

Russell Group response to consultation on OfS's new free speech complaints scheme

1. Do you have any comments on Proposal A regarding what a free speech complaint is?

- 1.1 We believe that the OfS's definition of a free speech complaint is in line with the intention of the Higher Education (Freedom of Speech) Act 2023.
- 1.2 However, we have some concerns about the practicalities of a complaint made about more than one provider, constituent institution or students' union. This may reduce burden and the number of complaints made via the scheme, but members have raised that there are likely to be issues in relation to the coordination of the complaint response, including representations. For example, willingness or ability to share sensitive information about decision making processes. The allocation of potential liability between parties could also blur the lines of accountability, with the lead respondent assumed as primarily responsible.
- 1.3 We suggest that the OfS looks to define or give examples of 'adverse consequences'. This might help complainants better understand whether or not they can complain via the scheme and make them aware of what might be considered 'minor' or 'more substantial'.

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

- 2.1 The categories of 'eligible' person are reasonable, but further clarity on the definition of 'visiting speaker' is needed. We feel that the definition should be restricted to individuals who have been formally invited through an organisation's approvals process. The OfS should make clear that an organisation would not be held liable for the invitation of speakers where proper approvals procedures have not been followed by students or staff.
- 2.2 Furthermore, the current phrasing of 'eligible person' could be interpreted as granting a permanent right to complain on any matter regardless of when an invitation was issued. For example, it could enable an individual to complain about a recent matter even when this individual was issued an invitation a long time ago, potentially on a completely different issue.

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

- 3.1 We welcome the OfS's proposal that the scheme will not be retrospective; only considering complaints relating to matters or events occurring after August 2024 and the scheme's implementation.
- 3.2 We would encourage the OfS to publish its response to this consultation and associated guidance by mid-April 2024 to ensure organisations have enough time to understand the scheme and implement any internal changes ahead of the scheme's implementation in August.
- 3.3 We are reassured that the OfS will look to avoid duplication by not reviewing complaints being dealt with by the OIA or a court or tribunal. Clear communication with students and staff will be important to ensure complainants know the differences between the OIA and OfS schemes and understand which route would be most suitable for their complaint. We strongly encourage the OfS to work closely with the OIA and would welcome further detail on how any information sharing agreement might work in practice.

- 3.4 We recommend that the OfS includes 'the complainant has acted aggressively, offensively, or abusively, or has made unreasonable demands on the respondent' to the list of examples in section C of the instances when the OfS would not review a complaint.
- 3.5 We would also ask the OfS for clarity on the terminology used including 'unreasonable demands' and 'reasonably practical' with a non-exhaustive list of examples.
- 3.6 We would also welcome clarity on whether the scheme would be open to complaints concerning academic freedom but where the respondent (most likely a university) had legitimately followed its own internal process or legal requirement. For example, Part A1 (6) of HERA includes a definition of academic freedom that does not make reference to ethical research conduct. We remain unsure whether a complaint could be submitted via the scheme, where an academic member of staff has been prevented from working on a particular research area due to an ethical consideration.
- 3.7 We understand that the OfS wants to avoid instances of tactical delay, but we have concerns about the inclusion that complaints could be reviewed by the OfS if 30 days have elapsed since internal processes started. Taking an organisation's internal process and the outcome of a particular complaint into consideration will add to the evidence base that the OfS considers during its review, and therefore it is important to give organisations the opportunity to complete internal review. University procedures are long established, following the Education Act 1986, and we hope that the complaints scheme will reinforce the importance of engaging with internal processes first, rather than risk undermining existing practice.
- 3.8 Our members have told us that it is unlikely internal reviews would normally be completed within 30 days, particularly in complex cases or in smaller organisations (such as students' unions) which have less resource to handle complaints. In addition, the 30-day period is a different timescale to the OIA student complaints scheme (90 days after the completion of internal processes). The shorter timeframe for the OfS's scheme could create a hierarchy of complaints and force organisations to review these quicker than other matters. Furthermore, if an internal process is still ongoing at the time a complaint is referred to the OfS scheme this would result in two parallel investigations which is not an efficient use of resource and could yield conflicting decisions.
- 3.9 We would therefore recommend that the OfS use a 90-day rule instead of 30-days. We would also look for assurances from the OfS that the discretion to intervene before these 90 days have elapsed should only be used if it clearly achieves the purpose of the Act.

