

HIGHER EDUCATION (FREEDOM OF SPEECH) BILL

Updated Memorandum from the Department for Education to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Higher Education (Freedom of Speech) Bill (“the Bill”). The Bill was introduced in the House of Commons on 12 May 2021 and was considered in Committee in September 2021. A carry-over motion was passed in the House of Commons on 25 April 2022 and the Bill was re-introduced in the House of Commons on 11 May 2022. The Bill was introduced in the House of Lords on 14 June 2022. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation, with reference to the Bill as amended in the House of Commons. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The Bill strengthens freedom of speech and academic freedom in higher education in England, as set out in the 2019 Conservative Manifesto. There is growing concern within government of a ‘chilling effect’ on university campuses that means that not all students and staff feel able to express themselves without fear of repercussion – suggesting that the space for freedom of 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. This may diminish intellectual life on campus.
3. There is already a legal framework in place, which in particular imposes on those concerned in the government of higher education providers a legal duty to take reasonably practicable steps to ensure freedom of speech within the law is secured for their members, students, employees and visiting speakers. Increasing reports of 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 Joint Committee on Human Rights (JCHR) found in 2018 there are a number of factors which may interfere with freedom of speech at universities, one of which was regulatory complexity.
4. The Bill strengthens freedom of speech duties of higher education providers registered with the Office for Students (“OfS”), the higher education regulator in England, and imposes a new duty to promote lawful freedom of speech and academic freedom in higher education. Similar duties are imposed on constituent institutions of registered higher education providers.
5. The Bill also imposes new freedom of speech duties on the students’ unions (“SUs”) of approved (fee cap) providers (a category of registered higher education provider).

6. The Bill creates a new cause of action (a tort for breach of a statutory duty) against registered higher education providers, constituent institutions of such providers and SUs which breach specified freedom of speech duties.
7. The Bill provides for new registration conditions for higher education providers in relation to freedom of speech and academic freedom. It also provides for the OfS to regulate SUs in relation to their compliance with their freedom of speech duties. Finally, the Bill creates a new office on the OfS Board, the Director for Freedom of Speech and Academic Freedom, to champion freedom of speech and academic freedom on campus, and to be responsible for investigations of infringements of freedom of speech duties which may result in sanctions or individual compensation via a new complaints scheme.

C. DELEGATED POWERS

8. There are five delegated powers in the Bill. Two concern monetary penalties that can be imposed by the OfS in relation to its new regulation of SUs at approved (fee cap) providers as regards their freedom of speech duties. Two concern the reporting of information about overseas funding by registered higher education providers and SUs to the OfS. One is a power to commence the provisions of the Bill, which allows for transitional provision and savings.

Clause 7(1): Regulation of duties of students' unions

Clause 7(1) inserts a new section 69B(3) of the Higher Education and Research Act 2017: Functions of the OfS in relation to students' unions

Power conferred on: the Secretary of State

Power exercised by: regulations

Parliamentary Procedure: affirmative procedure

Context and Purpose

9. Section 69B(2) (as inserted into the Higher Education and Research Act 2017 ("HERA") by the Bill) confers power on the OfS to impose monetary penalties on an SU at an approved (fee cap) provider if it appears to the OfS that it is failing or has failed to comply with any of its duties under sections A5 and A6 of HERA (as inserted into HERA by the Bill). Section 69B(3) provides that a monetary penalty is an amount determined by the OfS in accordance with regulations made by the Secretary of State.
10. These provisions mirror similar provision in section 15 of HERA as regards monetary penalties that the OfS may impose on registered higher education providers. To note that the Delegated Powers and Regulatory Reform Committee did not draw the power in section 15 to the attention of the House.
11. These provisions are required to support the OfS's role in ensuring compliance with freedom of speech duties imposed by sections A5 and A6 of HERA. This is the main compliance measure available to the OfS as regards

SUs, since it does not have powers to suspend or de-register SUs in the way that it can in relation to registered higher education providers. A decision by the OfS to impose a monetary penalty can be appealed by the SU to the First Tier Tribunal that may decide to set aside or vary the penalty imposed, affording the necessary protection to SUs.

Justification for taking the power

12. The Department considers that a delegated power is necessary to allow it to keep the penalties under review, see if they are working effectively and amend them if needed. The subject matter is limited to the amount of the penalty and not any wider aspect. It is in line with the approach taken in relation to the equivalent power concerning monetary penalties that can be imposed by the OfS in respect of higher education providers.
13. In relation to the equivalent power concerning higher education providers, regulations were made in 2019 (the Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019).

Justification for the procedure

14. The Department considers that the affirmative procedure is suitable for this measure because this level of scrutiny will provide a significant safeguard in setting the limits of penalties that could be introduced, and will allow for consideration and debate in both Houses.
15. This is in line with the approach taken in respect of the equivalent power in section 15.

