

Consultation - the OfS's free speech complaints scheme

About University Alliance

University Alliance (UA) represents 16 of the UK's leading professional and technical universities. Our members specialise in working with industry and employers. Their teaching is hands-on and designed to prepare students for careers. Their knowledge and research drive industry to innovate, thrive and meet challenges.

Our members are leading the way in innovation and business support in the green, tech, creative and healthcare industries. They are leading providers of teaching in healthcare, the creative arts, degree apprenticeships and more. We collaborate as UA to benefit our members and their communities, and to provide expertise to policy makers.

Summary

The Higher Education (Freedom of Speech) Act 2023 requires the Office for Students (OfS) to operate a free speech complaints scheme. It is imperative that this new scheme runs as effectively and efficiently as possible, ensuring a transparent, fair, and objective process for both complainants and respondents and good value for taxpayers.

In our consultation submission, University Alliance highlights several areas where members believe more detailed information is required to understand how the scheme will work in practice, including:

- How **non-financial adverse consequences** will be measured.
- How the scheme will apply **outside the UK** where national legislation pertaining to free speech may be more or less restrictive.
- How the OfS will **communicate** with complainants and respondents throughout the process, and **indicative timescales**.
- The **legal and regulatory status of recommendations and suggestions** issued by the OfS.

We have made a number of recommendations to improve the workability and overall fairness of the scheme, including:

1. **There should be a requirement for any formal processes for inviting speakers to have been followed by higher education providers or students' unions.** There should also be a parallel requirement for these processes to be made as simple, streamlined, and burden-free as possible, with the OfS issuing guidance on what is reasonable after consulting with providers and students' unions.
1. **The scheme should not have extraterritorial application**, i.e. it should not apply outside of the UK.
2. **There should be a requirement for a complainant to go through the provider's internal complaints process in the first instance.** A claim to the OfS's complaints scheme should be submitted only after that process has formally concluded and they are unhappy with the outcome.

3. **A complainant should only be able to access the OfS' complaints scheme after 90 calendar days have passed since they submitted a complaint to the provider's internal complaints process.** This is in line with the requirements of the Office of the Independent Adjudicator's (OIA) complaints scheme.
4. **There should be a 12-month deadline for the submission of complaints to the OfS.** This period should begin when a complainant has completed the provider's internal complaints process, in line with the OIA's complaints scheme.
5. **There should be a requirement for the OfS to seek representations from the respondent on the complaint in all cases.** This will allow the respondent to provide a counter case and to make any factual corrections about the evidence provided by the complainant, in line with the laws of natural justice. The respondent should always be given the opportunity to make representations before the OfS makes a final decision.
6. **Any advertising requirements for the OfS's free speech complaints scheme should mirror those for the OIA's complaints scheme.** Providers should be required to clearly signpost information about both schemes to staff and students, but they should have the discretion to determine how best to achieve this.
7. **The OfS should not have the power to recover its costs from providers.**
8. **The OfS should not publish specific information on any complaints under any circumstances.** It should, however, publish detailed statistics about complaints as well as a selection of anonymous case summaries to improve understanding and practice.
9. **An independent review of the scheme should be undertaken after 12 months to ensure it is working efficiently and effectively.**

The full list of recommendations is contained below in our response to Question R.

Consultation questions

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

There is an upfront need for the OfS to carefully clarify the legality of the free speech complaints scheme itself, which could be described as quasi-judicial, what standard of evidence it will be requiring from complainants, how it will determine the factfulness of evidence presented and make judgements. For consistency and alignment with other sector practices, it is recommended that the processes of the Office of the Independent Adjudicator (OIA) are mirrored to the fullest extent possible.

Further information is urgently needed about how the OfS will define, measure, and assess "adverse consequences" that are non-financial in a fair, objective, and proportionate manner. It is imperative that these are not minor, trivial, or insubstantial.

More information is also needed to explain how the process will work if there are multiple respondents. There should be a requirement to notify all respondents for the sake of transparency and to avoid duplication and unnecessary burden in dealing with the complaint.

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

Our biggest concern relates to the wide definition of “visiting speaker”, which is not limited to those invited through the provider’s or students’ unions formal processes. We believe this proposal will not be fair or workable unless there is a requirement for any formal processes for inviting speakers to have been followed. Consideration will also need to be given as to whether individuals have the appropriate authority to invite speakers, in accordance with university processes. These are well established and are designed to enable free speech within the law. They are a vital mechanism for universities to balance their responsibilities and consider a range of risks in a proportionate way. We would, however, support a requirement for these processes to be made as simple, streamlined, and burden-free as possible, with the OfS issuing guidance on what is reasonable.

The broad definition of “student” also raises several questions for higher education providers, as this could potentially include students at schools and further education colleges. It does not seem appropriate for the OfS to adjudicate on free speech claims for students on courses that are not regulated by the OfS in any other aspect. Further clarity is also urgently needed on how this relates to students studying on courses that are part of university partnerships, including franchised or validated provision, especially for students who are studying on transnational education courses overseas where the national law on free speech may be more or less restrictive than in the UK. For this reason, there is a very strong argument that the scheme should only apply to students studying in the UK.

