

# **Written evidence submitted by Universities UK (HEFSB07)**

## **Higher Education (Freedom of Speech) Bill – written evidence submitted to the Public Bill Committee**

### **1. Executive Summary**

- 1.1. Universities UK (UUK) is the collective voice of 140 universities in England, Scotland, Wales and Northern Ireland.
- 1.2. Our member universities' core purpose is to maximise their positive impact for students and the public both in the UK and globally through teaching, research and scholarship. We are led by our members and act on behalf of universities.
- 1.3. Central to this purpose is freedom of speech and academic freedom, which is at the heart of the UK's higher education sector. The free exchange of ideas drives forward innovation and discovery, provides students with the opportunity to test their thinking and develop their skillsets and ideas, and ultimately ensures that universities play a central role in our national debate and wider society.
- 1.4. That is why universities work hard to create the right conditions to both protect and promote free speech and academic freedom across their campuses and why there are already several free speech requirements on higher education providers.
- 1.5. The sector is keen to work with the government on the proposed legislation and UUK welcomes the opportunity to demonstrate our members' full and firm commitment to freedom of speech and to provide evidence to the Public Bill Committee in relation to the Bill.
- 1.6. There are several areas where we feel further clarification and assurances regarding the Bill are required, and which we invite the Committee to consider. These have been outlined in further detail below but, for summary, we believe the government should:
  - (i) Clearly outline how this Bill will interact with existing legislation and other duties which relate to free speech and academic freedom
  - (ii) Provide safeguards to ensure the statutory tort does not lead to universities and their students' unions from having to defend vexatious or frivolous claims.
  - (iii) Clarify the role of the Office for Students (OfS) Complaints Scheme and Director for Freedom of Speech and Academic Freedom in relation to that

of the existing ombudsman, the Office of the Independent Adjudicator for Higher Education (OIA).

- (iv) Provide a clearer definition within the Bill to protect those looking to secure a promotion or different job to ensure they are not adversely affected by the exercise of their freedom of speech.
- (v) Promote transparency across the sector by asking the OfS to publish annual reports covering events and speaker requests.

1.7. Specific recommendations aimed at mitigating these concerns have been included in highlighted boxes under each section below, and a full list of recommendations has been provided at the end of the submission for ease of reference.

## **2. Clearly outline how this Bill will interact with existing legislation and other duties which relate to free speech and academic freedom**

2.1. The legal and regulatory framework around freedom of speech is complicated and there are several pieces of legislation and other duties which relate to freedom of speech and academic freedom within the context of higher education.

2.2. This includes, but is not limited to, the Education (No. 2) Act 1986, the Equality Act 2010, and the Prevent duty (within the Counter-Terrorism and Security Act 2015). An **Appendix** has been provided at the end of this submission which details several of the key pieces of legislation which are often cited in relation to freedom of speech and academic freedom.

2.3. As freedom of speech is not an absolute right, but a freedom '*within the law*', these duties and pieces of legislation have the potential to conflict with each other and to interfere with free speech and academic freedom. This can make the job of balancing different, sometimes seemingly competing duties, challenging for universities.

2.4. On top of statutory duties, there are also additional considerations for universities. For instance, as [guidance from the Equality and Human Rights Commission](#) demonstrates, civil law also provides protection against offensive or harassing behaviour. This means that while certain views may be lawful to express, they could be unlawful in certain contexts, such as in the workplace.

2.5. Furthermore, many universities refer to common standards to determine respectful speech in its particular context – for instance, the International Holocaust Remembrance Alliance [working definition of antisemitism](#), which has also been adopted by many public bodies as well as the UK government.

2.6. As such, UUK believes that it is important that any additional duties placed on universities must be proportionate and that the government should outline, prior to the Bill being enacted, how they intend the new legislation to interact with existing legislation and other duties.

