

Higher Education (Freedom of Speech) Bill

Universities UK (UUK) parliamentary briefing June 2022 – Report

Stage and Third Reading amendments which have been tabled for debate at Report

Background to the Bill

The UK government introduced the Higher Education (Freedom of Speech) Bill in 2021, 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

- x 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.
- x Introducing a statutory tort, giving private individuals a right to seek redress for loss incurred as a result of a breach of Section 43.
- x 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 memTJ 0.06 (y)8.2 (un)15 me alotivoti 0.Bc9J 0.0017 ()dl (TJ 0.0n)0.6 (l t(r)-5.h12. (r)-5)11.1

UUK understand that the government intend to provide guidance to support universities regarding the new duties contained within 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. This is particularly significant when considering duties which can often appear to overlap or sit in tension with one another - such as the Prevent duty (which has legal protection)

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.

(b) proposals to reform the Human Rights Act

The Ministry of Justice (MoJ)

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. Although details have not been confirmed, 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.

New Clause 2 (NC2) tabled by Secretary of State Nadhim Zahawi MP) - “Duty to disclose overseas gifts and contracts affecting freedom of speech”

NC2 makes provision for the reporting of overseas funding by registered higher education providers and their students’ unions.

We welcome that NC2 is narrower in scope than NC1 with regard to requiring the OfS to provide an annual summary report outlining general themes and trends, as opposed to publishing a list of all financial disclosures. While we recognise that the NC1 amendment

tabled by Jesse Norman MP, aims to address the issues also highlighted by NC2, UUK does not support NC1. Therefore, we would like to work with the government on NC2 and address several elements of the amendment where UUK believes further clarification is required

Reporting threshold

Given the broad nature of financial activity that institutions will be required to report to the OfS, including research income, it will be vital that a proportionate and reasonable reporting threshold is set in regulations following the Bill. For example, equivalent legislation in the United States has a reporting threshold of \$250,000.

A risk based approach

Regarding the definition of “relevant overseas person”, we welcome the inclusion in the amendment of exemptions for ‘prescribed countries’ and wish to seek clarification on the list of prescribed countries for exemption. As a minimum, we believe trusted partner countries that are exempt from requirements under the Academic Technology Approval Scheme (ATAS) should also be excluded from the requirements. NC2

Defining “constituent institutions”

The NC2 duty applies to “constituent institutions” of a higher education provider. UUK would welcome clarification that ‘constituent institutions’ relates to institutions that fall directly within financial oversight of the relevant higher education provider as opposed to all bodies associated with a higher education provider which could therefore potentially include spin outs, businesses and others working with trusted partners, or whose operations do not and will not impact on freedom of speech and academic freedom within higher education.

Protecting commercially sensitive information

While the proposed amendment requires the OfS to provide only a summary report of overseas gifts and contracts, we would welcome clarification on whether the information that institutions would be required to submit to the OfS related to overseas gifts and contracts would be subject to freedom of information requests.

New Clause 3 (NC3) tabled by Alicia Kearns MP - “Duties regarding language and cultural programmes”:

NC3 makes provision for enhanced disclosure requirements around foreign language, culture, or exchange programs or courses. It would require that higher education providers (HEPs) “promptly report” any new partnership with an overseas organisation delivering foreign language, culture or exchange programmes or courses, to the OfS and Education Secretary. Following this, the Education Secretary would be given the power to issue a direction to the HEP to either terminate the partnership or for an alternative organisation for the partnership.

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This challenge has been exacerbated by ongoing ~~issues~~ ^{changes} over legal landscape and concerns over the context in which any new legislation would sit. The existing landscape is complex and, as such, there is often confusion and concern raised when discussing how universities