Clause 7(1): Regulation of duties of students' unions

Clause 7(1) inserts a new section 69B(4) of the Higher Education and Research Act 2017: Functions of the OfS in relation to students' unions

Power conferred on: the Secretary of State

Power exercised by: regulations

Parliamentary Procedure: negative procedure

Context and Purpose

16. Section 69B(2) (as inserted into HERA by the Bill) confers power on the OfS to impose monetary penalties on an SU at an approved (fee cap) provider if it appears to the OfS that it is failing or has failed to comply with any of its duties under sections A5 and A6 of HERA (as inserted into HERA by the Bill). Section 69B(4) enables the Secretary of State by regulations to set out matters to which the OfS must, or must not, have regard when exercising the power to impose monetary penalties.
17. These provisions mirror similar provision in section 15 of HERA as regards monetary penalties that the OfS may impose on registered higher education

providers. To note that the Delegated Powers and Regulatory Reform Committee did not draw the power in section 15 to the attention of the House.

18. These provisions are required to support the OfS's role in ensuring compliance with freedom of speech duties imposed by sections A5 and A6 of HERA. The Department's reasoning in this regard is the same as that set out above in relation to section 69B(3) setting the limits of monetary penalties.

Justification for taking the power

19. The Department considers that a delegated power is necessary to allow it to keep the considerations relevant to the imposition of penalties under review and amend them if needed. We expect that over time the matters to which the OfS should have regard, and the circumstances in which it is appropriate for the OfS to decide to impose a monetary penalty, may change as the new regulation of SUs by the OfS evolves and SUs adapt to the new regulatory environment. This flexibility sits within the parameters set by the overall limit to the monetary penalties, which will be prescribed by regulations subject to the affirmative resolution procedure.
20. In relation to the equivalent power concerning higher education providers, regulations were made in 2019 (the Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019).

Justification for the procedure

21. The Department considers that the negative resolution procedure gives an appropriate level of scrutiny. It reflects the need for transparency regarding the operation of the monetary penalties on the one hand, whilst ensuring necessary flexibility and avoiding the need for affirmative parliamentary approval for every change made to the factors to be considered by the OfS in imposing such penalties. These matters are unlikely to prove controversial but they do nonetheless warrant a degree of parliamentary scrutiny, which the negative procedure provides. The overall limits of the monetary penalties will be prescribed by regulations subject to the affirmative procedure (see the analysis in relation to section 69B(3) above).

Clause 9(2): Overseas funding

Clause 9(2) inserts a new section 69D(9) of the Higher Education and Research Act 2017: Overseas funding: registered higher education providers

Power conferred on: the Secretary of State

Power exercised by: regulations

Parliamentary Procedure: negative procedure

Context and Purpose

22. Section 69D (as inserted into HERA by the Bill) will require the OfS to monitor the overseas funding of registered higher education providers and their constituent institutions with a view to assessing its risk to freedom of

speech and academic freedom. The OfS may require providers to supply information about relevant funding from a relevant overseas person. Relevant funding means amounts received by way of endowment, gift or donation, research grant or contract, or educational or commercial partnership. A “relevant overseas person” is defined in subsection (8) as the government of an overseas country, a body incorporated, registered or headquartered in an overseas country, or a politically exposed person (“PEP”) (as defined) in relation to an overseas country – in each case, an overseas country other than a prescribed country. Section 69D(9) enables the Secretary of State by regulations to specify a country or territory that is prescribed for these purposes.

23. Section 69D(9) also applies to section 69E (see section 69E(6)(b)), for the purpose of the reporting of overseas funding by SUs at approved (fee cap) providers.
24. These provisions are required to ensure that the OfS has the information to enable it to better understand the possible extent of influence from foreign sources.
25. The extent of overseas funding is such that it is necessary to limit the scope of the information reported to ensure that the approach is proportionate. One way of limiting the scope is to limit the countries to which the provision applies. The government’s current intention is to prescribe the countries for the purpose of these amendments by mirroring the countries listed in the Academic Technology Approval Scheme (known as ATAS), as set out in the Immigration Rules. The countries listed in ATAS reflect existing and tested government policy relating to the higher education sector.
26. ATAS applies to international students and researchers who are subject to UK immigration control and are intending to study or research at postgraduate level in certain sensitive subjects (where knowledge could be used in programmes to develop Advanced Conventional Military Technology, weapons of mass destruction or their means of delivery). Students and researchers in these subjects must apply for an ATAS certificate before they can study or start research in the UK – unless they are nationals of specified countries.

Justification for taking the power

27. The Department considers that a delegated power is necessary to allow it to set out the relevant countries and then keep them under review and amend them as needed. If the ATAS countries are changed under the Immigration Rules, it is likely to be appropriate to amend the prescribed countries for the purpose of reporting overseas funding in a similar way.

