



Department  
for Education

# Higher education: free speech and academic freedom

February 2021





# Higher education: free speech and academic freedom

Presented to Parliament  
by the Secretary of State for Education  
by Command of Her Majesty

February 2021



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## Foreword by the Secretary of State for Education



Free speech is fundamental to our society. It is the lifeblood of democracy and the cornerstone of a free and liberal society. Throughout history, free speech has been a constant sword against tyranny, injustice and oppression.

Within our society's broader recognition of free speech, academic freedom has rightly enjoyed a special status, with additional protections recognised both in culture and in law. This is due to the special place our universities have historically held as centres of enquiry and intellectual debate, bastions of free thought from which new ideas can emerge to challenge society's cosy consensus. From Charles Darwin on evolution, to John Spencer Bassett challenging racism, that freedom has been used to advance views which, in their time, were widely criticised as deeply offensive and immoral, but which today are firmly established as accepted wisdom.

Of course, not every heterodox idea will be good. Ideas in themselves are not worthy of respect, only tolerance – and to thrive they must prove themselves in the arena of evidence and debate. But in amongst the oddball, incorrect, challenging or downright offensive ideas will be found those that will transform our society and revolutionise our worldviews. By their very nature we cannot know which these are in advance. But there is a reason why many people who experienced first-hand the persecution of the gay rights movement or the oppression of the Soviet Union are at the forefront of those arguing for free speech. Those who have never known authorities that were not broadly aligned to their values should be more cautious: today's orthodoxy can become tomorrow's oppression, and powers granted today to silence ideological opponents will inevitably be turned against them in future.

When I was younger, there was widespread consensus that the UK had done the right thing by offering Salman Rushdie sanctuary after he became the subject of a fatwa for publishing 'The Satanic Verses'. It was a mark of our free and liberal society. The attempts to ban 'Lady Chatterley's Lover' or Monty Python's 'Life of Brian' were similarly seen as an embarrassment that was thankfully in the past. Though people might disagree and protest, there was no right not to be offended.

That consensus is now being challenged. There are some in our society who prioritise 'emotional safety' over free speech, or who equate speech with violence. This is both misguided and dangerous. The social psychologist Jonathan Haidt makes the case powerfully: not only do such attitudes suppress speech, they make it harder to draw a clear line against violence. A shocking finding from a recent study by King's College London was that a quarter of students saw violence as an acceptable response to some forms of speech – and indeed we have seen this played out in the appalling scenes in

London, when Jewish societies invited speakers who other students did not approve of.

There are some who try to downplay this issue by pretending it is just about no-platforming. It is true that most speaking events are able to proceed – though even one no-platforming incident is too many. But there are far more significant concerns.

The rise of intolerance and ‘cancel culture’ upon our campuses is one that directly affects individuals and their livelihoods. Students have been expelled from their courses, academics fired and others who have been forced to live under the threat of violence. These high profile incidents are but the tip of the iceberg. For every Ngole, Carl or Todd whose story is known, evidence suggests there are many more who have felt they had to keep silent, withheld research or believe they have faced active discrimination in appointment or promotion because of views they have expressed.

Though there are noble exceptions, often a blind eye has been turned to the creeping culture of censorship. A culture has been allowed to develop in which it is seen as acceptable, even virtuous, for an academic to sign an open letter that calls for another to be dismissed or defunded.

At times, some university authorities have actively enabled policies that encroach upon free speech. Codes or statements have been introduced that would limit free speech, and some students’ unions have been granted inappropriate levels of control over which speakers can visit and how student societies can operate. Schemes have been established in which students are paid to report others for perceived offences. Academics have been pressured to adjust their reading lists for ideological reasons. In some universities, the authorities have even imposed security costs on student societies when inviting a speaker – in one case a foreign Ambassador – a policy which effectively cedes control of who can speak to those who can most credibly resort to criminal threats or violence. Even where lip service is paid to free speech, too often leaders have not done enough to defend those faced with ‘cancellation’, to prevent the abuse and personal harassment of those with heterodox views and to actively build a culture in which free speech is openly valued and celebrated.

This Government stands unequivocally on the side of free speech and academic freedom, on the side of liberty, and of the values of the Enlightenment. That is why we have today, in line with our manifesto commitment, set out plans to strengthen protections for free speech and academic freedom in higher education, increase the rights of redress for those who are wronged and establish a new Free Speech Champion in the Office for Students, who will champion and enforce the law. We know, furthermore, that the law can only go so far and that it is ultimately for the university community to uphold the principles of free speech and academic freedom as central to their purpose. That is why we have also set out here government expectations that go beyond the minimum legal duties and sets out what every university should aspire to.

We know that there is cause for optimism. Many individuals across the sector – students, academics, leaders and vice-chancellors – have courageously stood up for free speech and academic freedom, defending their own rights and those of others. Polls consistently show that there is a silent majority of both academics and students who are consistently in favour of free speech. This was demonstrated last year, when a grass-roots movement at the University of Cambridge secured an overwhelming majority in a vote to strengthen protections for free speech.

Over four centuries earlier, an alumnus of that institution, John Milton, penned an address to Parliament that remains one of the most powerful defences of free speech in the English language. “*Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties,*” he wrote. Today, Government answers that cry. Let Milton’s freedom ring out across our universities.



**THE RT HONOURABLE GAVIN WILLIAMSON MP**  
**Secretary of State for Education**



## 1) Executive summary and proposed changes

This report details how government proposes to strengthen freedom of speech and academic freedom in higher education in England.

Free speech is fundamental to liberty and underpins our liberal, democratic society. Our universities have a long and proud history of being a space where views may be freely expressed and debated. Historically, they have been a crucible where ideas, tested and explored, have fuelled the progress of freedom and emancipation. All staff and students should feel safe to challenge conventional wisdom by putting forward and discussing ideas that may be controversial, unpalatable, or even deeply offensive.

There is a growing body of evidence citing a ‘chilling effect’ on staff and students, domestic and international, who may feel unable to express their cultural, religious or political views without fear of repercussion – suggesting that the space for free speech at universities, often contested and febrile, may be becoming constrained. This is emphasised by a small number of high profile incidents in which staff or students have been threatened with negative consequences, including loss of privileges or dismissal, sometimes successfully, confirming that the fear of repercussion is not always unfounded.

Government is clear that any activities at higher education providers (HEPs) that seek to limit lawful free speech and academic expression are unacceptable in all but a limited number of circumstances. Without action to counter attempts to discourage or even silence unpopular views, intellectual life on campus for both staff and students may be unfairly narrowed and diminished. HEPs must do more to defend free speech and the Government believes that we must put in place greater protections for those who seek to exercise it.

There is already a legal framework in place, which imposes on those concerned in the government of HEPs a legal duty to take reasonably practicable steps to ensure free speech within the law is secured for their members, students, staff and visiting speakers. Increasing reported concerns in relation to freedom of speech, however, suggest that this duty is not being fully complied with and that there is insufficient enforcement of the duty; and the existing legal framework has been criticised as being overly complex<sup>1</sup>. The proposals in this paper aim to strengthen and reinforce these aspects of the legislation.

There are specific gaps within the current framework, such as the lack of a clear means of enforcement. If the duty is to have the significance and level of compliance it deserves, as a measure designed to protect the fundamental principle of free speech, then there must be clear consequences for any breach. In addition, there is a gap in that the duty does not apply directly to students’ unions (SUs).

Although there is evidence of widespread support for freedom of speech and academic freedom at universities from students and academics, there is also evidence that a minority of students and academics may be having a disproportionate influence on censoring expression on campus. Attempts to

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<sup>1</sup> Freedom of Speech in Universities, JCHR, 2018.

limit free speech have come, at different times, from SUs, academics and university authorities. There are also documented examples of foreign interference in our universities, and related attempts to undermine academic freedom and freedom of speech.

We continue to see such cases reported in the media, as well as concerns raised by individuals who report that they have not been able to express, share or debate their views, or who have faced sanctions, including loss of privileges, expulsion or dismissal, for doing so; these incidents in turn can serve to have a chilling effect on others. This is not right and not what this Government believes those leading or attending our world-leading universities want to see happening. That is why we are proposing to take action – so that HEPs, SUs, students, staff and visiting speakers are completely clear on their rights and responsibilities and individuals are able to seek redress where they believe their rights have been unlawfully breached. This paper sets out our intention to legislate to achieve this, alongside working with the sector on guidance and further research.

