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Higher Education (Freedom of Speech) Bill Committee

Written evidence of the Free Speech Union

The necessity of the Bill

1. We believe the Bill addresses a real, well-evidenced problem of restriction of free speech at English universities. Legislation is an appropriate measure to ensure that universities as public bodies protect a fundamental right that is integral to their functioning and value.

2. The appendix to our submission details almost sixty recent free speech infringements at English universities. It is compiled from FSU case-work, the 'banned list' maintained by Professor Dennis Hayes of Academics for Academic Freedom (https://www.afaf.org.uk/the-banned-list/), and open sources. The list is far from exhaustive – it does not include FSU members who asked to be kept off the list nor, of course, the many cases that have not come to light. Other witnesses will be able to provide the Committee with evidence of the effects and prevalence of self-censorship.

3. The appendix does, however, provide evidence of a systemic problem that manifests itself in consistent ways. Infringements of fundamental rights matter – no lawmaker who respects free speech as a fundamental right should dismiss the evidence presented in the appendix.

4. The free speech infringements detailed in the appendix can be sorted roughly into four categories:

    a. cancellation of speaking events (no-platforming);
    b. inappropriate use of disciplinary procedures and contractual provisions against students and staff;
    c. policy-making, particularly relating to harassment, that disregards universities' free speech obligations; and
    d. top-down edicts on curriculum content (most commonly with regard to 'decolonisation').

Cancellation of speaking events

5. The matter of cancelled speaking events has attracted comment from opponents of the Bill, particularly in light of a claim by Wonkhe that only a small fraction of university speaking events have been cancelled by students' unions or universities. Indeed, the evidence set out in our appendix suggests that, since late 2020, fewer cancellations have occurred. We are alarmed, however, by claims that, *therefore*, there is no free speech problem at English universities. While speaker cancellations tend to be more newsworthy, and sometimes involve high-profile figures, it would be a grave mistake to reduce the issue of campus free speech to speaking events. Other

forms of infringement are more common and have worse effects. The problem should be assessed in light of the institutional reality at English universities, not in light of press coverage.

Misuse of disciplinary procedures

6. The most harmful infringements of free speech arise from misuse of disciplinary procedures to penalise lawful speech by students or staff. The consequences for academics can be career-ending. For students, especially those subject to fitness to practise rules, careers can be ended before they have even begun.

7. For example, Student E (no. 13 in the appendix) was disciplined by his university following his participation in a WhatsApp conversation with fellow first-year politics students. He is a modest and polite young man, and throughout the long conversation he was painstakingly reasonable and decent. His near-downfall came following a discussion about the deceased George Floyd and his alleged use of the opiate fentanyl. When a friend joked that someone would meet Floyd in heaven, Student E joked: 'Tell him I said congrats for being completely drug free for nearly 8 months.' The comment was reported to the university, which decided to discipline Student E for a 'serious' abusive comment. It disregarded the fact this was a private exchange between students; the fact that 18-year olds should be free to enjoy bad-taste humour, and even to err; the fact that other students were far more provocative (albeit in the 'right' way). The university abused its power over Student E and left him in fear of his future education. This should not have happened.

Non-compliant policy-making

8. We believe that, too often, freedom of speech and academic freedom are not taken into account as relevant considerations in university policy-making. Whereas other forms of legal compliance consistently inform decision-making – for instance with equality and data protection legislation – freedom of speech and academic freedom tend not to be accorded equal respect.

9. For example, the FSU reviewed the 'Report+Support' websites of Russell Group universities (no. 5 in the appendix). Universities use these websites to allow members to report misconduct by other members, with an emphasis on discrimination and harassment. All but two of the Group's 24 universities maintain websites of this kind. Of those 22 universities, only one – the University of Oxford – balanced the need to prevent harassment against the obligation to secure freedom of speech. Furthermore, of those 22 universities, 17 (almost 80%) misrepresented the legal definition of harassment by omitting the requirement to take into account the reasonableness of perceptions of harassment, making their procedures *more* restrictive of free speech than required by law.

