RUSSELL GROUP

Higher Education (Freedom of Speech) Bill – Statutory Tort

During debates in the House of Lords the introduction of the statutory tort was opposed by wide range of peers from all sides on the Chamber.

Senior Crossbenchers, Conservatives and opposition front bench spokespeople spoke against its inclusion on the face of the Bill, with former ministers and legal experts raising a series of concerns with the Government's proposals (see key quotes referenced below).

The Russell Group shares the view of many peers that the tort could have unintended consequences contrary to the aims of this legislation. This includes the possibility of increased legal risk reducing the likelihood of universities and students' unions seeking to arrange events which could lead to litigation.

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. In the event internal processes do not conclude in a way that satisfies an individual, students can take their grievance to the Office of the Independent Adjudicator (OIA) and university staff have recourse through employment law and tribunals.

The amendments put forward by Government at report stage in the Lords which clarified complainants should pursue claims through these robust existing routes to redress and the new OfS free speech scheme before initiating a civil claim were a positive step. However, they were not sufficient to address the range of concerns outlined by peers.

The removal of the tort from the legislation was a sensible step that reduced the risk of unintended consequences without undermining the core aims of the Bill.

If returned to the Bill, the tort would add significant complexity for complainants, universities and students' unions. Managing the potential for litigation would also likely create significant administrative and resource burdens without adding to the enhanced protections for free speech introduced by the new OfS complaints process.

If the tort is returned to the Bill, it should be reintroduced via amendments which replicate the sensible safeguards Government proposed at report stage in the House of Lords. This would ensure it acts as a genuinely additional layer of protection for individuals with free speech concerns who have suffered loss.

While not addressing all the concerns expressed by experts in the House of Lords, this approach would go some way towards reducing the risk of the tort creating disproportionate bureaucracy, causing confusion for claimants faced with multiple complaints processes, and undermining existing disciplinary procedures.

Key quotes from House of Lords debates on the introduction of the statutory tort:

Lord Grabiner (Crossbencher, President of the University of Law):

“the Office for Students, and the OIA—as regulators with suitable powers and, as should be the case, an in-depth understanding of the higher education world—would be far better placed than a judge of the High Court to deal with the matters dealt with by the Bill. In principle, it should not be necessary to have a regulatory structure concurrently in place with a specially devised civil court process. The scope for confusion, and what I call trouble-making, is obvious.”

Lord MacDonald (Crossbencher, former Director of Public Prosecutions):

“far from encouraging free speech, which I am certain is its intention, it [the statutory tort] will have the opposite effect. Universities, unions and university societies will fear the heavy hand of litigation and the effect will be a chilling one.”

Lord Willetts (Conservative, former Universities Minister):

“there is a danger that that this type of provision has an opposite effect from the one intended, in that people who are thinking of potentially inviting speakers or organising events at their university are inhibited from doing so for fear that they could potentially find themselves caught up in complicated and demanding legal action; in other words, this could have exactly the opposite effect to the one intended.”

Lord Pannick (Crossbencher):

“The regulator should have sufficient power to resolve disputes and to give a declaration or a statement which will set standards which will then inform all relevant persons of what the requirements are in this context. That will be speedier than civil litigation; it will be less expensive than civil litigation; and it is highly likely to produce a more acceptable result than civil litigation.

“Despite their many skills, His Majesty’s judiciary is not the best body to determine these sensitive issues. A regulator will have far greater expertise and is far more likely to produce an acceptable result.”

Lord Johnson (Conservative, former Universities Minister):

"once the director for freedom of speech’s position is created, his or her position will be very strong and he or she will have sufficient powers to do the job that we expect him or her to do in promoting freedom of speech in our system. That is because the director for freedom of speech will be able to impose conditions of registration on any provider that falls short of the enhanced duties created by this Bill.

"These conditions of registration are an extremely powerful regulatory tool.....A statutory tort on the statute book will not help the regulator in any way at all; it already has the tools it needs".

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