2.7. We understand the Government intend to outline how the Bill interacts with existing duties through guidance, as opposed to substantive changes to legislation, however we would welcome a clear statement from the government that the Bill should not be read as undermining duties placed on universities by other legislation, including non-statutory duties. This will help support higher education providers to understand their new additional legal duties in respect to freedom of speech and enable them to better navigate this complex landscape.

2.8. In due course, we would also welcome further detail on how the Bill will be monitored to ensure it is having the desired effect and has not led to any unintended consequences.

**2.9. Recommendation: for the government to outline clearly, via a ministerial statement, that the Bill should not be read as undermining duties placed on universities by other legislation, including non-statutory duties.**

2.10. In addition, and in recognition of the complexity of the legal landscape which the OfS Director for Freedom of Speech and Academic Freedom will be expected to oversee, we feel that it is important that the appointee has experience of either the higher education or legal sector.

**2.11. Recommendation: for the government, in appointing the Director for Freedom of Speech and Academic Freedom, to have regard to the desirability of the preferred candidate having experience of either the higher education or legal sector.**

### **3. Provide safeguards to ensure the statutory tort does not lead to universities and their students' unions from having to defend vexatious or frivolous claims.**

3.1. The Bill contains provision to create a statutory tort for individuals who suffer loss resulting from a breach of the strengthened Section 43 duty.

3.2. The current Section 43 duty (contained within the Education Act 1986) requires universities 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.”*

- 3.3. Strengthening this duty involves shifting the emphasis from ‘protecting’ to ‘actively promoting’ free speech and provides a legal route through which an individual may sue a university or students’ union if they feel they are not adequately meeting this new duty.
- 3.4. UUK believes it is right that, where an individual feels they have suffered harm due to a breach of the Section 43 duty, they have the right to redress.
- 3.5. Nonetheless, feedback from members suggests the creation of the tort will change the balance of legal risk institutions have to consider regarding freedom of speech and academic freedom which could lead to universities adopting a more risk-averse approach to speakers and events.
- 3.6. In addition, without appropriate safeguards, there are concerns that the tort may encourage a ‘compensation culture’, leaving universities exposed to the risk of spurious or vexatious claims which would incur significant cost, time, and reputational damages to universities – irrespective of the merit of the claim or whether an individual was even involved in an instance relating to a breach of the Section 43 duty.
- 3.7. To help mitigate against this risk, UUK believe the government should amend the legislation to ensure the tort is proportionate and acts as an additional route of redress for those who have suffered harm due to a breach of the Section 43 duty.

- 3.8. Recommendation: for the government, in relation to the tort, to amend the legislation in the following ways:**
- (i) Ensure the new tort does not cut across existing processes within universities and alternative routes to redress (such as those offered by the OIA, employment law, and new OfS complaints scheme)**
  - (ii) Introduce a threshold for harm to reduce the likelihood of vexatious and/or frivolous claims (similar to that which is in place within the Defamation Act 2013)**
  - (iii) Limit the scope of those eligible to pursue civil proceedings to individuals who have been directly affected by alleged breaches of free speech duties.**

#### **4. Clarify the role of the OfS Complaints Scheme and Director for Freedom of Speech and Academic Freedom in relation to that of the existing ombudsman, the OIA.**

