

# INDEPENDENT HIGHER EDUCATION

IHE response to the OfS consultation on a new free speech complaints scheme

March 2024

## Introduction

In preparing this response, IHE consulted across our membership, many of whom do not have the resources to respond directly. Almost 90% of our membership are SMEs, and many operate within industry bodies, contexts, and spaces. As SMEs they continue to raise concerns about the regulatory burden of OfS activity, and how a one-size-fits-all model has a negative impact on their resourcing and their students. They urge the OfS to be proportionate in fulfilling their obligations within the Higher Education (Freedom of Speech) Act 2023.

We also consulted with our Student Advisory Board who represent the diverse student body of our members, many of whom study in these industry contexts, as apprentices, or with work placements. Many on the SAB are mature students or international students, who offer a unique perspective on the free speech proposals, but for whom mainstream students' unions may not be put forward. Our response therefore represents the views of many who are unable to respond to the many consultations which impact them, and we urge OfS to consider this in their decision-making processes.

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

The complaints scheme and regulatory ethos behind OfS's approach to fulfil its obligations to the HE (Free Speech) Act fails to recognise the fundamentally different environment that 21st century higher education operates within. Again, OfS has chosen a one-size-fits-all model, where a variation of approach would be more appropriate.

Higher education in the 21st century is a complex environment which blends traditional academic models with industry, community, and global learning opportunities. It is not clear from this consultation that the diversity of higher education models has been considered, nor that the specific concerns of industry-based or global provision are accounted for within the complaints model.

The scheme proposes that complaints must be about the governing body of a provider or constituent institution, with little consideration for the areas these bodies are responsible for that have no link to their higher education activities. The governing bodies of many providers on the OfS register are responsible for larger operations, and while often related to the industry context they are teaching within, are well outside the scope of their higher education operations. OfS should be clearer that the responsibility for freedom of speech lies within the higher education operations of the organisations, and those employed to deliver them.

Students at IHE members also expressed concern that the complaints scheme was not clear for students on apprenticeship programmes, work placements or clinical practice as part of a professional award. Examples within the consultation were very narrow, almost entirely related to traditional student experiences, and students felt they didn't see their learning environment reflected in the way the consultation proposed the complaints scheme to operate. Students who learned in these industry settings valued their employment status, but felt that their role as employee could be placed in jeopardy should their employer be expected to uphold the same level of protection for freedom of speech for students as a public body such as a university or college. In these higher education models, where the learning and employment spaces are blended, OfS must be clear that complaints are relevant only in the higher education context.

Higher education is also evolving to become more of a commercial environment. Providers are encouraged through research and innovation funding to create commercially viable products and enterprises. To bridge the current funding gap, providers must consider commercial partnerships and opportunities to support the student experience. Freedom of speech considerations for commercial activities are the focus of debate not only within the UK, but globally. Many definitions of freedom of speech fail to recognise where commercial sensitivity and freedom of speech may clash, for example where speakers may represent a commercial risk for an organisation, or where learning spaces blended with clinical practice are not appropriate places for some types of debate. While we recognise that OfS is constrained by the simplicity of the definitions provided in the Act, there is scope to define clearly that commercial activities fall outside of the scope of the definition and will not be considered as part of the complaints scheme.

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

### ***What is a student?***

IHE members often teach a broad range of provision, often to students who are under 18, under the umbrella of their governing body. Some provision is to younger learners where freedom of speech definitions can cause conflict with safeguarding policies. Curriculums in this space are more constrained, and delivery is more closely regulated. It is not appropriate that a complaint raised by these students be held in the same scheme and context as a complaint within a higher education curriculum.

As part of their wider offer, IHE members teach short courses of study which do not lead to a qualification or award. These courses can be as short as a few hours. To minimise regulatory burden, students studying on courses that do not lead to credit or a regulated qualification should not be permitted to use the scheme as they are currently outside of the scope of OfS regulation.

IHE members are industry experts, and often deliver provision direct to industry clients. This provision is defined by a contract between the provider and employer, and the learners are employees of the industry client. It is not appropriate for this scheme to apply to these students as they are also outside of the scope of other OfS regulatory conditions. The provider does not hold a contract with these students, but with their employer.

