 'defend British history and culture'**

- Education Secretary Gavin Williamson is set to unveil the 'free speech champion'
- They will have the power to defend students and academics at college campuses
- Institutions trying to cancel people due to their views will be penalised with fines
- Ministers also told heritage groups not to use public funds for political purposes



**Higher education:
free speech and
academic freedom**

February 2021

CP 394

Contested scale

- Number of events where a speaker has been banned?
- Expelled students (2 “cases” – Sheffield and Nottingham)
- “Sacked” staff?

Though there are noble exceptions, often a blind eye has been turned to the creeping culture of censorship. A culture has been allowed to develop in which it is seen as acceptable, even virtuous, for an academic to sign an open letter that calls for another to be dismissed or defunded.



Students' unions

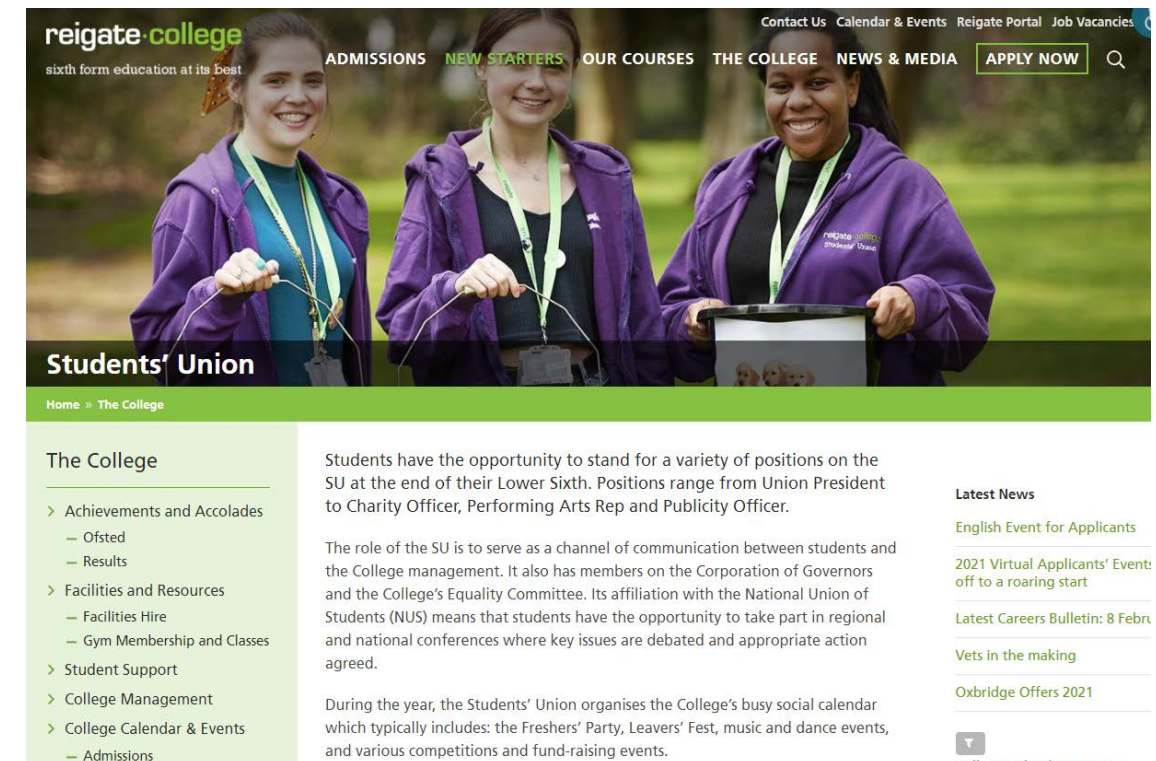
- Codes or statements have been introduced that would limit free speech, and some students' unions have been granted inappropriate levels of control over which speakers can visit and how student societies can operate.
- There is a legal framework in place, which imposes on those concerned in the government of HEPs a legal duty to take reasonably practicable steps to ensure free speech within the law is secured for their members, students, staff and visiting speakers... There is a gap in that the duty does not apply directly to students' unions (SUs).

