Written evidence on the Higher Education (Freedom of Speech) Bill

University of Cambridge

House of Commons Public Bill Committee

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Executive Summary

The University of Cambridge welcomes the Government's commitment to ensuring that free and lawful speech and debate are protected in higher education. We consider the free expression and exchange of views to be fundamental to the academic, social and extra-curricular experiences of being at university.

We are grateful to the Public Bill Committee for inviting written evidence to inform its consideration of the Bill. Our submission seeks to provide some comments on how the present version of the Bill could be further clarified and refined, in order to assist with interpretation and, in particular, to prevent the unnecessary overlapping of different processes.

In summary:

1. Additional clarity is required about how Higher Education Institutions (henceforth HEIs) and Students' Unions (henceforth SUs) are meant to balance their existing statutory duties with the new, enhanced freedom of speech duties created by the Bill, in instances where these duties may collide.
2. The sanctions and remedies provided for in the Bill should be proportionate to any breach by HEIs or SUs of their duties. The OfS, as the regulator of HEIs and SUs for free speech purposes, should seek to work with HEIs and SUs in order to improve their decision-making, rather than simply sanctioning SUs and HEIs in the first instances.
3. To prevent cases and complaints being pursued through separate, but parallel, processes at the same time, we suggest that the Bill stipulates that local routes must be engaged first, and that recourse to a civil claim is available only as a last resort, as indicated by the Secretary of State during the Bill's Second Reading (see below).
4. The Bill should make provision to ensure that the individual constituent Colleges of collegiate Universities such as Cambridge are regulated directly and in their own right in relation to freedom of speech duties.

We explain these points in greater depth in our full submission below.

Introduction

Freedom of speech and academic freedom are at the heart of the University of Cambridge. We believe that open and rigorous debate are fundamental to the pursuit of academic excellence. As a world-leading education and research institution, the University of Cambridge is fully committed to the principle, and to the promotion, of freedom of speech and expression. This is set out in the University's published Statement on Free Speech (available at https://www.governanceandcompliance.admin.cam.ac.uk/governance-and-strategy/university-statement-freedom-speech and reaffirmed also in the joint Russell Group

statement of Free Speech principles (available at https://russellgroup.ac.uk/news/russell-group-universities-set-out-principles-to-protect-free-speech/).

Comments and recommendations

During the Bill's Second Reading in the House of Commons on 12 July 2021, Ministers provided several helpful clarifying statements with regards to the statutory intention and interpretation of the Bill. We cite a number of these below. We encourage the Government to adopt these clarifications explicitly in the provisions of the Bill, to help avoid any confusion resulting from parts of the legislation where the detail is at present incomplete.

Our comments on the current version of the Bill centre on the following principles:

1. Operational clarity on how to balance potentially competing statutory duties

In addition to their existing duties to ensure freedom of speech, universities and student unions also owe legal obligations under (for example) the Equality Act 2010, UK employment law and the UK Government's Prevent framework.

It is worth noting that some degree of tension has always existed between legal protections for free speech and the other legal duties incumbent on organizations, across many different contexts. What is crucial, in our view, is that the Freedom of Speech Bill does not inadvertently increase this potential for conflict; nor should it add to the administrative complexity involved in balancing statutory duties and safeguards. Rather, the legislation should provide a clear steer as to how HEIs and SUs can successfully navigate their different legal obligations, particularly in scenarios where these obligations could run into conflict.

We note that the new Freedom of Speech Bill places an explicit duty on universities and SUs to "promote" free speech, although it is unclear what this means, or how compliance with the duty will be measured. The Bill also creates a suite of new measures by which providers and SUs could be challenged and sanctioned for failing to uphold freedom of speech. Further, the Bill contains provisions (specifically, A1 (3) and (4) and A4 (3) and (4)) that explicitly prohibit the attachment of any conditions (for example, adding a neutral discussant, taking steps to ensure the safety and security of attendees) to the use of premises by a speaker, external guest, etc. Collectively, these provisions appear to enhance the relative "weight" of freedom of speech duties in relation to other statutory duties. However, the Bill does not make mention of the other legal duties to which universities and SUs are subject. These include, but are not limited to: a statutory duty to prevent unlawful discrimination and harassment; a duty to foster good relations between members of protected groups, and others, and to take steps to eliminate unlawful discrimination; a duty of care owed to students and staff; and the Prevent duty deriving from the Counter Terrorism and Security Act 2015.

Meaning of "within the law" in the Bill

We note that the Bill states that freedom of speech, freedom of expression and academic freedom are to be upheld insofar as this free speech (etc) is "within the law". HEIs and SUs could infer from this that, in instances where upholding their free speech duties would come into conflict with their obligation to uphold statutory duties to (as an example) prevent unlawful harassment and discrimination (because the speech itself would prejudice these latter duties), then the speech in these cases would not be "within

the law" (as it would not be compatible with the fulfilment of these other legal duties), and would therefore not enjoy the strengthened protections put forward in the Bill.

