

Higher Education (Freedom of Speech) Bill – Second Reading

Date of second reading: Monday 12 July 2021

Background to the Bill

The government has introduced the [Higher Education \(Freedom of Speech\) Bill](#) with the intention of strengthening freedom of speech and academic freedom in higher education in England. This is in response to what it considers to be a ‘chilling effect’ on staff and students at UK universities, who feel unable to express their views. A small number of high-profile incidents are cited as evidence of constraints on freedom of speech and academic freedom.

UK universities are committed to protecting and promoting free speech, which is critical to the success of the higher education sector. There are already several free speech requirements on higher education providers, and universities host thousands of diverse debates and speaker events every year. As such, it is important that additional legislation and duties placed on universities are proportionate and seek to address the small number of incidents which take place across campuses. The sector is keen to work with the government on the proposed legislation and Universities UK (UUK) welcomes the opportunity to demonstrate our members’ full and firm commitment to freedom of speech and academic freedom.

This briefing provides a short summary of the Bill, as well as those areas where we feel further clarification and assurances are required.

Summary of the Bill

The Bill proposes several measures, including:

- The creation of a Director for Freedom of Speech and Academic Freedom on the Office for Students (OfS) Board, as well as a new OfS registration condition on free speech and academic freedom,
- Strengthening an existing duty (known as ‘the Section 43 duty’) to require higher education providers to ‘actively promote’ freedom of speech and extending this duty to directly cover students’ unions,
- Introducing a statutory tort, giving private individuals a right to seek redress for loss incurred as a result of a breach of Section 43,
- Enhancing contractual protections for academics with regard to academic freedom.

As a membership body representing 140 UK universities, UUK has consulted our members to understand the practical implications of these proposals. We have also met regularly with officials from the Department for Education in order to fully understand the proposals and relay our members’ views. Based on these conversations, there are number of areas where further clarification from the government is required. These have been summarised below.

Key points for clarification at Second Reading

There are three areas where universities would welcome further clarification during the Second Reading of the Bill. These are for the government to:

1. Clearly outline how this Bill will interact with existing legislation and other duties which relate to free speech and academic freedom.
2. Provide safeguards to ensure the statutory tort does not lead to universities having to defend themselves against vexatious or frivolous claims.
3. Clarify the role of the OfS Complaints Scheme and Director for Freedom of Speech and Academic Freedom in relation to that of the existing ombudsman, the Office of the Independent Adjudicator for Higher Education (the OIA).

One: Clearly outline how this Bill will interact with existing legislation and other duties which relate to free speech and academic freedom.

The legal and regulatory framework around freedom of speech is complicated and there are many different pieces of legislation which universities need to consider in light of freedom of speech. Some of the most notable examples include the Education Act 1986, the Equality Act 2010, the Prevent duty, as well as other requirements set out by professional, statutory and regulatory bodies (PSRBs).

There is significant concern over what the unintended consequences of this Bill could be. For example, this Bill could make it easier for those who promote conspiracy theories or 'alternative facts' to speak on university campuses – as well as provide them with the opportunity to take the university or students' union to court if they feel they have been denied a platform (see below for further details). Particular concern has been expressed on this point in relation to counterterrorism and the Prevent duty, antisemitism (particularly in the context of the IHRA definition), climate change, as well as 'anti-vax' campaigns.

Concern on this point also extends to academic freedom. The Bill proposes enhancing protections for staff to secure their right to academic freedom. In particular, this aims to ensure that academics who express lawfully held views will not suffer a reduced likelihood of securing promotion, or a different job within the same institution, as a result. Significant legal protections, including the Equality Act 2010 and employment law, are already in place to ensure that individuals are not treated unfairly with regards to securing further employment or promotion and academic staff directly employed by universities often have a term in their employment contracts protecting their right to academic freedom (which is a pre-existing condition of registration with the regulator for higher education, the OfS).

UUK understand that the government intend to provide guidance to support universities regarding the Bill. Nonetheless, before guidance can be produced and ahead of this Bill coming into force, it is essential the government outline how they intend the Bill to interact with existing legislation and outline how universities will be expected to balance their differing duties and responsibilities with respect to free speech and academic freedom. In due course, we would also welcome further detail on how the Bill will be monitored to ensure it is having the desired effect and has not led to any unintended consequences.

Two: Provide safeguards to ensure the statutory tort does not lead to universities having to defend themselves against vexatious or frivolous claims.

The Bill contains provision to create a statutory tort for individuals who suffer loss resulting from a breach of the strengthened Section 43 duty. The current Section 43 duty (contained within the Education Act 1986) requires universities to take “*such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.*” Strengthening this duty involves shifting the emphasis from ‘protecting’ to ‘actively promoting’ free speech and provides a legal route through which an individual may sue a university or students’ union if they feel they are not adequately meeting this new duty.

Universities have concerns that, without appropriate safeguards, the creation of this tort may encourage a ‘compensation culture’, leaving universities exposed to the risk of spurious or vexatious claims. For example, alongside concerns around the tort providing a route for those who promote conspiracy theories, ‘alternative facts’, or views which, though not illegal, are repugnant could then sue a university or Students’ Union, the Bill also provides little protection from a funded and coordinated campaign which could look to launch claims against several institutions. This could lead to courts becoming filled with minor disputes, while incurring significant cost, time, and reputational damage to universities, and ultimately detracting from their efforts to champion freedom of speech.

To help mitigate against this risk, UUK would welcome clarification on:

- how individuals will be expected to demonstrate they have suffered a material loss as a result of a breach of Section 43,
- whether there will be a defined financial threshold for this loss, and
- whether there will be any requirement for individuals to exhaust other complaint routes available to them before pursuing redress by means of the tort.

Three: Clarify the role of the OfS Complaints Scheme and Director for Freedom of Speech and Academic Freedom in relation to that of the existing ombudsman, the OIA.

The Bill also proposes creating the role of a Director for Freedom of Speech and Academic Freedom, who would be appointed to the OfS Board. Among their responsibilities, the Champion will have the power to investigate individual claims relating to breaches of the registration conditions relating to freedom of speech and recommend redress to the Board.

While it is right that individuals are provided the opportunities to seek the right of redress, UUK has concerns that the current proposal risks duplicating the role of the existing ombudsman for student complaints, the OIA, with that of the regulator, the OfS. We understand that students would be asked to choose between one of two different avenues to pursue complaints relating to free speech or academic freedom, which will each have different powers regarding the type of redress they can offer. The OfS Director would, for example, be able to consider the whole complaint – including those not related to freedom of speech – but their recommendations would only be able to relate to the freedom of speech aspects of the complaint. In addition, it is not clear what would happen if two individuals complained about the same incident, but opted to pursue different avenues, with one applying to the OfS and another to the OIA.

Furthermore, it has been suggested that universities would be able to use the new Director role as a 'two-way resource' who could advise universities on related issues, as well as being the primary route for concerns. While this could provide a welcome resource for universities and students, there are concerns that this further confuses the role of the new Director and raises questions over whether it would then be appropriate for them to oversee a complaint which they had previously advised on.

We understand the government are keen to ensure that academic staff and external speakers – who do not have access to the OIA – have access to a right of redress, but this proposal risks creating an unnecessarily confusing situation for students, confuses the role of a regulator (OfS) and an ombudsman (OIA), and could potentially result in inconsistent judgements between the two bodies in otherwise similar cases. UUK would welcome further clarity on how the government intend the Complaints Scheme to work in practice and what the role of the OfS Director for Freedom of Speech and Academic Freedom will be in relation to the OIA.

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