Students unions

- Although SUs are generally independent of their HEP, section 22 of the Education Act 1994 explicitly makes HEPs responsible for taking reasonably practicable steps to secure that their SU operates in a “fair and democratic manner”.
- Section 22 also specifically requires the governing body of the HEP to bring to the attention of all students, at least annually, the provisions of section 43 and of the HEP’s section 43 code of practice relevant to the activities or conduct of the SU.
- This demonstrates that matters relating to SUs and freedom of speech are something which a HEP may be legally responsible for. As with section 43, this legislation does not provide a specific enforcement regime for breach.
- Most SUs are registered charities and are therefore regulated by the Charity Commission as regards their compliance with charity law. This includes acting for the public benefit in a way that promotes their charitable purpose (e.g. “advancement of education”).
- This means, in principle, that SUs must not carry out political activity where it does not support their charitable aim and it must not be their sole/continuing activity. They must also comply with their other legal obligations, and only use their funds in a way that is balanced and non-discriminatory. As educational charities, there are limits on SUs spending money on political campaigning outside their direct remit; but this does not prevent debate and lawful free speech by students or student societies.
- There are likely to be steps that could be taken by the Charity Commission in cases where an SU is, for example, blocking free speech for reasons which conflict with these principles. Although there are concerns that these duties are not always being fully complied, there has, however, been little regulatory intervention in this area.

Proposals

- England
- Higher education as linked to OfS
- (HEPs not OfS registered, and FECs ignored/not thought about!)
- Consultation?
- Legislation?



The screenshot shows the Reigate College website. The header includes the college logo, navigation links (ADMISSIONS, NEW STARTERS, OUR COURSES, THE COLLEGE, NEWS & MEDIA), and utility links (Contact Us, Calendar & Events, Reigate Portal, Job Vacancies). A search bar with an 'APPLY NOW' button is also present. The main content area features a large image of three female students in purple hoodies, with the text 'Students' Union' overlaid. Below this, a breadcrumb trail reads 'Home > The College'. The 'The College' section contains a list of links: 'Achievements and Accolades' (Ofsted, Results), 'Facilities and Resources' (Facilities Hire, Gym Membership and Classes), 'Student Support', 'College Management', and 'College Calendar & Events' (Admissions). The main text describes the role of the Students' Union, stating that students can stand for various positions at the end of their Lower Sixth, ranging from Union President to Charity Officer, Performing Arts Rep, and Publicity Officer. It also explains that the SU acts as a communication channel between students and college management, and is affiliated with the National Union of Students (NUS). A final paragraph notes that the SU organizes the college's busy social calendar, including the Freshers' Party, Leavers' Fest, music and dance events, and various competitions and fund-raising events. On the right side, there is a 'Latest News' section with links to 'English Event for Applicants', '2021 Virtual Applicants' Events off to a roaring start', 'Latest Careers Bulletin: 8 Febru...', 'Vets in the making', and 'Oxbridge Offers 2021'. At the bottom right, there is a 'College Calendar & Events' section.

Proposals

1. Legislate for a Free Speech and Academic Freedom Champion to be appointed as a member of the OfS board with responsibility to champion free speech and investigate alleged breaches of registration conditions related to freedom of speech and academic freedom
2. Legislate to require a new OfS registration condition on free speech and academic freedom
3. Explore further the option of strengthening the section 43 duty to include a duty on HEPs to 'actively promote' freedom of speech
4. Legislate to extend the strengthened section 43 duty to cover SUs directly
5. Set clear minimum standards for the code of practice required under section 43
6. Introduce a statutory tort that would give private individuals a right of redress for loss as a result of a breach of section 43
7. Wider and enhanced academic freedom contractual protections

Government set to fine universities who 'cancel' people due to their views as ministers 'defend British history and culture'

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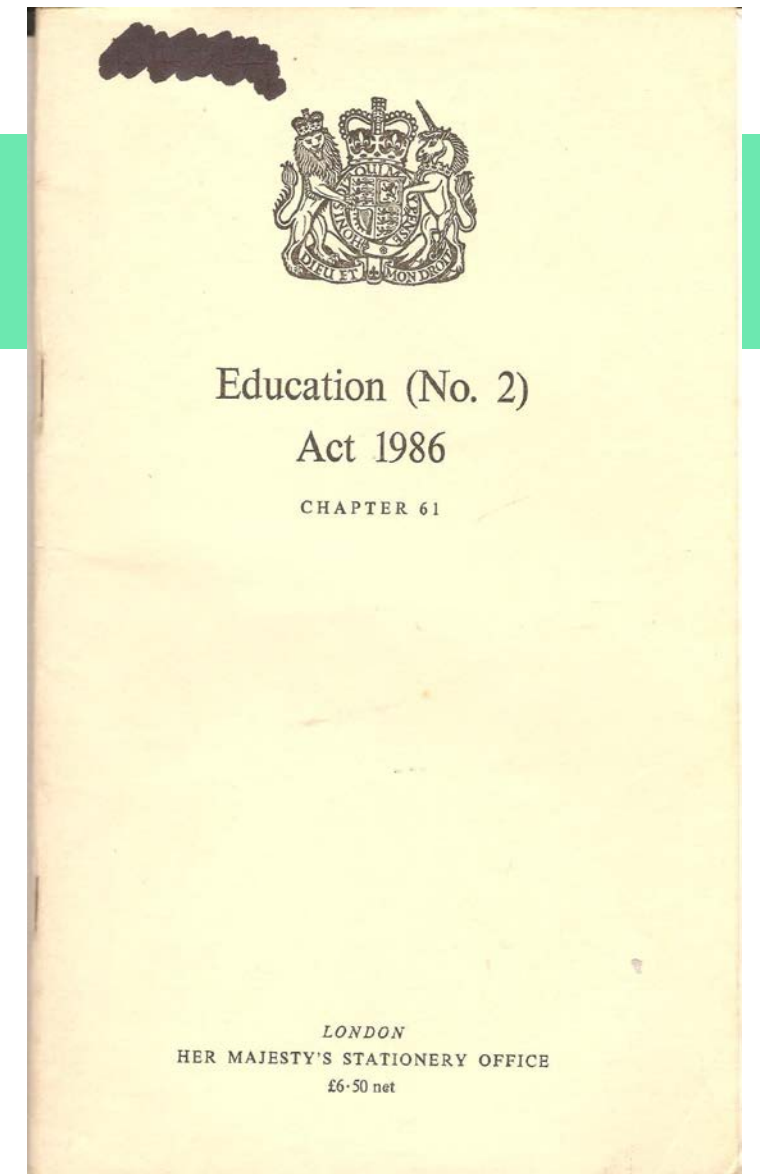
1. Champion