We propose to:

- legislate for a Free Speech and Academic Freedom Champion with a remit to champion free speech, investigate infringements of free speech in higher education and recommend redress
- legislate to require the Office for Students (OfS), the higher education regulator in England, to introduce a new, registration condition on free speech and academic freedom, with the power to impose sanctions for breaches
- strengthen the free speech duty under section 43 of the Education (No. 2) Act 1986 (the section 43 duty) to include a duty on HEPs to ‘actively promote’ freedom of speech
- extend the duty to apply directly to SUs
- introduce a statutory tort for breach of the duty, enabling individuals to seek legal redress for the loss they have suffered as a result of breach of the duty
- widen and enhance academic freedom protections, including extending protections so that recruitment and promotion are also covered
- work with HEPs to set minimum standards for free speech codes of practice (required under the legislation), making sure high standards become the norm across the sector.

## 2) The case for change

### Key aims and principles

1. Our universities have a long and proud history of offering a space for a range of views to be freely expressed and debated, allowing conventional wisdom to be challenged and new ideas to be put forward.
2. There is, however, growing concern within government of a chilling effect on university campuses<sup>2</sup> that means that not all students and staff feel able to express themselves without fear of repercussion. They may, for example, feel unsupported to challenge conventional wisdom or fear that their views on international political, historical or social issues will expose them to intimidation or harassment. There is also evidence of students being concerned that they may face the prospect of differential treatment by lecturers, or adverse impacts on their career prospects, on the basis of their expressed political views.
3. Discourse surrounding the concept and boundaries of freedom of speech has always been a feature of academic life and a topic of debate amongst wider society, and this debate is itself an example of thriving intellectual exchange. The extent to which free speech is protected within an educational context is rightly a matter of public interest and high-profile incidents where free speech appears to have been limited without clear reason are often amplified by widespread press coverage.
4. It is, however, of the utmost importance that higher education remains an environment where individuals feel able to explore and express a range of ideas without feeling the need to self-censor that expression. University should be a place where individuals are free to challenge particular views of the world and to have their views challenged in return. This exchange of competing, and sometimes controversial, viewpoints is what allows both individuals and academia itself to develop and grow. This forum of ideas is an essential feature of higher education and must be protected wherever it is challenged.
5. Historically, universities have been the breeding ground for ideas that have challenged the conventional wisdom of the time and they have played a fundamental role in reforming society in a positive way by exposing the settled views of the majority to new lines of enquiry. From women's suffrage to the expansion of gay rights, campus debate has led to tangible social changes. Even scientific progress, such as the theory of evolution, has faced challenge and criticism as controversial or offensive, but likewise prevailed against this and advanced our understanding of the world. This was possible because of the strong liberal tradition of free debate that allows unpopular

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<sup>2</sup> Academic freedom in the UK, Policy Exchange, 2019 The report used a sample of 505 UK university undergraduate students, aged 18-25.

views to be expressed and rejects an unchallenged acceptance of majority opinion.

6. Government is therefore clear that any activities at HEPs that seek to limit lawful free speech and academic expression, rather than contribute to the promotion of free speech and academic freedom, present a risk to lively intellectual life on campus and across the nation. Free speech and academic freedom are vital to the further development of students and their preparedness for future life, the pursuit of truth as a national endeavour.
7. The section 43 duty already sets out a legal framework, with those concerned in the government of HEPs under a legal duty to take reasonably practicable steps to ensure freedom of speech within the law is secured for their members, students, staff and visiting speakers. However, there is concern that this duty is not being fully complied with. The existing legal framework has been criticised by the Joint Committee on Human Rights (JCHR) in their 2018 report on Freedom of Speech in Universities as being overly complex<sup>3</sup>. The proposals in this paper aim to bring clarity where it is currently lacking, as well as fundamentally to strengthen the legal framework itself.
8. There are also gaps within the current framework, in particular the lack of a clear means of enforcement in relation to breach of section 43. Under the current framework, recent incidents of concern have not led to enforcement of section 43, nor to regulatory action being taken by the OfS, which may lead some to consider that the law is toothless and they can breach it with impunity. If the section 43 duty is to have the significance and level of compliance it warrants, as a measure designed to protect the fundamental principle of free speech, then there must be clear consequences for any breach. In addition, there is a gap in that the section 43 duty does not apply directly to SUs.
9. Freedom of speech and academic freedom are related but distinct concepts. Freedom of expression includes the right of all to freedom of speech; that is the right to lawfully express views (though that right is not absolute). This includes the rights of visiting speakers on campus to lawfully express views, as well as of students and staff to express their political views without fear of censorship.
10. Academic freedom is primarily concerned with the ability of academics to question and test perceived wisdom and to put forward new ideas and controversial or unpopular opinions without placing themselves in jeopardy of losing their jobs or privileges they may have at the HEP. This is vital in ensuring that academics are able to teach and undertake research that challenges established boundaries in their respective areas.

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<sup>3</sup> [Freedom of Speech in Universities \(parliament.uk\)](https://www.parliament.uk/evidence-taking/committees/jchr/2018-19/freedom-of-speech-in-universities)

11. A further related and fundamental principle in higher education is the principle of institutional autonomy.<sup>4</sup> This freedom from outside intervention gives HEPs clear grounds to resist external attempts to influence curricula and calls to take action that would undermine academic freedom, such as dismissal campaigns against academic staff. This document focuses on freedom of speech and academic freedom within higher education.
12. Proposed amendments to legislation regulating free speech at HEPs are intended to ensure that individuals feel more able and supported to freely express their views. However, HEPs must acknowledge the myriad pressures on students and staff seeking to express their views - including any inclination towards self-censorship - and should keep under review how their internal policies and processes can best promote a culture of lively intellectual debate and academic discovery.
13. Therefore, our proposals are based on these key principles:
  - (a) that students with a diverse range of views feel comfortable, and are actively encouraged, to express, debate and expand their views on campus and online, within the law;
  - (b) that students are not disadvantaged (or reasonably feel that they might be) if they choose not to align with a certain viewpoint;
  - (c) that academics within HEPs are able to exercise academic freedom without fear of detrimental treatment in terms of recruitment and promotion, in addition to dismissal or other benefits.
  - (d) that those who feel their speech has been unlawfully restricted in the context of higher education have clearer routes to make complaints and have access to redress.

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<sup>4</sup> This means that HEPs are free within the law to conduct their day to day management in an effective and competent way; they can determine the content of particular courses and the manner in which they are taught, supervised and assessed; they can determine the criteria for the selection, appointment and dismissal of academic staff and apply those criteria in particular cases; they can determine the criteria for the admission of students and apply those criteria in particular cases; and it also includes academic freedom as described above.

## Existing legal and regulatory context

14. Key elements of the existing legal and regulatory context relating to freedom of speech and academic freedom in higher education are described below. Additional detail and a summary of further relevant legislation is at Annex A.

## The section 43 duty

15. Section 43 of the Education (No. 2) Act 1986 places a duty on those concerned in the governance of all HEPs registered with the OfS (as well as establishments of higher or further education maintained by a local authority and other institutions within the further education sector) to take reasonably practicable steps to ensure that freedom of speech within the law is secured for their members, students and employees, and for visiting speakers. This covers academic freedom as well as freedom of speech more broadly. Section 43 applies in Wales as well as England.
16. The duty includes, but is not limited to:
  - (a) issuing and keeping up to date a code of practice setting out the procedures to be followed by students and staff in connection with the organisation of meetings and activities taking place on the HEP's premises (including SU premises), and the conduct of such persons in connection with those meetings and activities;
  - (b) taking reasonably practicable steps (including where appropriate the initiation of disciplinary measures) to secure that the code of practice is complied with; and
  - (c) ensuring, so far as is reasonably practicable, that the use of the HEP's premises (including SU premises) is not denied to any individual or body on any ground connected with their beliefs, views, policy or objectives.
17. This means that HEPs already have legal duties they must comply with and certain levers to secure compliance by student and staff (see also in relation to section 22 of the Education Act 1994 below). In some respects HEPs are accountable for SU actions in relation to freedom of speech. In practice, however, it appears that some HEPs have had little direct impact on the behavior of their SU, with students having to resort to legal action to ensure they were not excluded from activities or premises by their SU because of the expression of their views.
18. Furthermore, there is **no direct consequence provided for in legislation if a HEP breaches the section 43 duty**. A person affected by a HEP's failure to comply with this duty can seek to bring a claim for judicial review of the relevant decision. Remedies are discretionary and there is no right to claim damages for losses caused by unlawful administrative actions. However, it is possible to be awarded damages in judicial review claims if there is another



established cause of action, separate to the ground for judicial review, such as breach of the Human Rights Act 1998 or breach of a tortious statutory duty.

