

## **OfS consultation on proposed regulatory advice and other matters relating to freedom of speech – Imperial College London Response (FINAL)**

### **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 Imperial College London welcomes the OfS consultation on its proposed regulatory advice and other matters relating to freedom of speech. Imperial is committed to upholding the fundamental rights of lawful freedom of speech and academic freedom. We support efficient and effective regulation of the higher education sector to protect the student and the public interest, and we are taking proactive steps in this important area. This has included making an initial round of revisions to our Freedom of Speech Code of Practice to clarify our events procedures and reaffirm our commitment to upholding lawful freedom of speech, as well as establishing a cross-university task group to oversee implementation of the new regulatory requirements. However, the current pace of change does present a number of challenges, particularly given competing demands on university resources to deliver a high-quality teaching and student experience and world-leading research. We would welcome explicit recognition from the OfS that this is a new regulatory space which is complex and fast moving, and that in accordance it applies a sensitive and proportionate regulatory approach when implementing its new duties under the Higher Education (Freedom of Speech) Act 2023. We would encourage the OfS to set out a clear plan for how it will ensure that the free speech registration conditions are proportionate to the regulatory risk posed by specific individual providers. This should include taking into account a provider’s own risk-management and governance systems in the design of the regulatory monitoring, procedures and decisions.
- 1.2 We believe that the ‘secure’ and ‘code’ duties are reasonable and in line with the intention of the legislation. However, there remains significant uncertainty as to how the OfS intends to monitor the ‘promote’ duty and whether providers should expect to receive guidance on this duty. As the ‘promote’ duty is due to take effect from 1st August 2024, we would welcome clarity on the interplay between the ‘secure’ and the ‘promote’ duties to enable us to incorporate these considerations into our revisions of policies and procedures in light of the new legislation. We strongly welcome the OfS consultative approach, however given the significant resource implications of coordinating institutional responses to regulatory consultations, it would be incredibly helpful if more advanced notice of when and how the OfS plans to consult on the ‘promote’ duty and the monitoring of overseas funding condition could be provided.
- 1.3 We encourage the OfS to acknowledge the complex legal considerations that providers are navigating where free speech issues may interact with multiple legislative areas, including criminal law, the ECHR and civil law. We would welcome an open and collaborative approach where providers and student unions can seek informal advice on higher-risk cases without fear of regulatory intervention (at least for an initial transition period). This includes the possibility of making representations as part of the complaints process.

### **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 We welcome the clear statement from the OfS on the protection of free speech within the law and we are committed to upholding the fundamental rights of lawful freedom of speech and academic freedom. However, we recommend that the OfS acknowledges the limitations of HE institutions in ultimately determining what constitutes unlawful freedom of speech. We have seen several examples in the last few months of instances where the line between lawful and unlawful has been difficult to establish, particularly in areas where there may be a lack of case law and/or conflicting approaches from institutions such as the police and Government (where, for example, we saw members of the Government stating that some phrases used in demonstrations were unlawful, yet the police disagreed and declined to take action). Institutions must carefully consider their duties to tackle harassment alongside free speech duties, and this can be a complex and difficult balancing act. The guidance also does not account for other forms of speech that would be outside the law beyond the Public Sector Equality Duty (PSED); for example, further guidance would be welcomed on the apparent imbalance between the requirements under the Prevent Duty to have “due regard to the need to prevent people from being drawn into terrorism” compared to duties under the new free speech legislation which require institutions to “take reasonably practicable steps to secure free speech on campus”. We perceive a potential conflict could arise between our duties under Prevent to reduce permissive environments and our free speech duties. It is unclear whether this suggests that free speech duties may override other important duties and clarity on this aspect would be helpful.

2.2 We are concerned that there is extensive conflation of the terms ‘freedom of speech’ and ‘academic freedom’ within the guidance. This could cause confusion and may prove problematic when attempting to review internal documentation. Provisions about academic freedom are typically part of university statutes/charters, as well as employment contracts (and the concept of academic freedom is of course protected by law). Given that academic freedom is defined in law in the Higher Education and Research Act 2017, institutions would not wish to amend the wording of clauses relating to academic freedom as this might result in inadvertent conflict with, or ambiguity about, the legal definition of academic freedom. We therefore consider it better to be clear that new provisions pertain to lawful freedom of speech.

