

# **Our response to the Office for Students (OfS) consultation on the OfS' new free speech complaints scheme**

Universities UK (UUK) is the collective voice of 142 universities in England, Scotland, Wales, and Northern Ireland. Its mission is to create the conditions for UK universities to be the best in the world, maximising their positive impact locally, nationally, and globally. Universities UK acts on behalf of universities, represented by their heads of institution.

This response was developed in partnership with the Universities and Colleges Employers' Association (UCEA), Association of Heads of University Administration (AHUA), the Association of Managers of Student Services in Higher Education (AMOSSHE) and the Committee of University Chairs (CUC), and with support from an advisory group with representation from across the sector.

## **Our response**

### **Question A: Do you have any comments on Proposal A regarding free speech complaints?**

We note that the OfS' proposals include that a complaint may be about more than one provider or students' union. In these cases, the OfS must ensure that in any cases where multiple providers are considered as respondents they notify all respondents, to avoid duplication and unnecessary burden in dealing with the complaint. We suggest that it would be appropriate for a lead respondent to be identified, in consultation with all respondents, to coordinate activity.

## **Question B: Do you have any comments on Proposal B regarding who can complain?**

We have concerns about the broad definition of ‘student’ set out in the proposals. In particular, the lack of parameters for this definition means that students beyond higher education students are able to use this scheme. For example, this could include students studying on further education courses at colleges that also offer higher education. It is not appropriate for the OfS to adjudicate on further education students’ experiences of free speech on further education courses that are not regulated by the OfS in any other aspect. We also question how the OfS would be able to process these complaints from a practical perspective where they have less experience working with and contacts in further education.

Of further concern is that in the Act, ‘student’ is defined as a person who ‘is or was’ a student. This could arguably mean that any graduate of an OfS-registered provider is entitled to make a complaint, for example if they attend an event at the university several years after graduating. The OfS should identify a suitable time period after which graduates are not usually able to make a complaint, unless invited as a visiting speaker or being a member of staff.

The OfS must provide clarity on how this proposal relates to students studying on courses that are part of university partnerships, including franchised or validated provision. The OfS should also clarify whether students who are studying on transnational education courses (eg at overseas campuses) are able to complain under this scheme, as they will be subject to different laws regarding free speech. We strongly suggest that as part of guidance, the OfS should clarify that they will not consider complaints which concern the domestic legislation of other countries, ie if a country has free speech laws which conflict with the Higher Education (Freedom of Speech) Act 2023, providers should not be expected to breach those laws to uphold free speech as defined by the English context.

Providers have a broad range of corporate structures and partnership arrangements, and before the scheme is in place it needs to be made clear through further guidance which students are and are not able to submit a complaint to the OfS through this scheme, and where accountability lies for respondents (eg in franchise arrangements). We would welcome the opportunity to work with the OfS to consider this further.

The definition of ‘visiting speaker’ set out in the proposals is concerningly broad, as it does not limit a ‘visiting speaker’ to a person invited through the provider or students’ union’s formal processes for inviting speakers. Although we agree that the

definition of 'visiting speaker' should not be limited to only those who have been *accepted* to speak at a provider or students' union, we strongly recommend that the definition should be explicitly linked to completing the provider or students' union's process. University processes for visiting speakers are well established and will be embedded in the code of practice each provider and students' union is required to have under the Act. These processes will be designed to enable free speech within the law, and are a vital mechanism for universities to balance their responsibilities and consider a range of risks in a proportionate way (eg health and safety and security considerations).

The proposed definition of 'visiting speaker' could currently include anyone invited by any student, staff member or member of the students' union to speak without following proper procedures and it does not seem appropriate for a speaker to be able to complain about the provider or students' union in these instances. We propose that rather than the OfS attempting to define what constitutes an 'invitation', the OfS should take a risk-based approach as part of its regulation, assessing providers' and students' unions' codes of practice to ensure they are appropriate, proportionate and define the process for inviting speakers.

