

Russell Group response to OfS consultation on proposed regulatory advice and other matters relating to freedom of speech

1. **Do you have any comments on the guidance in our proposed Regulatory advice relating to section 1 on the ‘secure’ duties and the ‘code’ duties?**
 - 1.1 Section 1 of the proposed Regulatory advice reasonably describes the ‘secure’ and ‘code’ duties as set out in the Act. As acknowledged in the guidance, upholding the ‘secure’ and ‘code’ duties will require providers and students’ unions to make complex judgements around how these duties interact with other legal requirements and the ‘reasonably practicable’ steps they should take. **Given this, we would recommend the OfS encourages an open and supportive dialogue with providers and students’ unions so they can share approaches and seek informal advice in good faith, without fear of triggering immediate regulatory intervention.**
 - 1.2 Given the complexity of the legal landscape (and therefore the complexity of decisions being taken by providers, their constituent institutions and students’ unions) and the lack of precedent for OfS judgements on complaints, we would urge the OfS to always allow universities and students’ unions to make representations as part of the complaints process and consider a wide range of evidence before making judgments on complaints including internal decision-making frameworks, published codes of practice and risk management processes.
2. **Do you have any comments on the guidance in our proposed Regulatory advice relating to section 2 on free speech within the law?**
 - 2.1 Section 2 sets out a clear statement that “all speech is lawful, i.e. ‘within the law’, unless restricted by law” and goes on to specify the legislation that should be considered in assessing lawful speech. There is also a section which sets out how these pieces of legislation interact with free speech duties (para 26-33). Whilst helpful, we think this section should be clearer in describing situations where speech is unlawful and universities would be expected to take steps to restrict such speech, particularly where examples are more nuanced. This is particularly true where speech constitutes harassment: whilst the OfS states that ‘context is always relevant in determining whether speech does rise to the level of unlawful harassment’, meaningful advice on assessing this context to help equip universities to make judgements on whether the level of perceived harassment is indeed unlawful, is absent from the guidance. **We recommend that the OfS expands on this part of section 2 of the guidance and includes examples of unlawful speech (aligned with law enforcement) in section 4. Examples relating to antisemitic, Islamophobic and transphobic speech would be particularly helpful. We also recommend the OfS reviews Regulatory advice 24 once DfE has published its intended guidance on antisemitism to ensure coherence between this and the OfS’s free speech guidance.**
 - 2.2 Section 2 also refers to considerations of common law on confidentiality and privacy (para 13) when assessing lawful speech. We recognise how confidentiality and privacy may be relevant in the context of limiting speech and would welcome further detail on how a university may apply this to its assessment process.
 - 2.3 Whilst most of the guidance acknowledges that reasonable steps are required and context should be taken into account, paragraph 75 of the consultation appears to deal in absolutes. On a university’s code of practice, it states that providers should include “a statement that nothing in that other [policy] document should be read as undermining or conflicting with the

free speech code of practice; and that in case of any conflict the free speech code of practice will take precedence". It is reasonable for universities to have other regulation and policies in place, for example on bullying, dignity at work or social media. Whilst we agree these should be drafted in a way that is compatible with free speech duties, the legal basis on which the OfS considers the free speech code of practice should take precedent over these other policies is not clear. More generally, section 2 of the guidance fails to discuss universities' domestic regulations and policies when considering how to assess lawful speech. **We would ask the OfS to better consider universities regulations and policies in section 2 of the guidance and remove reference to a university's free speech code of conduct necessarily taking precedence over their other policies in paragraph 75.**

2.4 Boundaries of academic freedom should be guarded to preserve its societal value, yet the guidance lacks examples illustrating the importance of free and critical academic enquiry. **We would welcome examples within the guidance that demonstrate how a university should manage the interaction of general legal protections and responsibilities relating to freedom of speech and academic freedom.**

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

3.1 We welcome that the OfS does not expect providers, constituent institutions, or relevant students' unions to take steps that are not reasonably practicable 'for them'. The context in which a provider, constituent institution or students' union is operating, and the particulars of a specific situation are crucial in determining the reasonable practical steps that should be taken to secure free speech and so this recognition is very welcome.

