

## Higher Education (Freedom of Speech) Bill 2021

### Summary

Freedom of speech, together with academic freedom, anchors the commitment of our universities to the open and rigorous contestation of ideas. They are fundamental to their public purpose, as academic institutions, to advance research and education.

The importance of free speech and academic freedom mean it is right that we look closely at areas where legal protections can be improved. However, it is crucial any changes do not undermine the ability of universities and students' unions to prevent harassment or comply fully with counterterrorism legislation while acting to protect free speech. Any changes, including reforms to enforcement mechanisms, should also be clear, proportionate, and in line with the Government's stated intention to reduce bureaucracy across the higher education sector.

We support the principles underlying the Higher Education (Freedom of Speech) Bill 2021 (HEFoS Bill) and believe that some aspects of this legislation will help ensure consistency across the wider higher education sector on free speech protections. However, in a number of areas there are significant practical and legal concerns over the impact the reforms could have on universities and students' unions. These include:

- The implications of the proposed changes to the law on the ability of universities to balance competing legal requirements including their capacity to defend free speech while complying fully with equality law, including its protections against harassment, and counterterrorism legislation.
- The lack of clarity over how a new statutory tort offering a route to civil legal claims around free speech will interact with existing internal and external complaints procedures, and what protections will be in place to ensure claims are proportionate and not frivolous or vexatious.
- Uncertainty around how the proposed Office for Students (OfS) free speech complaints process will interact with existing procedures and routes to redress, and the full role and responsibilities of the new Free Speech Champion.

We believe that certain carefully drafted amendments to the legislation could help avoid potential unintended consequences, ensure new regulations and legal actions are proportionate, and that they do not lead to large increases in red tape without meaningfully adding to the way the higher education sector protects free speech and academic freedom.

## Russell Group and Free Speech

The commitment of our universities to ensuring campuses remain places where staff and students are exposed to a diversity of ideas and views was reiterated in a recent [joint statement supported by all 24 Russell Group universities](#).

The joint statement included explicit recognition that free and frank intellectual exchanges are a critical element of a university education and stressed the importance of ensuring universities continue to exist as places where diverse views of individuals will be tolerated. This includes topics and positions which some may find challenging or distasteful.

However, it is important to recognise that universities must consider all relevant legislation when considering how best to secure free speech and in some rare cases they are required by the law to impose certain restrictions on the manner in which free speech is exercised. The Equality Act 2010 and Counter Terrorism and Security Act 2015 are two examples of legislation that interact directly with free speech protections. Where universities must consider restrictions on speech, they do so in a way that is mindful of the fundamental importance of freedom of expression.

A 2018 OfS board paper reported the Regulator had "found no evidence of free speech being systematically suppressed. Our experience to date is that providers are working hard to be compliant with their duty under section 43 of the 1986 Education Act." While universities remain vigilant, this suggests they have balanced the competing legal requirements placed on them by existing law successfully.

High-profile media reports have suggested speaker events are regularly cancelled by universities and students' unions. The reality is that an overwhelming majority of events go ahead in a manner respectful of the rights and freedoms of all involved - speakers, students, and protesters:

a recent survey of 61 students' unions by higher education site Wonkhe found that just [six events out of more than 10,000](#) were cancelled in 2019/20. In most cases, cancellations were the result of administrative failures on the part of organisers.

- the OfS found that in 2017/18, of 62,094 requests by students for external speaker events in England just [53 were rejected by](#) universities or students' unions.
- Official data returns showed that in 2019/20, only 0.21% of event or speaker requests were rejected.

Free speech at Russell Group universities is protected through robust codes of practice published in line with legal duties. These are kept under regular review and updated when required so students and staff are fully aware of their rights and responsibilities as regards freedom of speech and academic freedom. Russell Group universities take steps to ensure details of free speech codes are available to all students and staff.

## Proposals included in the HEFoS Bill

We support the principles underlying the HEFoS Bill and believe that some aspects of this legislation will help ensure consistency across the wider higher education sector on free speech protections.

However, the proposals include a number of measures which could create potential conflicts with other legal obligations around protection from harassment, for example, that would be challenging to reconcile. There is clear potential for the changes which have been proposed to increase regulatory burden significantly, diverting resources provided by students and the Government away from core educational and research missions.

We would welcome moves from Government to address these concerns as the Bill progresses through Parliament. Action on these points would help ensure the legislation achieves its stated aims, is proportionate and – crucially - provides universities and students' unions with clarity so they can ensure freedom of speech and academic freedom continues to be protected fully.

## BALANCING COMPETING LEGAL DEMANDS

The codes of practice and guidance our universities have developed allow them to judge competing pressures and take decisions which reflect not only the several existing laws which help protect free speech and academic freedom but also the additional legal duties they are under, and which protect other, vitally important interests. These include responsibilities under the Equality Act 2010, which requires universities to prevent discrimination or harassment related to protected characteristics against students, staff and members of the public attending events, and the Prevent duty placed on universities by the Counter Terrorism and Security Act 2015. This requires universities to have regard to the need to prevent people from being drawn into terrorism.