Many universities also have space which they hire out for external use. The OfS should clarify that the use of space by external organisations falls outside the remit of the complaints scheme, as speakers invited by external organisations leasing space are not engaging with university business and are only obliged to comply with the rules of conduct stipulated by the external organisation.

We note that anyone who has applied to become a member of academic staff at a provider or constituent institution can also make a free speech complaint. Clarification on how adverse impact will be measured for job applicants is vital to avoid misuse of this element of the OfS' proposals. Please also see our answer to Question G on this.

We also have concerns about the definition of 'member' including board members for registered providers that are charities. Board members are charity trustees and under Charity Commission guidance are required to avoid conflicts of interest and conflicts of loyalty. Their freedom of speech is inherently restricted by their duty to safeguard the reputation of the provider and the duty of confidentiality they owe to the provider. Because of this, our view is that OfS should make clear that board members are not eligible to use the complaints scheme.

## **Question C: Do you have any comments on Proposal C regarding complaints that we will not review?**

We welcome the OfS' proposal that the scheme should not be retrospective, and our view is that it would not be appropriate to review complaints from before the time the scheme is in place, even if the alleged impact continues after the scheme is in place. Otherwise, the effect would be to judge the conduct and decisions of universities against duties that were not in force when the conduct occurred, or the decisions were made.

We also welcome the proposal to not review complaints that are being dealt with by a court or tribunal, or the Office of the Independent Adjudicator for Higher Education (OIA). On this point, it is imperative that the OfS provides clear communication to students about the differences between the OIA and the OfS schemes and guidance on how to navigate the two. We strongly encourage the OfS to work closely with the OIA on this, and to enable information sharing to avoid duplication between the OfS and the OIA.

We have significant concerns about the OfS' proposal to review free speech complaints after 30 days have elapsed since a provider's internal review process has begun. 30 days is an unrealistic timescale for providers to complete their internal processes, and after 30 days internal reviews may well be ongoing, especially due to the level of complexity that free speech-related complaints often entail. The 30-day limit is particularly unrealistic for small providers and many students' unions, who have less resource for handling complaints., There may be particular times of the year where there is a higher number of complaints, for example following appeals periods, which would make this even more pronounced.

Our view is that complaints should only be reviewed by the OfS after internal review processes are complete or if there is undue delay in the process, which should be at least 90 days. A 90-day period would be in line with the OIA student complaints scheme and the OIA's good practice framework. Although we understand the scope of the OfS and OIA complaints schemes are different, in practice universities are dealing with a wide variety of complaints, some of which are handled internally and some which interact with external processes such as the OIA's scheme. Crucially, setting the period for internal review to 90 days would avoid creating a hierarchy of complaints in which providers are under pressure to deal with free speech related complaints more quickly than other student complaints and are forced to prioritise these over other types of complaints, creating inconsistencies in how students and staff are treated on this basis. This is also very difficult to do in practice as complaints will often contain elements other than free speech and will need to be disentangled

before the OfS can investigate. To avoid duplication of effort between a provider and the OfS, it makes more sense to allow a provider time to unpack the elements of a complaint.

The 30-day time limit also carries a significant risk of bringing additional cases to the OfS, increasing the resource burden on the OfS and causing unnecessary duplication of effort with a university's complaints process, where they may have been satisfactorily resolved within the provider's own processes given a reasonable timeframe for resolution. Allowing a 90-day period allows providers time to use their own robust complaints schemes to resolve issues before the OfS becomes involved, which also may reduce duplication of effort.

The proposals state that the OfS will only review claims relevant to freedom of speech. We urge the OfS to provide further clarity on this, as complaints will often contain multiple elements. In particular, free speech complaints may often include elements related to harassment. In cases where complaints contain other claims not relevant to freedom of speech, complaints may be ongoing through other internal or external processes. The OfS should set out how this will be managed, and we urge the OfS to provide assurance that in these cases the OfS will not investigate a complaint until all aspects (both related and unrelated to free speech) of the internal investigation are complete.