- Similar to the Director of Fair Access
- BUT Ombudsperson powers over issues relating to FoS
- When is FoS also about harassment? Or fitness to practise?
- Workability/fairness of that kind of direct intervention role?
- What if they disagree?



2. Condition

- Education Act 1986 had no regulator/enforcer
- OfS establishes conditions of registration in a framework
- E1 requires providers to follow public interest governance principles
- One is on academic freedom and another is on freedom of speech
- Proposal is those two are turned into a separate condition (E3?) and language changed from “secure” to “actively promote”



BUT problem scale?

“ ...not received any evidence to demonstrate that providers are not using best efforts to tackle this problem on campus and to keep debate as civil as possible.

“ We obtained and examined a range of material concerning free speech through public interest disclosure, press office inquiries, as well as the Prevent data. Thousands of events take place on campus every year; there are only issues at a few but, when these issues arise, they usually gain substantial media coverage and such media coverage propagates myths.”

“ We have found no evidence of free speech being systematically suppressed. Our experience to date is that providers are working hard to be compliant with their duty under section 43 of the 1986 Education Act.

3. “Actively promote”

Actively promoting a positive and inclusive environment

The HEP actively promotes free speech and academic freedom as being central parts of a high quality higher education.

The HEP actively seeks to create a positive, inclusive environment for students and staff, that allows for diversity of perspectives and opinions. The HEP recognises that advancing ideas and learning through debate is a critical part of what HEPs do and is in the student interest and that free speech exposes students to new and challenging ideas.

The HEP encourages and promotes robust but civil debate, which tolerates and understands different viewpoints, even on controversial topics.

The HEP actively supports a culture of free speech and academic freedom within their institution, in a way that means that students, staff and the public are aware of their commitment to those freedoms. This might include, for example:

- where staff or students express controversial, but lawful, views or opinions, the HEP is clear in public statements and in response to any internal petitions or pressure for action against the individuals concerned that they support their right to free speech, even if they disagree with the views expressed;
- where an academic expresses controversial, but lawful, views and then for other reasons, ceases to be employed by the HEP, the HEP, where possible, seeks to provide public clarity that the cessation of the academic's employment was not linked to their expression of those views.

Section 43 code of practice

The HEP's code of practice on free speech, required by section 43 of the Education (No. 2) Act 1986, is written in clear language so that it is easily understood by staff, students and visiting speakers. The code is provided in an accessible format and is published on the HEP's website.

The HEP's code of practice on free speech does not actively limit free speech, for example by requiring 'respect' rather than 'tolerance' for all viewpoints.

The HEP keeps a written record of decisions taken under their code to: (i) refuse permission for an event to be organised; (ii) cancel an event which has already been organised; (iii) impose restrictions or mitigations on an event, such as the appointment of an independent chair to facilitate the event. In documenting its decision, the HEP indicates the factors taken into account and their reasons for making the decision.

The HEP's section 43 code of practice clearly sets out the steps that need to be taken in relation to the organisation of events or other activities that are to take place on the HEP's premises where issues of free speech may arise. These steps are as simple as possible. The HEP does not require unnecessarily complicated or burdensome processes to be followed in connection with the organisation of events or activities, recognising that such requirements may dissuade students from seeking to organise events or activities and thereby inhibit free speech. For these purposes, the HEP's premises include any premises occupied by the HEP's SU even where those premises are not owned by the HEP.