## **The Higher Education and Research Act 2017 and the Regulatory Framework**

19. Though there is no consequence provided for in section 43, the OfS is able to use its powers under the Higher Education and Research Act 2017 (HERA) to take action where a HEP has breached, or there is a risk that they might breach, one of the registration conditions related to free speech.
20. All registered HEPs are required to comply with the ongoing conditions of registration set by the OfS in its Regulatory Framework that are applicable to them. Conditions E1 and E2 require the governing documents of HEPs to uphold the Public Interest Governance Principles that apply to them (Condition E1), and to have in place adequate and effective management and governance arrangements to operate in accordance with their governing documents and to deliver the Public Interest Governance Principles in practice.

21. Two Public Interest Governance Principles are relevant:

“I. Academic freedom: Academic staff at an English higher education provider have freedom within the law:

- to question and test received wisdom; and
- to put forward new ideas and controversial or unpopular opinions

without placing themselves in jeopardy of losing their jobs or privileges they may have at the provider”.

There is no freestanding legal right to academic freedom set out in legislation but it is a principle recognised in HERA. This Public Interest Governance Principle is required to be included by virtue of section 14(7) of HERA. It is broadly worded so as to cover all activities which academics might engage in.

“VII. Freedom of speech: The governing body takes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider”.

This closely mirrors the section 43 duty.

22. The OfS monitors providers in relation to their conditions of registration and may intervene where it considers that a provider is at increased risk of breach, or has breached, one or more conditions. In the event of a breach of condition, the OfS can impose sanctions including monetary penalties and (ultimately) de-registration. To date, there has been little regulatory action taken by the OfS in relation to potential breaches of the Conditions concerning freedom of speech

or academic freedom, despite a significant number of concerning incidents being reported since its full suite of powers came into force in August 2019.

### **Employment law**

23. The majority of academic staff directly employed by universities have a term in their employment contracts protecting their right to academic freedom as described in the above registration Condition – though this is variable and this lack of consistency is an issue that is discussed below). Individual academics who feel their right to academic freedom has been improperly infringed may have recourse against their employer via grievance procedures and contractual / employment law remedies (where damages/compensation would be available).

### **Human Rights Act 1998**

24. HEPs which are public authorities under the Human Rights Act 1998 (HRA) are required to act compatibly with the Convention rights, as set out in Schedule 1 to the HRA , including Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association). Any interference with these rights, such as stopping an event going ahead, must be prescribed by law and necessary in a democratic society, which means that it must be proportionate. Action is ‘proportionate’ when there is a sufficiently important objective and the action taken is rationally connected to that objective, the action is no more than necessary to address the problem concerned and a fair balance has been achieved. This offers protection to students, staff and visiting speakers alike. A person affected by a HEP’s failure to comply with this duty can challenge it by, for example, judicial review proceedings and may be entitled to damages under the HRA in an appropriate case (though this is rare in this context).

### **Section 22 of the Education Act 1994 and charity law**

25. Although SUs are generally independent of their HEP, section 22 of the Education Act 1994 explicitly makes HEPs responsible for taking reasonably practicable steps to secure that their SU operates in a “fair and democratic manner”.
26. Section 22 also specifically requires the governing body of the HEP to bring to the attention of all students, at least annually, the provisions of section 43 and of the HEP’s section 43 code of practice relevant to the activities or conduct of the SU.
27. This demonstrates that matters relating to SUs and freedom of speech are something which a HEP may be legally responsible for.



As with section 43, this legislation does not provide a specific enforcement regime for breach.

28. Most SUs are registered charities and are therefore regulated by the Charity Commission as regards their compliance with charity law. This includes acting for the public benefit in a way that promotes their charitable purpose (e.g. “advancement of education”).
29. This means, in principle, that SUs must not carry out political activity where it does not support their charitable aim and it must not be their sole/continuing activity. They must also comply with their other legal obligations, and only use their funds in a way that is balanced and non-discriminatory. As educational charities, there are limits on SUs spending money on political campaigning outside their direct remit; but this does not prevent debate and lawful free speech by students or student societies.
30. There are likely to be steps that could be taken by the Charity Commission in cases where an SU is, for example, blocking free speech for reasons which conflict with these principles. Although there are concerns that these duties are not always being fully complied, there has, however, been little regulatory intervention in this area.

### **Limitations upon speech in higher education**

31. Whilst freedom of speech is a human right, it is not absolute and is subject to restrictions in certain circumstances. Significantly, the right to free speech in higher education under section 43 applies only to “free speech within the law” – that is, to speech that is lawful.
32. When considering their duties regarding freedom of speech and academic freedom, HEPs must also consider their other legal duties, in particular their duties under the Equality Act 2010, which includes the Public Sector Equality Duty. However, HEPs should be clear that lawful speech can only be limited in certain circumstances. These duties are detailed further at Annex A.
33. The legal duties on HEPs in relation to freedom of speech and academic freedom do not cover unlawful speech. There are a range of circumstances in which speech may be in breach of criminal law, including:
  - speech causing fear or provocation of violence<sup>5</sup>;
  - acts intended or likely to stir up hatred on grounds of race, religion or sexual orientation<sup>6</sup>;
  - speech amounting to a terrorism related offence<sup>7</sup>; and

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<sup>5</sup> Public Order Act, section 4.

<sup>6</sup> Public Order Act 1986, sections 18 and 29B.

<sup>7</sup> Under the Terrorism Act 2006 or Terrorism Act 2000.

- causing a person harassment, alarm, or distress<sup>8</sup>, where this would constitute an offence under the Public Order Act 1986<sup>9</sup>.
34. There are also circumstances in which speech may be found to be unlawful in respect of civil law, including defamatory speech. This can include defamatory material on social media.

### **Prevent Duty**

35. In their 2018 report, the JCHR found that the fear of being reported for organising or attending an event, combined with the increased levels of bureaucracy following the introduction of the Prevent Duty, was reported to be having a chilling effect on freedom of speech.
36. Government is clear that the Prevent Duty should not be used to suppress lawful free speech, rather it requires HEPs, when exercising their functions, to have due regard to the need to prevent people from being drawn into terrorism. There is no prescription from government (or the OfS) in regard to what action HEPs should take once they have had due regard. The legislation imposing the Prevent Duty in relation to higher education specifically requires that HEPs must have particular regard to the duty to ensure freedom of speech and to the importance of academic freedom. The Prevent Duty should not be used to shut down or discourage lawful speech, either directly or by the creation of unnecessarily bureaucratic processes that go beyond what is required by the Duty which may be co-opted by those who wish to suppress lawful free speech.

### **Free speech and academic freedom legislation in the Devolved Administrations**

37. There are some differences in terms of the legislative framework that is relevant to free speech and academic freedom in higher education across the United Kingdom. As stated above, the Government's proposals in this paper relate only to English HEPs registered with the OfS. Details of these differences are set out in Annex A.

### **Limitations of the current framework**

38. The limitations of the current framework set out above can be summarised as:
- (a) Although the OfS has powers to sanction HEPs under HERA (including fines and ultimately de-registration), there is no clear, direct means for the OfS (or any other public body) to enforce a breach of section 43. Enforcement of that duty by individuals

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<sup>8</sup> Public Order Act 1986, intentionally (section 4A) or unintentionally (section 5).

<sup>9</sup> There is an extensive case law as to what constitutes harassment, alarm and distress, and the majority of speech that expresses political or other opinions, even if controversial or offensive, will not constitute such an offence.

currently relies on complaints brought against the HEP by way of judicial review.

- (b) The section 43 duty only applies directly to HEPs and does not directly apply to SUs; there is only indirect accountability of the HEPs for the actions of SUs under section 43 and section 22 of the Education Act 1994.
- (c) The OfS has no power to regulate or sanction SUs.