### **Question D: Do you have any comments on Proposal D regarding time limits?**

We are supportive of the OfS implementing a time limit for free speech complaints. However, the proposal states, the time limit will apply from the date that adverse consequences last occurred. We have concerns that identifying a date for the last occurrence of adverse consequences will be challenging, as complainants could potentially argue that they have experienced adverse consequences for years after an incident took place, with the subjectivity of this claim making it very difficult to verify. Other factors in the intervening years may also make it hard to isolate the impact of the provider's actions. It will also increase the burden of dealing with the complaint, as it will be more difficult to locate the evidence and define what constitutes an adverse consequence, and more difficult to claim that the incident alone was the cause of adverse consequences as subsequent events will interact with it.

We suggest that it would be more appropriate to amend this time limit, so that the time limit is complainants 'normally' being able to make a complaint up to 12 months after the incident took place. This wording would allow OfS flexibility to look at claims

where effects are only clear after more than 12 months has passed, which is unlikely to be common.

### **Question E: Do you have any comments on Proposal E regarding submitting a complaint?**

We support the ability of a complainant to appoint a representative where appropriate, but it is essential that the complainant submits the original complaint themselves (unless being supported for accessibility reasons) and consents to the representative corresponding with the OfS on their behalf.

We would also like the OfS to clarify that a representative should not normally include legal representation. It is completely appropriate for a complainant to be supported, such as by a family member, fellow student, or staff member, but as this is not a legal process, we do not think it is appropriate for representations to be made by lawyers.

### **Question F: Do you have any comments on Proposal F regarding reviewing a free speech complaint?**

We welcome the flexible approach to reviewing complaints set out in the proposals. However, it is essential that the OfS provides additional detail on how it will correspond with the respondent throughout the process, including providing assurance that the provider or students' union will be notified when the OfS begins to investigate a complaint. This will enable the sharing of information between the respondent and the OfS to facilitate the review process, including confirming that a student is registered at the provider. It will also mirror the transparent approach taken by the OIA, which provides information to both parties.

Notifying the respondent about a complaint will also facilitate effective working between the OIA and the OfS complaints scheme, as the respondent can alert the OfS and OIA if they become aware that the same complaint is proceeding through both schemes. This reduces the reliance on a student to understand the nuances of both schemes and that their complaint should only be submitted to one of the two complaints schemes. The OIA currently informs a provider when they receive a complaint.

It would also be useful to understand how the OfS intends to process the complaints they receive, for example if they will be handled in the order they are received or prioritised in some way. If the OfS intends to prioritise complaints, clarity on how this will be done should be provided.

The OfS' proposals state that the OfS 'may' seek representations from the respondent on the complaint. However, our view is that, unless the OfS intends to decide a complaint is not justified, the OfS must always give the respondent the opportunity to make representations, to allow the respondent to provide a counter case and to make any factual corrections about the evidence provided by the complainant. This will also have the benefit of aiding the OfS' own investigation process, as it allows the respondent to provide the OfS with information about its own processes and procedures and the findings of internal reviews. This approach also recognises the reality that the respondent's own investigation is one of the primary sources for the OfS' investigation, and will often be integral to the OfS' ability to make a decision.

We would also stress the importance of clear communication to the respondent throughout, including providing regular updates on progress and updates on expected timescales for the completion of the process.

The OfS should provide further information on how they intend to make judgements on whether speech is 'within the law'. Seeking legal advice may not be sufficient, given legal views may differ. We also ask the OfS to clarify whether they will take into account that a respondent took and acted on legal advice, and how legal privilege will be maintained in these circumstances.

We strongly support the proposal to seek expert academic judgement where a complaint concerns academic judgement, and encourage the OfS to do this for all relevant complaints. We would like to understand further how academic expertise will be sought by the OfS where it is deemed to be required, and how this might interact with the use of academic experts within quality investigations and when assessing compliance against the B conditions.