IHE members raised concerns that students studying overseas may not be held to the same standards for freedom of speech as we have in the UK. This can cause conflict with the scheme for example where the rules in another country permit more speech than those in the UK, including speech considered hateful or threatening, or libelous. The risk for staff working overseas within these institutions must also be considered, and safety must be protected where freedom of speech is more restrictive in the overseas campus or site. OfS should seek to provide guidance on what they would consider reasonable approaches for students within overseas provision delivered or awarded by the regulated higher education provider.

Finally, OfS should seek to make clear where students undertaking an award from a regulated higher education provider but not learning at or paying a fee to that provider, are permitted to complain. Delivery in partnership arrangements is governed by a series of contracts between student and provider and teaching and awarding providers. These restrict what each partner has the power to change, and will play a role in the protection of free speech. In their future regulatory consultation, OfS should seek to clarify their expectations for the protection of free speech between partners, including ensuring that students are aware who holds responsibility for areas such as employment of staff, visiting speakers, or academic content. Students can then ensure their complaints are directed to the appropriate body.

### ***Academic Freedom***

Approaches to academic freedom are highly contextual to the individual education model the provider delivers. Similar to our arguments about students, staff who are *“engaged for the purpose of teaching”* may be teaching younger learners and therefore their academic freedom is restricted by their need to uphold the principles of safeguarding and the curriculum regulated by government. This learning is regulated by Ofsted who will not weigh academic freedom above what is appropriate for children, nor where teachers stray outside of the curriculum in areas such as British values for example. It should be clarified therefore, that academic staff are only those delivering regulated higher education provision.

Within IHE member institutions, many staff fulfil roles which blend commercial activity and teaching responsibilities. It is normal for an employee to hold a contract which delivers clinical provision and teaching, or working with the community and delivering on regulated qualifications. We expect OfS to act reasonably where actions which may be within the scope of academic freedom make another aspect of their role untenable, and therefore staff are unable to continue employment with the organisation.

## ***Visiting Speakers***

The OfS definition of visiting speaker is too broad and would place considerable undue burden on higher education providers.

IHE members often deliver higher education under an organisation with a broad range of activities and spaces. OfS should clarify that only visiting speakers with invitations submitted through the higher education section's visiting speaker process, by students or employees of the higher education branch of activity, are considered eligible for the process.

Limiting the scope of visiting speaker, and those eligible to invite them, to higher education activity will greatly reduce the number of frivolous or ineligible complaints submitted to providers, that may then be passed to OfS. In considering the balance of burden versus risk, we do not believe that activity outside of the higher education aspect of a provider's business to pose sufficient risk to freedom of speech. These areas are also outside of OfS's core regulatory risks, and therefore should not be included.

IHE would welcome further guidance on the grounds for invitations to ensure that frivolous invitations, for example, where commercial organisations are invited to sell a product, or where organisations are invited by a relevant individual but for purposes other than speaking, are not considered eligible by OfS. There is a strong risk that organisations could use the threat of complaints to OfS to compel a provider to consider requests to speak, at a considerable burden to the provider. This is not in the interest of students. IHE members reported such concerns at the advent of the Prevent process, and we do not wish to repeat such circumstances.

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

IHE welcomes the clarification that the complaints scheme will only consider complaints from the date of implementation, however we do have concerns that there will not be time for providers to make changes to internally manage complaints, given delays to guidance and clarification on the scheme. We urge OfS to publish details of the scheme and expectations for providers as quickly as possible, and to be reasonable in their approach to complaints in the early stages of the process.

While we support the sentiment that OfS would normally only review a complaint after an internal provider processes had been completed, IHE members strongly disagree with the proposals to consider a complaint after only 30 days of its submission to the provider. This timeframe, while intended to ensure that complaints receive a speedy resolution, has considerable consequences:

- **Definition of loss:** It is unclear how OfS would consider loss where a provider's internal processes are not complete. The provider is in the best position to rectify any loss incurred by a student, staff or visiting speaker, and must do so in full receipt of the evidence of the case. These processes should also be independent and supported by trained staff. It is therefore important that OfS allow these processes to follow their course before considering a complaint, ensuring that undue pressure on the process does not result in an incomplete outcome. 30 days is not enough time for a complaint to find resolution within most provider's processes.