3.2 Whilst we broadly agree with the factors which should be considered in assessing whether steps are reasonably practicable set out in paragraph 36, we would encourage the OfS to also include:

- (a) **Effective and efficient use of resource** - Universities receive significant amounts of public funding and from students themselves. It is important this funding is spent in a way that maximises benefits to students.
- (b) **Risk** – There may be risks associated with taking certain actions to secure free speech. These should be considered in assessing whether the steps taken were reasonably practicable.
- (c) **Jurisdiction** – Where providers are taking steps to secure free speech outside the UK, they will need to assess the local context including relevant laws and regulations when assessing the reasonably practicable steps to take.

4. Do you have any comments on the guidance in our proposed Regulatory advice relating to section 4 on steps to secure freedom of speech?

4.1 We welcome the inclusion of illustrative examples in this guidance to give the sector a better understanding of what the OfS is likely to consider to be reasonably practicable steps to secure free speech. However, in many cases these examples oversimplify scenarios which, in reality, will be far more nuanced. This limits their applicability and usefulness in dealing with real cases, and a wider range of more nuanced examples would therefore be helpful.

4.2 Whilst we understand the OfS cannot provide an exhaustive list of cases and likely judgements, the handling of early complaints will be especially important in setting precedent. **Judgements relating to these cases will provide the sector with real-world,**

nuanced examples and should be used to inform future versions of this guidance. We would also encourage the OfS to include best practice examples in future guidance which better reflect the diversity of the sector and variety of responses that might be considered reasonably practicable.

- 4.3 As mentioned above, we would also welcome examples of unlawful speech in section 4 and examples relating to antisemitic, Islamophobic, and transphobic speech would be particularly helpful.
- 4.4 **We would encourage the OfS to commit to a review in Spring 2025 which would include an evaluation of the effectiveness of the new complaints scheme, judgments made and an update to the Regulatory advice 24 to include real-world examples of reasonably practicable steps to secure free speech. This review should also consider new relevant guidance which intersects with free speech duties, for example the intended DfE guidance on antisemitism and OfS guidance on harassment and sexual misconduct, to ensure coherence between these and Regulatory advice 24.**

International partnerships

- 4.5 The guidance states that universities should ensure relationships with foreign countries do not undermine their freedom speech duties. However, the guidance is not clear as to how a university should balance its duties under the Act with differences in culture, regulations and laws of foreign states. Many universities have a range of international activities in countries where freedom of speech may be restricted. These could include, for example, overseas campuses, other transnational education (TNE) provision, fieldwork and study abroad opportunities. **We think free speech ‘within the law’ should consider where the speech is happening and respect domestic laws in place.** It would be a concern, for example, if the OfS were to expect institutions to take steps that could limit the ability of institutions to provide advice and guidance to staff and students abroad intended to help those individuals act in accordance with those local laws. Not only would this risk the safety of individuals but may also have far-reaching diplomatic and foreign policy consequences. **We urge the OfS to provide clarity on this point and clearly acknowledge the appropriateness of universities respecting the domestic laws of a country in which they are operating and considering these when determining the reasonably practicable steps they should take to secure free speech.**
- 4.6 **We would also ask the OfS to consider and provide information on how these duties might extend to blended learning where an academic or visiting speaker may transmit material overseas via online platforms (whether live or pre-recorded).** In this instance, whilst the safety of individuals would be less of a concern, universities still may have a responsibility to advise staff on how best to navigate local customs and laws.
- 4.7 We are concerned that examples 3¹ and 4² present an overly simplistic view of international student and staff arrangements. It is not clear where the line is between acceptance of basic

¹ “University A accepts international students every year through a programme of visiting scholarships funded by the government of country B. One condition of the scholarships is that recipients must accept the basic principles of the ruling party of country B. Another condition is that recipients must accept direction from country B’s government via consular staff. Depending on the circumstances, these arrangements may undermine free speech and academic freedom at University A. For instance, they may restrict the lawful expression of views by students. If so, amendment or termination of the scholarship agreement is likely to be a reasonably practicable step that University A should now take.”