We do not support the proposal that corporations should be able to access the scheme in their capacity as legal persons, as this leaves the scheme open to politicisation and abuse from vested interests. We also believe that complaints should be dismissed upon the death of the complainant, since they will no longer be available to respond to any questions or provide any information required by the OfS.

It is unclear whether commercial spaces for hire – a vital income stream for universities – or staff employed by third-party contractors are within scope. We strongly recommend that they are not included since these have no affiliation with the provider and are not part of the business of the provider.

Permanent staff of students’ unions have a longstanding civil-service type arrangement whereby they are politically neutral and do not comment on political decision-making at their SU. It is not clear what will happen to this convention under the proposals.

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

We are strongly opposed to the proposal that a complainant should be able to access the OfS’ complaints scheme after 30 days even if the respondent’s complaints process is still ongoing. This is simply not enough time in most cases for a provider to investigate a complaint, particularly in view of the high level of complexity that free speech-related complaints often entail. It is likely to lead to the OfS being inundated with claims that have been partially investigated, which is not a good use of public money. We believe this proposal should be changed to 90 calendar days in line with the OIA’s complaints scheme, with the potential for an extension if the circumstances objectively warrant it. This will also serve to avoid creating perverse incentives for providers to deal with free speech related complaints more quickly than other student complaints.

Moreover, it has not gone unnoticed in the higher education sector that the 30-day window contrasts markedly with the high degree of flexibility the OfS has granted itself in its

management of the process, where it has not committed to any timeframes for its review of complaints and determining their outcomes beyond doing so in a "timely manner".

Crucially, there should be a requirement for the complainant to go through the provider's internal complaints process in the first instance and submit a case to the OfS's complaints scheme only after that process has concluded and a letter has been issued to notify them of the conclusion of such processes. Providers must be allowed to conduct and complete internal processes without the risk of unnecessary interference from the regulator, which would only serve to undermine confidence in internal processes and infringe on institutional autonomy.

In addition, it is vital for respondents to be able to make representations to the OfS if they believe a claim is frivolous or vexatious.

There is also a need for greater transparency about how the OfS will respond to any non-free speech-related elements of complaints.

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

We agree with the proposed 12-month deadline for the submission of complaints to the OfS, which is consistent with the OIA's complaints scheme. However, we strongly disagree that the countdown timer should begin on the date when the adverse consequences last occurred. This could be some time after the alleged breach of free speech occurred and very difficult to evidence. Instead, the 12-month period should begin when a complainant has completed the provider's internal complaints process, as it is with the OIA's scheme.

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 they submit the original complaint themselves and consent to the representative corresponding with the OfS on their behalf.

There is a need for further clarification over the role of legal representation in what is designed to be a non- or quasi-legal process.

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

We believe it is vitally important that the OfS provides clear communication to both complainants and respondents throughout the whole process, including regular updates on progress and expected timescales. There is a need for further information about how the OfS will correspond with the respondent, including the assurance that they will be notified when a complaint is investigated. This will also mirror the transparent approach taken by the OIA, which provides information to both parties.

In addition, there should be a requirement for the OfS to seek representations from the respondent on the complaint in all cases 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 be of benefit to the OfS as it seeks to build a body of evidence about the case, as it will allow the respondent to provide the OfS with information about its own findings.

There is a need for further information about what role face-to-face meetings will have in the process, as well as when and how academic expertise will be sought by the OfS, and how this might interact with the B conditions.

More broadly it would be useful to have further information about the skills and expertise of the staff carrying out reviews of free speech complaints, and what additional training they will receive.

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

Again, this is an area where more information is needed. It is vital that the complaints scheme is underpinned by an indicative timeframe in which the OfS will seek to resolve most freedom of speech complaints. There is also a need for clear information on the appeals process for respondents, which should be subject to independent review.

We strongly support UUK's proposal for a full independent review of the complaints scheme after 12 months, with input from students and providers.

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

It is vital that the OfS clearly sets out the legal and regulatory status of recommendations and suggestions, as well as what they are likely to entail, including practical examples. The OfS must explain how it will ensure these will not infringe on institutional autonomy, as para 7(5) of Schedule 6A of the Higher Education (Freedom of Speech) Act 2023 states that the "The scheme may not authorise the OfS to require anyone to do or not do anything". There is a need for further clarity on how recommendations and suggestions will interact with OfS's other regulatory requirements, for example on harassment and sexual misconduct and quality, as well as other legal obligations (notably the Prevent Duty).

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

No comments.

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

Further clarification is needed about what criteria will be used to decide that complaints can be grouped together, and whether all respondents will be notified about group complaints. It is important that the OfS does not use the number of complaints received as a factor in making assessments about severity. 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?

The respondent should always be given the opportunity to make representations before the OfS makes a final decision, rather than the OfS's proposal that it "may" do so. There should always 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?

The OfS should only be able to request information which is directly relevant to its consideration of the free speech complaint. Information requested by the OfS should be submitted within a reasonable period in the circumstances.

