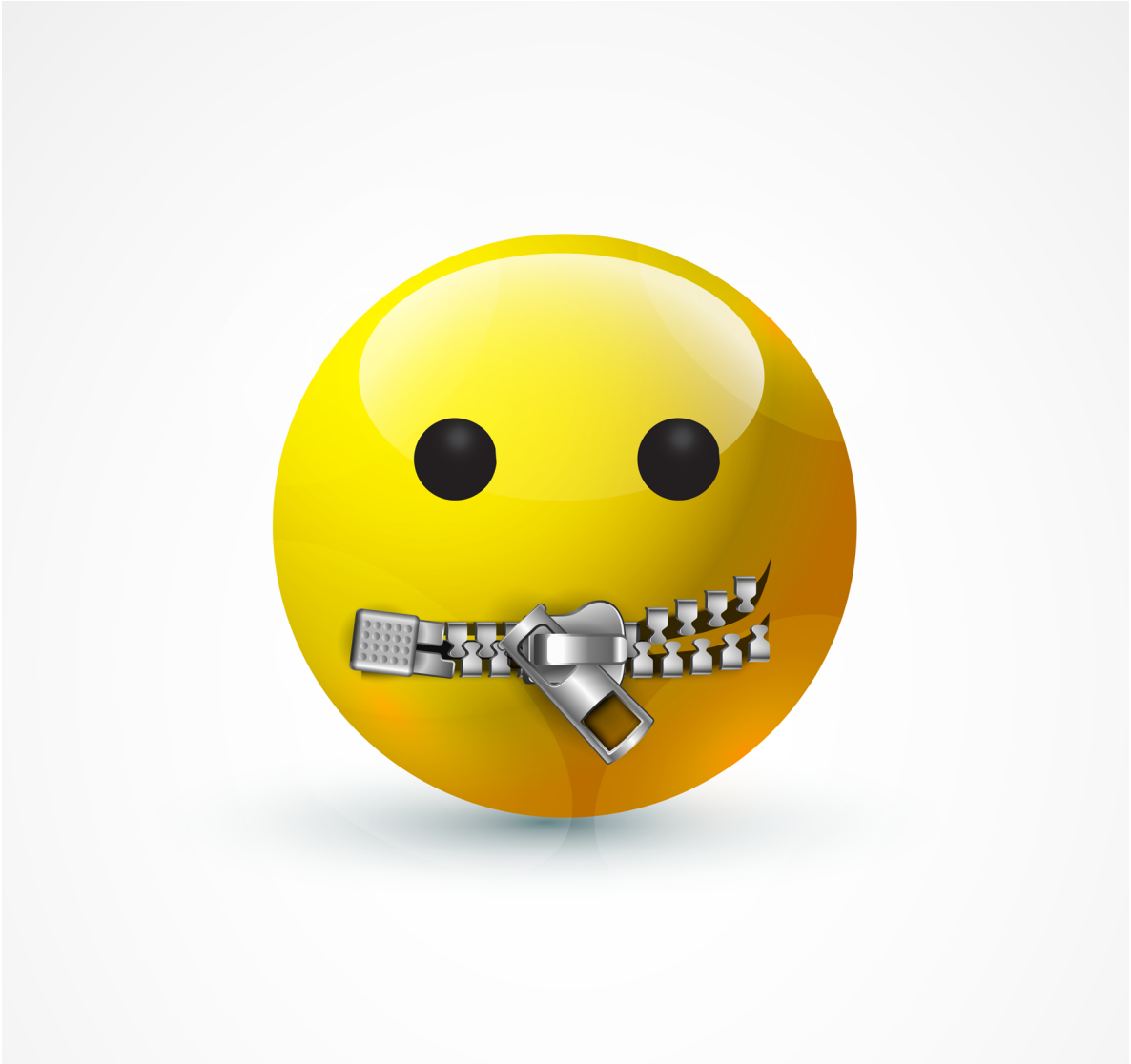
Free Speech Union briefing

Higher Education (Freedom of Speech) Bill

Response to second reading debate, House of Lords 28 June 2022

Arif Ahmed, Nigel Biggar, Eric Kaufmann, Doug Stokes and the Free Speech Union *September 2022*



Introduction

This note responds to criticisms of the Higher Education (Freedom of Speech) Bill that were raised on the Bill's second reading in the House of Lords. The Hansard record of the second reading debate can be found here.