Justification for the procedure

28. The Department considers that the negative resolution procedure gives an appropriate level of scrutiny. It reflects the need for transparency on the one hand, whilst ensuring necessary flexibility to reflect changes in the international environment and British foreign policy.

Clause 9(2): Overseas funding

Clause 9(2) inserts a new section 69D(10) and (11) of the Higher Education and Research Act 2017: Overseas funding: registered higher education providers

Power conferred on: the Secretary of State

Power exercised by: regulations

Parliamentary Procedure: negative procedure

Context and Purpose

29. Section 69D (as inserted into HERA by the Bill) will require the OfS to monitor the overseas funding of registered higher education providers and their constituent institutions with a view to assessing its risk to freedom of speech and academic freedom. The OfS may require providers to supply information about relevant funding from a relevant overseas person, where it exceeds the threshold in a 12 month period. Section 69D(10) enables the Secretary of State by regulations to specify the threshold amount for these purposes. Subsection (11) allows for provision in the regulations as to how the amount is to be calculated and on treating amounts received from someone else as received from a relevant overseas person.
30. Section 69D(10) and (11) also applies to section 69E (see section 69E(6)(c)), for the purpose of the reporting of overseas funding by SUs at approved (fee cap) providers.
31. These provisions are required to ensure that the OfS has the information to enable it to better understand the possible extent of influence from foreign sources.
32. The extent of overseas funding is such that it is necessary to limit the scope of the information reported to ensure that the approach is proportionate. One way of limiting the scope is to impose a monetary threshold over a 12 month period, below which overseas funding does not need to be reported. The government's current intention is to impose a threshold of £75,000, following discussions with the sector and representative groups.

Justification for taking the power

33. The Department considers that a delegated power is necessary to allow it to set the threshold and in due course to change the amount as appropriate. This will allow the Department and the OfS to assess the value of the information being reported over time, in terms of whether it allows the OfS to monitor the risk to freedom of speech and academic freedom effectively, and also to report on relevant patterns and trends of concern, as required under clause 9(3).
34. A delegated power will also enable the detail of how the threshold amount should be calculated to be set out. For example, with a long-term commercial partnership over a number of years, it may be necessary to attribute income to particular years (for instance, it may need to be set out whether interest should be regarded as received at the time it accrues or when it is paid).

35. The Bill provides that information should be supplied on relevant funding from a relevant overseas person, defined in subsection (8) as the government of an overseas country, a body incorporated, registered or headquartered in an overseas country, or a PEP in relation to an overseas country (in each case, an overseas country other than a prescribed country). It may be appropriate to set out where payments from someone else should be treated as a payment from a relevant overseas person. This could include where, for example, a PEP and their spouse each give a gift to a higher education provider, requiring that information on both payments is given to the OfS if, taken together, they are over the threshold amount. This will close gaps in the system that could otherwise be taken advantage of.

Justification for the procedure

36. The Department considers that the negative resolution procedure gives an appropriate level of scrutiny. The level of detail concerned is not appropriate for primary legislation. These matters are unlikely to prove controversial but they do nonetheless warrant a degree of parliamentary scrutiny, which the negative procedure provides.

Clause 13: Power for the Secretary of State to bring the Bill into force and make transitional provision and savings

Power conferred on: the Secretary of State

Power exercised by: regulations

Parliamentary Procedure: none

Context and Purpose

37. Clause 13(1) and (2) brings certain provisions of the Bill into force on the day on which the Act is passed and two months afterwards. Clause 13(3) gives the Secretary of State power to bring the remaining provisions of the Bill into force on such day as the Secretary of State may appoint by regulations. Clause 13(4) provides that different days may be appointed for different purposes. Clause 13(5) provides that the commencement regulations under subsection (3) may include transitional or saving provision.

Justification for taking the power

38. This power will enable the Secretary of State to commence the main provisions of the Bill at a suitable time. This will allow time for the OfS to create the complaints scheme and consult on the changes required as appropriate, as well as for the sector to prepare for the changes.
39. There are numerous examples of powers to make commencement regulations for the substantive provisions of the Bill, without a parliamentary procedure applying.
40. Clause 13(5) ensures that the Secretary of State can provide a smooth commencement of the new legislation and transition between existing legislation and the Bill, without creating any undue difficulty or unfairness in

making these changes. This may arise, for example, in relation to making clear how the new complaints scheme created by the Bill should deal with complaints regarding conduct prior to the coming into force of the Bill provisions, alongside conduct occurring afterwards.

Justification for the procedure

41. The Department considers that the power to make commencement regulations does not need to be subject to any parliamentary procedure as it only sets the date on which the new provisions will come into force. The substance of those provisions will be considered during the passage of the Bill through Parliament. This also applies to the related power to make transitional provision and savings, which is intended to ensure a smooth transition between existing law and the Bill and will only deal with technical aspects of that which will have a temporary effect.

**Department for Education
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