

Economic Activity of Public Bodies (Overseas Matters) Bill

Universities UK (UUK) parliamentary briefing

This briefing provides a summary of the Bill, outlines our key concerns as well as our position that universities should not be included in scope.

UUK is recommending that universities and other higher education providers are removed from the scope of the Bill.

Summary of the Bill

Background:

The government introduced the Economic Activity of Public Bodies (Overseas Matters) Bill in June 2023 with the intention of delivering its manifesto commitment to ban public bodies from ‘imposing their own direct or indirect boycotts, disinvestments or sanctions campaigns against foreign countries’.

The ‘main targets of the Bill’ are ‘official boycotts’ and ‘official divestment.’ However, the memorandum document acknowledges that it would be difficult to define the precise limits of ‘boycotts’ or ‘divestments’. Therefore, to prevent more subtle forms of targeting, the Bill is cast in broad terms of ‘investment’ and ‘procurement’ decisions.

The Bill will ban ‘public authorities’ as currently defined in Section 6 of the Human Rights Act 1998 i.e., ‘a court or tribunal, and any person certain of whose functions are functions of a public nature’ from boycotting a foreign country or territory, or a UK company, based on their overseas moral or political conduct.’ The scope also includes ‘hybrid public bodies’ in which universities and cultural institutions are provided as examples.

The Bill’s explanatory notes state that universities, as ‘hybrid public authorities’, would only be captured when performing a public function or act. It is currently unclear what activities and decisions of a university would constitute a public function or act.

In the impact assessment document, it advises against only covering institutions that are ‘more traditionally viewed as public bodies’ as it would not fully meet the policy objective. Therefore, the scope is recommended to also include hybrid public bodies such as universities and cultural institutions.

The Secretary of State or Minister for the Cabinet Office may, via regulation, specify a country or territory as exempt. However, Israel and the Occupied Palestinian Territories (OPT) are

featured on the face of the Bill, meaning they could not be later exempted. It is expected that Russia and Belarus will be exempted via regulation as soon as the Bill becomes law.

Those found to be in contravention of the Bill would be given written notice, followed by potential and as yet undefined monetary fines. The government has said that these will be set out via secondary legislation.

For most public bodies, enforcement would be via the Secretary of State or the Minister for the Cabinet Office or Treasury. For higher education providers in England, this would be undertaken by the regulator, the Office for Students.

Parliamentary scrutiny:

The Bill was introduced in the House of Commons in June 2023. It concluded initial Commons scrutiny in January 2024 and has now proceeded to the House of Lords. Second Reading has been scheduled for 20 February.

At Report Stage in the House of Commons, Rt Hon Kit Malthouse MP tabled Amendment 5 which sought to exempt universities as public bodies. UUK had engagement with Kit on this amendment, which was not put to a vote. In other legislative stages of the Bill, MPs raised concerns over reclassifying universities as public bodies as well as implications on freedom of speech.

UUK position

The Bill is (1) a disproportionate solution to the problem it aims to solve and (2) has severe unintended consequences for the higher education sector.

Part 1 of the position:

- We acknowledge that a key aim of the Bill is to address campaigns such as the Boycott, Divestment and Sanctions' (BDS) movement focused on Israel. The [Bill's briefing paper](#) cites examples relating to the BDS movement from local councils. There are no mentions in the briefing paper of universities themselves participating in the BDS movement.
- In fact, [UUK has always opposed](#) any blanket academic boycott of Israeli universities. Of the members (n=42) that responded to our recent survey, none reported directly taking part in the BDS movement.

Part 2 of the position:

- We have wide-ranging reservations about the scope, intent, and implications of the Bill. These include:

- 1) Potential to influence the outcome of the ongoing ONS review into universities' status in the national accounts, and whether they should be reclassified as 'public bodies'.
- 2) Clause 4 of the Bill contradicts duties placed on universities via the [Higher Education \(Freedom of Speech\) Act 2023](#) to uphold freedom of speech and academic freedom.
- 3) It contradicts existing government policy, guidance, legislation, and good practice in relation to establishing international partnerships and collaborations.
- 4) The Bill has a potentially damaging effect on due diligence, inhibiting open discussion and debate and limiting transparency in decision making.
- 5) It would give significant new powers and functions to the Office for Students (OfS). The core provisions of the Bill extend and apply across England and Wales, Scotland and Northern Ireland, but there are contrasting mechanisms as to how this is enforced.