The authors of this note are Professors Arif Ahmed (University of Cambridge), Nigel Biggar (University of Oxford), Eric Kaufmann (Birkbeck College, London), Doug Stokes (University of Exeter), and the Free Speech Union.

The principal criticisms raised by peers are answered in turn below. The Bill, like any legislation, stands to be improved, however many of the criticisms at second reading relied on common misunderstandings of the problems facing English universities, and can be easily rebutted.

The authors of this note are anxious to ensure that further debate of the Bill is informed by relevant evidence of the free speech problem at English universities, and strong arguments for how it can be resolved.

1. This Bill addresses a non-existant problem

> **Claim:** A review of 10,000 events by WonkHe (which strongly opposes the Bill) revealed that only six were cancelled and four of those because of faulty paperwork. There is no evidence the Bill is needed (Thornton, Wallace, D'Souza, Royall, Garden, Shafik).

Cancellation of visiting speakers is not an appropriate measure of the problem. Real evidence of this issue is found in:

- internal regulation of lawful speech;
- ideologically-loaded training;
- universities distorting the curriculum on ideological grounds;
- institutions taking political sides;
- physical intimidation of academic staff;

- universities investigating staff and students for lawful expression of view;
- universities sacking academics for their beliefs.

Both qualitative and quantitative evidence of the problem is plentiful:

- Recent data published by the Office for Students (OfS) show that out of 19,407 external speaker requests or events at English universities in 2020-21, 193 were rejected, compared with 94 in 2019-20, 141 in 2018-19 and 53 in 2017-18.
- The largest recent survey (by the University and Colleges Union) reports 35.5% of academics self-censoring (cf. 19.1% for the EU). As the authors wrote: 'Self-censorship at this level appears to make a mockery of any pretence by universities of being paragons of free speech and that of being advocates of unhindered discourse in the pursuit of knowledge and academic freedom.'
- A report from Policy Exchange shows that self-censorship in British academia is over twice as high among conservative academics in the social sciences and humanities (50%) as those on the left (23%), a pattern also reported in Canada and the United States.
- This finding has been repeatedly corroborated, including in a paper by Harvard Professor Pippa Norris which shows that Britain fits the pattern across western countries.
- A January 2022 report from the Legatum Institute similarly shows that 35% of British academics surveyed self-censor, with levels twice as high among conservatives.
- A June 2022 report by the Higher Education Policy Institute found that 79% of students believe 'Students that feel threatened should always have their demands for safety respected' while 4% disagree, and 61% of students say that, 'when in doubt', their own university 'should ensure all students are protected from discrimination rather than allow unlimited free speech'.

2. This Bill will impose an excessive burden on universities

> **Claim:** 'Ministers who preach deregulation and shrinking of the role of government are introducing a Bill to impose burdensome and costly new regulations on British universities' (Wallace). This Bill 'demonstrates a … misplaced lack of trust in the academic community' (Collins).

The principled response: One cannot reasonably dispute that there is a problem, provided one only looks at the evidence. We all agree too, or should agree, that free speech is a fundamental right – and all should agree that a right calls for a remedy when it is infringed. This leaves critics of the Bill facing difficult questions, which they should answer:

- how far can we go in tolerating violation of a fundamental right, before our inaction becomes indecent and cynical?
- specifically, what 'acceptable' level of intimidation and obstruction must female academics such as Kathleen Stock endure before we concede that their right to think and speak freely is as valuable as anyone else's, and worthy of real, legally enforceable protection?
- why is it seen as right and normal that the right not to be harassed is protected in law – indeed by way of a statutory tort under the Equality Act – whereas protecting the key right which gives universities their lifeblood is an 'intrusion' by the state?

