

## Litigation



**Fiona Scolding QC**

# Queries over interpretation of the duties as drafted. **Landmark** Chambers

## 1. The duty to promote freedom of speech

- “what is a reasonably practicable step” to secure freedom of speech?
- How does one “have particular regard to the importance of free speech” when taking these steps and what difference does that make?
- Construction of the code of practice which will be required to be issued by every Higher Education Provider (Clause 1 of the Bill)
  - What will it cover?
  - Will the procedures to be set out in the Code be sufficient and/or be subject to dispute?
  - The criteria for specified decisions – what will that look like?
  - Similar duties to be imposed on student unions – how will this work in practice? Must alert their members to it – will this be an issue? How do this “actively” as seems to be required?

## 2. Need to promote academic freedom

- Alongside the duties to promote free speech, higher education providers have to secure “academic freedom” for academic staff alongside the right to free speech
- But this duty is limited :
  - (a) Question and testing of received wisdom
  - (b) Putting forward new ideas , controversial or unpopular opinions only if
    - (1) Within the law
    - (2) Within the field of expertise of the academic (so not to do with wider university policies eg affiliation with Israel, Stonewall, unpopular regimes) .  
What does this mean???? And how can it be identified?
- This includes privileges and promotions and employment/the holding of offices and when recruiting new staff

## Statutory tort

- Creation of a statutory tort for breach of the freedom of speech duties to either

(a) The university

(b) The student union

To seek legal redress for their losses

- If an academic/employee, why not have this in the Employment Tribunal (rather than as a civil claim)?
- If a student union, do they have insurance or will such need to be created to indemnify them – would the ET be the appropriate place to examine these claims as well ?

## Regulation by the OFS

- The OFS has power to regulate student unions under this legislation
- Is that right? Should there be such oversight?
- Can impose monetary penalties for such failure - again is this fair or proportionate? Does this in fact stifle free speech?
- Power to injunct a student union if it does not give the OFS with information that it may require – necessary?

## Complaints scheme

- To be set up by the OFS and run by it
- Is this appropriate? Does it have sufficient independence from government?
- Very wide number of people who can complain – students, former students, invited speakers
- Any “adverse consequences” (not defined)
- OFS will have the power to make a recommendation including a requirement to pay monies, where appropriate and the university has to comply with this or face enforcement action.
- Can impose fines up to 500k
- Vexatious complaints? Replicates the statutory tort – why need both?
- Will need to have gone through the complaints process before bringing a tortious claim?

## The law of unintended consequences

- Significant increase in compliance measures /administration by both HEP's and student unions
- May well lead to greater division and less toleration
- Oversight over student unions – compromising their independence?
- Is it needed?

# Thank you for listening

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