Key areas of concern

1) Potential to influence the outcome of the ongoing ONS review into universities' status in the national accounts, and whether they should be reclassified as 'public bodies'.

Since the early 2000s, universities have been classified as 'not for profit institutions serving households'. The ONS first announced their [review of universities in the UK](#) in January 2017, and were originally meant to report within 12 months. However, this process was paused due to the review of post-18 education and funding, led by Philip Augar. As of December 2023, the [expected timetable for the classification review of universities](#) is:

Name of case:	Expected date of completion:
Universities (Scotland)	Quarter 2 (Apr to Jun) 2024
Universities (Northern Ireland)	Quarter 3 (Jul to Sep) 2024
Universities (Wales)	Quarter 3 (Jul to Sep) 2024
Universities (England)	Quarter 1 (Jan to Mar) 2025

In their [statements in 2017 and 2018](#), the ONS confirmed that the outcome of the review would be that an individual university would either be deemed to be in the private non-financial corporations (S.11002) sector, or will remain classified in the non-profit institutions serving households (S.15) sector.

The ONS regularly reviews legislation and guidance relating to a number of institutions, including universities, to determine whether any changes would have a potential impact on

their classification. In 2017, the ONS said that they were not aware of any legislative (or similar) changes at the time that would put in doubt the private sector classification of universities. However, given there have been substantial legislative and regulatory changes since 2017, as well as a review of the treatment of student loans in the national accounts, the ONS may look at the extent of public sector control in their assessment.

Why would reclassification be an issue for universities?

The reclassification of universities as public bodies would remove their autonomy over borrowing and investment decisions, handing responsibility to the Department for Education (DfE) and the Treasury. Universities would therefore be unable to access commercial lending and be subject to increasing direct controls from government on a whole host of other areas, greatly impacting their institutional autonomy.

We have recently seen the issues facing Further Education (FE) colleges following their reclassification as public bodies after a similar ONS review in November 2022. The government responded to the ONS decision by announcing a further set of controls over colleges to control their activities given that they all now add to public spending.

Relation to the Economic Activity of Public Bodies (Overseas Matters) Bill.

If universities were to be captured by the Bill, we believe this legislation, alongside other recent pieces of legislation and regulation, could lead to the ONS deciding universities should be reclassified as public bodies as part of their ongoing review. This would be hugely detrimental for the reasons outlined above and we would appreciate if parliamentarians could raise this as a consideration in their upcoming scrutiny of the Bill.

2) Clause 4 of the Bill contradicts duties placed on universities via the Higher Education (Freedom of Speech) Act 2023 to uphold freedom of speech and academic freedom. Universities have both legal and moral duties in this space.

Freedom of speech and academic freedom sit at the heart of the UK's higher education sector. Universities are rightly championed for the role they play in driving forward research and innovation, as well as providing students with the opportunity to think critically and engage with different perspectives.

UK universities also have legal duties to uphold academic freedom and freedom of speech. Alongside several existing legislative and regulatory duties placed on universities in this area, the government also recently passed the Higher Education (Freedom of Speech) Act 2023. The Act strengthens the existing 'Section 43' duty to require higher education providers in England to 'actively promote' freedom of speech and academic freedom, and also extends this duty to directly cover students' unions. The Act also:

- Allows for civil claims in the case that a university is found to be in breach of its duty to promote freedom of speech on campus.

- Places a new duty on universities to provide information to the OfS on overseas funding arrangements, so that they can monitor how this funding may inhibit freedom of speech or academic freedom.

The explanatory notes state that Clause 4 of the Bill prohibits bodies from ‘publishing statements indicating that they would participate in [a boycott or divestment] if it were lawful to do so’. This contradicts the policy aims of the Higher Education (Freedom of Speech) Act, by banning the right to express support for boycott or divestment campaigns.

The Bill also contradicts the HE Freedom of Speech Act’s duty to promote academic freedom. As the Bill is drafted, universities would only have to be ‘influenced by’ moral or political disapproval of foreign state conduct to be non-compliant. This could, for example, deter a group of academics from researching and discussing views on a boycott or divestment decision due to the fear of potential litigation or fines for the university. This could have the unintended consequence of restricting academic freedom, especially for those academics with expertise in foreign policy.

3) It contradicts existing government policy, guidance, legislation, and good practice in relation to establishing international partnerships and collaborations.