Liberal, rights-respecting legislatures do not tolerate abuse of fundamental rights by public bodies. We do not and should not simply 'trust' universities, or any public body, to do the right thing – the rule of law demands far more when it comes to fundamental rights such as free speech.

We should also firmly resist the mischaracterisation of the Bill as a 'government intervention' – and dismiss entirely the unserious suggestion of Lord Wallace that it is 'authoritarian'. This Bill, as the law in this country has always done, restrains public bodies from interfering with the freedom of individuals. It is in fact a check on 'intervention', enforceable informally through an ombudsman and formally through the courts. This is the normal operation of the rule of law.

Furthermore the Bill seeks to protect not only the rights of individual academics and students but also, crucially, the public's overwhelming interest in pluralistic and free-thinking universities.

It is true that primary legislation is, as noted by some peers, a 'top-down' change, and true too that law cannot on its own create a culture of freedom. It is also true, however, that academics and students cannot begin to change the culture of their institutions unless they have the minimal freedom from interference they need to set about that task.

The contributors to this note have unrivalled experience of such institutional battles. They can say with some authority that the current law does not oblige universities to allow academics the leeway to create, from the bottom up, a culture of tolerance. The process of initiating such change is grindingly slow, resisted at every step, and each success is met by a subsequent setback.

The practical response:

- The net cost of the Bill is estimated at £4.7m p.a. (compare spending by English universities on Access and Participation Plans which is due to increase from £550m to £565m from 2020-21 to 2024-25).
- The relevant question is: How much does it cost a university not to regulate speech or not to monitor and investigate its staff and students? Disciplinary investigations and hearings produce thousands of pages of documentation and interrupt the work of academics and administrators alike. Ideological curriculum change requires lengthy consultation and monitoring of module content. Tolerance – simply letting people speak freely – is always less costly than suppression.
- At present it is individual lecturers and students who are bearing the burden imposed by HEPs in the form of costs imposed on their speech; by regulating the latter the Bill is liberating the former.
- Critics also overlook the fact that, while the Bill will impose a greater cost for non-compliance than the existing law, it does not add substantially to the duties with which universities must comply. In short, the Bill will largely only pressure universities to do something which is already required by existing law and central to their purpose as public bodies.

3. This Bill will increase litigation

Claim: The statutory tort provision will lead to increased litigation, including through the small claims court, which universities will inevitably need to defend, incurring expense and time (D'Souza, Coventry, Willetts, Chakrabarti).

Response: At present, English universities' free speech duties are enforced by the High Court in judicial review proceedings. Legal enforcement is expensive, time-consuming, and unlikely, and universities therefore have little incentive to comply – resulting in the current sorry state of affairs.

The question, which is at the heart of the Bill and which its critics evade, is this: we know that infringement of the right to speech must be remedied, and we know that judicial review is an impractical means of remedy – so what then is a suitable system for enforcement and remedy?

The Bill comes up with largely the right answer – as a first port of call, it provides for a specialist adjudicator (the new OfS Director) who will deal solely with university free speech cases. The scheme will be informal and free to use. Like any public decision-maker, the legality of his or her decisions will be reviewable by the High Court. This is a proportionate, sensible solution for those many cases where someone has been treated unfairly and High Court proceedings would be vastly disproportionate – for instance, a student disciplined for saying the 'wrong' thing.

The Bill also provides for a remedy in the civil courts by way of a statutory tort. This means a university that breached its free speech obligations would have to remedy any loss caused by the breach, so as to put the claimant in the position they were in prior to the breach.

The criticisms at second reading were oddly oblivious to the considerable power courts now have to manage cases and prevent vexatious or misconceived claims from proceeding. It is virtually certain, for instance, that a judge would pressure any claimant to exhaust the OfS route before proceeding with a claim – and the claimant would risk significant adverse costs if he or she proceeded.

