

Higher Education (Freedom of Speech) Bill 2021

Summary

Our universities are committed to the open and rigorous contestation of ideas, anchored by our commitments to freedom of speech and academic freedom more broadly. These principles are fundamental to the public purpose of academic institutions in the UK and are central to delivering advances in research and education.

The Russell Group supports the principles underlying the Higher Education (Freedom of Speech) Bill and believe that aspects of this legislation will help ensure consistency across the higher education sector on free speech protections. 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, new legislation must not undermine the ability of universities and students' unions to prevent harassment or comply fully with counterterrorism legislation while acting to protect free speech. 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:

- Proposed changes to the law that make it more challenging for universities to balance competing legal duties and defend free speech while complying with equality law, protection against harassment and counterterrorism legislation. Clarification on how different legal obligations should be treated could be provided on the face of the Bill and proper guidance is also vital to ensuring everyone understands how the Bill fits with existing law.
- 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 not frivolous or vexatious. We are seeking safeguards against misuse to ensure the tort, if taken forward, is a genuinely helpful layer of protection for staff, students and speakers.
- Uncertainty around how the proposed Office for Students (OfS) free speech complaints process will interact with existing routes to redress, and the full role and responsibilities of the new Free Speech Champion. We are seeking assurances there will be proper consultation on guidance and measures to ensure the Free Speech Champion appointed has the confidence of students, staff and universities.
- New reporting requirements around international R&D and commercial arrangements that duplicate existing security regulations and could make it more challenging for universities to develop and maintain links with trusted overseas partners. Ensuring regulations are targeted properly with risk-based exemptions and proportionate reporting thresholds will protect UK values and our national interest as universities continue to foster knowledge and commercial partnerships.

Amendments consistent with the intent of the legislation addressing these issues would strengthen the Bill. They would 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 improving the way the UK higher education sector protects free speech and academic freedom.

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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 2021 [joint statement supported by all 24 Russell Group universities](#).

The joint statement includes explicit recognition that free and frank intellectual exchanges are a critical element of a university education and stresses 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 given the impression that speaker events are regularly cancelled by universities and students' unions. The reality is that the overwhelming majority of events go ahead in a manner respectful of the rights and freedoms of all involved - speakers, students, and protesters:

- A 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 or speakers.
- 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](#) at English universities 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 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 aspects of this legislation will help ensure consistency across the wider higher education sector on free speech protections.

However, the proposals also 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 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 the House of Lords. 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 continue 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, 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 clearer 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' capacity 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 group's 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 – and clarity on which legislation takes precedence if in conflict – 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 remain 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 makes clear the new tort is a backstop to the existing grievance processes in place would help ensure its introduction adds a genuinely helpful 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 2013¹ 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.**

The OfS has stated that it is committed to taking a proportionate approach to regulation and this must apply equally to the activities of the Champion, including the approach they take to data returns and the use of graded sanctions where complaints are upheld. This will be of particular importance for students' unions, who will be regulated by the OfS for the first time and in many cases will be operating under significant resource constraints.

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

INTERNATIONAL PARTNERSHIPS

Knowledge and research are international pursuits, and the relationships Russell Group universities have built up around the world have delivered major scientific breakthroughs and secured new resources for UK higher education to deliver high-quality teaching and learning.

We know working with international partners is not without risk. As world-leading research-intensive universities, our members are aware of how hostile state actors may seek to take advantage of new UK advances to threaten our national security or use financial leverage to try to undermine our values.

This is why the Russell Group has worked with Government on security measures such as the Academic Technology Approval Scheme (ATAS) and the National Security and Investment Act (NSIA) to develop a risk-based approach that keeps the UK safe while supporting legitimate international students, investment and collaboration.

Clause 9 of HEFoS, which was tabled by the Government at Report Stage in the House of Commons, introduced a series of new reporting requirements around overseas partnerships which, in some cases, interact with existing requirements under national security legislation.

We welcome the decision to take a risk-based approach that means universities will not have to report on activities with overseas partners from trusted countries already exempt from requirements under ATAS. Similarly, restricting reporting requirements around individuals to those who are Politically Exposed Persons (PEP) is a sensible step.

However, there are additional steps that should be taken to ensure new requirements in this area are as proportionate as possible.

Given the broad nature of financial activity that institutions will be required to report to the OfS, including research income, it will be vital that a reasonable reporting threshold is set through regulations following the Bill.

Equivalent legislation in the United States has a reporting threshold of \$250,000. Setting thresholds that are consistent with other leading research nations will ensure help international investors are not put off from partnerships with the UK because of requirements that could be seen as more onerous.

With overseas commercial arrangements and R&D partnerships in strategically important areas already subject to enhanced reporting requirements through the NSIA, **we would encourage Government to look again at the range of activities covered by Clause 9 and broaden exemptions so that a wider range of R&D, educational and commercial activities are excluded from scope, particularly where commercially sensitive information might be captured.** If this is not possible, as a minimum Government and the OfS should consider how maximum value can be extracted from existing returns under NSIA and ATAS before asking providers for additional information.

While the volume of returns is likely to be reduced significantly through the use of risk-based exemptions, we remain concerned regarding the capacity within the regulator to manage data effectively and securely. It would be helpful to understand what additional resources will be provided to the OfS to support this new element of their work, what costs would be associated with developing this new institutional capacity and how they will ensure staff have the appropriate expertise to make risk-based judgements on universities' international activities.

As indicated above we believe it is critical the new Director for Free Speech and Academic Freedom has sufficient experience and understanding of higher education and the complex legal framework in place around free speech to manage complaints effectively and fairly. **Adding information on R&D partnerships and commercial arrangements to the list of issues to be considered in the course of their duties underlines the importance of securing an appropriate appointment.**

June 2022