Free Speech Union briefing

Why the Higher Education (Freedom of Speech) Bill is needed and how it could be even better

June 2022

The Free Speech Union welcomes the new protections for freedom of speech in the Higher Education (Freedom of Speech) Bill.

While we wholeheartedly support this Bill and believe it is a significant improvement on the existing protections in law for free speech in English universities, we think it could be even better.

Consequently, we would like to put forward some amendments that will make these protections even more robust.

The Case for the Bill

We set out the case for the Bill in an earlier briefing:

- Since February 2020 the FSU has intervened in hundreds of cases involving students and academics at English universities who've been penalised for exercising their lawful right to free speech. In almost every case they would have been in a stronger position had the new law been in place.
- A 2017 report into academic freedom in the UK commissioned by the University and College Union (UCU), Britain's largest academic trade union, found that the constitutional and legal protections for academic free speech were weaker in the UK than in every EU member state, bar one. Thirty-five per cent of British academics admitted to self-censoring for fear of loss of privileges, demotion or physical harm. (The EU average was 19.1 per cent.)
- A 2020 report by the think tank Policy Exchange found a significant lack of viewpoint diversity at universities. It was co-authored by Professor Eric Kaufmann and Dr Remi Adekoya, both members of the FSU Advisory Council, as well as Professor Thomas Simpson, and was crucial in prompting the Government to propose new legislation. The report found that fewer than 20 per cent of staff at British universities voted for right-leaning parties, with 75 per cent voting for left-leaning parties (2017–19). Only 54 per cent of academics said they would feel comfortable sitting next to someone at lunch who was known to have voted Leave in the 2016 referendum, while just 37 per cent would feel comfortable sitting next to an individual who expressed gender-critical views on trans issues. Academics' career prospects, through grant applications and promotion, were also seen to be adversely affected by discrimination based on their views.
- A 2020 Survation poll conducted on behalf of ADF International found

that 27 per cent of students at British universities had “hidden” their opinions when they were at odds with those of their peers and tutors, with more than half of those self-censoring because of their non-conformist political views. A further 40 per cent withheld their opinions on ethical or religious subjects for fear of being judged negatively by their peers. Two-fifths of the respondents said “no-platforming” had become more frequent at their universities.

- A recent HEPI survey found that 38 per cent of British students believe “universities are becoming less tolerant of a wide range of viewpoints”, up from 24 per cent in 2016.

“Field of Expertise” and “Security Costs”

On the 20th June we wrote to the Secretary of State for Education, the Rt Hon Nadhim Zahawi MP, to welcome the Government’s acceptance of two amendments to the Bill put forward by the FSU: removing the caveat whereby the new academic freedom protections would only apply to academics when speaking “within their field of expertise”, and making it harder for universities or students’ unions to cite “security costs” as a reason to no-platform visiting speakers.
We are concerned that some parliamentarians will try to reverse these amendments, so it’s worth reiterating the case for both (which we set out in an earlier briefing).

The case for removing the “field of expertise” caveat is that:

- It is difficult to define and it 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?
- It could have a chilling effect on the willingness of academics to question and test received wisdom for fear that they might be stepping outside the realm of what could be considered their “field of expertise”.
- The existing law under the Human Rights Act 1998, which implements the European Convention on Human Rights, already protects academics’ speech within “areas of their research, professional expertise and competence”. The Bill should not resile from this by limiting protections to speech within the speaker’s “field of expertise”.

The case for making it harder for universities and students’ unions to cite

"security costs" when no-platforming invited speakers is:

- There are several examples in recent years of universities using the "security costs" excuse to try to cancel external speaker events. The Hansard record shows that this was a concern among MPs and peers when Parliament debated free speech in universities in 1986.
- 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, then the 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 and students unions to cancel events via the back door by asking student groups to cover "security costs".