### **A chilling effect on campus**

- 39. Beyond the limitations of the existing legal framework, there is growing concern that free speech on university campuses is being affected by increasing intolerance of ideas that challenge conventional wisdom. There are also cases of pressure being placed on students and staff to avoid certain narratives at English universities that are deemed controversial or unacceptable elsewhere.
- 40. The JCHR examined the issue of free speech in higher education following the decision to give the OfS powers to protect freedom of speech through HERA. The JCHR reported in March 2018 that evidence they considered from a range of sources showed that, while there is not a widespread problem, there were barriers to freedom of speech in universities and these should not be tolerated. Barriers included violent protest, incorrect use of 'no platforming' policies, complex regulation, and increased bureaucracy in organising events.
- 41. In May 2018, in light of these concerns, the then Minister for Universities, Sam Gyimah, called a summit for HEP and student leaders to discuss concerns that universities had become hostile places for freedom of expression. They agreed that the sector should support the Equality and Human Rights Commission (EHRC) to develop new guidance on this topic.
- 42. The 2019 EHRC guidance on freedom of expression in higher education sought to address these concerns. It received support from HEPs, student bodies, government and the Charities Commission.
- 43. Despite the development and publication of this guidance, incidents of concern are still reported, including open attempts to suppress speech which too often go unchallenged by those in leadership positions. There are still too many reported instances of freedom of speech and academic freedom not being adequately protected within higher education, and of students and staff being intimidated or harassed as a result of their views. There is also evidence of an emerging culture of intolerance of freedom of expression amongst a significant and vocal minority on university campuses<sup>10</sup>.

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<sup>10</sup> Freedom of expression in UK universities, King's College London, 2019. The sample

44. According to some surveys, the majority of academics and students are supportive of the principles of free speech and academic freedom. A recent report by the think tank Policy Exchange<sup>11</sup> found that, for any given potential dismissal campaign against a fellow academic, those who are opposed to a dismissal are likely to outnumber those in favour by 8 to 1. A report from King's College London (King's)<sup>12</sup> also found that the majority of students were supportive of free speech on campus, with 81% of students in the study agreeing that "freedom of expression is now more important than ever".
45. There are also positive examples of HEPs issuing clear statements of support for academics who have been subject to dismissal campaigns as a result of views that they have expressed.

### Challenges to freedom of speech

46. Although there is evidence of widespread support for freedom of speech and academic freedom at universities, there is also evidence that a minority of students and academics who do not share the tolerance of the majority are having a disproportionate influence on campus.
47. The King's report indicates that 26% of students think that violence can be justified as a way to prevent someone espousing hateful views. The same report showed that a similar proportion of students reported not feeling free to express their views at university for fear of disagreeing with their peers. This chilling effect appears to increase when political views are expressed. For example, Policy Exchange found that 4 out of 10 students who voted for the UK to leave the European Union felt uncomfortable expressing that in class, though the report was not clear as to the specific reasons for why this might be the case. <sup>13</sup>The King's report found a similar problem, with 59% of Conservative-supporting students saying that those with Conservative views are reluctant to express them at their university.
48. This is not simply an issue of Conservative, or more right-leaning, opinions being prevented from being openly aired. In the King's study, 24% of Labour supporters, 22% of Liberal Democrat supporters and 20% of Green Party supporters reported that they felt unable to express their views. This suggests that, beyond the narrative that free speech is an issue primarily impacting upon conservative thought, there is a growing atmosphere on campuses

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includes 2,153 online survey responses from a representative sample of students enrolled in UK higher education institutions.

<sup>11</sup> Academic freedom in the UK, Policy Exchange, 2020. Based on a survey of UK academics administered on 27 March 2020 by YouGov. The sample consists of 820 respondents (484 currently employed and 336 retired).

<sup>12</sup> Freedom of expression in UK universities, King's College London, 2019.

<sup>13</sup> Academic freedom in the UK, Policy Exchange, 2019 Note: The number of leave supporters in the sample was 64.

that is antithetical to constructive debate where differing opinion is respected.

49. This can sometimes translate into examples of no platforming of speakers and protests against academics or students who have expressed lawful, if controversial, opinions. There are many high-profile examples of this being reported.
50. In some cases, there have also been reports of events being disrupted through physical intimidation. Any instances of violence or intimidation on university campuses are completely unacceptable and attempts to forcibly silence speech should be subject to robust disciplinary action.
51. The potential for violent disruption of events means that it is even more important that HEPs are transparent in regard to the charging of security costs. HEPs should not be too quick to cite security costs as a reason to prevent an event from going ahead, though there will be limited circumstances where it is reasonable for a HEP to consider costs as prohibitive. Where an event is refused on the basis of security costs, the reasons must be clearly explained. In most cases it should be possible to at least mitigate the issues of security costs and, wherever possible, individuals wishing to express lawful views should not suffer as a result of the unlawful attempts of others to disrupt their right to free speech.
52. Although there is a large amount of press interest in such cases, the larger concern is not just whether high profile individuals are able to speak at university events, but the potential impact of no platforming and similar campaigns on how free students and staff feel to express themselves throughout the course of ordinary campus life.
53. There are concerns that this temptation to self-censor might be driven in some cases by pressure from overseas to avoid certain narratives that may be deemed controversial elsewhere. For example, students may be harassed, intimidated or subject to other hostile or negative conduct as a result of their views - expressed in seminars, at peaceful demonstrations, online or in other university forums - that are at odds with foreign political agendas. It is clear that individuals have the right to campaign against speakers, to protest peacefully, and to decide who they wish to share platforms with or indeed invite to speak. However, HEPs should be doing much more to challenge the climate in which these actions are seen as a standard response to encountering views that are seen by some to be controversial.
54. While the right to civil and non-violent protest is sacrosanct, intimidation, violence or threats of violence are a crime. HEPs should make clear that intimidation is unacceptable and show a zero tolerance approach to the perpetrators, applying strong sanctions and working with local police where appropriate to secure the right of the speakers to freedom of expression.
55. This lack of tolerance for the free expression of lawful views on campus is not restricted to external speaker events. There is also

growing evidence that students are actively concerned about the prospect of being subject to discrimination as a result of expressing their views.

56. A recent survey by ADF International<sup>14</sup> found that 44% of students and recent graduates felt that they would possibly face differential treatment by lecturers if they expressed views that were important to them. This concern appears to have an impact on longer term aspirations, with 38% of students and recent graduates reporting that they felt that the expression of views that were important to them would have negative impacts on their career prospects. Further evidence of this self-censorship amongst students is reflected in research from Policy Exchange which similarly reported students feeling unable to express their views openly on campus.<sup>15</sup>
57. Despite the press coverage focus upon high profile speaking events, it is the evidence that a significant proportion of students are self-censoring in relation to lawful views that is most concerning. All students should feel able to both challenge and be challenged by others on campus and this is essential to ensuring an academic environment where all are able to participate without fear of recrimination.

### **Challenges to academic freedom**

58. Concerns about freedom of speech and academic freedom are not limited narrowly to cover no platforming incidents and campaigns. The freedom of academics to question and test received wisdom and to put forward new ideas and controversial or unpopular opinions - including ideas deemed controversial by international audiences - without placing themselves in jeopardy of losing their jobs or privileges is essential in ensuring that universities remain places of free enquiry. With regard to research and academic freedom, the Government, HEPs and public funders are committed to rigorous frameworks which are in place to support the highest levels of research integrity.
59. Despite this, recent evidence suggests that, as well as wider issues concerning free speech, some academics also feel that their ability to research and teach freely without facing disadvantage due to their political views is not being adequately protected. Policy Exchange polling shows that a significant number of current and retired academics choose to self-censor as a result. The survey shows that 32% of those who identify as 'fairly right' or 'right' have refrained from airing views in teaching and research, with 15% of those identifying as 'centre' or 'left' also self-censoring. 16

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<sup>14</sup> [UK students feel censored on campus, poll finds | ADF International](#) Survation poll included survey of 1,028 students and graduates that have graduated in the last 5 years in the UK.

<sup>15</sup> Academic freedom in the UK, Policy Exchange, 2019

<sup>16</sup> Academic freedom in the UK, Policy Exchange, 2020



60. Academics also reported they would give less favourable treatment in relation to applications for grants, promotions and publications – whether being treated less favourably on account of their own political views or being prepared themselves to treat others less favourably. <sup>17</sup>
61. This atmosphere has been reflected in reported occurrences where it is not clear that the fundamental principle of academic freedom has been upheld.
62. As long as speech is lawful, HEPs should stand up for the rights of people to express their lawful views, even if there is potential for negative reaction. There have been reported instances where HEPs have taken action out of concern that the views of an individual academic may be seen as representative of the views of the university as a whole. This approach may lead to a culture of academic conformity where views of academics must align with the norms set by the majority of academics at the institution and undermine the freedom openly to challenge conventional wisdom.
63. As with the issues surrounding freedom of speech, the prominence of certain cases reported in the media can distract from the threat that a cultural shift in the way that debate and disagreement is approached within universities can have upon students and more junior or lower profile academics.
64. These challenges are unacceptable and represent an incursion on the core values of the higher education system.

