

Higher Education (Freedom of Speech) Bill – Statutory Tort

Universities UK (UUK) parliamentary briefing January 2023

This briefing presents UUK’s concerns around the statutory tort provision of the Higher Education (Freedom of Speech) Bill, ahead of its remaining parliamentary stages. It also outlines assurances we are seeking to the guidance that is being produced by the Office for Students (OfS), in relation to the Bill.

UUK has continuously raised the sector’s concerns about the tort since the Bill was introduced to Parliament in May 2021. During the Bill’s Lords stages, peers from across the political spectrum echoed these concerns and opposition to the tort’s inclusion in the Bill included former Conservative Ministers, senior crossbenchers, opposition frontbenchers and legal experts.

This strength in opposition led to the removal of the tort, via amendment at Report Stage in the Lords. While we welcomed the tort’s removal from the Bill, we are now concerned with the government’s intention to bring it back during the Commons consideration of amendments made in the Lords.

Our position remains that the tort should not stand part of the Bill, however, if it is to be reinstated, it must be implemented in as proportionate manner as possible. This means, at the very least, replicating the safeguards which were proposed by the government at Report Stage in the House of Lords. These safeguards were designed to ensure the tort is used appropriately and as the government had intended, effectively helping to raise the threshold for bringing a claim against a university (or students’ union). They would also make frivolous or vexatious claims significantly harder to bring against members as it effectively requires someone to have gone via the OfS or OIA before launching civil proceedings.

Background

Provision for a statutory tort within the Higher Education (Freedom of Speech Bill) would provide a legal route 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 tort will enable 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.

The cumulative impact of this could, counterintuitively, be to exacerbate any “chilling effect” on campus with universities adopting a more cautious and risk-adverse approach to speakers and events given the increased risk of litigation.

OfS guidance

There remain several questions over how the OfS intends to implement what amount to significant new duties and responsibilities contained within the Bill. This includes, but is not limited to, questions relating to how the new OfS Complaints Scheme will operate (including how it will differ and interact with the existing ombudsman, the Office of the Independent Adjudicator (OIA), the criteria and evidence upon which the OfS will launch their own investigatory action, and the timescales for when new duties will take effect.

Alongside this, UUK understands that the OfS is planning to increase its fees for universities by 13%, some of which is to account for the increased remit of the organisation to oversee its new free speech responsibilities. This comes at a time where there are already widespread concerns within the sector about the time and resource cost of regulation.

With the additional regulatory burden that this Bill will bring, it is surely fair to expect the Department for Education (DfE) to burden more of the associated costs and ensure, at a

minimum, that the sector is consulted on any new conditions of registration resulting from the Bill and any associated guidance, in an effective and timely manner.

We would welcome confirmation from the minister that they expect, and will request, the OfS to consult the sector on both the new registration condition and accompanying guidance in an effective and timely manner and ensure there is a sufficient implementation period to give universities time to prepare for the Bill coming into effect.

HE sector's work to promote free speech and academic freedom

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.

UUK recently published a [cross-sector statement](#) reaffirming the sector's commitment to upholding and promoting freedom of speech and academic freedom. The statement will form the basis of future work which we will be undertaking to support members in promoting academic freedom and free speech, alongside other duties once the Bill comes into effect.

UUK has also recently tackled some of the misperceptions about free speech and academic freedom at universities [our website](#).