- **Prioritisation:** As OIA consider 90 days to be the sector standard for completing a process, any shorter timescale would result in freedom of speech concerns being prioritised over other complaints and appeals within a provider to meet the shorter timescale. In a smaller provider this may considerably disrupt the complaints or appeals process to the detriment of students with concerns outside of the scope of this scheme, and for whom the provider may judge require a resolution more urgent for very good reasons. It is uncomfortable for IHE members to face such pressures when their processes aim to ensure they work in the best interest of all students.

As noted above, OfS should consider clear guidance on complaints that are out of scope, not simply those that are frivolous or vexatious. Most IHE members do not have dedicated legal expertise on freedom of speech and note they will find it difficult to determine if all complaints meet the definition of freedom of speech. Of particular concern is where the provider has commercial concerns, where ongoing police investigations must be considered, or where a student has privacy concerns which may place restrictions on the rights of others. Greater guidance on what OfS would not consider to meet the definition of freedom of speech, or how OfS would view a provider's actions in light of ongoing investigations by other bodies which would interact with complaints considered under the scheme, would be welcome.

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

IHE members found Proposal D very unclear. There was strong support for the implementation of a time limit for complaints, but how providers were to determine the date that adverse consequences last occurred was very unclear. IHE members understood that determining adverse consequences would be part of the complaints process, both for themselves and for OfS. Investigations would identify and verify any potential loss relating to the incident, rendering anything outside of this process to be considered subjective at best. We find this definition to be impractical.

We urge OfS to consider a fixed point, such as the date of a specific incident where the freedom of speech duty was breached, to ensure that information related to the complaint remains on file with the provider, and can be gathered from accessible sources. We recognise it may not be appropriate to set a time limit of when an incident first occurred, as this may not immediately be recognised as a breach of the freedom of speech. For example, where a member of academic staff is denied funding for a conference once it may not be clear there were academic freedom concerns; however, were they denied multiple times there may be evidence that academic freedom issues may be at play. Clear and definable time limits related to incidents would support both complainant and respondent in this case.

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

We welcome OfS proposals that complaints be submitted in writing, and that complaints cannot be submitted anonymously.

We urge OfS to clarify the role and responsibilities of any representative appointed by the student in this process. As most of our members do not have independent student unions, we have found that support from family, friends, and advisors to be very productive to internal

complaints processes and welcome their involvement. We also strongly support the role of a representative in supporting students to access the process, where it is appropriate. IHE members urged OfS to develop a consent process to ensure the student continues to consent to the support of a representative and is not removed from communications from OfS about their complaint. Consent forms a vital part of the representative's role.

This representative should also not be a legal representative. As OfS has made clear, this is not a legal process and those submitting complaints have recourse through the courts separately from the OfS process. Legal representation should be reserved for future stages should the student wish to pursue them.

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

While we welcome a more flexible approach as OfS initiates this complaints scheme, the lack of process outlined in the consultation document is concerning. It is right for OfS to consider each complaint individually and apply the most appropriate investigation tools to achieve the correct outcome. We do not consider it appropriate, however, to conduct investigations without a clear process, that incorporates reasonable checks and balances to ensure a fair and efficient process, including on cost.

As noted in proposal O, OfS intends to recover costs from respondents in relation to their review. It is only reasonable then for the provider or students' union to be informed of the investigation process, the decision-making within that process – including where cost should be considered when selecting methods of investigation – and the timelines for completion. The regulator's code addresses investigation under point 6, and states clearly that those regulated should have clarity on approaches and costs of checks on compliance, and that the regulator should have a mechanism to ensure their officers act in accordance with their published service standards. OfS must publish more detailed approaches to their investigations before they start and ensure their internal governance processes have the independence to manage any appeals of decisions.

OfS should also publish clear timescales for their investigation, including expectations on when information should be submitted to OfS and where either party in the complaint can expect a response from OfS on information submitted and decision-making points in the investigation. Given the complexity of these complaints, and the focus on loss as a key part of the decision-making process, OfS must publish and adhere to timescales for investigation least they create further loss for the complainant.