In developing new relationships with overseas higher education institutions, businesses and states, UK universities comply with national security regulations to help protect national interests. They also consider both moral and political issues as part of their due diligence and duty of care for students and staff:

- The Committee of University Chairs Higher Education Code of Governance notes that it is the responsibility of university Councils / Boards to consider the reputational impact of all partnerships and collaborations, which often include financial aspects.
- The National Protective Security Authority’s Trusted Research Guidance for Academia encourages universities to ‘know their partners’. Considerations include, ‘Are there any potential ethical or moral concerns for the application of your research?’, and ‘Could your research be used to support activities in other countries with ethical standards different from our own, such as internal surveillance and repression?’
- UK Research and Innovation’s Trusted Research and Innovation Principles note that ‘It is important to understand the democratic and ethical values of the country that the partner is based in and where these might differ from our own’.
- Working with the government, UUK created guidelines on Managing risks in internationalisation, designed to explicitly protect values of the academic freedom, freedom of speech and institutional autonomy. Recommendations include ‘due diligence processes, with consideration of the government’s and other guidance and to consider the efficacy of their due diligence processes and how they assess

reputational, ethical and security risks.’ There are dedicated chapters on protecting universities’ reputation and values, people, campuses and partnerships.

- In addition to this guidance, universities comply with regulation aimed at improving national security, including the [National Security and Investment Act 2021](#). The [National Security Act 2023](#) has also recently received Royal Assent, which includes a Foreign Influence Registration Scheme.

In making decisions relating to international investments and procurements, universities take moral, political and reputational considerations into account. As outlined above, this is actively encouraged and backed up by several pieces of government regulation and guidance. We are concerned that the Bill may contradict the intentions of the aforementioned regulation and guidance.

We are also seeking greater clarity as to whether research collaboration, consultancy, and contract research fall under the scope of ‘procurement’ as defined in the Bill. Greater clarity should either be on the face of the Bill or issued in guidance.

4) The Bill has a potentially damaging effect on due diligence, inhibiting open discussion and debate and limiting transparency in decision making.

In the Bill’s current wording, universities only have to be ‘influenced by’ moral or political disapproval of foreign state conduct to be non-compliant. Should merely discussing moral or political considerations potentially leave a public body open to litigation or penalties, it may inhibit transparency, by discouraging open discussion in decision making, and also hinder effective due diligence. By unintentionally discouraging transparency and effective due diligence, there is also potential for this legislation to undo the progress the government and higher education sector had made to help manage security-related issues.

5) It would give significant new powers and functions to the Office for Students (OfS). The core provisions of the Bill extend and apply across England and Wales, Scotland and Northern Ireland, but there are contrasting mechanisms as to how this is enforced.

The Bill would give significant new powers and functions to the OfS, impinging on universities’ autonomy. The OfS would take on responsibility for overseeing a hugely complex and contentious area of regulation which effectively counters their new regulatory powers to ensure universities uphold freedom of speech and academic freedom.

Clauses 6-10 of the Bill provide the OfS with powers to issue written notices requiring a person to provide a wide array of information and to penalise breaches and non-performance. As has been noted, a public body merely needs to be ‘suspected of being in the process of making a prohibited decision or about to make a prohibited statement’. They are obliged to hand over all information ‘likely to be useful’ to the enforcement authority in determining whether an offence has, or is likely to be, carried out.

This power would normally be protected by legal privilege and according to Richard Hermer KC, ‘this would therefore be handing the enforcement authorities more powers than those enjoyed by anti-terrorism police and the security services’. Granting such powers would place significant bureaucratic burden on the regulator and would be a significant overreach into universities’ autonomy.

There are already existing concerns within the sector about the costs and time resource associated with regulation. UUK understands that the OfS is planning to increase its fees for universities in the 2023–24 academic year by 18.5%, some of which is to account for the increased remit of the organisation to oversee its new free speech responsibilities.

Although the OfS is named on the face of the Bill, as the enforcer / authority for universities in England, we understand that for universities in Scotland, Wales or Northern Ireland, this would be the Secretary of State and Treasury. It is unclear why it is the Secretary of State and Treasury in the rest of the UK, but the OfS in England. It is also unclear how this enforcement would be aligned.

We are also concerned that for universities in England, the same body (the OfS) that is responsible for investigating where universities have not upheld their duty to promote freedom of speech and academic freedom on campus, would also be tasked with investigating potential breaches of this Bill, which includes merely expressing a legally held view on UK foreign policy.