

Comments from the University of Sussex on the Proposals by the OfS for the Freedom of Speech Complaints Scheme

1. Question A: Do you have any comments on Proposal A regarding free speech complaints?

- 1.1. The proposed drafting of Rule 2 is very broadly defined and alongside the rules of the scheme, we believe that guidance will be important to assist, preferably with nuanced examples.
- 1.2. Rule 1 states that the OfS reviews free speech complaints about “*governing bodies of registered higher education providers or of constituent institutions of those providers, and about relevant student unions*”. It does not specify that this includes complaints about the provider/institution, its officers and employees, which we believe is the intention. For example, disciplinary action is given as an example, which wouldn’t be action taken by the governing body nor would they generally have any knowledge of it. We suggest that this is clarified.
- 1.3. The definition of a “*constituent institution*” in the glossary (Section T of the rules) requires further clarification. It states that this includes “*any other institution of a higher education provider*”. We think more detail is required around who a complainant can complain about, including whether this includes University partnerships, institutions accredited by an HEI, spin-outs and subsidiaries. The Rules should also be explicit about whether recognised trade unions could be caught by the definition or not, including local branches.
- 1.4. Clarification is also needed about how the OfS will deal with a complaint against more than one provider, or a provider and its student union. We suggest that all parties complained about should be informed, and all consulted and given the opportunity to make representations. If a complaint is made about a Student Union matter or event, we consider that this should be notified to the relevant provider, who should then be given the opportunity to make representations.
- 1.5. The two examples given of “adverse consequences” at paragraph 41 are straightforward, but others will be less so, for example complaints about marks in assessments. A greater list of examples would assist, including ones in which the OfS would consider that there have not been adverse consequences, together with guidance on how the OfS will assess the level of impact.
- 1.6. We suggest that the OfS also expressly confirms that it will not investigate any free speech complaints which arise in, or in relation to, other jurisdictions which will have their own laws on freedom of speech. It is important that providers are confidently able to advise their staff and students who may work or visit overseas that other jurisdictions will have their own laws which will govern them in that jurisdiction, without fear of a complaint arising. This is particularly pertinent for trans-national partnerships. Guidance from the OfS would assist in this regard.

2. Question B: Do you have any comments on Proposal B regarding who can complain?

- 2.1. Clarity is required about trade unions, including whether a Trade Union can make a complaint itself and/or on behalf of a member. We propose that this is clarified in Section T of the Proposed Rules (Glossary).
- 2.2. We consider the definition of “*visiting speaker*” to be both broad and ill defined. We disagree with the proposal not to limit “visiting speaker” to those authorised under an approval process; rather we urge the OfS to reconsider this as consider it sets clear boundaries and all providers should ensure in any event that their approval process does not breach freedom of speech duties.
3. **Question C: Do you have any comments on Proposal C regarding complaints that we will not review?**
 - 3.1. The 30 day time limit is a considerable concern. Most internal complaints will not be concluded within 30 days, especially complex complaints or complaints involving numerous witnesses, and/or interrelated matters. We strongly suggest extending 30 days to 90 days, which then also mirrors the Office of the Independent Adjudicator (OIA) timeframes and will help ensure parity of treatment for managing complaints, helping avoid prioritising or escalating complaints with freedom of speech elements. A longer timeframe will also promote internal resolution, which is a better outcome, and also reduce the potential burden on the OfS. We recognise, however, that in some circumstances there might be a need to investigate in a shorter timeframe and this could be built-in for exceptional cases.
 - 3.2. The reserved discretion to investigate earlier should be used only in wholly exceptional cases (e.g. if an injunction is sought). If the OfS determine to investigate early, we propose that they must notify the Respondent with reasons.
 - 3.3. We believe the intention to focus on reviewing freedom of speech claims is correct, but clarity will be required about which aspects of a complaint the OfS has not considered in the outcome, as well as any intersection with OIA processes. We note that the updated OIA Rules state that students with a complaint which has free speech elements can choose to take this either to the OfS or to the OIA, and students will be free to choose which option they prefer. Clarity is needed as to whether, if the OfS investigate a student complaint, the OIA can investigate elements which are unrelated to freedom of speech or whether one element should be stayed whilst either the OIA or the OfS investigate. We suggest that agreement be reached between the OfS and OIA on how to approach this.
 - 3.4. If a potential OIA complaint includes an element relating to freedom of speech, clarity is needed on whether the student can refer the freedom of speech element to the OfS for determination prior to bringing the entirety of the complaint to OIA. The OIA have clarified that they will not review a complaint being considered under the OfS scheme and the OfS should similarly clarify that they will not review anything being considered by the OIA. Guidance to students from both the OIA and the OfS – ideally joint guidance - outlining that the two complaint routes differ, what the outcomes could be and how related elements will be treated, will be needed.
 - 3.5. A student would normally take a “completion of procedures” letter to OIA. We suggest that, to mirror processes, there should be a similar process here for the OfS complaints scheme.
 - 3.6. We also propose that the OfS clarify how they will address complaints where freedom of speech is just one component. We consider that it would be inappropriate for the OfS to