² “Institute A in University B is jointly funded by University B and a commercial entity based in a foreign country C. A proportion of staff at Institute A are appointed through a process managed within country C. This process imposes an ideological test as a condition of appointment and of ongoing employment. Depending on the circumstances, these arrangements may have the effect of penalising applicants to academic posts for their exercise of academic freedom. They may also have the effect of restricting the free speech and academic freedom of students and staff at University B. In these circumstances, terminating or amending these arrangements with Institute A is likely to be a reasonably practicable step that University B should now take.”

norms under the legal framework of another state and the removal of academic freedom or freedom of speech from students or staff. For example, if, during a recruitment process, another country requires a staff member to sign an agreement that they accept the basic values of tolerance and dignity in the workplace – is this a breach of their free speech? While there may be no intrinsic risk to their free speech, this will depend on how the values are implemented in practice.

- 4.8 Educating people from countries with different regimes can build an understanding of the benefits of democracy, transparency and free speech and our members have measures in place to protect students and support them to undertake study and research freely. On student scholarships (example 3), the OfS does not appear to adequately distinguish between a university conceding that a foreign government may make in-country decisions about which of its citizens are eligible for financial support, and inappropriately accepting limits on their freedom of speech once they join a university. **We would welcome greater consideration by the OfS of the complexities of these arrangements**, in which universities often recommend students to receive funding based on academic suitability, but the foreign partner ultimately decides which applicants to fund.
- 4.9 Termination of these contracts, as suggested in the guidance, would likely have a significant negative impact on UK/foreign relations. The actual impact on the perceived influence of foreign states in restricting free speech in UK universities is unclear, and we therefore question whether such a response would be proportionate. Indeed, denying students the opportunity to study in the UK may have a greater, long-standing impact on the freedom of speech of the individual in receipt of funding. **As an alternative, we would suggest a reasonably practicable step would be for universities to publish its free speech policy and communicate this to recipients once in the UK.**
- 4.10 We would also highlight that clauses relating to scholars and their conduct are also found in UK Government funded scholarships. For example, FCDO-funded Chevening scholarships have a clause stating “You must not engage in political activities or in any other activities of a public nature likely to affect the British Government adversely”³. We would welcome guidance on the reasonably practicable steps universities should take in reviewing such contracts with the FCDO.

Appointments

- 4.11 The expectation that providers keep a record of evidence on decisions made (paragraph 47) is likely to be disproportionate and would be an inefficient way of addressing concerns around hiring practices, already robustly regulated by employment law. **We do not believe that there is sufficient evidence that this would be a proportionate or reasonably practicable measure to secure free speech and academic freedom.** Instead, guidance could be expanded to “if appropriate this record should include evidence that the appointment process did not penalise a candidate for their exercise of academic guidance” and the guidance should look to give examples on what specific evidence would be acceptable.

Employment

- 4.12 The guidance emphasises the importance of timeliness in taking reasonably practicable steps. However, given the legal complexities involved in many cases, institutions will need to take careful and considered action using a range of information available to them which may take time to obtain. Often, actions will need to be agreed by a panel of decision-makers such as a constituted academic or student disciplinary committee or a sub-group of a university

³ <https://www.chevening.org/wp-content/uploads/2022/06/Terms-and-conditions-scholarships2022.pdf>

Senate. The two-week timeframe for intervention in example 6⁴ may well be the length of time needed for a Vice-Chancellor to reach a robust decision and act, depending on the situation and context, and should therefore be considered reasonable and reference to a specific timeframe removed from the guidance.