10. This demonstrates the extent to which the UK's top universities tend not to incorporate free speech obligations into their decision-making. It is alarming that, despite the planning and committee work and administrative oversight involved in producing reporting websites, only one university reflected on how a legal prohibition of conduct creating 'an offensive atmosphere' might conflict with its free speech duties.

11. The Government is right to take action to ensure that freedom of speech becomes an integral aspect of decision-making at all levels of university governance. We believe there is no undue imposition in requiring universities to safeguard a right which is: a) by institutions' own

admission, integral to their value and function as public bodies; and b) a fundamental right in UK and international law.

Curriculum edicts

12. The FSU has challenged a number of university departments that have sought to fetter academic freedom by imposing politicised edicts governing curriculum content.

13. For example, Oxford's Faculty of Music (no. 20 in the appendix) has not only decolonised its curriculum, it has also adopted a policy that 'no tutors should speak disparagingly to students about any element of the curriculum'. Whereas such freedom to speak and indeed disparage is crucial to the success of campaigns to reform curriculums, it seems that, in this faculty at least, such freedom ceases once the 'correct' curriculum has been arrived at.

14. At the University of Exeter (no. 19 in the appendix), decolonisation criteria requiring a move away from 'white, Eurocentric curriculum' were seemingly introduced by bureaucratic means, without consulting the academic staff. We subsequently wrote to the University.

15. It is important that academic departments, as collective bodies, have full freedom to determine the content of curriculums, even when such decisions are made on wholly political grounds. The Bill is necessary, however, to ensure that when such decisions are made the academic freedom of individuals is safeguarded – for instance, by consulting the departmental staff. There is an increased need for consultation when curriculums are modified for politically contentious reasons.

Insufficiency of the 1986 Act

16. Some opponents of the Bill have argued that existing legislation should suffice to secure freedom of speech at English universities. It is by now clear, however, that the mere presence of the Education (No 2) Act 1986 on the statute book will not suffice to secure free speech and academic freedom in practice. Were the 1986 Act sufficient, we would not be where we are.

17. The Government is therefore right to bring forward new legislation that grants quicker and easier means of enforcement in relation to a wider range of higher education contexts.

The impact of the Bill

18. The desirable and likely outcome of the Bill will not be an increase in litigation, but renewed efforts to comply by universities – and, ultimately, greater flourishing of freedom of expression and thought at English universities. The creation of a greater risk of liability, together with the active duty to promote the importance of freedom of speech and academic freedom, should suffice to make freedom of speech an unignorably important factor in institutional decision-making.

19. While it is right that MPs consider the regulatory burden on universities, we believe for a number of reasons that the Bill is unlikely to result in a significant net increase in bureaucracy.

20. First, in most cases universities will not need to *do* a great deal to ensure compliance – many disputes dealt with by the FSU could have been avoided had institutions simply paused, refrained from a knee-jerk response, and applied common-sense fairness and reasonableness.

21. Second, the Bill is likely to make it easier for universities to reject frivolous and vexatious complaints about the conduct of students or academics. Committee members should not underestimate the time and resources swallowed up by disciplinary procedures.

22. Third, the Bill should drive universities to streamline their external speaker approval procedures so as to minimise risk-aversion and to facilitate events going ahead. Most speaking events pose little real risk of liability to universities, barring occupier's liability. Reducing the time spent on managing risks that are, in fact, fanciful is to universities' advantage.

23. While some university leaders and MPs, somewhat regrettably, portray the Bill as a salvo in the 'culture war', we believe that it is likely to be helpful to those university administrators who, rather than harbouring any secret malice against free speech, simply feel pressured to give in to campaigns calling for denunciation or cancellation. The Bill will give Vice-Chancellors a degree of cover in facing down and de-escalating such campaigns – they will be able to assert their sympathy with the protestors, while insisting that nevertheless their hands are tied by the demands of the law.

24. We believe also that fears about the Bill's impact on universities' institutional autonomy are, while understandable, frequently over-stated. If universities dislike the prospect of intervention by the new Director or the OfS, their best option is to put in place their own home-grown free speech policies with the aim of complying with the Bill's requirements, but on their own terms. We believe the Bill is already having this nudge effect – one English university has seized this opportunity and will announce an ambitious free speech regime in October. Other universities will, we hope, follow suit. The Bill's effect of prompting bottom-up reform is, we believe, a very positive outcome.