determine an outcome on freedom of speech elements prior to any internal investigation concluding on broader, potentially related, matters. The OfS should set out in greater detail how they will deal with complex complaints with overlapping and inter-related issues. Clarity is also needed about whether an OfS investigation into complaints be stayed if a complainant subsequently brings legal proceedings relating to the freedom of speech issue, either in whole or part. This intersection needs greater consideration.

3.7. The OfS should explain how they will assess whether they consider a complaint to be frivolous and/or vexatious, including whether they keep a record of repeated vexatious/frivolous complainants to help in this assessment. A Respondent should also have the opportunity to argue that a complaint is frivolous or vexatious, if the OfS do not dismiss a complaint before considering its merits. We suggest that if the OfS determine that a complaint is frivolous/vexatious is made without consideration of the merits, the Respondent should be notified of this outcome.

3.8. We agree that the scheme should not have retrospective effect.

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

4.1. We agree with the need for time limits, but consider that the current proposal of the time limit on the last “adverse consequence” is incorrect. For example, in a claim relating to refusal to promote, an academic could argue that they have been repeatedly denied promotion due to a Freedom of Speech breach many years previously. As the OfS has noted, it will be very difficult to fairly investigate matters which have arisen over a considerable time lapse. We suggest a time limit of twelve months from the alleged freedom of speech breach itself should be sufficient, to prevent potential recurring or time-remote adverse consequences being eligible for consideration. This again would mirror the OIA.

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

5.1. We agree that complainants should use a standardised complaint form, not email. We recommend that the form should always require supporting evidence, even if just a statement.

5.2. We agree that the OfS should not review anonymous complaints. However, we have serious concerns regarding the OfS’s proposals concerning identity. We consider it likely that a majority of Complainants will ask for their identity not to be disclosed. If the OfS accede to most requests to protect identity, that will in all likelihood mean that it is withheld from the Respondent. If a Complainant’s identity is withheld this is likely to seriously inhibit the Respondent from producing a full and fair response and make representations, including:

- Potentially challenging frivolous/vexatious claims
- Providing full information including context
- Cross referencing to other claims, complaints or grievances

5.3. In turn, this would also hinder the OfS from carrying out a fair and timely investigation. We therefore suggest that the default position should be to disclose a Complainant’s identity, unless there are compelling reasons not to.

5.4. We also suggest that the OfS should clarify circumstances in which it envisages being “legally required” to disclose identity.

5.5. We have significant concerns of cost escalation if the Complainant (or Respondent) can appoint a legally qualified representative. We strongly suggest that legal representation is discouraged, except for exceptional circumstances when the potential consequences are particularly severe. We suggest clarity is needed about whether trade unions can represent Complainants.

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

6.1. Whilst we agree that the review process should include discretion for the OfS to determine what activities it should undertake as part of the review, we suggest that the OfS provide further detail on what these activities might comprise of and when they might be deployed in the process. We also suggest that a clearer process is set out, for example to confirm that the OfS will notify the Respondent within a set timeframe (we propose 10 working days) of a complaint being received which the OfS intends to investigate, together with regular intervals at which the Complainant and Respondent will be kept informed of progress and next steps in the OfS's investigation.

6.2. The proposal that the OfS "may" (rather than "will") share information with the Respondent causes serious concern. For example, it may be that a complainant is a vexatious employee or an employee subject to serious disciplinary proceedings, matters which might be highly relevant to the OfS determination on eligibility. It is not clear when the complaint will be shared with the Respondent and when it won't. We believe that the default position should be to always share information unless there are exceptional and overriding reasons not to. As set out in our response to Proposal K, we also suggest that the default position should also be that a Respondent is always invited to make representations in response to a complaint, to ensure fairness in the investigation.