Additional Amendments

In addition to these two amendments, which the Government has already accepted, we think the Bill would be even better if the Government accepted several more:

- **Equality Act Amendment.** The Equality Act 2010 specifies that universities must prevent harassment directed at members of their community who have a protected characteristic. In section 26(4) of the EqA, 'harassment' is defined not just by the perception of the victim, but by the circumstances of the case and whether it is reasonable for the conduct involved to have had the effect of harassment. Notwithstanding these nuances, universities have often been overzealous in interpreting their responsibilities under the EqA, stressing the subjective perception of complainants and ignoring the other tests. This has resulted in the no-platforming of visiting speakers – as happened with Professors Jo Phoenix and Rosa Freedman at the University of Essex, when trans activists argued that allowing them to speak would constitute 'harassment' of trans students and staff. The HEB currently makes no provision to address this issue, which poses a considerable threat to freedom of speech, particularly in the context of higher education, where knowledge production relies on the exchange of controversial

ideas. It is therefore essential that discussions of a political or academic nature are not censored merely on the grounds that they are perceived to be offensive. The HEB should be amended to specify that conduct relating to academic and scientific matters should only be deemed to be 'harassment' under the EqA if the person engaging in the conduct knew, or ought reasonably to have known, that it would have the effect of harassment. This would relieve academics and students from the fear that academic debate could constitute accidental or unwitting harassment.

- **Reduce Ambiguity**. Clause 1, section A1 of the Bill specifies that higher education providers must take reasonably practicable steps to secure freedom of speech within the law. This duty is not sufficiently clear. Universities should not be under a positive duty to protect speech that is trivial or intolerant. However, the responsibility to secure lawful free speech on topics of an academic or political nature should be an absolute and positive duty. It would take little effort to insert a subclause at section A1 clarifying the parameters of what is meant by "reasonably practicable" to prevent any ambiguity of interpretation. This could be achieved by detailing what this clause does not include and restating the absolute duty to defend political and academic speech within the law.
- **Secure Academic Freedom**. The HEB makes welcome provisions to protect academic freedom by specifying that academic staff should not suffer loss of employment or detriment to career progression as a result of exercising their right to challenge received wisdom and test controversial ideas. However, this is currently a weak duty. The Bill merely obliges universities to take steps that are "reasonably practicable" to prevent an academic losing their job simply for exercising their speech rights within the law. This should be a hard duty, clearly stating that universities must not dismiss academic staff who have exercised their lawful right to free speech in debates of a political or academic nature.
- **Employment Tribunal Jurisdiction**. The new statutory tort created by the HEB introduces the right to sue a university for failing to secure freedom of speech. However, those most likely to take advantage of this are employees of the university who have been unfairly dismissed for lawfully exercising their speech rights. These cases would usually be heard by an Employment Tribunal, where the losing party is usually not compelled to pay the other side's costs, but Employment Tribunals have not been granted the jurisdiction to hear claims brought under

the new statutory tort. Dismissed academics will be obliged to launch an entirely separate and prohibitively expensive High Court claim in order to have their case considered under the terms of the HEB. This creates a stark inequality in access to justice which could be rectified by granting the Employment Tribunal jurisdiction to hear cases brought under the HEB statutory tort. Unamended, the Bill will grant justice only to the wealthy or fortunate, creating the impression that freedom of speech is a right to be enjoyed only by the privileged few.

- **Jurisdiction of the Director for Freedom of Speech and Academic Freedom**. The Office for Students complaints process, created by the HEB and administered by a new Director for Freedom of Speech and Academic Freedom, will be most welcome to academics and students who have been sanctioned but not formally dismissed by their university for exercising their lawful right to free speech. However, the jurisdiction of the Director is currently unclear. The Bill should be amended to clarify that the Office for Students complaints scheme grants the Director the power to determine whether a university has acted unlawfully with regard to the complainant's right to freedom of speech.
- **Curriculum Content.** The Bill should be amended to specify the right of academic staff to be consulted on and express criticism of the curriculum choices of its institution including, for instance, where a university makes an ideological decision to 'decolonise' its curriculums. This should form part of a broader commitment to enshrine in the HEB the fundamental right of academics to criticise the policies, procedures and decisions of their employers.

