

Higher Education (Freedom of Speech) Bill

Universities UK (UUK) parliamentary briefing October 2022 – Lords Committee Stage

This briefing presents our key concerns and where clarification and assurances are still required on the Higher Education (Freedom of Speech) Bill at its Lords Committee Stage. It also encourages peers to consider amendments that aim to address these concerns and ensure that the Bill is proportionate, avoids any unintended consequences and does not lead to unnecessary burden or duplication of existing duties.

Academic freedom and freedom of speech sit at the heart of the UK's higher education sector. They 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. Without them, universities would not be able to fulfil one of their most essential aims: the advancement of understanding and pursuit of truth.

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 legislation and UUK welcomes the opportunity to demonstrate our members' full and firm commitment to freedom of speech and academic freedom. UUK has particularly welcomed the Bill's shift from protecting free speech and academic freedom to more active and visible promotion within the sector. You can find more about how the sector is already responding to this shift in the appendix on p.9.

Key points for clarification or amendment at Lords Committee Stage

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. There are four main areas of concern where we would welcome further clarification or amendments that seek to address these. These are for the government to:

1. Clearly outline how this Bill will interact with (a) existing legislation and other duties which relate to free speech and academic freedom, and (b) new proposals put forward in the Bill of Rights Bill and Online Safety Bill.
2. Remove the provision in the Bill which would create a statutory tort to avoid 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).
4. Ensure that duties on overseas funding are targeted with risk-based exemptions and proportionate reporting that will protect UK values and our national interest as universities continue to pursue new knowledge and commercial partnerships.

One: Clearly outline how this Bill will interact with (a) existing legislation and other duties which relate to free speech and academic freedom, and (b) new proposals put forward in the Bill of Rights Bill and Online Safety Bill

(a) existing legislation and other duties which relate to free speech and academic freedom

The legal and regulatory framework regarding academic freedom and freedom of speech is complex and there are many different pieces of legislation which universities need to consider. Some of the most notable examples include the Education Act 1986, the Human Rights Act 1998, the Equality Act 2010, the Prevent duty, as well as other requirements set out by professional, statutory and regulatory bodies (PSRBs).

UUK understand that the government intend to provide guidance to support universities regarding the new duties contained within 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 several other overlapping duties placed on universities also have legal protection within the existing landscape – such as the Prevent duty and Equality Act. Existing guidance is clear that these existing duties do not unnecessarily inhibit free speech or academic freedom, as has been suggested, and so we would welcome reassurances from the government to clarify this point during the Committee stage. 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.

We encourage peers to support amendments to the Bill that specify additional legislation that universities should have due regard to when judging decisions related to freedom of speech. This will help universities to traverse and balance the complex legal and regulatory framework that already exists around freedom of speech.

(b) new proposals put forward in the Bill of Rights Bill and Online Safety Bill

There are currently two pieces of legislation making their way through Parliament that could conflict with the HE FOS Bill – the British Bill of Rights Bill and the Online Safety Bill. We are aware that the timing and prioritisation of these Bills has changed in the context of the new government and since the HE FOS Bill was introduced. If the two Bills were to remain or return, albeit in different forms, our concerns would be on the following.

Following consultation on proposals to reform the Human Rights Act (HRA), the Ministry of Justice (MoJ) brought forward a new British Bill of Rights Bill that seeks to strengthen free speech to become a legal “trump card”. UUK members have raised concerns about potential unintended consequences relating to reforming the HRA. In particular, the MoJ consultation made reference to a strengthened section 12 of the HRA, which applies “*when a court is considering granting any relief that affects freedom of expression.*” This has been reflected in Clause 22 of the draft Bill.

At the same time, the Department for Digital, Culture, Media and Sport (DCMS) has brought forward a Bill designed to increase safety online, the Online Safety Bill. While universities would not be covered directly by the Online Safety Bill, given many incidents related to on campus free speech and academic freedom are covered extensively on social media and often involve students, staff, and / or visiting speakers, it is not clear how the two Bills will interact. Given the porous boundaries between the two, there is a risk that an already complex landscape is further complicated with a new category of speech which is deemed legal for an individual to say on campus, but illegal or harmful for them to type online.

Both of these points are significant given measures included within the HE Freedom of Speech Bill look to make it easier for an individual to launch a complaint or take a university to court over a breach regarding free speech. This could change the balance of legal risk institutions have to consider regarding freedom of speech and thereby lead to universities adopting a more risk-averse approach to speakers and events (covered in more detail below).

To help mitigate against this risk, UUK would welcome clarity from government on how the measures included within the Bill of Rights Bill and Online Safety Bill should be read when considering the HE FOS Bill, particularly in relation to the OfS Complaints Scheme and statutory tort.

Two: Remove the provision in the Bill which would create a statutory tort to avoid 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 the creation of this tort may encourage a ‘compensation culture’, leaving universities exposed to the risk of spurious or vexatious claims. This concern is particularly relevant given the Bill enables someone to bring forward a claim if they believe they have suffered “adverse consequences” as a result of “action or inaction” of the governing body of a registered higher education provider. Such wording is not defined and is therefore vague and unhelpful, posing a risk that the tort (and OfS Complaints Scheme) could be used to launch vexatious or frivolous 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 and leading to more risk adverseness across the sector.

We have continuously raised our concerns regarding the tort since the Bill was introduced to Parliament in May 2021. However, we have yet to receive the necessary assurances or clarifications that would address these concerns.

We are also deeply concerned about the combination of the unintended consequences of the tort outlined above, with the lack of clarity around the role of the OfS and OIA in regard to the complaints scheme, as well as potential politicisation of the role of the OfS Director.