3. “Actively promote”

Imposition of mitigations

When an activity or event falls to be considered under the HEP’s section 43 code of practice, the HEP’s starting point is that the event or activity should be allowed to proceed, without any restrictions or mitigations, such as requiring a speech to be shared in advance. Such restrictions or mitigations should not be applied as a default.

In the rare cases in which a HEP decides to impose restrictions or mitigations on an activity or event, the HEP strives to be even-handed and impartial. Where the HEP decides to impose mitigations at an event where a speaker is taking a particular position on an issue, but not to impose similar requirements at an event where a speaker is taking a different position on that issue, the HEP documents its reasons for doing so. The HEP does not impose mitigations – for example, a requirement for an independent chair or a format which ensures challenges to the speaker – at an event simply because the speaker is taking a minority view on the issue. Of course, whether the imposition of mitigations is

appropriate in any case will always depend on the individual circumstances of that case.

Security costs

Where the HEP considers that a particular event or activity gives rise to security concerns, they may consider putting additional security in place as a mitigation to allow the event or activity to go ahead. In each case, the HEP actively seeks to minimise security costs.

When making a decision on security costs, the HEP considers whether the speech is from a particular perspective or on a particular topic that is generally disadvantaged and/or particularly susceptible to being stifled within the HEP.

The HEP documents any decision to impose security costs, and who should bear those costs, setting out the reasons for that decision.

The right to challenge or protest

The HEP recognises that the right to free speech includes the right to challenge or protest i.e. the right to disagree. The HEP does not impose restrictions or mitigations on an event, or cancel the event, simply because a protest against a particular speaker is planned. Conversely, the HEP does not allow the protest to prevent speech from being heard (for instance, by drowning it out) or to intimidate speakers or audience members.

3. “Actively promote”

Other policies and procedures

The HEP's internal policies and procedures consistently reflect the principles of free speech and academic freedom. For example, the HEP may decide to include express references to academic freedom in the employment contracts of staff members and to free speech in their student and staff disciplinary codes or procedures.

The HEP should not encourage students to inform upon other students for lawful free speech, nor should they pay, or otherwise reward, students for doing so.

The HEP should not interfere with academic freedom by imposing, or seeking to impose, a political or ideological viewpoint upon the teaching, research or other activities of individual academics, either across the whole HEP or at department, faculty or other level. For example, a head of faculty should not force or pressure academics to teach from a their own ideological viewpoint, or to only use set texts that comply with their own viewpoint. This applies equally to contested political ideologies that

are not associated with a particular political party or view, such as 'decolonising the curriculum'.

The HEP also seeks to ensure that their disciplinary codes or procedures are drafted in a way that does not act to inhibit lawful free speech and/or that does not create the impression that those codes or procedures may be used to punish lawful free speech. For example, a disciplinary code which refers to 'offensive speech' or to 'bringing the [HEP] into disrepute' without reference to the right to free speech may act to inhibit free speech or academic freedom that is within the law.

The HEP's internal HR policies should not assume a purely subjective definition of offence or harm when considering matters such as dignity, conduct or harassment. In other words, an action is not offensive simply because a person claims that they have found it to be so. In relation to harassment, for example, there is a subjective assessment of the impact or effect of the act or behaviour on the recipient, but there is also an objective assessment of whether that impact or effect is reasonable in all the circumstances. Claims of offence can give rise to the risk of shutting down free speech and prevent certain viewpoints being heard. Policies should contain a reasonableness test, and the burden of proof in such matters should not be set up in a way which systematically works against free speech.

3. “Actively promote”

Students’ unions and other student representative groups

The HEP takes reasonably practicable steps to ensure that their SU, or other student representative body, follows the HEP’s section 43 code of practice.

The HEP works with their SU, or other student representative body, to take reasonably practicable steps to secure free speech within the law for all students and not just for those who hold the majority view on a particular issue.

The HEP takes steps to ensure that SUs do not deny or restrict registration or use of facilities to student societies as a result of a difference of political views between the student society and the SU, provided that those views and their expression constitute free speech within the law.

The HEP takes reasonably practicable steps to ensure that any student, including student societies, or staff member can organise a speaking event or activity where issues of free speech or academic freedom are relevant. There are no requirements for events or activities to be organised through the HEP’s SU or other student representative body, and no reduction in access to university facilities simply because the SU is opposed to an event or activity.

- Charity law and wider duties
- Legal status of societies
- What is an SU?