Complaints and investigation processes

- 4.13 Example 17⁵ describes an online portal students can use to submit anonymous reports to senior staff of 'problematic speech'. Report and Support tools are commonly used by universities and have been successful in helping to tackle racism, sexism and other issues on campus. The promotion of an online portal giving students and staff the opportunity to share instances of harmful or problematic speech is a reasonable mechanism for identifying and addressing patterns of concern. Report and Support is not normally used in relation to individual disciplinarys but can be used successfully to identify emerging issues on campus and respond proportionately. Universities have the internal expertise to determine which reports relate to lawful expression and do not warrant further action. Given this, **we do not believe it would be a reasonably practicable step to remove the use of Report and Support tools and we recommend paragraph 69 is amended and example 17 removed from the draft guidance.**
- 4.14 We remain concerned of the possibility of commercial bookings, for example the booking of premises for conferences or summer schools, which have nothing to do with ordinary university business regarding the delivery of education and/or research, being within the scope of this guidance. The Act is unclear on this matter, and we would like clarification on this matter from the OfS as a matter of urgency.

Governance

- 4.15 In lectures, seminars and student-led events, students are exposed to a wide range of competing views and perspectives which help broaden their understanding of both their course of study and the world around them. We agree with the OfS that this can, and sometimes should, include diverse opinions and rigorous debate on controversial topics. **However, it is not clear in paragraph 103⁶ whether the guidance intends only that academics have the right to teach areas of controversy within the curriculum as set by the university, or that universities would be required to go as far as to modify the curriculum to accommodate requests to provide greater exposure to controversial ideas. The latter interpretation would undermine universities' autonomy over their curricula, as protected under the Higher Education and Research Act (2017), and clarity is needed to ensure this autonomy is not put at risk.**

⁴ "A postgraduate literature student, A, publishes a paper accusing Shakespeare of 'systematic racism' based on an analysis of the sonnets. A national newspaper accuses A of 'smearing a great British icon'. It mounts a campaign calling for A to be expelled from their postgraduate course. After two weeks the vice-chancellor of A's university, B, issues the following statement: 'University B regards free speech as a fundamental value that is at the heart of everything we do. This extends even to views that we consider wrong and that many in our community reject. The views of A do not represent the views of University B. University B is proud of Britain's great literary heritage.' In Example 6, the vice-chancellor of University B did not intervene for two weeks. This period of uncertainty may itself have penalised A. Depending on the circumstances, the statement may have undermined A by criticising their position. The statement was not explicit that University B would not expel A. In these circumstances a clear, prompt and viewpoint-neutral response is likely to have been a reasonably practicable step that University B should have taken"

⁵ "University A promotes an online portal. Students can use this portal to submit anonymous reports to senior staff of 'problematic speech'. Depending on the circumstances, the portal may discourage open and lawful discussion of controversial topics, including political topics and matters of public interest. If so, removing such a portal and/or replacing it with a reporting mechanism that would not have this effect, are likely to be reasonably practicable steps that University A should now take."

⁶ "Providers and (where relevant) constituent institutions should ensure that decisions about the curriculum and the way it is delivered safeguard: a. the ability of academics to teach and communicate ideas that may be controversial or unpopular but lawful; and b. opportunities for students to be exposed to such ideas."

- 4.16 More generally, we are concerned that the guidance may undermine the coherence of programmes under the OfS's conditions of registration. For example, paragraph 103 (b) could be used as an argument to expand the content of programmes, even where there is no coherency, to provide greater student choice or 'exposure' to controversial ideas, putting it in conflict with condition B1 which asks for course coherency. **Greater clarity on how this is expected to be operationalised whilst maintaining course coherency would be appreciated.**

Research

- 4.17 We are concerned about the potential implications of paragraphs 104-105 on the ability of universities to make valid choices about research areas which contribute to its wider strategy and civic mission. Universities undertake due diligence on research partners, and if a partner has the potential to damage wider opportunities or the reputation of an institution, the current wording does not allow a university the option to refuse funding for that research. Guidance should distinguish between the topic of the research and the source of funding by clarifying what an 'organisation' is, as referred to in para 105b of the guidance. **We would appreciate clarity from the OfS on this matter. We are also concerned this section of the guidance could undermine ethical research policies and committee decisions and would like to see direct reference to abidance to a university's own research ethics policy and governance.**