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

No comments.

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

We do not support the proposed advertising requirements, which we think are overly prescriptive. Any advertising requirements for the OfS's free speech complaints scheme should mirror those for the OIA's complaints scheme so as not to privilege one complaints mechanism over another and avoid confusion. It is also vital for students to be supported to understand the differences between the two different complaints mechanisms. Providers should be required to clearly signpost information about both schemes to staff and students, but they should have the discretion to find the best means of achieving this at their institution.

It is, however, reasonable for the OfS to require providers to use a mandatory template in the letter sent to complainants after they notify the provider of any free speech complaints. As with the OIA template, this should clearly state that complainants are expected to have completed the institution's internal processes before they submit their complaint to the OfS.

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

It is vital that the scheme is run in an efficient manner which provides value for money for students, providers and taxpayers, and there must be clear safeguards to ensure this. The OfS registration fee increased in 2023-24 in part to fund this new function. We therefore do not support the OfS also being able to recover its costs from providers in any circumstances.

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

We strongly oppose the proposal to publish specific information on any complaints under any circumstances. We recommend instead that the OfS follow the approach of the OIA and publish statistics as well as a selection of anonymous case summaries to improve understanding and practice.

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

As outlined above, there are a number of areas where we believe more detailed information is required to understand how the proposals will work in practice, including:

- How **non-financial adverse consequences** will be measured.
- How the process will work when there are **multiple respondents**.
- How the proposals apply to **franchise and partnership students**.

- How the proposals apply to **students studying outside the UK** where national legislation pertaining to free speech may be more or less restrictive.
- Whether the proposals apply to **commercial spaces and third-party contractors**.
- How the proposals are compatible with the **political neutrality** of the permanent staff of students' unions.
- How the OfS will process the **non-free speech elements** of claims.
- The role of **legal representation** in what is a non-legal process.
- How the OfS will **communicate** with complainants and respondents throughout the process, and indicative **timescales**.
- The role of **face-to-face meetings** and **academic expertise** in the process.
- The **background and training** of OfS staff reviewing free speech claims.
- The **legal and regulatory status of recommendations and suggestions** issued by the OfS.
- The criteria used to determine whether multiple complaints should be **grouped together**.

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 have given a number of recommendations above about how to improve the proposals, including:

2. There should be a requirement for any formal processes for inviting speakers to have been followed by higher education providers or students' unions. There should also be a parallel requirement for these processes to be made as simple, streamlined, and burden-free as possible, with the OfS issuing guidance on what is reasonable after consulting with providers and SUs.
3. The scheme should not have extraterritorial application, i.e. it should not apply outside of the UK.
4. Corporations should not be able to submit complaints, and any complaints should be dismissed upon the death of the complainant.
5. There should be expectation for a complainant to go through the provider's internal complaints process in the first instance and submit a claim to the OfS's complaints scheme only after that process has formally concluded and they are unhappy with the outcome.
6. A complainant should only be able to access the OfS' complaints scheme after 90 calendar days in line with the OIA's complaints scheme (with the potential for an extension if the circumstances objectively warrant it).
7. Respondents should be able to make representations to the OfS if they believe a claim is frivolous or vexatious.
8. There should be a 12-month deadline for the submission of complaints to the OfS. This period should begin when a complainant has completed the provider's internal complaints process, in line with the OIA's complaints scheme.
9. There should be a requirement for the OfS to seek representations from the respondent on the complaint in all cases to allow the respondent to provide a counter case and to make any factual corrections about the evidence provided by the

complainant. The respondent should always be given the opportunity to make representations before the OfS makes a final decision.

10. The OfS should only be able to request information which is directly relevant to its consideration of the free speech complaint. Information requested by the OfS should be submitted within a reasonable period in the circumstances.
11. Any advertising requirements for the OfS's free speech complaints scheme should mirror those for the OIA's complaints scheme. Providers should be required to clearly signpost information about both schemes to staff and students, but they should have the discretion to determine how best to achieve this.
12. The OfS should require providers to use a mandatory template in the letter sent to complainants after they notify the provider of any free speech complaints. As with the OIA's template, this should clearly state that complainants are expected to have completed the institution's internal processes before they submit their complaint to the OfS.
13. The OfS should not have the power to recover its costs from providers.
14. The OfS should not publish specific information on any complaints under any circumstances. It should, however, publish complaint statistics as well as a selection of anonymous case summaries to improve understanding and practice.
15. An independent formal review of the scheme should be undertaken after 12 months to ensure it is working efficiently and effectively.

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

It is highly likely that these proposals will have a disproportionate impact on individuals based on their protected characteristics, as free speech complaints are likely to overlap with complaints regarding harassment relating to providers' duties under the Equality Act. A comprehensive Equality Impact Assessment should be undertaken urgently to assess this fully.

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 above, a full Equality Impact Assessment should be undertaken to understand how the proposals are likely to affect different types of students. A number of the proposals deviate from the approach taken and process used by the OIA's complaints scheme. This could create a perverse incentive for providers to privilege free speech complaints over the many other types of student complaints.