4. Students unions

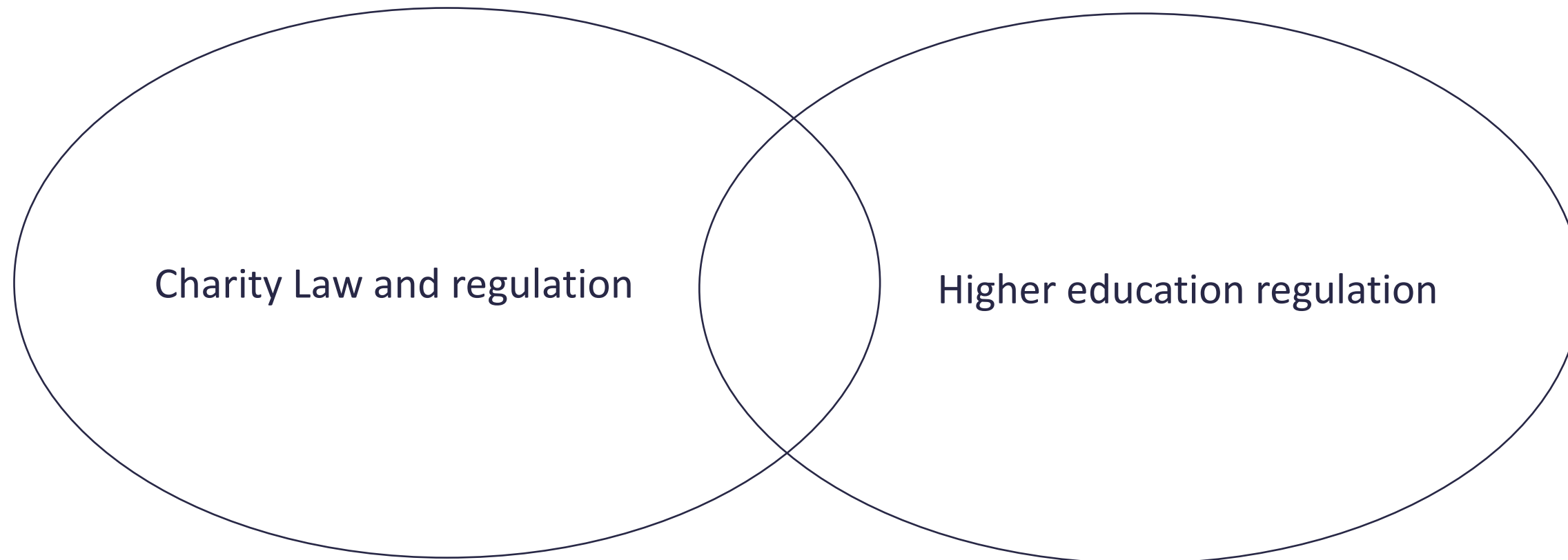
- Extending the section 43 duty to those responsible for SUs means that SUs would themselves be directly responsible for taking reasonably practicable steps to ensure that lawful freedom of speech is secured, as HEPs are now.
- As regards regulation of such an expanded section 43 duty, consideration has been given to which body would be best placed to regulate SUs in this area.
- The JCHR flagged in their 2018 report that the involvement of two regulators in England for HEPs and SUs, and differences in legal duties, make the regulatory environment within which SUs operate complex. The report raised concerns that the Charity Commission's approach in regulating its charities "does not adequately reflect the important role SUs play in educating students through activism and debate".
- Therefore, the report recommended extending the remit of the OfS to include the regulation of SUs. At the time the OfS had only recently been established and the Government did not consider it appropriate to legislate to change its remit; we now think that, in light of the issues outlined in this paper, this is a recommendation we can support.