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<sup>17</sup> Academic freedom in the UK, Policy Exchange, 2020

## **The Government's expectations**

65. The Government supports the widest possible definition of free speech – anything that is within the law, subject to other legal requirements. This is integral to high quality education and research. As centres of learning and debate, it is crucial that HEPs are, and are seen to be, supportive of free speech and even-handed and impartial in how their free speech policies are applied to different opinions and individuals.
66. Government does not wish HEPs simply to passively allow free speech. They are already required by legislation 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. Government wishes HEPs to take active steps to achieve this aim, including in supporting a wider culture that is supportive of free speech, as well as in how they deal with particular requests.
67. HEPs should strive to do the very best they can, as they do with other areas which are considered to be moral imperatives, such as access, equality and academic excellence. Government wants them not to simply do the minimum that is required by law.
68. HEPs should be aware of, and protect against, a range of possible restrictions on lawful free speech. It is important that free speech is upheld, whether this is in the face of concerns about reputational risk, strong disagreement and protest from staff or students, or financial pressure from overseas states or partners. HEPs should also take action to prevent a chilling effect on others, where staff, students or visiting speakers may feel unable to express their views for fear of repercussion, and should be careful to avoid contributing to such an effect by their conduct.
69. The section 43 duty on those concerned in the government of HEPs covers their premises, including SU premises. The governing body must bring to the attention of all students at least once a year the provisions of this legal duty and the HEP's code of practice relating to freedom of speech, as relevant to the activities or conduct of the SU. Our expectations on HEPs regarding lawful free speech include how they take action through work with their SU.
70. Annex B sets out in more detail the Government's approach in this area, including where HEPs can go beyond compliance with the existing duties and demonstrate good practice.



## **Policy and legislative changes**

71. In light of the limitations identified in the existing legal framework, as well as the growing evidence of a tangible threat to the fundamental values of both freedom of speech and academic freedom in universities, the Government intends to take action to ensure that these principles are strengthened, as promised in the Government's Manifesto.
72. The policy proposals set out in this paper are aimed not only at ensuring that the gaps in the existing framework are closed, including by providing clear mechanisms for enforcement which are currently lacking, but also that HEPs, academics, staff and students - as well as the domestic and international organisations they partner with - are all aware of the importance of preserving the fundamental values of free speech and academic freedom.
73. These aims cannot be achieved by legislation alone. They require all who work, teach and learn at universities to work together to assert the value of freedom of speech and academic freedom and, where it is under threat, ensure that it is protected.
74. In reasserting the central role of freedom of speech and academic freedom within the higher education sector, the Government wishes to bring clarity to the existing duties as well as strengthening them where necessary. The proposals seek to provide universities and regulatory bodies with the tools they need to carry out their duties effectively in this area and where universities and students' unions fail to meet their duties, providing the opportunity for redress to individuals who are not afforded their right to express themselves freely within the law.

## Policy proposals

### **Proposal 1: Legislate for a Free Speech and Academic Freedom Champion to be appointed as a member of the OfS Board with responsibility to champion free speech and investigate alleged breaches of registration conditions related to freedom of speech and academic freedom**

75. A Free Speech and Academic Freedom Champion will be a clear and tangible demonstration of the importance that the Government and the OfS places on these principles in higher education. The Champion will make recommendations on potential breaches to the OfS Board, which already has the power to issue sanctions, as well as having a role in ensuring that individuals whose freedom of speech has been unlawfully suppressed within a higher education context are able to secure redress.
76. There is currently an individual on the OfS Board with specific focus, including the Director for fair access and participation, who has a specific role in relation to the OfS's access and participation functions. The Free Speech and Academic Freedom Champion will play a similar role in terms of having a particular focus on free speech and academic freedom and will be appointed by Ministers in a similar manner.
77. As the OfS already has some power to regulate in this area, appointing a Champion to the OfS Board will give further weight to the free speech and academic freedom elements in the registration Conditions and the Public Interest Governance Principles. The Champion will have a particular focus on monitoring whether HEPs are meeting the freedom of speech and academic freedom aspects of the registration requirements and in championing them publicly. The Board, on the advice of the Champion, will have the existing sanctions available where these requirements are not being complied with.
78. To ensure that individuals have a clear and simple route to individual redress, the Champion will also have powers to investigate and recommend to the Board redress, where a clear breach of the relevant registration Conditions had led to an individual suffering loss.
79. The Office of the Independent Adjudicator for Higher Education (OIA) currently provides an ombudsman function for student complaints about HEPs in England and Wales and, as part of this, can currently investigate freedom of speech complaints from students. The OfS regulates registered HEPs through registration Conditions which relate to matters including access and participation, quality and standards of education, financial sustainability and good governance. It does not currently have any remit to investigate individual cases in the way that an ombudsman does. Under these proposals, student complaints which are exclusively about free speech and academic

freedom would be considered instead by the Free Speech and Academic Freedom Champion.

80. Whilst the OIA is only able to investigate student complaints, a Champion on the OfS board could be a 'one-stop shop', able to consider and recommend redress for free speech concerns for staff, students and visiting speakers, making the process clearer and easier to pursue. The OIA would continue to be the ombudsman in relation to student complaints on other matters but would refer cases which are exclusively concerned with free speech and academic freedom to the Champion. Government will engage with stakeholders to ensure that this demarcation of responsibilities for complaints is clear and workable.

**Proposal 2: Legislate to require a new, OfS registration Condition on free speech and academic freedom**

81. The role of the Free Speech and Academic Freedom Champion would be supported by a new, registration Condition on free speech and academic freedom.
82. As set out above, the OfS currently regulates free speech primarily via Conditions E1 and E2, which require the governing documents of HEPs to uphold the Public Interest Governance Principles that apply to them (Condition E1), and to have in place adequate and effective management and governance arrangements to operate in accordance with their governing documents and to deliver the Public Interest Governance Principles in practice(Condition E2). There are two Public Interest Governance Principles which are relevant:
  - “I. Academic freedom: Academic staff at an English higher education provider have freedom within the law:
    - to question and test received wisdom; and
    - to put forward new ideas and controversial or unpopular opinionswithout placing themselves in jeopardy of losing their jobs or privileges they may have at the provider”.
  - “VII. Freedom of speech: The governing body takes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider”.
83. The creation of a new Condition will make the obligation on HEPs to ensure freedom of speech and academic freedom clearer and more upfront. This new Condition would emphasise the significance of freedom of speech requirements, as well as setting out that this responsibility goes beyond maintaining free speech codes of practice and includes the expectation that HEPs must actively promote freedom of speech on campus.
84. Introducing this new Condition will also provide clarity on the role and responsibilities of the Free Speech and Academic Freedom Champion, who will oversee its compliance. The Condition will set out

clear expectations on HEPs that the Champion will be able to rely on when enforcing free speech and academic freedom requirements.

85. Shifting the dial in this way will require legislative changes, amending HERA so that a free speech and academic freedom Condition becomes a mandatory initial and ongoing Condition. The OfS will consult on the detailed requirement for this but primary legislation may indicate the key principles, reflecting the strengthened section 43 duty (see below).

### **Proposal 3: Explore further the option of strengthening the section 43 duty to include a duty on HEPs to ‘actively promote’ freedom of speech**

86. Section 43 requires HEPs 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. There are subsidiary provisions including those relating to a code of practice and the application of the duty to SU premises.
87. To ensure that the duty on HEPs is clear and robust, Government is exploring how to strengthen this duty.
88. First, the duty could be extended to include a duty to **actively promote** freedom of speech within the law. This would mean that HEPs would have a duty not only to take reasonably practicable steps to ensure that freedom of speech is secured, but would also have a general duty to actively promote free speech on campus. This would go further than the current requirements, obliging HEPs to take positive steps to promote the values of free speech and enquiry as essential elements of a healthy and thriving academic environment.
89. Steps taken by a HEP to demonstrate that they are fulfilling this duty could include making positive public statements reasserting the importance of free speech and academic freedom, particularly where individual students and staff face criticism for expressing lawful views. The strengthened duty could also include specific reference to related issues in securing freedom of speech such as a transparent and fair approach to charging for security costs at events.
90. As set out below, extending the section 43 duty to apply to SUs directly would mean that they would also be subject to this enhanced duty.
91. Finally, a further way of amending the section 43 duty could be to include direct protections for individuals, analogous to the way the academic freedom principle provides that academics should be able to exercise that freedom without jeopardy of losing their jobs or privileges. The section 43 duty could be strengthened to set out explicitly that students, staff or employees should not be subjected to a detriment at their HEP such as losing their position or having rights or privileges removed, because they have exercised their right to free speech within the law.