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

- 4.1 We are supportive of the OfS implementing a time limit for free speech complaints. However, it could be challenging to identify a date for the last occurrence of 'adverse consequences' and this could lead to inconsistencies in the scheme and disadvantage complainants if not made clearer in guidance. Instead, we would recommend the OfS uses a time limit of 12-months after an organisation's internal processes have concluded and the complainant has received a Completion of Procedure letter. This would reduce the likelihood of tactical delay on the part of the respondent, but also encourage complainants to pursue their complaint through the organisation's internal processes first. This would also align the complaints scheme with current OIA practice.

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

- 5.1 We would like further information on who the OfS believes would be an appropriate representative for a complainant. The OIA publishes guidance on representing a student,

stating that a representative must understand the complaint, know what outcome the student wants, and can and will act in the student's best interest. The OIA also discourages legal representation where possible on the basis that procedures and reviews are informal. Without further guidance there is a risk of the creation of an industry associated with pursuing free speech complaints with little involvement from the individuals affected. We would encourage the OfS to publish similar, or more detailed, guidance within the scheme's rules on who a complainant can appoint to act on their behalf.

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

- 6.1 Proposal F suggests that the OfS 'will tell the complainant, and the respondent if relevant, whether and to what extent we are able to review their free speech complaint'. We would recommend the OfS always tells the respondent (i) when it has decided to review a free speech complaint, or (ii) when a complaint has been made but a review will not be taken forward. This approach would align with the OIA's existing complaints scheme and build trust and confidence in the scheme through clear communication and transparency.
- 6.2 We recommend the OfS communicates with a named, mutually agreed point of contact for the respondent rather than relying on the current Accountable Officer system. Notice of complaints should be made in writing and include details on what activities the OfS will undertake as part of its review process. The OfS should also look to provide regular updates to both the complainant and respondent, to include updates on expected timescales for the completion of its review.
- 6.3 We would like to understand further when academic or expert advice will be sought by the OfS. In the early months of the scheme, it will be critical to ensure consistent and robust judgements on free speech complaints as these will set precedent for future outcomes. To support OfS staff to build their own expertise in this new area of work and ensure consistency in early judgements, we would recommend that in the first 12 months of the scheme's implementation, the OfS should always seek academic or expert advice to inform their review of a complaint.
- 6.4 More generally, it is not clear how the OfS intends to adjudicate matters of academic judgement. We are concerned that if an independent regulator is put in a position to make decisions on matters of academic judgment, it might have the unintended consequence of threatening academic freedom at universities. We note that the OIA complaints scheme expressly rules out any complaints about academic judgement.

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

- 7.1 Proposal G suggests the OfS would take a decision on a complaint 'as soon as reasonably practicable', however we would strongly recommend the OfS commits to a regular timeframe for making a decision on complaints. The proposed rules of the free speech complaints scheme requires both complainants and respondents to adhere to timeframes, therefore it is not unreasonable for the OfS to do the same. We understand that in complex complaints this timeframe may be exceeded but this should be clearly communicated to both the complainant and respondent. For non-complex complaints, however, we would encourage the OfS to align itself with the OIA and aim to normally complete their review within 90 days of receiving all the information it needs.