However, absent further clarity in the Bill, this would be an untested assumption, and an HEI/SU relying upon this assumption may carry a greater risk of being exposed to a free speech challenge. Consequently, clarity needs to be provided as to what "within the law" means: presumably this term does not just refer to the scope of the criminal law, but also to HEIs/SUs' ability to comply with their duties prescribed by the relevant equality law, private law, employment law and so forth.

Ministerial statement during the Second Reading

During the Second Reading of the Bill (12 July, HoC), the Secretary of State for Education provided some clarification on how HEIs and SUs should seek to reconcile their different duties under the new legislation:

> As now, the right to lawful free speech will remain balanced by the important safeguards against harassment, abuse and threats of violence as set out in the Equality Act 2010, the Prevent duty and other legislation, none of which we are changing.[1]

We welcome this acknowledgement of the range of statutory obligations that are incumbent upon HEIs and SUs, and that there will be an expectation that duties will continue to need to be balanced against each other. Including a version of this clarification in the text of the Bill would help to pre-empt potential confusion for members, guests, staff, students and governing bodies in how to use and interpret the new legislation.

Recommendations:

- **We suggest that the Bill provides enhanced clarification on how SUs and HEIs' existing statutory duties, including those owed under Prevent and the Equality Act, are expected to interact with SUs and HEIs' new and strengthened duties in relation to freedom of speech.**
- **The clarification provided by the Education Secretary in the Second Reading, cited above, is welcome. We recommend that the clarification is included on the face of the Bill, and that it provides a steer on how the different duties are to be balanced in practice. This would assist with the early and accessible interpretation of the legislation for guests, members, students, staff and governing bodies alike.**
- **The Freedom of Speech Bill should provide specific acknowledgement of the nature of the legal duties that might still prevail over free speech. This does not need to be an exhaustive definition, but it should refer to examples of the relevant lawful limitations on free speech (see above - criminal law, private law, equality law, etc), to illustrate which types of speech are considered by the Bill to be "within the law".**

2. Proportionality

[1] Rt Hon Gavin Williamson, Hansard Volume 699: debated on Monday 12 July 2021, column 49-50

A key principle in the regulation of English higher education is proportionality: this consideration is written into the OfS's general duties in HERA 2017 and is further required of the OfS by the Regulators' Code.

We note that the Bill equips the OfS with only one, rather blunt instrument with regards to enforcing compliance from SUs, namely the power to impose monetary penalties. This is unlikely by itself to help to improve the quality of governance and decision-making where free speech matters are concerned. We suggest that the Bill could instead make provision for the OfS to implement a gradated scheme of guidance, dialogue and warning, before it moves to formal sanctions for serious and repeat breaches by individual providers and individual SUs.

Moreover, some of the terms used in the legislation as a basis for action or sanction against a HEI or SU are vague and open-ended. Such phrases in the Bill include "adverse consequences" and "adversely affected". These terms need to be defined so that marginal or negligible adverse consequences are excluded from scope.

Relatedly, clause 3 - the provision for civil claims - is incredibly broad as currently drafted. Under clause 3, any person (or organization) could bring an action against an HEI/SU, regardless of whether they had been directly affected and regardless of the extent of any loss or adverse effect they had experienced. The scope of this route for redress therefore needs to be made proportionate. The claimant should be required to demonstrate locus standi by showing that their right to freedom of speech had been violated.

Recommendations:

- **We suggest that the range of proposed sanctions are reviewed – particularly as regards SUs – and that intermediary interventions, including dialogue and guidance, are available to the OfS where appropriate. This would be analogous to the OfS's regulatory approach as outlined in para 133 of the OfS's Regulatory Framework, which states that dialogue would precede the imposition of any sanctions.**
- **A range of sanctions would allow for interventions which are more proportionate to the facts of individual cases, recognizing that some cases are more likely than others to constitute evidence of repeat or serious breaches of duty.**
- **Terms such as "adverse consequence" and "adverse(ly) affected" need to be more clearly defined and should exclude the most marginal and negligible consequences, also to avoid vexatious or spurious complaints.**
- **The Bill should specify that a complainant who seeks to bring a civil claim needs to demonstrate that they have been affected directly by a provider or SU's perceived breach of duty; that this has infringed their right to freedom of speech; and that they have suffered some degree of loss in consequence.**

3. Simultaneity of routes for redress

The Bill's current wording around the scope of the OfS's free speech complaint scheme (Clause 7, new Schedule 6A, subsection 5) appears to allow for complainants to escalate their case / "free speech complaint" through multiple routes simultaneously. According to the current version of Clause 7, an individual would be able to refer their complaint to the OfS's complaints scheme *at the same time* as the individual pursues it

through a provider or SU's internal procedure, and/or *at the same time* that it is being dealt with by the Office of the Independent Adjudicator (OIA), or a court or tribunal.