Appendix 1
Suggested Amendments

1. Equality Act Amendment

At clause 1, at section A1 insert new subsection (4):

> Notwithstanding section 26(4) of the Equality Act 2010, conduct that constitutes, or forms part of, discussion of an academic or scientific matter hosted by a provider shall only be deemed to have the effect described at section 26(1)(b) of that Act if the person engaging in such conduct knew or ought reasonably to have known that it would have that effect.

Member's explanatory statement

This amendment provides that in academic circumstances the perception of harassment is irrelevant, and conduct will only be unlawful if it was reckless or, as per section 26(1)(a) of the Equality Act 2010, purposeful.

2. Reduce Ambiguity

At clause 1, at section A1 insert new subsection (5):

> The duty at subsection A1(1) shall not apply to speech that is, in the reasonable judgment of the provider, trivial, intolerant or insulting, unless:
>
> (a) the speech is of a political or academic nature; or
>
> (b) not complying with that duty would result in a breach of the provider's obligations under section 6 of the Human Rights Act 1998.

Member's explanatory statement

The purpose of this amendment is to grant providers a proportionate power to prohibit speech which, while lawful, is not conducive to the workplace or academic life.

3. Secure Academic Freedom

At clause 1, at section A1 replace the text at subsection (5) with the following:

A provider must:

(a) take the steps set out at subsection (1) to secure the academic freedom of:

(i) academic staff, and

(ii) visiting speakers who are academic staff of any other higher education institution; and

(b) otherwise refrain from restricting the academic freedom of academic staff in any way.

Member's explanatory statement

This amendment prohibits providers from imposing the specified detriments in response to a lawful exercise of academic freedom by academic staff or visiting academic speakers.

4. Employment Tribunal Jurisdiction

At clause 4, insert new section A8:

(1) A civil court or an employment tribunal has jurisdiction to determine a complaint brought by a member of academic staff under paragraphs A7(a) or (b).

(2) 'Civil court' has the meaning set out at subsection 194(10) of the Legal Services Act 2007.

(3) A claim before an employment tribunal may include a claim for damages relating to dismissal.

Member's explanatory statement

This amendment allows the Employment Tribunals to determine claims brought by academic staff members under the new statutory tort.

5. Jurisdiction of the Director for Freedom of Speech and Academic Freedom

At clause 8(2), amend schedule 6A, para. 6(1) as follows:

6 (1) The scheme must require the OfS—

(a) to make a decision as to the extent to which a free speech complaint is justified, and

(b) to make that decision as soon as reasonably practicable.

A decision that a free speech complaint is justified includes a decision that, in the opinion of the OfS, a registered higher education provider has breached the duty at section A1 or has interfered unlawfully with the complainant 's right to freedom of speech.

Member's explanatory statement

This amendment ensures that the Director's power to determine rights and duties, which is essential to his or her role, is clear in the statute and not challengeable by way of judicial review.

6. Curriculum Content

At clause 1, amend subsections A1(5) as follows:

(5) The objective in subsection (2), so far as relating to academic staff, includes securing:

(a) their academic freedom; and

(b) their right to be consulted on any requirement made in connection with the content of the curriculum.

Member's explanatory statement

This amendment seeks to ensure that academic staff are consulted on any obligation to teach a certain curriculum.

7. Freedom to criticise one's institution (and its curriculum)

At clause 1, amend subsections A1(6) as follows:

(6) In this Part, "academic freedom", in relation to academic staff at a registered higher education provider, means their freedom within the law—

(a) to question and test received wisdom,

(b) to put forward new ideas and controversial or unpopular opinions, and

(c) to express opinions about a registered higher education provider, including without limitation opinions concerning its curricula, governance, affiliations and the teaching and research conducted at the provider

without being adversely affected (or being placed at risk of being adversely affected) in any of the ways described in subsection (7).

Member's explanatory statement

The purpose of this amendment is 1) to protect an academic's freedom to criticise his or her institution; and 2) to ensure that the protection applies to actual as well as threatened adverse consequences.


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FREE SPEECH UNION