

# Higher Education (Freedom of Speech) Bill

## Universities UK (UUK) parliamentary briefing June 2022 – Lords Second Reading

This briefing provides a short summary of the Bill, as well as those areas where we feel further clarification and assurances are still required ahead of the Bill's Second Reading in the Lords.

### **Summary of developments at Commons Third Reading**

The Higher Education (Freedom of Speech) Bill completed its final stages in the House of Commons on 13 June 2022. A government-led amendment (now Clause 9) was added to the Bill that would require higher education providers to report overseas funding of their institutions, constituent organisations and students' unions to the Office for Students (OfS). This includes gifts, research contracts/grants and educational partnerships.

In response to a proposed amendment tabled by Alicia Kearns MP on cultural and language partnerships, it was confirmed by the minister that the Bill would explicitly include "educational partnerships, including Confucius institutes" and that accompanying guidance would make clear that the OfS and new Director for Freedom of Speech and Academic Freedom would be able to impose a "wide range of proportionate" remedies as specific conditions of registration. Further details and UUK's response to Clause 9 can be found on p.6.

Reforming the Human Rights Act may have led to the more restrictive definition of academic freedom put forward in the original wording of the Higher Education (Freedom of Speech) Bill that included a caveat that academic freedom exists only within an academic's "field of expertise". UUK therefore welcomes the addition of Amendments 1, 2 and 16 to the Bill, which remove the express limitation that academic freedom covers only matters within an academic's field of expertise.

### **Background to the Bill**

The UK government introduced the Higher Education (Freedom of Speech) Bill in May 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 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 UUK welcomes the opportunity to demonstrate our members' full and firm commitment to freedom of speech and academic freedom. UUK has also 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.7.

## Summary of the Bill

The Bill proposes several measures, including:

- The creation of a Director for Freedom of Speech and Academic Freedom on the 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.
- A duty to disclose overseas gifts and contracts affecting freedom of speech.

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 still required:

### 1. Key points for clarification at Lords Second Reading

There are four areas where universities would welcome further clarification during the Bill's Second Reading in the Lords. 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) proposals to reform the Human Rights Act.

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).
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) proposals to reform the Human Rights Act**

### *(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.

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) has recently consulted on proposals to reform the Human Rights Act (HRA), including a new 'British Bill of Rights' that would seek to strengthen free speech to become a legal "trump card". UUK members have raised concerns about potential unintended consequences relating to reforming the HRA.

The MoJ consultation also makes 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 is significant given measures included within the Bill look to make it easier

for an individual to take a university to court over a breach regarding free speech (covered in more detail below).

UUK believes it is right that, where an individual feels they have suffered harm due to a breach of the Section 43 duty, they have the right to redress. Nonetheless, feedback from our members suggests the creation of the tort will change the balance of legal risk institutions have to consider regarding freedom of speech which could lead to universities adopting a more risk-averse approach to speakers and events.

To help mitigate against this risk, UUK would welcome clarity on how a strengthened section 12 of the Human Rights Act would impact on the statutory tort set out in the HE FOS Bill.

## **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. 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.

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

- how individuals will be expected to demonstrate they have suffered adverse consequences or a material loss as a result of a breach of Section 43,
- whether there will be a 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. 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 practise and what the role of the OfS Director for Freedom of Speech and Academic Freedom will be in relation to the OIA.

We would also welcome a guarantee that the new OfS Director will have the necessary experience and understanding of higher education and the complex legal framework in place around free speech. This will be critical to ensure they are able to manage complaints 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.

#### **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 the NC1 amendment 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. However, 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.

The duty outlined in Clause 9 also applies to “constituent institutions” of a higher education provider. We are concerned that this could have the unintended consequence of including 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.

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.

UUK would welcome assurance 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.

UUK encourages the government to review the range of activities covered by Clause 9 and broaden exemptions so that a wider range of R&D, educational and commercial activities would be exempt.

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

## **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.