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FREE SPEECH UNION

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Dear Dr Bradshaw,

I am writing to you in my capacity as General Secretary of the Free Speech Union, a non-partisan, mass membership public interest body that stands up for the speech rights of its members and campaigns for free speech more widely.

As you will be aware, the University of Cambridge, a member of the Russell Group, was recently criticised for its 'Report+Support' scheme, which facilitated anonymous reporting of 'microaggressions' and 'misgendering', among other offences, and included a contentious definition of racism rooted in critical race theory. Following these criticisms, the University temporarily removed its 'Report+Support' website and then restored it, but with the list of reportable offences removed. On 29 May 2021, the *Telegraph* [drew attention](#) to similar schemes at other Russell Group universities.

In light of this, the Free Speech Union has carried out its own preliminary research into these reporting portals at the 24 Russell Group universities, focussing particularly on those schemes that encourage members of the university to report other members for harassment.

'Harassment' here refers to the term as defined in section 26 of the Equality Act 2010: unwanted conduct related to a person's relevant protected characteristic, which has the purpose or effect of violating their dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

We are concerned by what we've found. Of the 22 Russell Group universities that provide a platform for reporting instances of harassment, only three state correctly the legal test for harassment (they are the University of Birmingham, Imperial College London and the University of Oxford).

Of that 22, over three quarters neglect to state the Equality Act's crucial legal safeguards for preventing the Act being invoked to curtail freedom of expression.

Some universities wholly mis-state the law.

We believe that you, as CEO of the Russell Group, need to display moral and intellectual leadership and intervene to rectify a systemic error which threatens the credibility of the UK's leading

universities, and may render them vulnerable to legal challenge, particularly after the new Higher Education (Freedom of Speech) Bill becomes law.

The s.26(4) safeguard

As you will be aware, the Equality Act 2010 imposes liability on any relevant person or organisation that intentionally harasses another person with a protected characteristic. A person or organisation will also be liable if the conduct, regardless of intent, has the *effect* of harassing another person – but any such finding must take into account all of the following at s.26(4):

- (a) the perception of the affected person;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

This safeguard significantly reduces the risk that innocent conduct, not intended to harass anyone, could be categorised as unlawful.

The safeguard is particularly important in universities, where vigorous argument and robust debate form part of everyday life. Free and exploratory exchange would be fettered if harassment could be established solely on the basis of a *perceived* effect, without regard to the circumstances of the case or whether it is reasonable for the conduct to be perceived as harassment.

Furthermore, English and Welsh universities have a positive duty under section 43 of the Education (No 2) Act 1986 to take reasonably practicable steps to secure freedom of speech on their premises. Under section 6 of the Human Rights Act 1998, all UK universities also have an obligation not to act incompatibly with the protection of the right to freedom of expression under article 10 of the European Convention on Human Rights. The Convention attaches particular importance to the protection of academic free speech and academic freedom. See *Aksu v Turkey*, App nos. 4149/04 & 41029/04 (15 March 2012) para. 71; *Erdoğan v Turkey*, App. nos. 346/04 & 39779/04 (27 August 2014), para. 40.

As a result of the interaction between these various laws, the following is clear. The safeguard at s.26(4) of the Equality Act gives leeway for universities to do what is necessary to comply with their positive duty to secure freedom of speech without falling foul of the Equality Act. Indeed, the explanatory notes to the Equality Act indicate the need to strike this balance:

99. In determining the effect of the unwanted conduct, courts and tribunals will continue to be required to balance competing rights on the facts of a particular case. For example, this could include balancing the rights of freedom of expression (as set out in Article 10 of the European Convention on Human Rights) and of academic freedom against the right not to be offended in deciding whether a person has been harassed.

Further, the ‘circumstances’ of academic discussion must be interpreted in light of Article 10, and the premium it sets on universities as ‘watchdogs’ of the public interest within which academics are free to exercise an enhanced right to freedom of expression. These are circumstances in which interference with the right to freedom of expression must be strictly justified, and in which it is reasonable to expect that fellow students or academics are permitted to say things that are challenging and provocative.

Our findings

We have found that at most Russell Group universities, students considering making a complaint of harassment are not informed of these crucial safeguards, or of the importance of freedom of speech as protected by UK legislation and international human rights law.