A small change to the wording of subsection 5(2) from "the scheme *may* include provision" to "the scheme *must* include provision" would help to resolve this and would also ensure a proportionate time-limit for referring complaints (to avoid speculative attempts at compensation relating to historic events).

We are strongly of the view that complaints should not be escalated through multiple routes simultaneously. This is likely to lead to immense confusion and partial and/or contradictory rulings by different authorities. A situation of competing judgements could, in turn, undermine faith in local disciplinary processes and in the OIA's and OfS's procedures.

We also fear that this approach could be particularly problematic where the complaint or civil claim is part of a wider case or grievance, and/or relates to different areas of law (for example, as part of a disciplinary case being considered by a provider, and/or a case involving whether a member of staff is unfit for practice).

Relatedly, we note that the Bill does not specify that complainants should seek first to make use of existing, local complaints routes or processes available at the provider and/or SU, and/or the OIA, before the complainants resort to an OfS free speech complaint or to a civil claim. At present, the OIA only considers student complaints once the local process has been completed; a similar principle should apply in relation to the proposed framework for free speech-related complaints.

We therefore suggest that the overlapping nature of the array of processes set out in the Bill is resolved, and a clearer sequence set out. For example, the Bill could be amended to require that complainants first exhaust local complaints processes, then the OIA or employment tribunals, then the OfS free speech route, before having recourse to a statutory tort if no alternative means of securing a remedy exists. This would be consistent with the Secretary of State's welcome reassurance during the Bill's Second Reading that:

> Though this legal route [the new statutory tort] is an important backstop, we do not want all cases going to court where they could otherwise be resolved by other means.[2]

We suggest that this expectation needs to be made clearer in the legislation itself, to reassure prospective complainants that more local (and more accessible) routes are available to them, and to avoid the legislation being used as a springboard for vexatious and spurious civil claims. Local routes will also be more suitable in cases where a complainant has incurred no obvious material loss that could be remedied with compensation, and yet the complainant still has other concerns or grievances (for example, relating to disciplinary matters) that they would like to see investigated.

As an additional observation, we note that clause 3 specifies that a civil claim can be brought against a provider or SU "in respect of a breach" of a provider's duties under section A1 or an SU's duties under section A4. However, clause 3 does not say whether this breach would first have to be ruled upon/adjudicated by the OfS, or whether the courts (rather than the regulator) would make a decision as to whether a "breach" of

[2] Rt Hon Gavin Williamson, Hansard Volume 699: debated on Monday 12 July 2021, column 49-50

duties had actually taken place. We suggest this is revisited and clarification is provided in the Bill.

Recommendations:

- **The Bill should specify a clear order or sequence in which different complaints routes need to be exhausted before a complaint can be escalated via the OfS scheme or brought as a civil claim under clause 3, in order to avoid different processes being invoked simultaneously.**
- **To help achieve this, the wording of subsection 5 of new Schedule 6A should state "must include provision for" rather than "may include provision for".**
- **We also suggest that consideration is given to making it clear in the Bill that a civil claim can only be brought under clause 3 as a last resort, when other (including more "local") routes for redress have been exhausted, and/or in instances where alternative routes for redress do not exist. This would codify the Secretary of State's expectation quoted above.**
- **We suggest that the Bill is amended to make clear whether or not the OfS first needs to establish that a breach of A1 or A4 has taken place, before a civil claim can be brought and/or recognized against a HEI or SU under clause 3.**

4. Regulation of constituent Colleges

During the Bill's Second Reading in the House of Commons, Members pointed out that the free speech duties would apply to registered higher education providers in England, but not individually to the constituent Colleges of collegiate Universities.

The Colleges and University of Cambridge collectively agree that the Colleges and "central" University should each be subject to regulation individually and in their own right for the purposes of compliance with the new free speech duties.

This could be achieved by a minor amendment to the legislation, to ensure that the new duties apply to a constituency of institutions that is wider than only "registered higher education providers" (given that Colleges are not individually registered with the OfS).

Indeed, a broader range of institutions, including constituent Colleges, were individually subject to the s.43 duty prior to the enactment of HERA 2017. Consequential amendments resulting from HERA 2017 appear to have narrowed the application of free speech duties to registered higher education providers, but the new Freedom of Speech Bill offers an opportunity to revert back to a wider field of organizations who are regulated directly for the purposes of free speech.

It is also worth noting here that constituent Colleges, whilst regulated generally by the Charity Commission rather than the OfS, are regulated individually by the OfS in relation to Prevent; Colleges are also individually subject to duties of care and statutory duties to prevent unlawful harassment and discrimination.

Recommendations:

- **We suggest that the Bill is amended to make clear that constituent Colleges in collegiate Universities are, where relevant, individually subject to the duties specified in the Freedom of Speech Bill, and are regulated directly for these purposes.**