



Department  
for Education

# Higher Education (Freedom of Speech) Bill

**ECHR Supplementary Memorandum**

**June 2022**

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1. This Memorandum supplements the Memorandum provided on 5 May 2022 prepared by the Department for Education (“the Department”), which addressed issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Higher Education (Freedom of Speech) Bill (“the Bill”). This Supplementary Memorandum addresses issues arising under the ECHR in relation to government amendments concerning security costs, as tabled at Commons Report stage.

## **Summary of the relevant amendments**

2. The new provisions are inserted into clauses 1 and 3 of the Bill. They will create a new duty on the governing bodies of higher education providers registered with the Office for Students (“OfS”), and on students’ unions (“SUs”) at approved (fee cap) providers (a category of registered providers), to secure that, apart from in exceptional circumstances, use of their premises by any individual or body is not on terms which require the individual or body to bear some or all of the security costs relating to the use of the premises. There will also be a new provision for providers and SUs to set out in their codes of practice, required under the Bill, criteria for determining whether there are exceptional circumstances for the purposes of the new duty.
3. The new duties on higher education providers will also apply to constituent institutions that are in many ways independent of their parent institution e.g. colleges at the Universities of Oxford, Cambridge and Durham. References in this Memorandum to providers include providers and colleges.
4. Section A1(1) (in clause 1 of the Bill) will impose a duty on the governing bodies of providers to take reasonably practicable steps to secure freedom of speech within the law for staff, members, students of the provider and visiting speakers, having particular regard to the importance of freedom of speech. In the Department’s view, this would mean that a provider could not unreasonably pass on security costs to an event organiser, and could not pass on unreasonable security costs. However, the amendments make express provision in relation to security costs by providing that they should only be passed on to event organisers in exceptional circumstances. The Department considers these measures necessary to address concerns that the existing duty on providers under section 43 of the Education (No. 2) Act 1986 to take “reasonably practicable” steps to ensure freedom of speech is not being fully complied

with and that freedom of speech in higher education is being undermined by actions such as passing on (some or all) security costs to event organisers, which may result in certain events not going ahead.

5. The new duty in section A1(10) is stated to be “[i]n order to achieve the objective in subsection (2)”, the objective being to secure freedom of speech within the law for staff, members, and students of the provider, and visiting speakers. This means that the duty will not apply so as to prevent providers from passing security costs onto event organisers for more general, social events (e.g. freshers’ week, graduation social events), since such events would not relate to freedom of speech. This limitation narrows the potential impact of the new duty and draws an appropriate line in terms of its exercise within the context of the Bill.
6. Section A5(5) in clause 3 imposes a similar new duty on SUs.

## **ECHR Issues**

### *Article 10*

7. The measures aim to explicitly strengthen rights to freedom of speech and to uphold/promote compliance with Article 10 of the ECHR (freedom of expression). The intention is to avoid a scenario whereby passing on some or all security costs would mean that an event could not go ahead, thereby inhibiting free speech. The measures are intended to strengthen individuals’ rights to freedom of speech under Article 10 and to remove any scope for the argument that passing on security costs to event organisers is acceptable (or should be considered normal) other than in exceptional circumstances.
8. The new provisions will not completely eradicate the possibility that security costs could still potentially be a barrier to an event being able to go ahead. For example, there could be exceptional circumstances which could allow the provider or SU to pass on the costs of security to an event organiser, but the organiser may not be able to afford to pay the costs, meaning that the event could not proceed. These instances could amount to a possible interference with Article 10 rights, albeit justified. Given the

high bar of the exception, the Department considers that the risk of possible unlawful interference with Article 10 rights as outlined above is small and proportionate.

### *Article 1 Protocol 1*

9. In addition, a requirement for providers or SUs not to pass on security costs to event organisers, other than in exceptional circumstances, could engage Article 1 Protocol 1 (protection of property) (“A1P1”). The effect of the provisions is that providers or SUs will be responsible for paying the security costs themselves (apart from in exceptional circumstances), which could be construed as directing them on how to spend their money, which may amount to a control on the use of property for the purposes of A1P1.
10. The provisions allow providers or SUs to pass on some or all of the security costs for events in “exceptional circumstances”. This gives some discretion for providers, depending on the specific circumstances.
11. The Department notes in this context that a provider or SU is not required under the Bill to allow the use of their premises or facilities (e.g. in relation to online events) at all times and in an unlimited way. It is open to them to offer premises for use by event organisers at specified times. This means that the commitment to pay security costs is not open-ended. In addition, most events on campus are likely not to be controversial and would not require security over and above what is normally provided. The new duty will therefore only apply in limited circumstances, when considering the large number of events that take place on campus throughout the year. The Department also understands that the majority of providers are already covering the costs of events and will therefore not be significantly impacted by these measures.
12. A1P1 is a qualified right and so any interference may be permissible if lawful, necessary (in the public or general interest) and proportionate. A1P1 recognises that there may be interference by government to control the use of property when it is in the public or general interest. This involves striking a fair balance between the general interests of the community and the property rights of the individual. The Department considers that in practice it is unlikely that the security costs for an event are ever going to be so high as to be disproportionate as weighed against the importance of promoting

and supporting freedom of speech (noting the exception that is provided for exceptional circumstances). Given this, the Department considers that a fair balance will be struck.

13. The decision to pass on some or all security costs to event organisers can be made in exceptional circumstances, which means that providers or SUs will not be responsible for security costs in all cases without exception – the duty is not absolute. The existence of an exception (i.e. exceptional circumstances) gives sufficient leeway, in the Department’s view, to ensure that there is not unwarranted interference in the control of property of providers and SUs – noting the relatively large margin of appreciation for States in relation to A1P1. Furthermore, as the amendments do not set out what may constitute exceptional circumstances, it means that providers and SUs are not obliged to reach a particular outcome as the discretion ultimately lies with them. The requirement to include the criteria for determining whether there are exceptional circumstances in the code of practice will ensure that there is transparency. As a result, the Department considers that the measures are proportionate and not excessive in pursuing a legitimate aim (to strengthen freedom of speech protections).
14. In light of the above, the Department considers that the security costs amendments do not give rise to any unlawful interference with any ECHR rights.

**Department for Education**

**9 June 2022**

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