6.3. Disclosure of information could be very onerous for the Respondent, especially in complex matters. We propose that Respondents should only be required to disclose information which is both necessary to the complaint on a reasonable and proportionate basis, and to have the right to refuse to disclose any information which the Respondent reasonably considers could breach data protection legislation ; alternatively if this is a legal requirement then this should be stated.

6.4. Whilst we recognise that there might be occasions where expert academic judgment is required, we suggest that the OfS should outline when it envisages it might be sought. Appropriate measures also need to be put in place to ensure that there is no potential conflict of interest, e.g. around grant funding/employment. We suggest that the parties be notified of who the proposed expert will be and have the opportunity to object within a short time frame on limited grounds (e.g. conflict of interest). If academic judgment is sought, the OfS should also set out who will bear the costs.

6.5. We are seriously concerned that the ability to seek "settlements" of complaints could lead to undue pressure on Respondents to agree to settle. Clarification should be given on the meaning of a "settlement", including what it covers and how it is documented. We note that the OfS has proposed that a Notice of Complaint Outcome would be issued and confirm the terms of a free speech complaint. We consider it would be highly inappropriate for any settlement terms to be published, as settlements are usually private and confidential. The OfS

should also clarify what role, if any, it would have if they “seek” settlement. We would suggest that while it might be appropriate for the OfS to suggest that the parties consider settlement, they should not act as a mediator in case settlement is not achieved. For settlements to be effective, they should also be full and final of the entire freedom of speech complaint and be legally binding in that regard to avoid further potential legal action. We suggest that this be expressly recommended in the Rules.

6.6. We also have concerns that if the volume of complaints is high and the OfS has insufficient resources to carry out full reviews, this could result in pressure on the parties to settle instead. Therefore it is important that the OfS is sufficiently resourced to deal with complaints.

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

7.1. We strongly recommend that the OfS should set an expected timeframe in which to investigate and reach a decision, albeit that there may be exceptions to this. Limiting the obligation to “as soon as reasonably practicable” is insufficient and could cause significant difficulties, for example should an OfS investigation continue beyond a Court or tribunal hearing, where the outcome of an OfS investigation could have significant bearing on legal matters. There is no guidance in the consultation on what a timely investigation by the OfS should be. Consideration should be given to the real possibility of other legal and quasi-legal processes that may be running in parallel to the OfS investigation or being contemplated, and therefore some certainty/clarity around the time an investigation is needed or likely, which would also enable parties to apply to stay legal proceeding pending the outcome. In respect of the timeframe, we suggest there should be parity on time to investigate (i.e. the Respondent and the OfS each have the same amount of time).

7.2. We are extremely concerned that there does not appear to be a mechanism for a Respondent to challenge or appeal an outcome, particularly given that the current proposals do not even invite Respondents to make representations. We consider that this runs contrary to the principles of natural justice and we strongly suggest that the OfS includes a mechanism for a Respondent to appeal an outcome.

7.3. We are concerned that a Notice of Complaint Outcome is proposed to be published outlining the terms of a settlement of a free speech complaint. We consider that any settlement should be kept private and confidential.

7.4. Although “*More likely than not*” is a low standard of proof, it is equivalent to the civil test “on balance of probabilities” and we agree that it is the correct test.

8. Question H: Do you have any comments on Proposal H regarding recommendations and suggestions?

8.1. It appears that there is a difference between “*recommendations*” and “*suggestions*” – that recommendations must be adhered to (and OfS will report on recommendations and the Respondent’s response), and (though not explicit) that the Respondent can decide whether to follow suggestions. We request that this is clarified.

8.2. Clarity is also sought on the consequences of a Respondent not complying with recommendations.

8.3. There is little information on how financial penalties will be valued and assessed. This area needs considerably more detail and transparency in a fully worked proposal.

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

9.1. The OfS should be required to inform all parties if it intends to suspend an investigation, with reasons, together with a subsequent timeframe.

9.2. Parties should be given notice of when a Notice of Complaint Outcome is expected as this may have bearing on the timing of withdrawal of complaint.

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

10.1. The OfS should clarify what will happen if a lead complaint is not justified and whether the same outcome will be applied to all the group complaints or not.