The courts also assign cases to various 'tracks' depending on the value of the claim. This aims to ensure the burden of litigation is proportionate to the interests at stake. A student who has missed a term of teaching due to an unlawful attempt to discipline him might be put on the County Court small-claims track. An academic dismissed from her well-paid professorship might be assigned to the multi-track at the High Court.

The Bill does of course, create some risk of burdensome legal action. Were this a knock-down argument, however, we wouldn't have any enforceable rights. It is inconceivable that the Bill's critics would deploy these arguments against human rights or equality claims – and they must answer for why they make this seemingly unprincipled distinction.

Universities can best mitigate the risks created by the Bill by tolerating dissent and thereby not breaching its legal duties. In short, the risk of

vexatious litigation posed by the Bill is no greater than the risk posed by any statutory right. It is an outlying risk to which critics are giving disproportionate weight.

Some may object that this Bill will leave universities facing liability in damages if they breach their obligation. That is current and, indeed, the point. There should be a cost for interfering with a right that is fundamental both to our democracy and to our public interest in higher education – and universities should have a negative incentive to comply with their duty to protect that right.

4. This Bill makes a political appointee judge of free speech complaints

Claim: The new Director of Free Speech and Academic Freedom will have disproportionate power. Appointment to the role should be subject to greater scrutiny to ensure the appointee has the appropriate expertise and is not appointed on party-political grounds (Royall, Collins).

Response: Informal dispute resolution mechanisms are not conducted by the independent judiciary – the precise point is to offer a cheaper, informal alternative to the courts. This trade-off is integral to all ombudsman schemes. The Bill's critics protest too much in highlighting this as a stand-out problem with the Bill. Had the Bill not provided an informal procedure as an alternative to the courts, it is likely critics would denounce its 'judicialisation' of universities.

While it is correct that the Director will require legal assistance in making recommendations, it is not clear that this criterion for the role should weigh decisively against other criteria such as familiarity with the higher education sector and commitment to academic freedom.

Moreover, the Bill's critics disregard the existing statutory criteria for OfS appointments which will also apply to the Director. In accordance with schedule 1, subparagraph 2(2) of the Higher Education and Research Act 2017, the Secretary of State will have to have regard to candidates' experience of promoting students' interests, providing higher education and managing regulatory systems, among other criteria. The Secretary of State will also have power to remove the Director on grounds of inability, unfitness or such other grounds as she considers appropriate.

It should be noted too that the appointment of the Director will be more

closely regulated than appointments to the Office of the Independent Adjudicator (which critics of the Bill seem to regard fondly). The body running the OIA, and its adjudicators, need only be 'suitable persons'.

5. The Bill will protect Holocaust deniers

Claim: Does the Bill protect Holocaust deniers? (Willetts, Deech).

Response: No. The Bill protects 'freedom of speech within the law'. Holocaust denial, while not illegal in the UK, is nevertheless not protected as free speech. It cannot attract the protection for freedom of speech offered by Article 10 as it runs counter to the values of the Convention itself.

Moreover, universities need only take 'reasonably practicable steps' to secure freedom of speech. It is more than arguable that devoting time and resources to platforming malicious, intellectually meritless conspiracy theories is not a step that any court in this country would ever demand of any university.

6. This Bill harms free speech

Claim: How can it be a protection of academic freedom to give more and more power over independent institutions of scholarship to the Government's Office for Students and the new director for freedom of speech (Chakrabarti)?

Response: It needs to be stated clearly: university autonomy does not mean universities are free to dispense with fundamental rights, whether the right to equality or the right to free speech. Nor are they free, as publicly funded bodies, to determine what is in the public interest. Peers should argue that the public has a vital interest in free, tolerant, pluralistic universities. Taxpayer money spent achieving that goal is money well spent. If universities wish to pursue other goals, they must seek alternative funds to do so.

By restraining the University bureaucracy the Bill proposes to return autonomy to the individual staff and students that are currently being controlled by it. The lecturer who wishes to criticise Sharia law, for instance, is not restrained from doing so by the OfS but by his own institution.

