

*GuildHE response to:*

# Consultation on the OfS's new free speech complaints scheme - GuildHE FINAL

*Final Version 5 March 2024*

## About GuildHE

*GuildHE is an officially recognised representative body for UK Higher Education, championing distinction and diversity in the sector. Our 60 members include universities, university colleges, further education colleges and specialist institutions, representing over 150,000 students. Member institutions include some major providers in professional subject areas including art, design and media, music and the performing arts; agriculture and food; education; business and law, theology, the built environment; health and sports.*

## Overview

1. This document provides the GuildHE consultation response on behalf of members to the OfS' consultation on the new free speech complaints scheme.
2. Members received two drafts of the consultation response, firstly on 5th January and then the second draft on 26th February and discussed the consultation response at the GuildHE Council, 25th January, and at the GuildHE EDI Network 26th January. This final draft incorporates comments received from members in these various engagements as well as those received directly.

## Key points

3. Complainants should only be able to take complaints to the OfS once they have completed institutions' own process or after an unreasonable delay. We believe that the proposed 30 days is unreasonable and arbitrary and should be closer to 90 days.
4. There should be a statute of limitations of five years after the initial incident rather than 12 months after the last "adverse incident" which could be many years later.
5. Visiting speakers should not be considered as such until they have gone through the institution's visiting speakers process to prevent confusion about who can make invitations.

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6. There should be more detail on how the OfS will keep down the costs of the scheme to ensure that it doesn't take away from core teaching and learning activities.
7. The OfS should conduct a review of the effectiveness of the scheme after one year.

## FINAL GuildHE Consultation response

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

Universities and colleges often hire out their space for commercial purposes. They already have a legal duty not to deny any individual or group on the grounds of belief or the views, within the law, of individuals or that group. There could helpfully be more guidance on what reasonably practicable steps providers are expected to take to secure free speech for events on their campus or estate that they are not organising.

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

#### **Visiting speakers**

We believe that visiting speakers should have to go through the institution's approval process to become a formally invited speaker or be invited by an officer of the provider in order to become eligible for the OfS complaints scheme.

The OfS suggested approach is highly ambiguous by not clarifying who is able to make invitations or the process that would need to be followed for someone to become a formally invited speaker. This could lead to confusion with any student or staff member being able to issue an invitation, whether they have made the requisite room booking, done relevant due diligence or followed other relevant procedures.

Para 57 considers but rejects a narrower definition of visiting speakers, saying: *"We have proposed a broad definition of 'visiting speaker'. We consider that a narrower definition would risk excluding those who should legitimately be considered visiting speakers. We considered a definition that would restrict 'visiting speakers' to those who had been approved under the organisation's approvals process. However, a refusal to approve an invitation may itself give rise to questions about whether there has been a breach of a duty to secure free speech within the law. We therefore discounted this option."*

We believe that there needs to be some way of defining whether it is a legitimate invitation on behalf of the institution or students' union and the current wording does not do so. In practical terms, we think the OfS needs to reconsider the scope to ensure that there is a legitimacy test built into the regulation - providers (and students' unions) can't be responsible for things that happen on their campus' without their knowledge and neither should the regulator be condoning unofficial events as it potentially puts student safety at risk.

## **Overseas campuses**

The proposals include all students at the registered provider, this would therefore include all students even those at a provider's overseas campuses. The complaints scheme is looking at securing "free speech within the law" - but there needs to be further clarifications as to whether this is the law of the country where the campus is based or English Law? There are many countries where there are additional restrictions on what people are able to say, or indeed other countries where there are more freedoms in relation to free speech. There should be additional guidance from the OfS on their expectations in these examples. We do not believe it appropriate that the OfS - as an English regulator - try to interpret the laws of another country for which they are not expert.

## **Institutional structures**

In addition to clarification about whether overseas campuses are included, there should be additional clarification about the corporate structure of providers and which bodies are included. For example, would this include all organisations in the same corporate structure as the OfS registered body and would this also include franchise and/or validated provision? We believe that the OfS should restrict its activities to just higher education students. If it doesn't then it will result in an unfair system whereby further education students at one institution will be covered by the scheme and not at another institution, just depending on their corporate structure. It may also have the unintended consequence of encouraging institutions to change their corporate structures just to get round specific OfS conditions.