- 4.1. The Bill proposes the creation of a new OfS Complaints Scheme which will be overseen by the OfS Director for Freedom of Speech and Academic Freedom.
- 4.2. As with the creation of a statutory tort, UUK believes it is right that individuals are provided the opportunity to make a complaint where they feel a university has fallen short in their duty to promote freedom of speech or academic freedom.
- 4.3. Nonetheless, there are concerns that the current proposal risks duplicating the role of the existing ombudsman for student complaints, the OIA, with that of the regulator, the OfS.
- 4.4. Although further details have yet to be published, we understand that students would be asked to choose between one of two different avenues – either via the existing OIA route or the new OfS route – to pursue complaints relating to free speech or academic freedom.
- 4.5. The different routes would, however, have different powers regarding the type of redress they can offer. The OfS Scheme would, for example, be able to consider the whole complaint – including those not related to freedom of speech – but only make recommendations which relate to the freedom of speech aspects of the complaint. UUK believe this approach risks creating a confusing situation for students who may be unclear which is the most appropriate route for them to go down, and may be uncertain as to what type of redress each route can provide.
- 4.6. Furthermore, it has been suggested that the OfS Director could be used as a resource to support the sector by offering advice and guidance on certain scenarios. Yet such a set-up raises questions over whether it would then be appropriate for the OfS Director to oversee a complaint, should one arise, which they had previously provided guidance on – even if that guidance is only general and not related to specific instances.
- 4.7. While we welcome the fact that any complaint must not to be referred under the new OfS Scheme until the complainant has exhausted any internal procedure beforehand, we understand that there will be no right to appeal an OfS decision. This would appear to be unfair and out of kilter with other routes of redress, such as that provided by the OIA.
- 4.8. UUK understand the government are keen to ensure that academic staff and external speakers – who do not have access to the OIA – have access to a right

of redress, however the OfS Complaints Scheme, as currently understood, risks creating an unnecessarily confusing situation for students, while also blurring the role of the regulator (OfS) with that of the ombudsman (OIA).

- 4.9. UUK would welcome further clarity on how the government intend the Complaints Scheme to work in practice and what the role of the OfS Director for Freedom of Speech and Academic Freedom will be in relation to the OIA.

**4.10. Recommendation: for the government to commit to providing further details of the OfS Complaints Scheme which should be subject to consultation with the sector.**

**5. Provide a clearer definition within the Bill to protect those looking to secure a promotion or different job to ensure they are not adversely affected by the exercise of their freedom of speech.**

- 5.1. The Bill proposes enhancing protections for staff to secure their right to academic freedom. This aims to ensure that academics who express lawfully held views do not suffer a reduced likelihood of securing promotion, or a different job within the same institution, as a result.

- 5.2. The language in the Bill is, however, vague and reference to “*the likelihood of their securing promotion or different jobs*” would be difficult for a higher education provider, or individual, to interpret or prove.

- 5.3. It is worth noting that significant legal protections, including the Equality Act 2010 and employment law, are already in place to ensure that individuals are not treated unfairly with regards to securing further employment or promotion and academic staff directly employed by universities often have a term in their employment contracts protecting their right to academic freedom (which is a pre-existing condition of registration with the regulator for higher education, the OfS).

- 5.4. As such, we feel the language should be updated to reflect a clearer concept in relation to an applicant’s chances of securing promotion or different job which

**5.5. Recommendation: for the government to amend the wording in the Bill, removing reference to reducing ‘the likelihood’ and replacing it with wording focused on ensuring an individual is not ‘adversely affected’ by the exercise of their freedom of speech when looking to secure a promotion or different job.**

focused on ensuring an individual was not adversely affected by the exercise of their freedom of speech.

## **6. Promote transparency across the sector by asking the OfS to publish annual reports covering events and speaker requests**

6.1. The Bill includes provisions that enable the Secretary of State to require, by direction, the OfS to report on matters relating to freedom of speech and academic freedom in its annual report, or in a separate special report.

6.2. Despite this, UUK feel there is the opportunity to go further. Similar data is already collated by the OfS as part of their responsibility to monitor compliance of the Prevent duty in higher education in England and could be published annually to help serve this purpose.

6.3. The latest figures available from the OfS cover the academic year 2017-18 and show that each year, universities – along with their students’ unions – host tens of thousands of diverse debates and speaker events every year, with less than 0.1% of events or speaker requests being rejected (see Table 1 below).