92. Government would welcome views from the sector about whether the section 43 duty as it is currently framed goes far enough to ensure that the fundamental values of free speech and academic freedom are not only secured but actively promoted on campus.

**Proposal 4: Legislate to extend the strengthened section 43 duty to cover SUs directly**

93. Section 43 requires HEPs to ensure, so far as reasonably practicable, that no individual (including visiting speakers) or group is prevented from using its premises on any ground connected with an individual's beliefs or views, or a policy or objectives of the group. The duty applies to **any premises occupied by a SUs, even if they are not owned by the HEP**. However, this duty lies on individuals and bodies of persons concerned in the governance of the HEP; it does not lie on those who govern SUs.
94. Extending the section 43 duty to those responsible for SUs means that SUs would themselves be directly responsible for taking reasonably practicable steps to ensure that lawful freedom of speech is secured, as HEPs are now.
95. As regards regulation of such an expanded section 43 duty, consideration has been given to which body would be best placed to regulate SUs in this area.
96. The JCHR flagged in their 2018 report that the involvement of two regulators in England for HEPs and SUs, and differences in legal duties, make the regulatory environment within which SUs operate complex. The report raised concerns that the Charity Commission's approach in regulating its charities "does not adequately reflect the important role SUs play in educating students through activism and debate". Therefore, the report recommended extending the remit of the OfS to include the regulation of SUs. At the time the OfS had only recently been established and the Government did not consider it appropriate to legislate to change its remit; we now think that, in light of the issues outlined in this paper, this is a recommendation we can support.
97. As the OfS will have a strengthened role in regulation of free speech requirements as a result of these proposals, we believe it is sensible for the OfS to be given powers to regulate SUs in regard to free speech. This change in principal regulator should facilitate better overall oversight of the proposed strengthened free speech duties and would allow for a uniform regulatory approach to free speech across the HE sector. The OfS would be able to apply its existing sanctions, including fines, to SUs that breached the requirements imposed on them in relation to free speech.
98. Although the OfS does not currently regulate SUs directly, the free speech and academic freedom Public Interest Governance Principles referred to in Conditions E1 and E2 do apply to HEPs' interactions with SUs. SUs are currently regulated by the Charity Commission

and would still, as registered charities, be subject to charity law as well as the expanded section 43 duty.

99. The OfS states in its Regulatory Framework that its primary aim is to ensure that registered HEPs deliver positive outcomes for students. We are aware that bringing SUs into the scope of the OfS in respect of free speech would be a significant change and are exploring options that will ensure the coherence of this approach.
100. Under these proposals, charitable SUs would remain charities and governed by charity law in the same way that HEPs which are charities are subject to charity law, but with the OfS as the principal regulator in relation to free speech. The Charities Act 2011 provides for exempted charities to be primarily regulated on charity law purposes by a regulator that is not the Charity Commission, although the Charity Commission retains some regulatory functions. Changes to the existing Memorandum of Understanding between the Charity Commission and the OfS (which sets out how they regulate HEPs in tandem) could extend its scope to bring in SUs as well.

**Proposal 5: Set clear minimum standards for the code of practice required under section 43**

101. Section 43 requires HEPs to issue and keep up to date a code of practice setting out the procedures to be followed by students and staff in connection with the organisation of meetings and activities taking place on the HEP's premises (including SU premises), and the conduct of such persons in connection with those meetings and activities; and to take reasonably practicable steps (including where appropriate the initiation of disciplinary measures) to secure that the code of practice is complied with.
102. The vast majority of HEPs currently maintain detailed codes, though these codes of practice vary between HEPs in terms of content and level of detail. As set out, the publication of a code of practice can be considered by the OfS when assessing whether a HEP is fulfilling its duties in relation to compliance with Condition E2.
103. To ensure more consistency across HEPs, the Government could mandate clearer minimum standards for the codes of practice. These minimum standards could reflect the spirit of statements such as the Chicago Principles, developed by the University of Chicago, which set out the importance of free speech, as well as its limitations and includes a statement opposing boycotts of academic institutions or scholars. Government welcomes the publication of principles from some UK universities and encourages other HEPs to take a similar approach.
104. Government is keen to work with the sector to ensure that the many HEPs with robust free speech codes are supported in their attempts to fulfil their free speech duties and that all HEPs make clear their expectations of students and staff in regard to free speech. There are a wide range of good examples of free speech codes across HEPs



and the Government would like to work with HEPs to build upon these high standards and ensure clarity and consistency across the sector.

105. The above proposal to extend section 43 to SUs directly would mean that SUs could then be subject to these minimum standards for their codes of practices.
106. There are a range of ways in which minimum standards could be set out, including through non-legislative means by the OfS including minimum standards as part of its registration Conditions or by government issuing best practice guidance.

**Proposal 6: Introduce a statutory tort that would give private individuals a right of redress for loss as a result of a breach of section 43**

107. As well as ensuring that duties to protect freedom of speech and academic freedom are being complied with, it is also important that individuals have recourse to seek redress where a breach of these duties has prevented them from being able to exercise their rights and they have suffered loss as a result.
108. There are a range of existing routes by which individuals can seek redress within higher education. These are:
  - a) individuals may make complaints directly to the HEP, following which the HEP may take reasonably practicable steps (including disciplinary measures) to secure that the requirements of the HEP's code of practice on freedom of speech issued under section 43 are complied with;
  - b) they may also notify the OfS in relation to registered HEPs, which will consider the notification as part of their regulatory role (though it is not currently within their remit to deal with individual complaints);
  - c) students, including postgraduate students with teaching roles, may complain free of charge to the OIA including in reference to freedom of speech;
  - d) staff working for the HEP may bring a claim before an employment tribunal, including under the Equality Act 2010;
  - e) HEPs can be subject to judicial review and such a claim could include breach of Convention rights (in particular Article 10 on freedom of expression).
109. However, these existing complaint routes generally do not give a right for individuals to seek redress for breach of section 43. Case law has established that the exercise of the section 43 duty can be judicially reviewed but it does not confer any private law rights. This means that individuals have no route to redress under section 43 where they have been negatively affected by a HEP breaching their section 43 duty. There are also concerns that individuals who do not have adequate contractual protections in relation to freedom of speech and

academic freedom, or who do not have employment rights, may be unable to seek redress via employment tribunals.

110. There is a further gap in relation to SUs as they are not public bodies and so are not subject to judicial review. If section 43 is extended to cover SUs directly, we can consider as part of that whether private action can be taken by individuals against an SU directly for breach of their section 43 duty.
111. We are therefore proposing the introduction of a statutory tort, which would give private individuals a right of redress if they have suffered loss because of breach of the section 43 duty. The purpose of such a route of redress would have the combined aim of both compensating individuals for any loss suffered, as well as giving teeth to the section 43 duty and ensuring that HEPs and SUs take their legal responsibilities seriously.
112. As the current duty placed on HEPs by section 43 benefits members, students and employees of the establishment, and visiting speakers, a range of persons could be covered by this new right of action:
  - a. **Students who are disciplined because of their views** (e.g. expelled from their course)
  - b. **Organisers of an event which is cancelled** – if they have incurred costs (room hire, the speaker’s expenses, publicity costs etc.)
  - c. **Visiting speakers who are disinvited or ‘no platformed’**
  - d. **Academic staff who are disciplined because of their views, where they relate to their field of study**
  - e. **Academic staff who are disciplined because of their views, where they do not relate to their field of study**
113. We welcome views on whether all these categories of individual should be able to seek redress by means of a statutory tort as described above.

### **Proposal 7: Wider and enhanced academic freedom contractual protections**

114. As well as strengthening the legislative framework and enforcement mechanisms in relation to both free speech and academic freedom, the Government is also exploring ways to ensure that academic staff have robust contractual protections in place that secure their right to academic freedom.
115. Currently, many HEPs include a measure of protection for academic freedom within their academics’ contracts, though there is no consistent contractual protection applying across all institutions and certain categories of academic staff are not covered by these provisions.