Training

- 4.18 **We are concerned that the steps described in relation to training and induction are not reasonably practicable.** For example, we do not consider that the expectation to provide all staff involved in making decisions in relation to the activities listed in paragraph 115 with training and a detailed understanding of how these apply to their role, is reasonable or achievable. **As an alternative, we propose that a reasonably practicable step would be to ensure such staff are able to access the advice they need, for example by being provided with a named contact who they can consult.**
- 4.19 We also consider that any training and induction which is developed is unlikely to be ready to deliver by the 1 August. We would therefore **suggest that the OfS to recognise explicitly in the guidance that appropriate training and induction will take time to develop and implement. We would also welcome support for sector collaboration in developing new training and induction programmes, for example via best practice sharing or a joint commission, led by the OfS.** This would help ensure consistency in training delivered and reduce burden on individual institutions and lead to more efficient use of resource.

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

- 5.1 All Russell Group universities are committed to defending and securing free speech for everyone in their community. Institutions and students' unions already have robust policies and procedures in place for dealing with existing regulatory and legislative requirements and are now taking proactive steps to ensure compliance with the new legislation and related guidance. Doing so, including through reviewing and updating codes of practice and policies, and developing appropriate training and induction programmes will take time and will require the consideration of final guidance, which will be some time coming given the consultation on the draft closes on 26 May. Having finalised codes of practice, training and induction in place by 1 August is therefore likely to prove extremely challenging. **We would ask the OfS to consider this and be reasonable in its expectations of providers, their constituent institutions, and students' unions in its judgements of any early cases brought to this scheme. For example, recognising that Codes of Practice may not be finalised and**

published by 1 August and appropriate training and induction programmes are likely to take more time to develop and implement.

6. Do you have any comments on our proposed amendments to the OfS Regulatory Framework?

6.1 No response.

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

- 7.1 It is important that the complaints scheme and general activities of the OfS provide value for money for students, institutions, and taxpayers. Whilst the Act allows the OfS to recover costs, in the context of significant financial pressures across the sector, we are concerned that excessive cost recovery will impact the wider student experience, as universities will be forced to divert resources away from teaching, student support and research.
- 7.2 We believe it is incumbent on the OfS to use its resources in an efficient and effective manner. We would also highlight that OfS registration fees increased in 2023-24, by an average of 13% for the majority of providers, in part to fund the Regulator's new function. We would expect the OfS to take this into account when considering additional costs it needs to recover.
- 7.3 We would also ask the OfS to recognise the costs already incurred by institutions as a result of the Act: the impact assessment for the Higher Education (Freedom of Speech) Bill estimated a cost of £48.1m jointly incurred by students' unions and providers in familiarisation and compliance costs (including administrative burden).
- 7.4 We think it will be important for the OfS to commit to only seeking to recover actual costs in the operation of the complaints scheme. Costs recovered should be proportionate and carefully consider the financial position and resource of the provider, constituent institution or students' union to avoid unintended consequences for the quality and provision of core student services.
- 7.5 Current quality investigations within the sector have lasted many months and the process would benefit from greater transparency around the timings and likely costs of investigations. Given this context, **we would recommend the OfS sets a reasonable cap on cost recovery per investigation (which might consider more than one complaint at a time), in consultation with the sector.**
- 7.6 **We are concerned that proposals to recover costs will have a severe and disproportionate impact on students' unions.** Students' unions are non-profit-making charities. The block grant they receive from their university, which may or may not have conditions attached, only covers the costs of the core services they provide to students. If a students' union were found in breach of the free speech duties and a monetary penalty imposed and/or substantial recovery of costs, they would have no option but to cut core services to students. **We recommend the OfS revisits these proposals and consults on a more proportionate system for cost recovery specifically for students' unions.**

May 2024