25. It is important to note impacts which, contrary to some, the Bill will almost certainly *not* have.

26. The claim that the Bill will protect Holocaust denial and hate speech is a canard. The Bill protects 'freedom of speech within the law', and it is virtually certain that an English court would follow the consistent line of judgments of the European Court of Human Rights which hold that Holocaust denial and other forms of hate speech fall outside the protection of Article 10 of the Convention. Furthermore, it strikes us as unlikely that many or indeed *any* English students will embrace this Bill, once it is made law, as an opportunity to promote Fascism and racism. Lawmakers should, we believe, respect the intelligence and decency of young people.

27. We are also unconvinced by claims that the Bill will provoke a welter of vexatious litigation. The OfS free speech complaints scheme will be allowed to weed out frivolous or vexatious complaints, and as it is likely (though not certain) that claimants will need to exhaust the OfS route before commencing litigation, and this should serve to head off meritless claims. More importantly, the Bill does nothing to limit the courts' power to strike out fanciful claims or award summary judgment and, as always, claimants bringing hopeless claim will face the usual practical obstacles – the virtual impossibility of securing a no-win no-fee arrangement, and the threat of adverse costs. We therefore see no reason why this Bill should particularly attract or enable vexatious litigants.

28. Finally, we see no danger in clause 3 allowing any 'person' to bring a civil claim. This provision creates a statutory tort, and courts will assess claims according to usual common law principles of *locus standi*. As such, only a person whose legal rights have been infringed will have standing to bring a tort claim. In addition, the courts will be alert to any abuse of process. If, for instance, the FSU as a legal 'person' attempted to bring a private claim on behalf of a member whose free speech rights had been infringed, we suggest that the court would be likely to hold that judicial review was the proper process, and that an attempt to evade the restrictions of judicial review by pleading in tort constituted an abuse of process.

How the Bill could be improved

29. While we are strongly supportive of the Bill we believe that, as with any legislation, it could be improved.

30. The following two amendments are modest and, we believe, uncontroversial. First, Parliament should ensure that the definition of 'registered higher education provider' includes colleges that form part of the provider (as at Oxford and Cambridge). This would correct the oversight arising from the Higher Education and Research Act 2017, in which the current free speech duty was limited to institutions registered with the OfS, thereby exempting Oxbridge and other colleges which are regulated by the Charity Commission.

31. Second, Parliament should close off the 'security costs' loophole by obliging universities to cover any reasonable costs that are needed to allow a speaking event to go ahead safely. Without such an explicit obligation, universities may seek to justify cancellation of controversial events on the basis that security costs go beyond the 'reasonably practicable steps' they are obliged to take.

32. More broadly, we believe that Parliament should ensure that its intention is sufficiently clear and certain, and that key gaps are filled now and not left to be filled in unpredictable fashion by the courts. We identify the following key gaps, which we are happy to expand on in oral evidence.

33. The meaning of 'reasonably practicable steps' has not been explored by the courts, either in its own right or in relation to Article 10 of the European Convention. Further clarity is needed.

34. The interaction of the regulatory process through the OfS, and the legal process of claiming in tort, is unclear. In other instances where Parliament has provided for both regulatory and legal remedies, legislation has clarified when a claim might be suitable for legal determination. This aspect of the Bill is beset by potential difficulties, and requires careful handling. The Bill should ensure a) that the OfS, despite being an administrative body, has jurisdiction to determine the full range of complaints likely to be brought before it; and b) that meritorious claimants have a route to court and are not bottlenecked in the OfS complaints scheme.

35. Finally, Parliament must ensure that universities can navigate with sufficient certainty the competing obligations under this Bill and under the Equality Act 2010. The decision as to whether provocative speech is free speech within the law, or conduct having the effect of harassment, is very finely balanced. As making the wrong decision either way could incur liability, Vice-Chancellors may reasonably decide that a policy of anodyne risk-aversion is the wiser choice. This could defeat the policy aim of the Bill. We believe Parliament should decide,

in this Bill, how this conflict is to be resolved, rather than outsource this difficult decision to universities.

THE FREE SPEECH UNION
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