Two universities – Edinburgh and Leeds – do not have a function for reporting s.26 harassment. Of the remaining 22 institutions, 17 (i.e. 77%) do not inform students of the s.26(4) safeguard. Some institutions not only omit the key safeguard, but also fail to define, or mis-define, harassment itself.

For instance:—

University of Exeter’s [‘Speak Our’](#) page and the reporting pages of [Glasgow](#) do not define harassment at all.

The Report+Support page at the [University of Newcastle](#) does not define harassment itself, but does give an erroneous definition of racial harassment, which prioritises subjective perception and minimises objective reasonableness:

If the victim believes that it was because they belong to a particular racial group, it is usually considered as racial harassment.

The Report+Support page at the [University of Bristol](#) partially quotes the Equality Act definition, and then significantly overstates the extent of the legal prohibition:

Harassment against a person due to a protected characteristic, is considered a hate crime.

This is incorrect and intimidating. Speech that truly *does* constitute harassment under the Equality Act is not, per se, punishable as a criminal offence.

The University of Nottingham also radically mis-states the law in its guidance:

Harassment is any type of unwanted behaviour that you find offensive or which makes you feel intimidated or humiliated. This can take the form of spoken or written words or abuse; offensive emails, tweets or comments on social networking sites; Images and graffiti; physical gestures; facial expressions; or comments attempted to be passed off as jokes.

The definition then goes on to allude to the Equality Act’s ‘protected characteristics’. This is simply incorrect – such behaviour *may* constitute harassment, but only if key conditions, necessary for the preservation of academic free speech, are taken into account.

The LSE is one of the five Russell Group universities that correctly cites the key safeguard in its [guidance](#). Unfortunately, much else in the guidance is garbled, confusing the Equality Act definition with that in the Protection From Harassment Act 1997, and then further muddling harassment and discrimination:

Harassment is defined in law as a course of unwanted conduct which can cause an individual alarm or distress and may put people in fear of violence. It can include repeated attempts to impose unwanted communications and contact upon another individual(s) in a manner that could be expected to cause distress or fear in any reasonable person.

Under the Equality Act 2010 individuals are protected from three types of harassment. Firstly, it is unlawful to treat someone less favourably where it relates to a 'relevant protected characteristic.'

The University of Durham, to its credit, cites the key safeguard prominently on its [Report+Support page](#). But that good work is largely undone by the insinuation that 'microaggressions' may constitute unlawful conduct, for instance:

- not acknowledging someone's contribution;
- not providing timely and constructive feedback;
- not giving someone eye contact.

The Durham guidance improperly overstates the Equality Act's power to regulate speech in the academy. The circumstances of university teaching will almost always involve numerous contributions to discussions, some of which are made at the same time in the heat of argument, and not all of which can be acknowledged.

Furthermore academics are often more likely to excel in academic expertise than in the kind of emotional intelligence we use when regulating eye contact. Such people may not be aware of their body language or how it might be construed as aggressive by others. Short of concerted campaigns of humiliation, it is vanishingly unlikely that *any* of this conduct would reasonably constitute harassment in academic circumstances in the eyes of the court. This guidance establishes no lawful reason why anyone at university should inhibit their free expression in this way.

We also found that nine Russell Group universities provide information for those who find themselves accused of harassment, or other offences. Not one of them, however, furnishes the accused with those crucial safeguards in s.26(4) which could enable them to protect their freedom of expression and mount a defence against the charge. Those bringing complaints, on the other hand, are not only made aware of their rights in law, but presented with an even greater right of complaint than the law actually grants. This is obviously unfair.

The consequences

We are not criticising members of your Group on a point of pedantry – that they have got the law wrong, and they should do their research and state it correctly. No, our complaint is more serious than that. We believe that by systemically exaggerating the requirements of the Equality Act 2010, and by failing to embed its safeguards for freedom of speech, these institutions are in breach of their s.43 duty to take reasonably practicable steps to secure freedom of speech on their premises.