116. In 'post-92'<sup>18</sup> HEPs, full-time and fractional lecturing staff (lecturers, senior lecturers and principal lecturers) employed by the HEPs have a standard employment contract, which is subject to national negotiation. It contains the following provision:
- “Notwithstanding the above (the institution) affirms that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs and privileges they have at (the institution).”
117. In post-92 HEPs, the concept of academic freedom is also found in the institution's Articles of Government. The Board of Governors is charged, after consultation with staff, with making the rules relating to the conduct of staff and in doing so must have the regard to the principle of academic freedom, as described above.
118. In chartered institutions (most of the 'old' pre-1992 HEPs), the rules of the university are set out in charters and statutes (rather than instruments and articles). In most pre-92 HEPs, an employment statute enshrines the principle of academic freedom and covers the redundancy, disciplinary, dismissal and grievance procedures which determine the procedures applying to staff covered by the statute. The employment statute will cover staff engaged in teaching and research and may also cover staff engaged in research, teaching and scholarship, and academic-related staff. The statutes are pieces of legislation that can only be changed with agreement by the Privy Council.<sup>19</sup>
119. Individual academics who feel their right to academic freedom has been improperly infringed may seek recourse against their employer via their institution's grievance procedures and ultimately via contractual/employment law remedies. It is therefore important to ensure that the staff are able to rely on clear contractual terms in relation to academic freedom.
120. Despite these contractual protections, there are still gaps that mean academic freedom is not contractually protected in a comprehensive way across the sector. The protections set out above extend only to staff who are directly employed by a HEP and therefore do not cover individuals who are participating in another capacity, such as a visiting fellow.
121. There is also a lack of clear protection in regard to recruitment and promotion of staff<sup>20</sup>. Section 14(7) of HERA, which sets out the

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<sup>18</sup> Former polytechnic colleges which received university status following the Further and Higher Education Act 1992.

<sup>19</sup> Education Reform Act 1988, section 203 (3b).

<sup>20</sup> The Equality Act 2010 provides protection in recruitment for specific protected characteristics but does not extend to expression of lawful but perhaps controversial/unpopular views.

principle of academic freedom, refers to the freedom for academic staff to act in certain ways without placing themselves in jeopardy of losing their job or privileges at the HEP. We will extend these protections to include recruitment and promotion, to cover the existing gap in the definition.

122. The European Court of Human Rights has repeatedly highlighted the importance of academic freedom as protected in particular under Article 10, underlining “the importance of academic freedom, which comprises the academics' freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction”<sup>21</sup>.
123. It is particularly important that staff working within the higher education sector are entitled to these contractual protections, as a climate where individual staff members are fearful regarding their employment status and progression leads to self-censorship and an environment where open debate is stifled.

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<sup>21</sup> *Sorguç v Turkey*, no.17089/03, § 35, 23 June 2009.

## **Conclusions and next steps**

124. Government is clear that the ability of individuals to express themselves freely and explore and discuss a range of views, including those that may be controversial, is integral to ensuring that our universities remain places of open enquiry and the free exchange of ideas.
125. The purpose of this policy paper is to set out the limitations of the existing legal framework in regard to freedom of speech and academic freedom within higher education, identifying where protections might be strengthened and proposing enhanced enforcement mechanisms.
126. The issues of free speech and academic freedom are, by their nature, subject to a great deal of public debate and any proposals in this area should recognise the complex balance that must be struck between securing these rights at the same time as ensuring that students and staff are protected from harassment on campus.
127. Potential for offence caused by speech should not in itself be used to prevent lawful freedom of speech, but equally freedom of speech should not be used as an excuse not to tackle instances of unlawful harassment or to offer a platform for speech that is unlawful, including speech which incites violence.
128. Striking this balance will require intervention not only from government but also from civil society. Government recognises that the vast majority of the sector shares the values of free speech and academic freedom that are set out in this paper and these proposals aim to strengthen and further enable the efforts of those who are working to ensure that these values are protected.

## **Next steps**

129. In addition to the reports and research cited in this paper, we are very grateful for the time already given by academics, students, representative bodies and others in offering insights into the way that free speech and academic freedom rights and responsibilities are currently exercised and acted on. We are now looking forward to engaging with a wider range of stakeholders about our analysis of the challenges faced and the proposed changes, as we work together to solve these important issues.

## **Annex A – Wider existing legislative framework**

### **The Equality Act 2010**

HEPs are subject to the Equality Act 2010 and therefore may be liable for discrimination against, or harassment of, their service users (including students), members and guests, if this is carried out by an employee in the course of their employment.

Harassment under the Equality Act 2010 is defined as “unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating [a person’s] dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for [that person]”.

When considering whether a behaviour constitutes harassment, courts will consider whether it is reasonably foreseeable that the behaviour will have the effects set out above. The courts will balance competing rights, including freedom of expression, and these provisions are not intended to undermine the principle of freedom of speech or academic freedom.

As such, the exposure of students to views or course content that they find offensive or distasteful is unlikely to constitute harassment. Similarly, a speaking event where the content has been clearly advertised in advance is unlikely to constitute harassment if attendees attend with prior knowledge of the views likely to be expressed.

On the other hand, behaviour that is directed towards individual students is more likely to constitute harassment as this would more clearly contribute to violating a person’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment.

### **The Public Sector Equality Duty**

HEPs that are public authorities specified for this purpose must comply with the Public Sector Equality Duty set out in section 149 of the Equality Act 2010. This duty requires HEPs, in the exercise of its functions, to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other behaviour that is prohibited by or under the Equality Act 2010;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The relevant protected characteristics referred to for this purpose are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

HEPs therefore have a legal duty to consider these factors when taking decisions, including in relation to free speech and academic freedom on campus. This does not mean that lawful speech which may cause offence should be prohibited or even discouraged, but that HEPs should consider a

range of ways to ensure that discussions on campus, particularly those including controversial or sensitive topics, take place in a way that is conducive to encouraging good relations between people who share a relevant protected characteristic and people who do not.

The promotion of values of free speech and tolerance of different views may form part of this consideration. Encouraging groups with different opinions to engage with those with whom they disagree can often lead to greater levels of mutual understanding and respect in comparison to attempts to silence alternate viewpoints.

It is also important that HEPs consider the impact of attempts to shut down speech on campus upon people with protected characteristics who may feel unable to express their views, for example those with faith-based views that may not align with the majority of those on campus.

Clearly, HEPs should also consider the potential negative impacts upon individuals who are victims of discrimination, harassment or victimisation, including where this is a result of speech expressed on campus. However, HEPs should also ensure that lawful speech which may cause offence but which does not constitute unlawful behaviour under the Equality Act 2010 is protected – in fact, the discussion of minority-held views on campus is likely to have a positive impact on those who share these views and who may otherwise self-censor (an issue raised across a number of research reports<sup>22</sup>).

### **The Prevent Duty**

Sections 26 to 35 of the Counter-Terrorism and Security Act 2015 set out the provisions regarding the Prevent Duty. This is a general duty on specified authorities, in the exercise of its functions, to have due regard to the need to prevent people from being drawn into terrorism. Section 31 provides that, this Duty applies to governing bodies of institutions which provide higher education courses of a description mentioned in Schedule 6 to the Education Reform Act 1988. The governing body must have regard to guidance issued by the Secretary of State when carrying out the Duty. There is general Prevent Duty guidance, revised in 2019<sup>23</sup>, and specific guidance for higher education institutions in England and Wales, updated in 2019<sup>24</sup>. Section 31 requires that HEPs must have particular regard to the duty to ensure freedom of speech under section 43 and to the importance of academic freedom as referred to in section 202(2)(a) of the Education Reform Act 1988.

### **Free Speech and academic freedom legislation in the Devolved Administrations**

The Higher Education Funding Council for Wales (HEFCW) is the HE regulator in Wales. **Section 48 of the Higher Education (Wales) Act 2015** places an obligation on HEFCW, when exercising its functions under that Act,

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<sup>22</sup> Reports include the JCHR 2018 report on Freedom of Speech in Universities, as well as a recent poll by Survation on behalf of ADF International.

<sup>23</sup> [Revised Prevent duty guidance: for England and Wales - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418111/Prevent_duty_guidance_for_higher_education_institutions_in_England_and_Wales_2019.pdf).