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

### **Completing institutional processes**

We believe that complaints should complete the institutional process before they go to the OfS. This would give the provider the opportunity to put matters right and respect the autonomy of institutions to deal with matters affecting them. There was specific provision for this made in the Higher Education (Freedom of Speech) Act 2023 in Schedule 6A under 5 (2)(b) when it says that "The scheme may include provision that -(b) a free speech complaint is not to be referred under the scheme until the complainant has exhausted any internal procedure for the review of complaints which is provided by the registered higher education provider, constituent institution or students' union about which the complaint is made".

Complaints only going to the OfS once they have completed institutional complaints procedures would prevent the confusion of two complaints processes, the institutional one and OfS one, running in parallel - and potentially coming to different conclusions.

Waiting till the institutional processes are completed would ensure that the OfS isn't overwhelmed by complaints that could have been successfully resolved at the institutional level.

We agree that the OfS should only consider the free speech elements of a complaint. However, these types of complaints are often highly complex including a wide range of issues including

bullying and harassment. This would reinforce the reason why complaints should complete the institutional process before going to the OfS, and would support the OfS in its understanding of whether the action also complied with the potentially impending condition of registration on harassment and misconduct.

Finally, it would prevent the confusion of students part way through an institutional complaint needing to decide if they go via the OfS or OIA route, the latter of which would only be available to them once they have completed the institutional procedures. We therefore believe that complaints should only go to the OfS once they have completed institutional processes.

### **Unreasonable delay - 30 days?**

It is, however, right to suggest that there should be an option for complaints to go directly to the OfS if there is an unreasonable delay in institutional processes, but we believe that this should be closer to the 90 days used by the OIA.

We do not believe that the proposal that complainants are able to go directly to the OfS 30 days after the institutional process commences is reasonable. These cases are often very complex, potentially requiring investigation and additional evidence gathering. There are also practical challenges of identifying a panel and arranging the meeting. For all of this to happen within 30 days feels unreasonable. We also believe that it is important that complaints are reviewed properly rather than trying to rush to meet an arbitrary timeline, we wouldn't want the 30 days period to unintentionally result in less rigorous investigations and processes.

A 30 day period after the incident would also restrict the ability for less formal resolutions that might result in increased understanding rather than taking it straight to complaint. It should be clear that the 30 day limit doesn't include these informal attempts to resolve the complaint, but that the complainant should be able to make it a formal complaint rather than going through the informal processes if they want.

The OIA considers it to be good practice for complaints to be considered within 90 calendar days and so using a different approach would create further confusion between the OIA and OfS schemes. By having the same time limit as other institutional complaints schemes it would prevent the implication that some complaints are more important than others and should be fast-tracked, potentially taking resources away from other schemes.

### **Timetable**

We agree that the OfS only consider complaints received on or after the 1st August and relating to incidents that occurred after that date. We do not believe that institutions should not be held accountable for complaints relating to activities before the complaints scheme came into force. We do however have concerns that the OfS will not be ready to deal with complaints from the 1st August and this feels unnecessarily rushed to put the scheme in place and test its effectiveness. If the OfS decides to stick to the timeline it should review the scheme after a year to identify ways to make it more effective.

## **Students' Unions Complaints Schemes**

It might be helpful to specify to those institutions that do not have a complaint procedure that deals with these complaints that they do not need to create a new process - although they can if they would like. It is likely that in many students' unions, particularly smaller ones, they may not have their own complaints processes and so it should be clear that they do not need to create their own processes but can directly refer complainants to the OfS scheme.

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

We believe that there should be a time-limit after the initial breach as well as after the last occurrence of the adverse consequence. The current proposed time-limits of basing it on 12 months after the adverse consequences last occurred means that there is in practice no time-limit if the complainant argues that these adverse consequences are ongoing.

There should be some form of statute of limitations, not least in terms of the expectations on the provider maintaining records and evidence relating to a case and as the consultation recognises "evidence may have been destroyed and memories may have faded". We would argue that complaints should be brought within 12 months of the last occurrence of the adverse consequence and that this can not be more than five years after the initial incident.

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

We agree that complaints should be submitted in writing and that these should not be anonymous.

We have concerns about the use of legal representatives. It is completely appropriate for a student to be supported through the process such as by a parent, fellow student or staff member. However, since this is not a legal process we do not believe that representations should be made by lawyers as this will either result in an unbalanced case or provoke a litigation arms race. This has been discussed in the sector recently surrounding other complaints and appeals.