4. Students unions

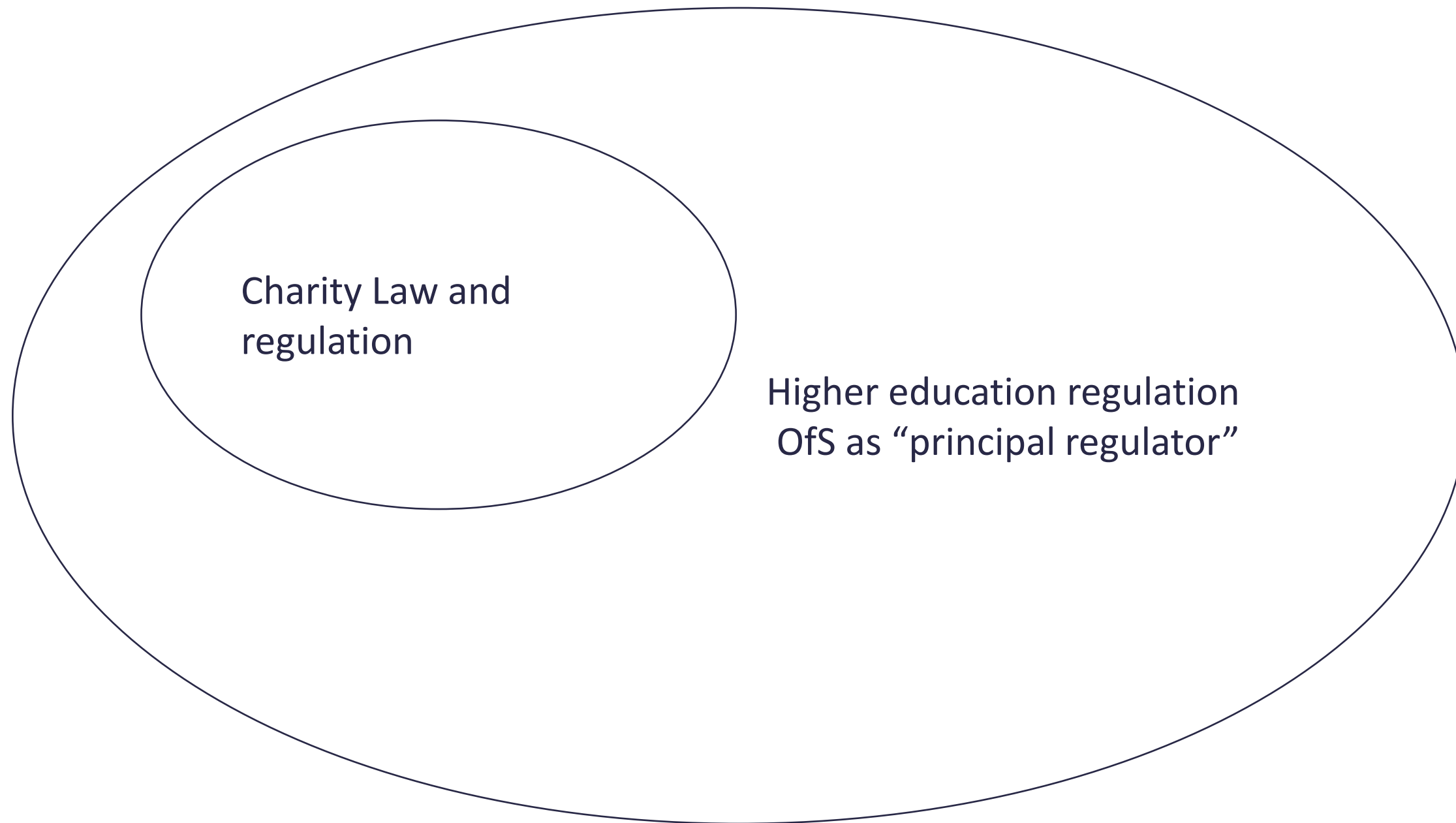
- As the OfS will have a strengthened role in regulation of free speech requirements as a result of these proposals, we believe it is sensible for the OfS to be given powers to regulate SUs in regard to free speech. This change in principal regulator should facilitate better overall oversight of the proposed strengthened free speech duties and would allow for a uniform regulatory approach to free speech across the HE sector. The OfS would be able to apply its existing sanctions, including fines, to SUs that breached the requirements imposed on them in relation to free speech.
- Although the OfS does not currently regulate SUs directly, the free speech and academic freedom Public Interest Governance Principles referred to in Conditions E1 and E2 do apply to HEPs' interactions with SUs. SUs are currently regulated by the Charity Commission and would still, as registered charities, be subject to charity law as well as the expanded section 43 duty.
- The OfS states in its Regulatory Framework that its primary aim is to ensure that registered HEPs deliver positive outcomes for students.
- We are aware that bringing SUs into the scope of the OfS in respect of free speech would be a significant change and are exploring options that will ensure the coherence of this approach.

4. Students' unions

- Under these proposals, charitable SUs would remain charities and governed by charity law in the same way that HEPs which are charities are subject to charity law, but with the OfS as the principal regulator in relation to free speech. The Charities Act 2011 provides for exempted charities to be primarily regulated on charity law purposes by a regulator that is not the Charity Commission, although the Charity Commission retains some regulatory functions. Changes to the existing Memorandum of Understanding between the Charity Commission and the OfS (which sets out how they regulate HEPs in tandem) could extend its scope to bring in SUs as well.



4. Students' unions



4. Students' unions

- Further education
- A register of students' unions
- Changes to HERA
- Wider charity law requirements, including governance and oversight
- No clarity on complaints here

Taking the debate forward:

A new code to secure and champion freedom of speech and political diversity on campus



February 2021

5. And the rest

- Minimum standards for the HEI COP
- Statutory tort giving individuals right of redress
 - Students who are disciplined because of their views (e.g. expelled from their course)
 - Organisers of an event which is cancelled – if they have incurred costs (room hire, the speaker’s expenses, publicity costs etc.)
 - Visiting speakers who are disinvited or ‘no platformed’
 - Academic staff who are disciplined because of their views, where they relate to their field of study
 - Academic staff who are disciplined because of their views, where they do not relate to their field of study
- Wider and enhanced academic freedom contractual protections

Next?