<sup>24</sup> [Prevent duty guidance: for higher education institutions in England and Wales - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418111/Prevent_duty_guidance_for_higher_education_institutions_in_England_and_Wales_2019.pdf)

to take into account the importance of protecting academic freedom, including, in particular, the freedom of institutions to determine the contents of particular courses and the manner in which they are taught, supervised or assessed, to determine the criteria for the admission of students and to apply those criteria in particular cases, and to determine the criteria for the selection and appointment of academic staff and to apply those criteria in particular cases.

**Section 43 of the Education (No. 2) Act 1986** applies in Wales.

**Section 26 of the Further and Higher Education (Scotland) Act 2005** requires institutions in Scotland to aim to uphold (so far as the institution considers reasonable) the academic freedom of all persons engaged in teaching, the provision of learning, or research at the institution. Institutions must also ensure (so far as the body considers reasonable) that such staff's appointments held or sought, and entitlements or privileges, are not adversely affected by their exercise of academic freedom. Academic freedom is defined to include freedom within the law to hold and express opinions, question and test established ideas or received wisdom, develop and advance new ideas or innovative proposals, and present controversial or unpopular points of view.

In Northern Ireland, **article 3 of the Education (Academic Tenure) (Northern Ireland) Order 1988** requires the Department of the Economy, in exercising their functions under that Order, to have regard to the need to ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions.

## **Annex B – Government expectations**

### **Examples of good practice**

In this section, we have set out examples of behaviours which would represent good practice in demonstrating that a HEP is upholding, and delivering in practice, the important principles on freedom of speech and academic freedom. This annex sets out the Government's view on what is good practice in relation to these principles.

This does not affect the legal requirements that HEPs must comply with and that free speech and academic freedom may, in certain specific contexts, be limited by law, nor does it replace any relevant existing statutory guidance on, for example, the Prevent Duty.

#### ***Actively promoting a positive and inclusive environment***

The HEP actively promotes free speech and academic freedom as being central parts of a high quality higher education.

The HEP actively seeks to create a positive, inclusive environment for students and staff, that allows for diversity of perspectives and opinions. The HEP recognises that advancing ideas and learning through debate is a critical part of what HEPs do and is in the student interest and that free speech exposes students to new and challenging ideas.

The HEP encourages and promotes robust but civil debate, which tolerates and understands different viewpoints, even on controversial topics.

The HEP actively supports a culture of free speech and academic freedom within their institution, in a way that means that students, staff and the public are aware of their commitment to those freedoms. This might include, for example:

- where staff or students express controversial, but lawful, views or opinions, the HEP is clear in public statements and in response to any internal petitions or pressure for action against the individuals concerned that they support their right to free speech, even if they disagree with the views expressed;
- where an academic expresses controversial, but lawful, views and then for other reasons, ceases to be employed by the HEP, the HEP, where possible, seeks to provide public clarity that the cessation of the academic's employment was not linked to their expression of those views.



### ***Section 43 code of practice***

The HEP's code of practice on free speech, required by section 43 of the Education (No. 2) Act 1986, is written in clear language so that it is easily understood by staff, students and visiting speakers. The code is provided in an accessible format and is published on the HEP's website.

The HEP's code of practice on free speech does not actively limit free speech, for example by requiring 'respect' rather than 'tolerance' for all viewpoints.

The HEP keeps a written record of decisions taken under their code to: (i) refuse permission for an event to be organised; (ii) cancel an event which has already been organised; (iii) impose restrictions or mitigations on an event, such as the appointment of an independent chair to facilitate the event. In documenting its decision, the HEP indicates the factors taken into account and their reasons for making the decision.

The HEP's section 43 code of practice clearly sets out the steps that need to be taken in relation to the organisation of events or other activities that are to take place on the HEP's premises where issues of free speech may arise. These steps are as simple as possible. The HEP does not require unnecessarily complicated or burdensome processes to be followed in connection with the organisation of events or activities, recognising that such requirements may dissuade students from seeking to organise events or activities and thereby inhibit free speech. For these purposes, the HEP's premises include any premises occupied by the HEP's SU even where those premises are not owned by the HEP.

### ***Imposition of mitigations***

When an activity or event falls to be considered under the HEP's section 43 code of practice, the HEP's starting point is that the event or activity should be allowed to proceed, without any restrictions or mitigations, such as requiring a speech to be shared in advance. Such restrictions or mitigations should not be applied as a default.

In the rare cases in which a HEP decides to impose restrictions or mitigations on an activity or event, the HEP strives to be even-handed and impartial. Where the HEP decides to impose mitigations at an event where a speaker is taking a particular position on an issue, but not to impose similar requirements at an event where a speaker is taking a different position on that issue, the HEP documents its reasons for doing so. The HEP does not impose mitigations – for example, a requirement for an independent chair or a format which ensures challenges to the speaker – at an event simply because the speaker is taking a minority view on the issue. Of course, whether the imposition of mitigations is



appropriate in any case will always depend on the individual circumstances of that case.

### ***Security costs***

Where the HEP considers that a particular event or activity gives rise to security concerns, they may consider putting additional security in place as a mitigation to allow the event or activity to go ahead. In each case, the HEP actively seeks to minimise security costs.

When making a decision on security costs, the HEP considers whether the speech is from a particular perspective or on a particular topic that is generally disadvantaged and/or particularly susceptible to being stifled within the HEP.

The HEP documents any decision to impose security costs, and who should bear those costs, setting out the reasons for that decision.

### ***The right to challenge or protest***

The HEP recognises that the right to free speech includes the right to challenge or protest i.e. the right to disagree. The HEP does not impose restrictions or mitigations on an event, or cancel the event, simply because a protest against a particular speaker is planned. Conversely, the HEP does not allow the protest to prevent speech from being heard (for instance, by drowning it out) or to intimidate speakers or audience members.

### ***Other policies and procedures***

The HEP's internal policies and procedures consistently reflect the principles of free speech and academic freedom. For example, the HEP may decide to include express references to academic freedom in the employment contracts of staff members and to free speech in their student and staff disciplinary codes or procedures.

The HEP should not encourage students to inform upon other students for lawful free speech, nor should they pay, or otherwise reward, students for doing so.

The HEP should not interfere with academic freedom by imposing, or seeking to impose, a political or ideological viewpoint upon the teaching, research or other activities of individual academics, either across the whole HEP or at department, faculty or other level. For example, a head of faculty should not force or pressure academics to teach from a their own ideological viewpoint, or to only use set texts that comply with their own viewpoint. This applies equally to contested political ideologies that

are not associated with a particular political party or view, such as 'decolonising the curriculum'.

The HEP also seeks to ensure that their disciplinary codes or procedures are drafted in a way that does not act to inhibit lawful free speech and/or that does not create the impression that those codes or procedures may be used to punish lawful free speech. For example, a disciplinary code which refers to 'offensive speech' or to 'bringing the [HEP] into disrepute' without reference to the right to free speech may act to inhibit free speech or academic freedom that is within the law.

The HEP's internal HR policies should not assume a purely subjective definition of offence or harm when considering matters such as dignity, conduct or harassment. In other words, an action is not offensive simply because a person claims that they have found it to be so. In relation to harassment, for example, there is a subjective assessment of the impact or effect of the act or behaviour on the recipient, but there is also an objective assessment of whether that impact or effect is reasonable in all the circumstances. Claims of offence can give rise to the risk of shutting down free speech and prevent certain viewpoints being heard. Policies should contain a reasonableness test, and the burden of proof in such matters should not be set up in a way which systematically works against free speech.

### ***Students' unions and other student representative groups***

The HEP takes reasonably practicable steps to ensure that their SU, or other student representative body, follows the HEP's section 43 code of practice.

The HEP works with their SU, or other student representative body, to take reasonably practicable steps to secure free speech within the law for all students and not just for those who hold the majority view on a particular issue.

The HEP takes steps to ensure that SUs do not deny or restrict registration or use of facilities to student societies as a result of a difference of political views between the student society and the SU, provided that those views and their expression constitute free speech within the law.

The HEP takes reasonably practicable steps to ensure that any student, including student societies, or staff member can organise a speaking event or activity where issues of free speech or academic freedom are relevant. There are no requirements for events or activities to be organised through the HEP's SU or other student representative body, and no reduction in access to university facilities simply because the SU is opposed to an event or activity.



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