Some HEIs do not allow legal representation in their internal processes for the very reason that university complaints processes for students are not legal processes. This would potentially result in a situation where a complainant isn't allowed to use a lawyer in the complaints process at the provider but then brings them in for the OfS complaint - potentially encouraging them to use the OfS scheme rather than completing the institution's own processes. Furthermore, not allowing formal legal representation brings an aspect of fairness (and cost reduction) - not every staff member or student can afford legal representation, and if one party does have legal representation then it puts pressure on the other party to do the same.

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

The current proposal allowing the OfS "discretion to determine what activities to undertake to conduct a review" is ambiguous. The OfS should provide further detail on the kind of processes that they might use when reviewing a complaint. Will there be a panel, what type of people will be

on the panel, will they conduct their own investigations and so on? It will be important for the respondent to have the opportunity to provide evidence to the OfS as well so that the OfS can make informed considerations.

The OfS should provide clear and regular communication with the complainants and those involved in the process to ensure that all those involved know where the complaint is in the process and what progress is being made.

We believe that any complaints involving academic freedom should involve expert academic judgement and need to carefully weigh up institutional responsibilities for maintaining academic freedom.

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

We believe that there should be clear indicative timelines for how quickly the OfS will review complaints and not just “as soon as reasonably practicable after we have received a free speech complaint”. The OfS has undertaken investigations and reviews in the past that have taken several years and so there needs to be much greater clarity about what a “reasonably practicable” time is.

The time-limit should be the same time limit that the OfS considers to be an unreasonable delay for institutions. If the OfS expects institutions to deal with complaints within 30 days, then so should the OfS, or if you introduce a different expectation on institutions then this should apply to the OfS.

Given that this is a new area for the OfS, the OfS should commit to a review of the complaints scheme after 12 months, including engaging with students and providers on their views about how it is working.

The OfS should provide clear guidance on how it will determine the thresholds between the different outcomes of “partly justified” and “justified”, without guidance this boundary may become the subject of expensive judicial reviews.

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

We agree that it is appropriate that the review recommendations and rationale be published. The OfS should reflect on whether a long detailed report may be so context specific that it is not helpful to publish in full for each case, but rather publish case studies drawing out broad themes that would be useful in different contexts. The OfS should consider the way in which it makes recommendations and whether it makes some recommendations directly to the complaint respondent rather than publishes them.

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

No specific comments.

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

In principle we agree that there could be times where group complaints would be appropriate, but this may require more thought for how it would work in practice, as different people may be differentially affected by a particular incident given the highly personal nature of speech and how this impacts on people. This may be less likely to be true in other forms of complaints that the OIA deals with which has recently started dealing with group complaints.

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

Agree - but if the logic of having representations holds for the OfS, and that this may slow down the process, then it should also hold for institutions and the concerns that we have about the outlined relating to the 30 day time-limit from the start of the process.

We also see a difference between the ability to make representations and the formal ability to appeal the outcome of the decision. There must be the ability to review. This is particularly important if these complaints have not already completed an institution's own complaints processes and so the OfS process would be the only stage of complaint. We believe that there should be the possibility for appeal, if it has not already completed an institution process, potentially to the OfS Board.

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

No specific comments.

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

No specific comments.

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

It is appropriate that institutions publicise the scheme through their regular communications channels but the OfS should consider developing some template materials that can be used - especially by smaller students' unions that may not have the same resources to widely publicise the scheme.

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

We welcome that the scheme will be free to complainants but it will be important to ensure that the costs of the scheme do not rise exponentially, as awareness rises and cases get taken to Judicial Review. If the costs are excessive it will result in money being taken away from front-line teaching and learning activities.

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

There is an interesting consideration of whether the OfS needs to publish outcomes in full and for all cases? The OfS should be mirroring accepted sector norms and keeping outcomes confidential unless there is a specific need or a FOI request. We suggest a better course of action would be to mirror the OIA and produce anonymised case studies to keep an emphasis on promoting good practice – this would be more in line with their duties as an arm's length, risk-based sector regulator. This is especially true where the outcome is found not to be justified.

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

Nothing additional to that raised in other responses.

**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?**

No specific comments.

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

The current political narrative around free speech and how this is positioned in relation to harassment of people from particular protected characteristics need to be given due care and consideration to ensure that it does not negatively impact on their experiences. The OfS should publish an Equality Impact Assessment to demonstrate that it has considered these issues in detail.

**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?**

The expectations around dealing with complaints within a 30 day period is likely to disproportionately affect smaller providers and students' unions that are less likely to have the resources to deal as rapidly with these kinds of complex cases.