### **6.4. Table 1: External speakers and events 2017-18**

<b>Dataset</b>	<b>Number reported</b>	<b>Number of providers</b>	<b>% of reported</b>
Number of events and speakers approved	59,574	253	100%
Number of events and speakers approved with conditions or mitigations	2,153	65	3.61%
Number of events and speakers referred to the highest decision maker in the provider's process	314	68	0.53%
Number of events and speaker requests rejected	53	17	0.09%

Source: [Prevent monitoring accountability and data returns 2017-18](#), the OfS

**6.5. Recommendation: For the government to ask the OfS to publish, on an annual basis, the data it collects on the number of external speakers and events occurring across higher education institutions in England, including the number of rejected speakers.**

## **7. Summary of recommendations**

- 7.1. For the government to outline clearly, via a ministerial statement, that the Bill should not be read as undermining duties placed on universities by other legislation, including non-statutory duties.
- 7.2. For the government, in appointing the Director for Freedom of Speech and Academic Freedom, to have regard to the desirability of the preferred candidate having experience of either the higher education or legal sector.
- 7.3. For the government, in relation to the tort, to amend the legislation in the following ways:
  - (i) Ensure the new tort does not cut across existing processes within universities and alternative routes to redress (such as those offered by the OIA, employment law, and new OfS complaints scheme)
  - (ii) Introduce a threshold for harm to reduce the likelihood of vexatious and/or frivolous claims (similar to that which is in place within the Defamation Act 2013)
  - (iii) Limit the scope of those eligible to pursue civil proceedings to individuals who have been directly affected by alleged breaches of free speech duties.
- 7.4. For the government to commit to providing further details of the OfS Complaints Scheme which should be subject to consultation with the sector.
- 7.5. For the government to amend the wording in the Bill, removing reference to reducing 'the likelihood' and replacing it with wording focused on ensuring an individual is not 'adversely affected' by the exercise of their freedom of speech when looking to secure a promotion or different job.
- 7.6. For the government to ask the OfS to publish, on an annual basis, the data it collects on the number of external speakers and events occurring across higher education institutions in England, including the number of rejected speakers.



## Appendix: Existing legal and regulatory landscape relating to free speech and academic freedom

Relevant legislation, legal duty or regulatory body	Summary
<b>Education (No. 2) Act 1986</b>	Section 43 of the Education (No.2) Act 1986 requires HEPs 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, but not to HEPs in Scotland or Northern Ireland.
<b>The Human Rights Act 1998</b>	This incorporated the European Convention on Human Rights (ECHR) in domestic legislation and includes the right to freedom of expression, which subsumes freedom of speech. This offers protection to students, staff and visiting speakers alike and 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.
<b>The Higher Education and Research Act 2017 and the Regulatory Framework</b>	<p>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. 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, with Conditions E1 and E2 applying to free speech and academic freedom.</p> <p>Condition E1 refers to the public interest governance principles which are applicable to all registered providers. These principles explicitly reference freedom of speech and academic freedom. Condition E2 makes reference to statutory duty on freedom of speech in section 43 of the Education (No.2) Act 1986 referred to above.</p>
<b>Equality Act 2010</b>	Section 149 of the Equality Act 2010 creates a public-sector equality duty (PSED) on universities and other bodies undertaking public functions, which harmonises the equality duties across the protected

	characteristics. The protected characteristics are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
<b>Counter-Terrorism and Security (CTS) Act 2015 (Prevent Duty)</b>	HEPs also come within the Prevent Duty, which is a legal obligation imposed on specified bodies by the Counter-Terrorism and Security (CTS) Act 2015. Under the Prevent Duty, when deciding whether or not to host a particular speaker, RHEBs [relevant higher education bodies] are required to carefully consider carefully whether the views being expressed, or likely to be expressed, constitute extremist views that risk drawing people into terrorism or are shared by terrorist groups.
<b>The Education Act 1994</b>	Although Students' Unions 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. 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 the HEP's section 43 code of practice.
<b>The Charity Commission</b>	Most Students' Unions are registered charities and are therefore regulated by the Charity Commission. This includes acting for the public benefit in a way that promotes their charitable purpose (e.g. "advancement of education").
<b>Employment law</b>	Academic staff directly employed by universities often have a term in their employment contracts relating to Condition E1 mentioned above and protecting their right to academic freedom.

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