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

11.1. As set out in response to Proposal G, we suggest that the OfS must always notify the Respondent when a complaint is made and the Respondent should always be allowed to make representations. It is grossly unfair to have a process which could lead to a complaint being justified against a Respondent, with potential fines and significant reputational damage, when the Respondent does not have an opportunity to give representations. It should not be at the OfS's discretion whether to decide whether to invite representations; this should be a right given to Respondents.

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

No

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

13.1. It would assist to give examples of "*requirements*" along with likely time frames.

14. Question N: Do you have any comments on Proposal N regarding advertising the scheme?

14.1. In order to advertise the scheme, guidance needs to be issued by the OfS and OIA that students can be directed to, so as to understand their options when complaints involve issues of free speech. It is helpful to have wording to use in materials, but we suggest that the current draft text should also refer to the OIA and this guidance. It would also assist providers to have guidance and suggestions from the OfS about how it suggests providers advertise the scheme.

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

15.1. We consider that far greater detail is needed and are pleased that the OfS is going to set out proposals on costs, fees and charges in a future consultation, which we hope will be conducted as soon as possible. We suggest that the proposals will need to include clarity on how the OfS will incur and charge back costs. For example, we consider it would not be appropriate for the OfS to use external consultants/lawyers and charge costs back to the Respondent, because

this could pressure Respondents to settle to avoid cost escalation, or pressure the OfS to partially uphold a complaint in order to recover their costs and so impact impartiality. We would therefore advise against the OfS being permitted to charge back costs for external counsel. We also recommend that clear principles are set out, including that any costs and fees charged to the Respondent should be proportionate to the breach.

- 15.2. The Rules will also need to set out how the OfS will apportion costs if a complaint is upheld which is related to other respondents, including a Respondent's own Student Union complaint. Clarity is needed on whether recommendations will be made for costs to be shared or apportioned commensurate to blame for the breach and, if so, how this will be calculated

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

- 16.1. Whilst we consider publication of outcomes which are partially or fully upheld upholds transparency, we do not agree that any complaints which are not upheld or which are settled should be published. It could cause considerable reputational damage to a Respondent to publish complaints which are not justified, and is disproportionate. Rather, we propose that the OfS could publish regular data reports on complaints which are not upheld, with both overall numbers (which could be segmented, e.g. by the nature of the complaints or region) together with anonymised examples to assist Respondents in undertaking their own investigations.

- 16.2. We are particularly concerned that individuals can be named. Guidance should be provided on how the OfS will determine whether an individual is "*not fit and proper*" and – if permitted – should only be for the most egregious of breaches due to the potentially very significant personal impact.

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

- 17.1. We consider that far greater consideration needs to be given to the interplay between this new scheme and the OIA's complaint scheme, the overlap with other legal processes and the intersection between providers and their Student Unions. This is generally unclear at the moment. For example, if any court or tribunal hearings consider matters which have freedom of speech issues that are also the subject of a complaint to the OfS, a complainant should be obliged to inform the OfS and furthermore be under an ongoing duty to keep the OfS informed of any developments, such as withdrawal, settlement or listing for hearings. We suggest that greater consideration is given to this.

- 17.2. We recognise that any new scheme will have areas which will need adjustment as issues come to light in operation, and suggest that a further consultation is undertaken after 18 months to gauge the effectiveness of the scheme and enable any recommendations for improvements.

18. 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?

Please see the totality of our responses to the proposals. We invite the OfS to ensure that it adheres to the Regulator's Code when considering the responses to the consultation, and further proposed iterations of the Rules and in the operation of the Scheme.

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

There should be an equality impact assessment conducted on all aspects of the proposals to check this. However, our main observations are that the scheme needs to be fully accessible to disabled complainants and that those operating the scheme need to be mindful of the need to make adjustments for disabled individuals accessing the scheme.

20. 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?

20.1. As above, we are seriously concerned about the interplay with other proceedings which has not been explored in detail in the consultation. Upholding of complaints by the OfS has the potential to lead to increased litigation in the employment tribunal and civil courts. For example, an employee whose complaint is upheld may decide to pursue a complaint for discrimination on the grounds of religion and belief in the Employment Tribunal. Such complaints are subject to strict time limits and legal tests that OfS complaints are not, and these may not be met. It is imperative that before finalising the Rules that the OfS gives due consideration to this, and ensures that the interplay is addressed.

20.2. We are concerned about staff and students named as witnesses or perpetrators of a freedom of speech complaint and the impact an investigation and findings (and potential publicity) will have on them. We raise this concern based on the experience of these groups in the investigation into internal complaints.