

## Russell Group position on the OfS's approach to Free Speech

### Executive summary

1. Freedom of speech and academic freedom remain core values at the heart of a university's purpose, and Russell Group universities are committed to defending and securing free speech for everyone in their community.
2. We have welcomed the OfS's proposed principles-based approach to implementing the Act and believe both the complaints scheme and accompanying regulatory guidance are consistent with the intention of the Higher Education (Freedom of Speech) Act 2023.
3. However, given the complexity and the reality of universities and students' unions having to balance free speech duties with other legal requirements, we seek clarity on some practicalities relating to the complaints scheme and ambiguity in the accompanying regulatory advice before these duties come into effect on 1 August 2024. **We recommend the OfS:**
  - **Is reasonable in its expectations and in its judgements of early cases brought by the complaints scheme**, given the short timeframe to prepare for implementation.
  - **Commits to a full review in Spring 2025** to evaluate the effectiveness of the complaints scheme and update Regulatory Advice 24 with real-world examples of reasonably practicable steps to secure free speech.
  - **Provides clarity on how the OfS understands free speech 'within the law' in the context of transnational education (TNE)**, with a clearer acknowledgment of a provider and constituent institution's responsibility to take reasonably practicable steps within the law of the country in which it is operating.
  - **Always allows universities and students' unions to make representations as part of the complaints process.**
  - **Encourages open and supportive dialogue** that allows providers and students' unions the opportunity to share approaches and seek informal advice in good faith.
  - **Includes examples of unlawful speech** which universities would be expected to take steps to restrict, including antisemitic, Islamophobic or transphobic speech, in the guidance.
  - **Considers a broader range of factors to determine 'reasonably practicable steps'**, beyond the proposed guidance, before making judgments.
  - **Reconsiders the guidance relating to international student scholarships and academic appointments** and consider that the reasonably practicable step a university can take is to publish its free speech policy and communicate this to recipients once in the UK.
  - **Provides clarification to ensure that interpretation does not undermine universities' autonomy over their curricula.**
  - **Only seeks to recover actual costs** in the operation of the complaints scheme, set a reasonable cap on cost recovery per investigation and consult on a more proportionate system for cost recovery and monetary penalties for students' unions.

## 1. Proposed Regulatory Advice 24

- 1.0 As acknowledged in the guidance, upholding the new 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. We recommend the **OfS encourages open and supportive dialogue that gives providers and students' unions the opportunity to share approaches and seek informal advice in good faith without fear of triggering immediate regulatory intervention.**
- 1.1 **It would be helpful if the OfS could more clearly describe situations where speech is unlawful and cases where speech constitutes harassment, where intervention to restrict speech by universities will be necessary.** Providing examples of "offensive but lawful" and unlawful speech would provide additional clarity, including in the context of issues such as anti-Semitism where universities have been encouraged by Ministers to sign up to non-regulatory codes of practice.
- 1.2 We welcome recognition that the context and the particulars of a specific situation are crucial in determining the reasonably practical steps that should be taken to secure free speech. While we agree with the proposed factors, **we recommend that effective and efficient use of resource, risk level and jurisdiction are also considered in determining reasonably practicable steps.**
- 1.3 The handling of early complaints will be especially important in setting precedent, and their judgements will provide the sector with real-world examples which should be used to inform future versions of this guidance. **A review of the guidance in spring 2025 could include best practice examples which better reflect the diversity of the sector and a broader variety of reasonably practicable steps to secure free speech.**
- 1.4 It remains unclear how the duty to secure free speech is to be applied to transnational education. It would be a concern 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 local laws. **We urge the OfS to provide clarification on how it understands free speech 'within the law' in this context, with a clearer acknowledgment of a provider and constituent institution's responsibility to take reasonably practicable steps within the law of the country in which it is operating.**
- 1.5 Guidance relating to international student scholarships and academic appointments does not adequately account for a university conceding that a foreign government may make in-country decisions about which citizens are eligible for financial support. Termination of these contracts, as suggested in the guidance, would likely have a negative impact on UK/foreign relations, and we question whether such a response would be proportionate. **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.**
- 1.6 We agree with the OfS that students should be exposed to a wide range of competing views, and this will sometimes include diverse opinions and rigorous debate on controversial topics. However, it is unclear from the proposals whether universities would need to modify curricula to accommodate requests for greater exposure to controversial ideas. **The OfS should provide clarification to ensure free speech guidance does not undermine universities' autonomy over their curricula, as protected under the Higher Education and Research Act (2017).**
- 1.7 Given the timeline for implementation and the complexity involved, institutions and students' unions will have limited time to do due diligence in reviewing documentation, including Codes of Practice, and to develop appropriate training and induction programmes as required by the

draft guidance. **We would ask the OfS to be reasonable in its expectations of providers, their constituent institutions and students' unions and in its judgements of early cases brought by the complaints scheme.**

## 2. Cost recovery

- 2.1 In the context of financial pressures across the sector, excessive OfS cost recovery would impact the wider student experience as universities would be forced to divert resources away from teaching, student support and research. **The OfS should commit to only seeking to recover actual costs in the operation of the complaints scheme, and we would recommend it sets a reasonable cap on cost recovery per investigation (which might consider more than one complaint at a time), in consultation with the sector.**

## 3. Complaints scheme

- 3.1 We welcome the OfS's proposal that the scheme will not be retrospective and are reassured that the OfS will look to avoid duplication by not reviewing complaints being dealt with by the OIA or a court or tribunal. Clear communication with students and staff will be important to ensure complainants understand the differences between the OIA and OfS. **We encourage the OfS to work closely with the OIA and would welcome further detail on how information sharing agreement might work in practice.**
- 3.2 We hope that the new OfS complaints scheme will reinforce the importance of engaging with well-established internal university processes first, rather than risk undermining existing practice. We are concerned the proposed 30-day deadline for internal processes would not enable full consideration of complex cases where free speech concerns interact with other issues before complainants could escalate through the OfS. Forcing the prioritisation of free speech and academic freedom cases also risks creating a hierarchy that could delay outcomes for complainants whose cases do not involve these issues. **We would therefore recommend that the OfS use a 90-day rule instead of 30-days, in line with the OIA student complaints scheme.**
- 3.3 **We would recommend the OfS always tells the respondent (i) when it has decided to review a free speech complaint, or (ii) when a complaint has been made but a review will not be taken forward.** This approach would align with the OIA's existing complaints scheme and build trust and confidence in the scheme through clear communication and transparency.
- 3.4 Given the potential reputational and financial risk associated with a partially justified or justified complaint, **we urge the OfS to always seek representation from a respondent which could include evidence of a concluded internal process.** It would then be the respondent's choice on whether to make representations. At the point where the OfS has everything it needs to conduct a review and make a decision it should notify both the complainant and the respondent in writing, as is common practice in the OIA complaints scheme.