We would therefore welcome support for the cross-party amendment tabled by Lord Stevens and Lord Willetts to prevent the creation of a new statutory 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. 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.

That is why UUK also feel it is critical that the new OfS Director has the requisite experience of the higher education sector. Particularly following on from previous comments from Peter Riddell, the former Commissioner for Public Appointments, who criticised the appointment process for new board members at the Office for Students, stating that a previous assessment panel lacked higher education expertise and was “basically loaded” with people with political connections. These concerns were outlined further by the Institute for Government who noted that “problematic prominent examples of public appointments set a damaging tone which...risks corroding the ability of government to attract the best talent to serve as public appointees more widely.”

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 amendments to the Bill that would require the new OfS Director:

- Has the necessary experience and understanding of higher education and the complex legal framework in place around free speech.
- Has not been a member of/donated to a political party for at least 2 years.

This will be critical to ensure they are able to manage complaints both effectively and fairly. Adding information on R&D partnerships and commercial arrangements to the list of issues to be considered by the Director also underlines the importance of securing an appropriate appointment.

UUK would also welcome a statement of intent from the government outlining how they 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.

Four: Ensure that duties on overseas funding are targeted with risk-based exemptions and proportionate reporting that will protect UK values and our national interest as universities continue to pursue new knowledge and commercial partnerships.

In developing new relationships with overseas higher education institutions, businesses and states, UK universities comply fully with national security regulations to help protect national interests and have well established processes to ensure new partnerships fully respect a commitment to values like freedom of speech and academic freedom that are central to their public purpose.

It is right that we continue to keep the activities outlined in Clause 9 under review, and that the way universities work with overseas partners is scrutinised appropriately and proportionately. We therefore welcome that Clause 9 is narrower in scope than was proposed by an earlier amendment in the Commons 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. We also welcome the confirmation that it will take a more risk-based approach, with trusted partner countries that are exempt from requirements under the Academic Technology Approval Scheme (ATAS) also now excluded from the requirements of the duty.

There are, however, still several practical concerns with Clause 9. Firstly, UUK is concerned about the potential disclosure of commercially sensitive information to the Office for Students, which could make it more challenging to pursue new trading opportunities

overseas and therefore, impact on wider government objectives relating to economic development and building a Global Britain.

In addition, 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. It is also unclear whether financial reporting requirements will be on an individual or cumulative basis, the latter of which would result in significant additional bureaucracy as it would require universities to collect all relevant financial activity in case it subsequently exceeded the threshold. Finally, with other pieces of legislation relating to overseas funding and influence currently being considered by Parliament, government should ensure there is no duplication of duties or reporting requirements which are placed on universities.

UUK would encourage amendments that aim to broaden the exemptions of Clause 9 so that a wider range of R&D, educational and commercial activities would be exempt, and ensuring that it avoids any unintended consequences that harm the UK's global competitiveness.

We would also welcome clarification on whether any commercially sensitive information, which institutions would be required to submit to the OfS related to overseas gifts and contracts, would be subject to freedom of information requests.

We would also welcome clarification that any threshold and reporting requirement placed on universities are based on individual, rather than cumulative, financial activity.

Response to amendment tabled by Lord Johnson of Marylebone

This amendment would include income from international tuition fees in the definition of overseas funding and add a duty for the OfS to monitor 'over-reliance' on overseas funding from a single country.

The monitoring duty that would be placed on the OfS would provide duplication of existing data on overseas funding which is already collected by the Higher Education Statistics Authority (HESA) at an aggregate level and using this it is already possible to identify patterns and where international fee income is coming from.

Clause 9 of the Bill also addresses this area to some extent by saying "The OfS must monitor the overseas funding of registered higher education providers and their constituent institutions with a view to assessing the extent to which the funding presents a risk to the matters in subsection (2)".

The OfS has also already been directed to monitor over reliance from a single source of funding. In a February 2021 guidance letter to the OfS, the then Secretary of State, Rt Hon Gavin Williamson CBE said “Universities UK produced important guidelines and recommendations to help providers manage risks in internationalisation. I would like the OfS to monitor the adoption of these recommendations by providers and continue to support the sector to manage these risks to the reputation, integrity and sustainability of individual institutions, as well as to the sector as a whole”.

UUK’s security guidelines (pg 20) recommends that due diligence to mitigate security-related risks should be undertaken regularly, with regular reviews in relation to international partnerships and projects, explicitly mentioning tuition fee income as part of this alongside other sources of income such as investments, donations, philanthropy, commercialisation, capital investment and staff honorary and consultancy appointments.

Appendix:

UUK work to promote free speech and academic freedom

Universities UK, alongside Advance HE and Guild HE, has recently held a series of workshops to help further understand some of the very real and practical challenges which universities are often faced with when making decisions regarding free speech and academic freedom.

This work is particularly significant in the context of the Higher Education (Freedom of Speech) Bill but is important and necessary work irrespective of the legislation given the existing duties placed on universities.

During the workshops, attendees welcomed the Bill's shift from protecting free speech and academic freedom to more active and visible promotion within the sector. The workshops also heard positive examples of how universities have introduced or strengthened existing initiatives that seek to outline the importance of academic freedom and free speech to students and staff.

These workshops have been the start of a process to help identify where further guidance and support could help members in bringing together three strands of work which are often perceived to sit in tension with one another:

- the need to promote free speech and academic freedom
- the importance of good campus relations and EDI work
- and maintaining a zero-tolerance towards harassment

We hope that through this work we can help equip those working across institutions but particularly at departmental level to manage areas of tension, recognising that this can often be where challenges arise.

This challenge has been exacerbated by ongoing questions 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 should navigate this issue.