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

- 8.1 We agree that there should not be an exhaustive list of recommendations at this point and it is encouraging to see the OfS take a principles rather than rules-based approach. We would encourage the OfS to consider risk, as per the Regulator's Code, when making decisions to ensure recommendations are proportionate.
- 8.2 The Act's wording suggests that 'the scheme may not authorise the OfS to require anyone to do or not do anything'. Given the original intent of the scheme, outlined in legislation, it will be important that recommendations do not require institutions to take certain actions. We also would welcome further detail on the consequences of a respondent not adhering to a recommendation.
- 8.3 We note the fact that the scheme will not affect the OfS's ability to investigate or take regulatory action in respect to non-compliance with the OfS's conditions of registration. However further clarity is needed on how complaints received under the scheme will feed into decisions about regulatory compliance, especially once the new free speech condition of registration is in place.

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

- 9.1 No response.

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

- 10.1 Before the scheme's implementation, further detail on how the OfS will 'group complaints' that were submitted individually is needed and whether an individual complainant can disagree with the OfS's decision to (i) determine a lead complainant or, (ii) group their complaint with others.

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

- 11.1 Given the potential reputational and financial risk associated with a partially justified or justified complaint, we would urge the OfS to always seek representation from a respondent which could include evidence of a concluded internal process. It would then be the respondent's choice on whether to make representations. At the point where the OfS has everything it needs in order to conduct a review and make a decision, the OfS should notify both the complainant and the respondent in writing, as is common practice in the OIA complaints scheme.

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

- 12.1 We are welcoming of the flexibility built-in to the OfS's proposed approach. However, we do believe there should be a clear minimum period for information to be provided, such as 4 weeks for both complainants and respondents. Again, this is normal practice for respondents providing information to an OIA complaint. This would help balance the burden on those involved with a complaint in preparing the information while still ensuring the review is conducted in a timely manner.

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

13.1 We support the OfS's proposal to ensure respondents comply with any requirements imposed on it by, or under, the rules. We believe that the timings referred to in previous answers would enable respondents to comply with the scheme and would recommend that the OfS builds in the opportunity for respondents to request an extension, for example on providing information, on reasonable grounds.

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

14.1 Proposals to advertise the scheme in relevant organisational materials are reasonable, however organisations must be given sufficient time to implement these changes ahead of the scheme's launch in August 2024. We would reiterate that the OfS should look to publish the response to this consultation and associated guidance by mid-April 2024 to allow a reasonable timeframe for advertising to be put in place.

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

15.1 We understand that the OfS plans to set out proposals on this in a future consultation and we would urge the OfS to consult the sector well in advance of the scheme's implementation and allow at least 12 weeks for genuine consultation, as is suggested in government's Code of Practice on consultations.

15.2 With institutional resources increasingly stretched, we do not think it would be reasonable to charge universities if a complaint is deemed unjustified. That said, there is also a concern that this could lead to an unintended incentive for the OfS to always conclude at least a partial justification of a complaint, in order to recover the costs from representatives. We would want to better understand how the OfS would mitigate this risk.

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

16.1 There is a lack of clarity on how the OfS will communicate that a complaint has been made, or when a review is underway, about an organisation. This needs to be resolved ahead of the scheme's implementation. It would be unfair to a respondent to publish notices, decisions, and reports on a specific complaint without sufficient prior notice given the reputational and financial risk.

16.2 We believe the OfS should be transparent and publish information about the number and type of free speech complaints made by the OfS and the outcome of those complaints. This information should be anonymised and not identify the provider, constituent institution, or student union within a statistical publication. Publishing statistical information about the number of complaints at a named institution without contextual information or the resulting judgement could lead to misinterpretation and/or undue risk to an organisation's reputation.

16.3 We would also urge the OfS to reconsider its intention to publish information about complaints which would identify an organisation. We are unclear as to the value of doing so and it is not in line with the approach taken by the OIA.

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

17.1 Please refer to previous responses.

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

18.1 Please refer to previous responses.

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

19.1 We would welcome the OfS publishing further guidance for providers, constituent institutions and students' unions on how the free speech complaints scheme should be used in the context of balancing other legislative requirements, including Prevent and the Equality Act.

20. Do you have comments about any unintended consequences of the proposals?

20.1 Please refer to previous responses.

February 2024