### **Question G: Do you have any comments on Proposal G regarding our decision and Notice of Complaint Outcome?**

We are broadly supportive of this proposal, but would like to seek further explanation on what making a decision about a complaint 'as soon as reasonably practicable' means. We urge the OfS to set a usual timeframe for making a decision on complaints, with the understanding that particularly complex complaints may exceed this timeframe. As well as providing clarity for providers, this will also provide assurance of swift resolution for complainants using the scheme. Making a decision in a reasonable timeframe is also essential to keeping the costs of the scheme down, both for the OfS and for the sector.

We would also like to seek further information on how 'adverse consequences' will be defined, measured and assessed when making decisions, especially as this is

integral to deeming whether a complaint is partially or fully justified. We note that adverse consequences are not limited to financial consequences and could include a wide-ranging variety of consequences, so would welcome further information on how the OfS will consider and assess this. We also note that the OfS' view is that a 'justified' decision should be reserved for more serious cases, and ask the OfS to provide further information on what constitutes a more serious case.

The OfS must also provide information on the appeals process for respondents on decisions. It is essential that there is an appeals process for respondents to appeal decisions, and we suggest that the OfS set out an internal appeals process that would include review by an appropriate panel of experts.

Given that this is a new area for the OfS, the OfS should commit to a review of the complaints scheme after 12 months, including engaging with students and providers on their views about how it is working. Our view is that the OfS' commitment to evaluation should be reflected in this work, and that a review of the effectiveness of the scheme is appropriate due to the novelty of this area of work for the OfS. This review should include a genuine openness to making change where elements of the scheme are found not to be working as effectively as hoped or having negative or unintended impacts, and should also consider regulatory burden. We also suggest that the OfS considers setting key performance indicators (KPIs) in relation to the running of the scheme, for example on time taken to review complaints.

### **Question H: Do you have any comments on Proposal H regarding recommendations and suggestions?**

We would welcome the OfS providing further information on recommendations and suggestions, including examples of what they may include and the process for determining them. Our view is that recommendations and suggestions should not be overly prescriptive, and should respect institutional autonomy. For example, in a recommendation that a respondent should review its processes, it would not be appropriate for this recommendation to include prescribing what changes should be made as a result of the review. This is in line with the OfS' outcomes-based regulation.

We note rule 48, which states that the operation of the scheme does not affect OfS' ability to investigate and/or take regulatory or enforcement action in respect of non-compliance with the OfS' conditions of registration or other regulatory requirements. Further clarity on how the complaints received under the scheme will interact with and feed into regulatory requirements such as on harassment and sexual misconduct and quality would be welcome.



**Question I: Do you have any comments on Proposal I regarding suspension and withdrawal?**

No.

**Question J: Do you have any comments on Proposal J regarding group complaints?**

Further clarification on how the OfS intends to group complaints and deal with complaints would be helpful, including how providers or students' unions will be notified of this decision. Dealing with complaints on a group basis may cause internal review processes to diverge from the OfS' processes, if not complete. Notifying the respondent of the decision to deal with a complaint as a group complaint may also assist the OfS in identifying vexatious or malicious complaints. Given the nuances of individual experiences and the importance of context when speech is exercised, grouping complaints by themes may minimise the important differences in these cases and OfS should be clear in their decision making around grouping complaints.

We would also welcome clarification on whether the OfS will use the number of complaints received as a factor in making assessments about severity, as this could prove problematic if there are organised efforts to submit multiple complaints.

**Question K: Do you have any comments on Proposal K regarding representations?**

Please see our response to Question F. Our view is that the respondent should always be given the opportunity to make representations before the OfS makes a final decision. There should be an opportunity for a respondent to provide a counter case and, if required, to make factual corrections to the evidence provided by the complainant.

**Question L: Do you have any comments on Proposal L regarding information requirements?**

No.

**Question M: Do you have any comments on Proposal M regarding a respondent's duty to comply?**

No.

### **Question N: Do you have any comments on Proposal N regarding advertising the scheme?**

We support the expectation that providers will be raising awareness of the existence of the scheme. In particular, it is essential that students are supported to understand the scheme and the differences between it and the OIA's student complaints scheme, and the OfS should take steps to support this through proactive communications.