We are also concerned that OfS may not seek representations from the provider or students' union who are the subject of the complaint, and may not communicate fully with the provider or students' union where an investigation has begun. Initial representations from the respondent are critical to identifying if the complaint is eligible, and any attempts made to address loss within the provider or students' union's internal complaints processes. We would also welcome OfS consideration of any additional context to the complaint that may aid in considerations of eligibility of the complaint, particularly under the frivolous or vexatious conditions noted above.

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

As noted in our response to Proposal F, we do not feel that the decision-making process is clear, and in particular who within OfS is responsible for the decision-making process and reviewing any representations.

We would welcome further clarification on timescales for the decision-making process, especially where OfS has initiated a complaint process before the provider's internal process is completed, as these may then become inter-dependent.

We welcome OfS's approach to the initial decision, and agree that the civil standard is the most appropriate test OfS could reasonably meet as a regulator. We would welcome more clarification on how this test would apply to the financial and other consequences, especially in the initial stages. Civil courts have the benefit of precedence and do not have the power to impose ongoing conditions on providers as the OfS does. It is vital that OfS set clear and actionable consequences, with further clarity on what it considers justified or serious complaints and where they may warrant more severe consequences.

We echo the call by other representative bodies for a review of the complaints scheme after 12 months to assess effectiveness, impact, and regulatory burden. This could also support a better understanding of the role of different consequences in the OfS's overall assessment of risk and delivery of their regulatory obligations.

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

Overall IHE members found the proposals to make recommendations and suggestions that support a provider to "*mitigate the risk of future breaches of their duty to secure free speech within the law*" to be a constructive approach to the challenges posed by the new freedom of speech obligations, on both OfS and providers/students' unions.

We remain concerned that OfS has not demonstrated a clear understanding of how recommendations and suggestions will need to be contextualised to fit the very different higher education providers across the register, and the even more diverse students' unions they will have regulatory responsibility for, for the first time. We urge OfS to ensure that recommendations and suggestions protect institutional diversity and reflect the nature of the provider or students' union receiving them.

IHE have made the case elsewhere in this consultation that a more modern approach to freedom of speech and academic freedom is needed to ensure that the OfS complaints scheme is fit for higher education delivered in the 21st century. It is just as vital in the delivery of recommendations and suggestions as it is in the eligibility for complaints.

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

We welcome the proposals on suspension and withdrawal but reiterate our request for a clear timeline for decision making, to enable the complainant to withdraw before a decision should they wish to do so.

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

IHE members remain unclear on how OfS will group complaints, and what expectations there may be on the provider to ensure that internal processes are complete when OfS applies a grouping. We encourage OfS to communicate with a provider or students' union when considering grouping to identify any further complainants within their internal processes or to identify any concerns that complaints may be vexatious.

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

We urge OfS to include mandatory representations from both parties in the complaint ahead of final decision-making on a complaint. This is a vital opportunity to address any factual inaccuracies and to ensure that all relevant information is made available to the decision maker ahead of the process.

If representations are made after OfS has made a decision on what they are 'minded' to do (as it is often worded), then an additional layer of independence must be built into the management of representations to ensure that information is fairly considered.

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

IHE members would welcome further guidance on the information requirements specific to the freedom of speech complaints scheme. As a regulator, OfS can request information that may not be disclosed under other circumstances, as identified by GDPR fair processing legislation. This information is likely to be sensitive, given the nature of the scheme, and could be harmful to individuals involved in the complaint itself.

We urge OfS, as part of their clarification of the investigation process, to implement a review of any information request made of the provider to assess conflict with other legislative and/or compliance matters, such as the Equality Act, and explicitly allow the provider or students' union to make a response to request to identify where conflict or harm may be a concern. OfS should consider this information before finalising any information requirements.



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

Given the broad timescales that OfS has set for submitting complaints and decision-making, OfS should address a respondent's duty to comply should the provider no longer be registered, the provider of the students' union no longer be in the Approved fee-cap category, or the responsibility of the members of the governing body should the provider exit the higher education market during the process of decision-making.