These websites facilitate students in making potentially damaging accusations against others – including making anonymous accusations – without taking the simple, cost-free step of telling them when a complaint *isn't* legitimate, and when it might have a chilling effect on the free expression which universities are obliged to protect. We can see no good reason why your members have not

taken this reasonably practicable – and obvious – step to ensure that these complaints schemes do not result in self-censorship and a culture of denunciation.

The cases of [Eric Kaufmann](#) at Birkbeck and [Neil Thin at Edinburgh](#) clearly demonstrate the danger of universities making it easy for students to make politically-motivated, vexatious and groundless complaints against academics.

We believe that organisations should be free to decide, on ethical grounds, that they wish to provide even greater equality protections than the law requires. It is clear that some of your members have made just such a decision. Unlike some other organisation, however, universities do not enjoy unfettered liberty in making this decision. Their competing duty to secure freedom of speech *obliges* them to seek such accommodations as the law allows between the competing duties. In all but three cases, we see no attempt to make such an accommodation – or even any awareness of the obligation.

The 19 erring institutions we discuss in this letter are needlessly exposing themselves to the risk of legal challenge, particularly after the new Higher Education Bill becomes law, and that is something we think you should make them aware of. But the more important point, we hope you agree, is that they are acting in a way that is unworthy of world-leading universities in a liberal society.

Most of the schemes have an anonymous reporting function, purportedly for the purpose of monitoring and data-gathering. Yet it is unclear what benefit universities will derive from data which, due to the failure of these schemes to properly explain the law, may in many cases refer to conduct that is wholly lawful and doesn't in fact constitute harassment. The data gathered under these schemes about the prevalence of harassment on campus could not reliably inform further steps universities might take in order to prohibit unlawful harassment. This is a recipe for bad policy-making.

Next steps

These policies are a clear signal that Russell Group universities are not match-fit for the new free speech protection regime that will apply shortly in England.

It is clear that most of these schemes have been devised without so much as a nod to universities' legal duty to protect freedom of speech. The Higher Education (Freedom of Speech) Bill will, when it becomes law, lead to enhanced remedies in the event of breach, as well as a regulatory duty to promote freedom of speech, and greater cognisance of free speech rights. The 'Report+Support' schemes will be open to challenge by students and academics under the new legal regime. They can rightly claim that these schemes purposefully, or negligently, facilitate the denunciation of lawful speech.

As you will be aware, the Secretary of State for Education [wrote](#) to English vice-chancellors on 16 February 2021 advising them to implement best practice ahead of imminent changes to the law. We suggest that this was prudent advice, and that addressing the errors in these reporting schemes would be a good place to start.

In addition, we ask you to consider how these schemes form part of an overall picture, in which universities expand the strictures of the Equality Act beyond the limits set by law, while disregarding their fundamental mission to facilitate free enquiry and debate. The [Reindorf Report](#) into the University of Essex should be a clear warning of the folly of this approach, leading as it did to the no-

platforming of two external speakers. We suggest you reflect seriously on the reputational hazard of this mindset.

It is clear from researching these schemes that most are off-the-shelf products, bought from commercial companies. Of the 24 Russell Group members, 16 of them, or two thirds, use a template clearly provided by a single company. It is reasonable to infer from the consistent errors across the websites that institutions are also outsourcing the task of establishing what the law requires. Indeed, there is almost no evidence that Russell Group institutions have reflected seriously about how their obligations under the Equality Act can be reconciled with their duty to safeguard free speech.

There are exceptions, however. The University of Oxford, which does not rely on a template website, shows how good practice and compliance with the law can be achieved. Its [policy on harassment](#) states:

Freedom of speech and academic freedom are protected by law though these rights must be exercised within the law. Vigorous academic debate will not amount to harassment when it is conducted respectfully and without violating the dignity of others or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

The perception of the complainant and the extent to which that perception is in all the circumstances reasonable will also be relevant.

We commend this more thoughtful bespoke approach, and suggest that Group members should have it in mind as a starting point in amending their own policies and procedures.

If any of your members would like our help in revising these reporting schemes to ensure they are compatible with their existing duties to uphold free speech, as well as the new legal framework that will be created by the Higher Education Bill, we would be happy to advise on a cost-free basis.

Yours sincerely,



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cc: The Rt Hon Michelle Donelan, Universities Minister
Lord Wharton, Chair, Office for Students
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