**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 the acknowledgement from the OfS that what is ‘reasonably practicable’ may vary from institution to institution. However, the examples provided throughout the regulatory guidance are arguably not representative of the complexity of cases that many institutions are faced with which significantly limits their applicability. Whilst we understand that the OfS cannot provide an exhaustive list of cases, we would welcome a commitment to include best practice examples in future guidance once real-world judgements have been made available.

3.2 In reference to Example 17, whilst the context of this case is acknowledged, the arguably negative framing of reporting portals could have the unintended consequence of discouraging the use of Report and Support tools, important mechanisms through which

students and staff can inform the institution about any experiences of bullying and harassment.

- 3.3 We are concerned that the expectation that providers keep a record of evidence on decisions made during appointment processes (paragraph 47) will be overly burdensome and potentially duplicative of regulatory oversight given that hiring practices are already robustly regulated by employment legislation.

**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 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.
- 4.2 We ask for clarity on the interaction between the regulatory advice on free speech and the new condition on harassment and sexual misconduct to ensure coherence. We would welcome assurance that these documents will be reviewed in tandem to reduce the potential for inconsistencies.

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

- 5.1 We have concerns that the planned implementation date of 1 August 2024 is an unrealistic timeframe for implementation of the proposed regulatory requirements given that the OfS has not yet published the results of its consultations processes, continues to consult on some areas and is yet to finalise the regulation that will apply to providers. We are committed to defending and securing free speech and have been reviewing relevant policies in advance of the publication of regulatory guidance over the past year. However, there will be a significant resource requirement to update the wide-ranging policies that reference free speech duties, to communicate free speech commitments across all of the communications materials referenced in the guidance and to implement the training and induction requirements. We would welcome clarity from the OfS on their expectations that these requirements will be implemented by 1st August 2024, particularly taking into account the time required to develop comprehensive training provision, the fact that application materials are finalised significantly in advance of the start of the academic year, and staff capacity over the summer period. Whilst compliance with the new requirements is a university priority, we are alert to the fact that this is as yet draft guidance, and we are still awaiting publication of the OfS' response to its consultation on the new free speech complaints scheme.

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

- 6.1 No further comments.

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

- 7.1 We are concerned that excessive cost recovery could impact upon the wider student experience, as universities will be forced to divert resources away from teaching, student

support and research at a time when the sector is already facing significant financial sustainability issues and student unions generally have very limited funds. We would welcome assurance that any recovery of costs will not put providers and student unions at risk financially, particularly in the current financial climate.

7.2 Uncertainty remains over the OfS' intended approach to the monitoring of international funding. Imperial is a world leading university with many global research partners and donors. We would therefore welcome an early indication of the financial threshold that will be set for monitoring international funding, and encourage the threshold to be set at a level that is not so low that tracking and recording all such instances of funding is administratively burdensome and resource intensive (e.g. an early indication that it might be as low as £75,000 would be administratively burdensome for Imperial). In relation to student union funds, given Imperial's highly international student body, many of Imperial College Union's clubs and societies receive funding from overseas sources. As such, the new requirements could create significant administration burden and societies will want to be proactive in taking steps to ensure compliance. We encourage the OfS to publish details of if and when it expects to consult on its approach to the monitoring of overseas funding.

**8. Are there aspects of the proposals you found unclear? If so, please specify which, and tell us why.**

8.1 Please refer to previous responses.

**9. In your view, are there ways in which the objectives of this consultation could be delivered more efficiently or effectively than proposed here?**

9.1 Please refer to previous responses.

**10. Do you have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics?**

10.1 Please refer to previous responses.

**11. Do you have any comments about any unintended consequences of these proposals, for example, for particular types of provider, constituent institution or relevant students' union or for any particular types of student?**

11.1 Please refer to previous responses.