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

We support the role providers have in advertising the scheme, which places it alongside other similar schemes that students can use, including that of the OIA. We urge OfS and OIA to clarify how their schemes differ and the choices students have in making use of both schemes, which would allow providers and students' unions to direct students to information consistently.

We would welcome further clarification of OfS's expectations for annual advertising of the scheme, and expectations for how their code of practice and processes for events should be advertised to speakers not yet invited to speak.

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

As noted above, it is difficult to comment on charges, costs and fees without further clarity on the processes of investigation. It is important that OfS clarify the investigation process and decision-making in its following consultation. Without parameters set on what is appropriate, investigation tools and timelines costs can quickly spiral. OfS should also consider the cost already spent on a provider or students' unions own internal complaints process, and the cost of responding to information requests.

IHE would also urge OfS to consider the implications of any charges, costs, and fees on the wider student experience at the provider. Many IHE members are SMEs, and we are aware that over a dozen providers on the register are micro entities, eligible for the micro-provider fee waiver. OfS should conduct an SME impact assessment on any proposals for charges, costs, and fees to ensure that they do not disproportionately impact smaller providers and their students.

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

IHE welcomes that OfS will seek representations from a provider or students' union before any final decision to publish information, but this should not be as limited as proposed in the consultation document. Representations should be sought in all cases, and in a clear and

systematic manner. We see no reason why OfS should not have, as part of its complaints process, representations related to publishing the outcome, and this becomes critical where the case matter can be sensitive for parties beyond the complaint.

We support the publication of information about the free speech complaints scheme, and welcome information on complaints that have been justified and where they have not. We do not feel, however, that it is necessary or helpful to publish information on every complaint, especially where a complaint was not justified, and publication could be more harmful than helpful. Following the OIA model, the opportunity for the sector and students to access summaries of findings, especially where there were recommendations or suggestions would promote further use of the scheme, and stronger complaint submissions.

Finally, IHE considers it disproportionate to publish all details about every complaint, regardless of the outcome. The implications for individual complainants, those involved in the complaint from the provider or students' union, and the reputation of the provider could be severe, and each should be weighed in the publication decision. To not do so would risk the publication creating more loss than the incident which gave rise to the complaint.

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

We have raised a number of areas which we find unclear and where we would welcome further guidance or information earlier in our response. These include the consideration of commercial sensitivity in eligibility for the complaints scheme, the definition of student, employee, and which aspects of the registered entity must the duty apply to. It also includes the process of investigation, and who within OfS will undertake the decision-making process. We remain unclear on who OfS views as an appropriate representative, and how they will group complaints.

IHE also remains unclear on the process for appealing decisions made under the scheme. Although the practice is not aligned with good practice among industry regulators, OfS has always offered representations as a matter of course, yet has chosen not to apply this consistently in the case of its free speech complaints scheme. This makes it unclear how providers or students' unions can make a complaint about this aspect of OfS's delivery which is not in line with the regulator's code.

We understand this is a new area of regulation, for both OfS and for providers/students' unions. We urge OfS to commit to a review at 12 months after the implementation of the scheme, when we feel experience may make many of these areas clearer, where guidance may currently struggle.

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

As noted above we are very concerned about the potential impact on younger students, and on those overseas who may experience far more negative consequences for some of the decisions in this consultation, than those undertaking traditional, campus-based higher education in the UK post-18.

**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?**

We will cover our specific concerns for student organisations who may be caught by the broad definition of students' union from the act, in the subsequent consultation on regulating students' unions.

We are particularly concerned that OfS has not accounted for the consequences of some proposals on smaller providers, without the legal resources and with limited resources to manage complaints of this nature. Without more proportionate approaches, including more time to resolve internal complaints processes, clarity on those students and staff eligible for the process, and action to limit the impact of costs and fees on existing students, there will be a disproportionate impact on smaller providers.

We are also concerned about the consequences of the lack of clarity on commercial confidential information, and the role of employees with joint teaching and commercial roles. IHE represents an incredible diversity of higher education providers, offering students unparalleled student choice. Our members' partnerships with industry help prepare students for the 21<sup>st</sup> century job market. We feel strongly that these proposals could limit student choice, by pushing industry to place undue distance between themselves and higher education environments in order to protect commercial confidential information.

**Contact IHE**

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