- In addition to the reports and research cited in this paper, we are very grateful for the time already given by academics, students, representative bodies and others in offering insights into the way that free speech and academic freedom rights and responsibilities are currently exercised and acted on.
- We are now looking forward to engaging with a wider range of stakeholders about our analysis of the challenges faced and the proposed changes, as we work together to solve these important issues.

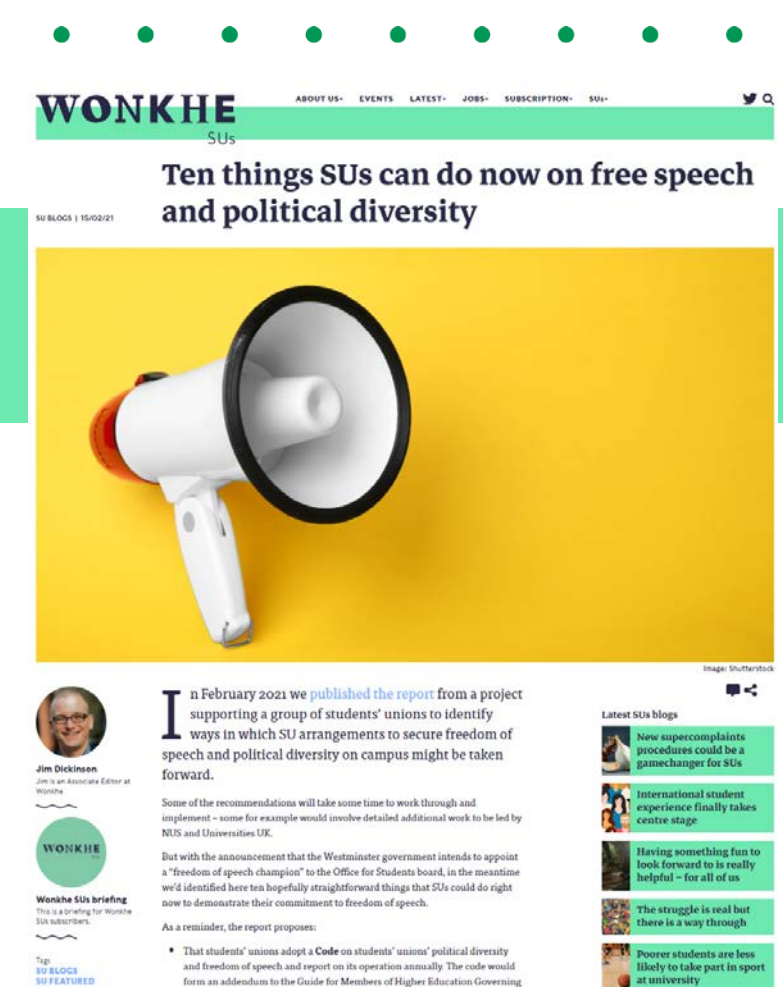
Will it happen?

- Pre-existing and Partial/Overlap of Champion and SU proposals (plus FE gap)
- Action planned by OfS?
- Progress made by SUs
- Legislative timetable
- DfE and Gavin Williamson
- Legislation danger!

What can SUs do?