To the extent that this Bill takes autonomy away from the institution, it does so in order to give it back to the autonomous, free-thinking teacher or student – the bedrock of the University. Autonomous institutions can be as great a threat to expressive freedom as governments.

As George Washington University law professor Jonathan Turley argues, 'The dangers posed by private censorship for a political system are the same as government censorship in the curtailment of free speech.' Indeed, sometimes governments outsource censorship duties to private actors as when India successfully lobbied Twitter to censor critics of India's handling of the pandemic, masking the scale of the problem. Turley notes that the US government has protected free speech rights, as when it intervened to protect the civil rights of African-American protesters in the South.

7. This Bill makes impossible and contradictory demands

Claim: The 'duty to promote' threatens to put universities in an impossible situation because of a potential conflict with the equality duties (Shafik).

Response: The duty is to secure and to promote freedom of speech within the law. There is no duty to promote harassment or other forms of speech that are offences under other legislation. On the question of prioritization, the EHRC guidance on Freedom of Expression makes it clear that the definition of harassment in the Equality Act 2010 cannot be used to undermine academic freedom and we'd expect the OfS director to enforce that.

Further, the Bill's critics miss a crucial distinction – the impact of the Bill will be most keenly felt on equality policies that exceed the requirements of the Equality Act and, by going further than required by law, have the effect of restricting lawful free speech. Forcing universities to strike the proper balance between these competing obligations will be a positive achievement.

8. This Bill creates overlapping enforcement mechanism

Claim: The statutory tort introduced in section 4 would impose unnecessary burdens on universities and would duplicate the work of the OfS complaints scheme (Shafik, Willetts, MacDonald).

Response: Probably for most academics, and certainly for most students, the financial risks associated with a tort action could be very high. As Lord Howe put it: 'The category of those potentially owed a duty of care under the Bill is narrowly defined. They would then need to point to a genuine and material loss they had suffered as a result of a breach of the freedom of speech duties.'

On the duplication point: the Bill will forbid a complainant from running the same case simultaneously through the courts and the OfS. The only possible route would be the OfS and **then** the courts, though if a claim has been denied by the OfS it would be pretty risky to go through the courts. The OfS route is meant to provide an inexpensive and less risky alternative to the court route, similar to the Office of the Independent Adjudicator which can rule on some cases that the courts can also cover. The OIA complaints scheme **has** been successful and has **not** created massive duplication of work.

A new regulator in addition to the OIA is necessary for several reasons.

First, whereas the law restricts the OIA from determining legal rights and obligations, the new scheme will have to do exactly that – it will therefore exercise a separate jurisdiction to the OIA.

Second, it is right that university free speech and academic freedom be treated not only as specialist matters, but also as matters that require urgent and dedicated attention in order to preserve the health of the UK's world-leading higher education sector.

Third, it is imperative that the Director be committed to freedom of speech and, to a degree, insulated from the institutional pressures that can militate against prioritising freedom of speech.

9. This Bill will lower university standards

Claim: 'It is a fundamental epistemological misconception to argue that the mission of universities places them under some sort of obligation to give airtime or credence to those who argue, for example, that there were no gulags in the Soviet Union, that vaccines cause autism, that the Protocols of the Elders of Zion are genuine or that intelligent design explains the origin of the universe (Stevens).

Response: The Bill does not place any obligation on any university to host or hire anyone. It merely gives control to individual academics over whom to invite or hire and takes it away from bureaucrats. This is the effect of sections A1(3)-(4) in the Bill. Only in the case of cancelling an event or firing an academic does it come into play, but standards can still be applied at invitation and hiring stages.

Furthermore, a careful distinction must be drawn, which eludes Lord Stevens. Universities must maintain standards, but standards are not the same thing as ‘orthodoxies’. The key standard that English universities must maintain is open-mindedness. That will at times mean confronting orthodoxies, and grappling with fallacy and falsehood.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