### **Question O: Do you have any comments on Proposal O regarding charges, costs and fees?**

We understand that the OfS intends to set out proposals in relation to recovering costs from respondents in a future consultation. The OfS should provide further information on the timeline for this future consultation as soon as possible. We support the scheme being free to use for the complainant, but it is vital that the costs of the scheme to the sector are kept under control, as if costs are excessive there could be a knock-on impact on the wider student experience.

### **Question P: Do you have any comments on Proposal P regarding the publication of information relating to the free speech complaints scheme?**

We are supportive of the publication of information relating to the free speech complaints scheme, and understand it is an important mechanism for building understanding and sharing learning on free speech complaints. However, the proposal to publish specific information on a complaint even where a complaint is found not to be justified seems to be disproportionate.

In particular, publishing the respondent's name where complaints are not justified could pose a reputational risk in that it allows the number of complaints against a particular provider or students' union to be tallied, despite the fact that the OfS processing a higher number of complaints relating to a particular provider or students' union may reflect a high level of activity related to free speech (eg speaking events) rather than a particular issue at a provider.

We suggest that alongside aggregate-level figures on the number of complaints received by the OfS and the subject matter of complaints, specific information about a complaint should only be published where a complaint is found to be justified or partially justified. As well as this, we suggest that the OfS should publish a selection of anonymous case summaries as a resource for lesson learning for the sector. This would mirror the approach taken by the OIA which the sector has been able to use effectively to improve practice.

If information on complaints is going to be published, it becomes even more important that the complaints process includes an appeal element. Not including an appeal element is not aligned with good practice among industry regulators, and publishing material that is subject to disagreement by either the complainant or the respondent could leave the OfS exposed to judicial review on the basis of not having an appeals scheme.

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

We would welcome further clarity on the definitions used in the proposals, particularly of ‘visiting speaker’ and ‘student’. As mentioned in our response to Question B, we have concerns about how broadly these definitions are currently drawn.

We would also welcome clarity on whether universities’ commercial activities (eg external hiring of space) are in scope for the complaints scheme, as this is not currently set out in the proposals.

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

We understand that the Higher Education (Freedom of Speech) Act 2023 requires OfS to operate a complaints scheme. As mentioned previously, given that this is a new area for the OfS, we strongly suggest that the OfS commits to a review of the complaints scheme after 12 months, including engagement with providers, students’ and students’ unions. Our view is that the OfS’ commitment to evaluation should also be reflected in this work, and that a review of the effectiveness of the scheme is appropriate due to the novelty of this area of work for the OfS. This review should include a genuine openness to making change where elements of the scheme are found not to be working as effectively as hoped, to be unreasonably burdensome, or having negative or unintended impacts.

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

We have concerns about the impact that these proposals could have on individuals on the basis of their protected characteristics. The requirement for universities to balance upholding freedom of speech with tackling harassment often comes into sharp focus in relation to debates around protected characteristics. We urge the OfS

to undertake and publish an equality impact assessment on the complaints scheme. In all its work on freedom of speech, the OfS must ensure providers are supported to balance their requirements on freedom of speech and harassment, and ensure that staff and students from marginalised groups' safety and sense of belonging in higher education is not in any way compromised by this work.

We also note the potential impact on student and staff mental health. There should be a balance between reviewing complaints in a timely manner and allowing a complainant to engage with the process in a sensitive way, without being put under undue pressure to supply evidence at pace.

**Question T: Do you have any comments about any unintended consequences of these proposals, for example, for particular types of provider, constituent institution or students' union or for any particular types of student?**

As the proposals are currently set out, there is a significant risk of creating a hierarchy of complaints, where universities are obliged to deal with free speech related complaints more quickly than other types of complaints. This could have a knock-on detrimental effect on universities' ability to address other complaints which they receive. This risk is particularly acute for smaller universities, who may have less capacity for managing complaints.