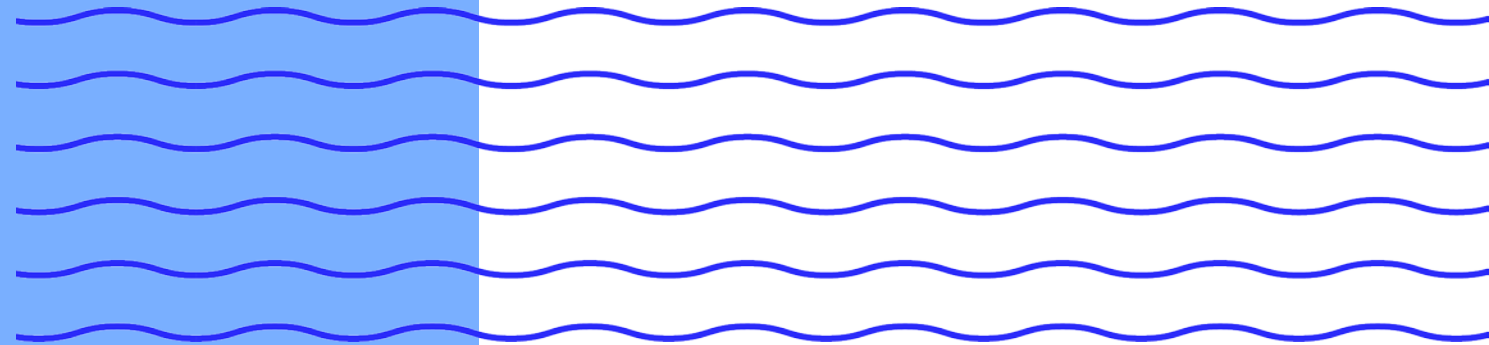
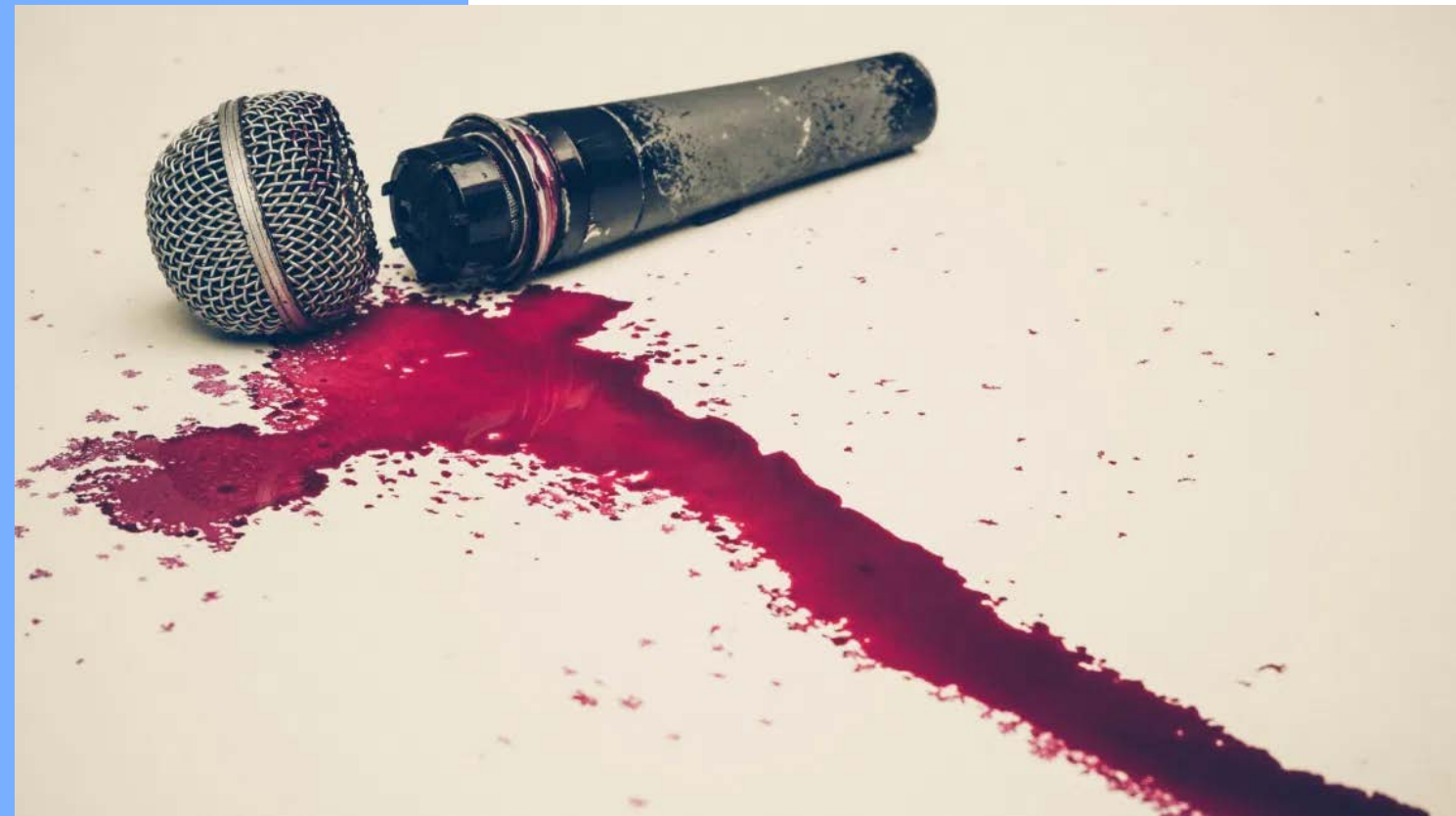
1. Support in principle?
2. Discuss/adapt/agree code at Trustee Board
3. A single webpage
4. Clubs and societies
5. Campaigns and policy clarity
6. Advocacy clarity
7. VFM statement and process
8. Reviewing procedures
9. Complaints
10. Breadth and range

Debate Week!



The government's new free speech proposals and SUs

The new proposals, how they would impact SUs if effected what might happen next



WONKHE
SUs