Free Speech Union briefing

The Higher Education (Freedom of Speech) Bill 2021

November 2021

Why we need a Free Speech Bill

There is a free speech crisis in universities which stands in direct contradiction to the British values of mutual tolerance, fairness, open-mindedness, and intellectual freedom.

The Higher Education (Freedom of Speech) Bill is a vital piece of legislation that looks to strengthen the right of academics to "discuss, debate, and debunk other views".

It recognises the threat posed by a growing intolerance of dissenting viewpoints on campus, and that there are "too many reported instances where students or staff have been silenced or threatened with a loss of privileges".

Dr Jordan Peterson was banned from Cambridge University in 2019, Kathleen Stock has been run out of the University of Sussex, and at Kings College London one in three academics are self-censoring for fear of career-repercussions or physical harm.

Pollster Dr Frank Luntz says that 66% of British people believe that "we have gone too far with cancel culture". And this phenomenon is most pernicious in the Higher Education sector.

The Objectives of the Bill

Gavin Williamson, Second Reading 12 July: "Freedom of speech is a fundamental right in any civilised country but especially for students and faculty in higher education, which has always been a crucible for new ideas and ways of looking at the world. Staff and students should be free to discuss, debate and debunk other views."

Four ways in which the Bill could be even better

1. The Bill does not protect academics if they comment on a topic outside their "field of expertise".

- "Academic freedom", the ability to question received wisdom and put forward controversial opinions, is limited by the Bill to an academic's "field of expertise".
- This is difficult to define and risks overly restrictive interpretations of what constitutes an academic's proper "field". Could a professor of international relations criticise efforts to 'decolonise' the curriculum in another department without fear of repercussions?

- This could have a chilling effect on the willingness of academics to question and test received wisdom for fear that they may be stepping outside the realm of what could be considered their "field of expertise".
- This could potentially dissuade academics from participating in debates surrounding free speech, British history, and wider British values.

2. The Bill does not enable 'cancelled' academics to seek redress through the Employment Tribunal.

- The Bill creates two new remedies for academics and students engaged in disputes with universities concerning freedom of speech or academic freedom. The first is the new Office for Students (OfS) complaints scheme set out in clause 8 of the Bill. The second is the new statutory tort – the right to sue a university for failure to secure freedom of speech – set out in clause 4.
- Both routes will create a new regime and culture of free speech protection at English universities and are to be welcomed. However, the Bill should be amended so that academics, who are also employees with defined rights in employment law, have a third route – the right to take their university to the Employment Tribunal.
- The OfS complaints scheme is a welcome and invaluable tool in cases involving students, and in cases where an academic is sanctioned by a university but not dismissed. However, in serious cases where an academic is dismissed for exercising their right to freedom of speech, the situation changes, and the OfS scheme may not be sufficient, particularly if the political wind changes and a Director of Free Speech and Academic Freedom (the Free Speech Champion) is appointed who is not a robust defender of free speech.
- However, for a dismissed academic to take the other route – bringing a High Court claim against their former employer under the new statutory tort – would be prohibitively expensive. That means only those with substantial means, or a rich benefactor, could afford it. To rectify this, the Bill should: (a) give jurisdiction over claims brought under the new statutory tort to the Employment Tribunal, where the losing party is not compelled to pay the other side's costs; and (b) state clearly that losses arising from dismissal can be claimed under the statutory tort. In the absence of these changes, academics dismissed for exercising their right to freedom of speech would not be able to bring claims in the ET.

3. The Bill does not stop universities from using "security costs" asan excuse to stifle free speech.

- There are several examples in recent years of universities using the excuse of "security costs" to try and cancel external speaker events.
- In 2020, Bristol Students' Union demanded £500 in "security costs" from the Bristol Middle East Forum as a condition of allowing it to invite Mark Regev, the then Israeli Ambassador, despite not asking for anything to cover security when the same society invited his Palestinian equivalent.
- Also in 2020, the Jewish Society at Lancaster University was asked to pay £1,500 towards "security costs" as a condition of inviting Mark Regev. Because the Society couldn't afford this, the event was cancelled.
- It is essential to close the loophole which allows universities to cancel events via the back door by asking student groups to cover "security costs".

4. The Bill does not prevent the Equality Act 2010 being weaponised to restrict free speech.

- The free speech provisions in this Bill are undermined by the open-ended definition of "harassment" in the Equality Act 2010 (EqA) which doesn't make exceptions for discussions which have taken place for scientific or academic purposes.
- Higher Education institutions could – despite the Higher Education Bill – continue to place limits on academic freedom by invoking their legal duty under s.26 of the Equality Act to protect members of the university with certain characteristics from "harassment". That sounds uncontroversial, but the difficulty is that some universities define "harassment" to include allowing people to express points of view that some members of protected groups find objectionable. For instance, two law professors – Rosa Freedman and Jo Phoenix – were no-platformed by Essex University in 2019 on the grounds that giving them a platform to argue that transwomen shouldn't be treated as if they're legally indistinguishable from biological women would have constituted "harassment" of trans students.
- To avoid the EqA being invoked in this way to circumscribe free speech on campus in future, we suggest amending the Bill to make it clear that when controversial points of view are expressed in discussions

taking place for a scientific or academic purpose, s.26 of the EqA does not apply.

- This amendment will not open the door to hate speech for two reasons. First, it preserves the prohibition on purposeful harassment (i.e., speech which has the deliberate aim of violating someone's dignity). Its focus in on excluding the free exchange of ideas from charges of unintentional harassment. Second, universities would remain free to prohibit genuine hate speech, such as Holocaust denial. This amendment would not affect that right.
- We also believe the Bill should be amended to stop the Prevent Duty being invoked to override the robust free speech protections it puts in place.

Solutions

1. Remove the reference in the Bill to "field of expertise".

This is a matter of common sense and open-mindedness. It cannot be right to offer less robust free speech protections for academics who stray outside their "field of expertise".

Part A1 (6) of the Bill should remove the provision which refers to "field of expertise".

2. Insert a new clause against unfair dismissal in line with the 1996 Employment Act.

The Bill introduces a new statutory tort to protect academics from unfair dismissal. However, this will be a damp squib if the Bill's OfS scheme remains the primary body tasked with reviewing such claims.

This is a matter of fairness. Given the important nature of their work, academics should not face unjust consequences for exercising their lawful right to free speech without having adequate recourse to the Employment Tribunal.

Insert a new clause – A7 – which states that an academic shall be considered "unfairly dismissed" if he or she is dismissed in contravention of a university's duties under the Bill, and the academic will then have recourse to the protections offered by the Employment Rights Act 1996 (The Employment Tribunal).

3. Close the security cost loophole.

There is a straightforward way to close this loophole. At clause 1, amend subsection A1(3) so that universities must bear “any reasonable cost incurred in securing such safe use of the premises or facility”.

4. Ensure that this Bill excludes academic debate from the EqA’s definition of “harassment”.

Provide academic and scientific debate with a limited exception from the definition of “harassment” in the EqA.

Insert a new clause – A1(3A) – stipulating that conduct that constitutes, or forms part of, a discussion of an academic or scientific matter in a higher education setting shall not constitute conduct having the unintentional effect of harassment under s.26(1) of the Equality Act 2010.

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