The reforms included within the HEFoS Bill can, in part, be taken as an effort to make clear the responsibilities of universities in regard to freedom of expression. However, at present the changes which have been proposed risk increasing complexity and regulatory burden for universities, staff and students alike and may impede universities' capacities to uphold other, important, legal duties. For example:

- Amendments to existing free speech law that would introduce a new duty to "promote" free speech would change the legal balance between protection of freedom of expression and other statutory duties on universities. In particular, there is a risk that the duty to promote free speech might indirectly undermine universities' efforts to comply fully with the public sector equality duty, which includes duties to eliminate unlawful discrimination, harassment and victimisation, and to foster the participation in university life of protected groups. With no case law to refer to, getting this balance right and establishing what is necessary to comply would be challenging, and may lead to an overly cautious approach being adopted by universities.
- The Bill states that the terms on which the premises of a university or students' union are provided for an event cannot relate in any way to an individual or groups policy, views or beliefs. We support this principle fully. However, the absolute nature of this requirement will conflict with obligations placed on universities through Prevent, which legally require checks on whether views are likely to constitute extremism. Any steps taken to mitigate this risk potentially open universities up to criticism and challenge as constituting an unlawful restriction on freedom of speech.
- Government is also rightly working with universities and the OfS to deliver improvements in the way universities work to tackle issues of bullying and discrimination that have no place in higher education. It is unclear how the new free speech duty will interact with guidance on issues such as these where public statements from individuals may not meet the legal threshold for hate speech.

Additional clarity within the legislation and comprehensive guidance for universities and students' unions over what the Bill means for the navigation of the various statutory duties and obligations they are under will be necessary to help mitigate these risks.

**An amendment making clear the additional areas of legislation universities and students' unions must have regard to while fulfilling free speech duties is one mechanism through which this could be achieved.**

Absent detailed further guidance, there is a possibility of unintended consequences including a "chilling effect" where legal complexity disincentivises individuals within universities and students' unions from seeking to arrange events.

## CREATION OF A NEW STATUTORY TORT

The Bill proposes the creation of a new tort that would allow individuals who feel their right to free speech has been restricted to take a civil action against a university or students' union.

The circumstances of how and when individuals could pursue claims through a civil action remains unclear, with the Bill as introduced setting out no thresholds for harm that could help mitigate against

frivolous or vexatious claims. The Bill also fails to explain how the tort will interact with existing modes of redress and the new complaints process proposed in the Bill which would be operated by the OfS.

At present, internal grievance and complaints processes offer staff and students significant opportunities to seek redress when they feel their right to free speech has been infringed. These include comprehensive rights to appeal. In the event internal processes do not conclude in a way that satisfies an individual, then students can take their grievance to the Office of the Independent Adjudicator (OIA). Where free speech concerns interact with employment decisions, university staff have recourse through employment law and tribunals.

**An amendment to the Bill that make clear the new tort is intended to act as a backstop to the existing grievance processes in place would help ensure its introduction genuinely adds an additional layer of protection for individuals with free speech concerns who have suffered loss.** This would reduce the risk of the tort creating extra bureaucracy, causing confusion for claimants faced with multiple complaints processes, or undermining existing disciplinary procedures.

**Introducing a threshold for harm within the tort would also help ensure this route could not be abused by individuals and groups who do not have genuine grievances.** This would be consistent with the protections provided in the Defamation Act 2013<sup>1</sup> passed by the Conservative-led government of the day, while still offering a route to redress for individuals directly affected by any failure to protect freedom of speech or academic freedom.

## ROLE AND RESPONSIBILITIES OF THE OFS

The HEFoS Bill includes proposals that would increase the free speech responsibilities of the OfS: with a new Director for Free Speech and Academic Freedom overseeing the administration of a complaints scheme which, for the first time, will see the higher education regulator in England have powers to intervene in the activities of students' unions.

Following the publication of the Bill, concerns have been raised publicly by the OIA, the independent body which deals with higher education complaints, over the potential confusion that the creation of a new route for free speech complaints through the OfS could cause for students. The Russell Group shares these concerns, and would welcome moves to ensure complainants, universities, students' unions, and others have full clarity over the manner in which free speech complaints will be handled.

A significant proportion of complaints which involve free speech also include broader concerns on issues such as fitness to practise. Under these circumstances, it may be difficult for individuals wishing to take a complaint forward to identify the correct path to follow and understand how this choice may impact on the way their case will be handled. **We would encourage Government and the Regulator to work with the sector to develop detailed guidance to ensure the new scheme works for complainants, is understood fully by universities and students' unions, and includes safeguards around complaints relating to historic events.**

The new Free Speech Champion will sit on the OfS Board and take responsibility for overseeing a complex area of regulation which involves a range of statutory duties. With media reports suggesting the Champion will have wide discretionary powers to intervene in cases where free speech is perceived to be under threat, **amendments that will help guarantee the individual appointed has the necessary experience and understanding of the complex legal regime to defend free speech and work with universities to help them manage competing legal responsibilities would be welcome.**

**Confirmation that existing commitments around proportionality in OfS regulation will apply to the activities of the Champion and any penalties imposed on institutions where a complaint is upheld will also be important. Reflecting the resource constraints under which many students' unions operate, further action to ensure the manner in which they are regulated is proportionate with any sanctions graded appropriately would also be welcome.**

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2013/26/contents>