

The Higher Education (Freedom of Speech) Bill 2021: what does the bill do?



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The Bill

- Described by Labour as *“A bill that amounts to legal protection for hate speech”*
- Sec of State for Education: *“Our universities must not become spaces where ideas are debated within a narrow consensus with those who challenge majority views subject to censorship themselves.”*
- **POLL:** What do attendees think? Will the new Bill will have an overall positive or negative impact on freedom of speech at universities (including student unions)?

The Bill: summary

- Statutory duties on Higher Education Providers (HEPs) and Student Unions (SUs) to (i) secure freedom of speech (FOS) and (ii) establish a code setting out a range of relevant matters
- New (and broadly framed) right to bring civil proceedings against providers and SUs for breach of duty to secure FOS
- Duty on HEPs and SUs to promote FOS
- New oversight and regulatory powers and duties for Office of Students (OfS), including regulation of SUs
- Free speech complaints scheme administered by OfS
- Creation of Director of FOS and Academic Freedom

The main statutory duties to secure FOS

- Centrepiece is ‘new’ duty to *“take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take in order to achieve the objective [of securing FOS within the law]”*
- Duty on HEPs (Clause A1) **and SUs** (Clause A4)
- The objective:
 - For HEPs, is securing FOS for staff, members, students and visiting speakers
 - For SUs, for members, students of the HEP, staff of the SU/HEP, members of the HEP and visiting speakers
- Decisions denying use of HEP/SU premises (and affiliation for SUs) are specifically identified as an example of potential breach
- In relation to HEPs in England, replaces duty in s.43 of Education Act 1994

Maintaining a code of practice/promoting FOS

- Duty on HEPs and SUs, with a view to discharging FOS duty, to maintain a code of practice setting out:
 - values relating to FOS
 - procedures to be followed by staff and students of the provider in connection with the organisation of meetings/activities on the premises
 - criteria to be used by provider in making decisions about whether to allow the use of premises and on what terms
- Duty to:
 - take reasonably practicable steps to secure compliance with the code
 - bring FOS obligations and code to attention of students once a year

New civil cause of action/complaints mechanism

- Clause 3 : New right to bring civil proceedings against providers and SUs for breach of duty to secure FOS:
 - Who can bring claim? “*a person*” – cf complaints procedure
 - Apparently no requirement for causation or harm
 - UUK highlighted risk of vexatious claims as a concern

- New complaints mechanism:
 - ‘eligible person’ who has suffered ‘adverse consequences’ as a result of a claimed breach of the FOS duty by HEP **or SU** may make a complaint
 - OfS has power to make recommendations only
 - Overlap with complaints mechanism of OIA for HE?

Expansion of powers/duties of Office for Students

- OfS established by 2017 Act:
 - Providers must register... if they wish to access public grant funding/recruit international students/apply for degree awarding powers
 - Funded by registration fees from providers and DfE
 - Chair, CEO, members and directors appointed by the Sec of State (Sch.1)

- Wide range of new powers to oversee the statutory regime, including bringing SUs directly within purview of OfS

Expansion of powers/duties of Office for Students

- OfS must have regard in performing its functions (i) the need to promote the importance of FOS and (ii) need to protect academic freedom of academic staff
- Regulation of HEPs:
 - Duty to promote the importance of FOS within the law and academic freedom for academic staff in provision of HE;
 - Power to identify good practice relating to FOS/academic freedom and give advice about such practice;
 - Registration conditions for HEPs to include conditions enforcing compliance with duty

Expansion of powers/duties of Office for Students

- Registration conditions for HEPs must require HEPs to keep OfS informed of associations or bodies which are SUs at that provider
- OfS must maintain a list of SUs and make it publicly available; and monitor whether SUs are complying with the statutory duties; SUs obliged to provide OfS with information for the purposes of OfS' functions
- May impose a monetary penalty if *“it appears to the OfS that it is failing or has failed to comply with any of its duties under those sections”* (such power already exists in relation to HEP breach of registration conditions)

Other provisions

- Creation of Director of Freedom of Speech and Academic Freedom
 - Director is responsible for overseeing performance of OfS free speech functions
 - Can carry out any such functions delegated by OfS
- Bill also introduces a freestanding duty on HEPs/SUs to promote the importance of FOS/academic freedom

Thank you for listening

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