

**Welcome to Landmark Chambers'**

**'The freedom of speech bill for universities:  
necessary or superfluous?' webinar**

The recording may be accessed [here](#).

# Your speakers today are...



**Samantha Broadfoot QC (Chair)**



**Fiona Scolding QC**

**Topic:**  
Litigation

# Your speakers today are...



**Yaaser Vanderman**

**Topic:**  
Current position  
on freedom of  
speech on  
campus



**Admas Habteslasie**

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



**Hannah Gibbs**

**Topic:**  
The Higher  
Education  
(Freedom of  
Speech) Bill  
2021 : the  
government's  
concerns

## Current position on freedom of speech on campus



**Yaaser Vanderman**

# Concerns?



Invited to speak at UN Women Oxford UK and disinvited 30 mins before talk



Prof Selina Todd disinvited from Oxford International Women's Festival

## Legal obligations on universities

- **Section 43 of the Education (No. 2) Act 1986**
  - Reasonably practicable steps to ensure freedom of speech secured for members, students, employees and visiting speakers
  - Includes ensuring, so far as reasonably practicable, use of premises not denied to a person/body due to their beliefs, policy or objectives
  - Code of practice about securing freedom of speech

## Legal obligations on universities

- **Section 202 of the Education Reform Act 1988**
  - In exercising functions, University Commissioners must have regard to the need:
    - “to ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions”

## Legal obligations on universities

- **Equality Act 2010**
- **Common law duty of care**
- **Counter-Terrorism and Security Act 2015**

## Regulator - Office for Students

- **Higher Education and Research Act 2017**
  - Regulates Higher Education Providers
  - One of its roles is to make sure that Providers' governing documents on freedom of speech meet baseline requirements.
  - Can intervene and apply sanctions.

*R (Ben-Dor) v University of Southampton (27 Apr 2016)* 「Landmark  
Chambers」

- Conference – “International Law and State of Israel: Legitimacy, Responsibility and Exceptionalism”
- University withdrew permission for event following risk assessment of violence
- B brought judicial review – breach of s43 in combination with Article 10 and 11 ECHR.

# *R (Ben-Dor) v University of Southampton* (27 Apr 2016)

- General principles from Supreme Court in *R (Lord Carlile) v Home Secretary* (2014):
  - Free speech “*one of the essential foundations of a democratic society*” but not absolute
  - Proportionality of interference a matter for Court
  - But Court will give weight to the decision-maker where they are better placed to weigh risks

*R (Ben-Dor) v University of Southampton (27 Apr 2016)* 「Landmark  
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- Whipple J - no disproportionate interference of Article 10/11 ECHR here because:
  - Objective of avoiding risk of violence sufficiently important;
  - University not proposing to ban conference for all time;
  - Considerable weight given to University's assessment of risk;
  - Lawful to have regard to terrorism heightened state of alert following incident in Paris;
  - These were exceptional circumstances within meaning of University's Code.

## *R v University of Liverpool ex p Caesar-Gordon (25 May 1990)*

- Conservative Association invited South African diplomat to meeting
- University withdrew permission because of risk of disorder in University and in adjacent residential areas.
- High Court – s43 of the 1986 Act did not entitle University to take into account threat of disorder outside of its grounds by those not under its control.

## Student unions?

- Not required to comply with s43 duties, but:
  - Section 43 applies to student union premises; and,
  - Student unions have to follow code of practice

## EHRC Guidance

- EHRC Guidance produced in Feb 2019



## EHRC Guidance – no-platforming

“However, if a speaker has already been invited by an SU society or group and the speech will be lawful, the SU will need to consider their obligations under their HEP’s s.43 code of practice. If an SU cancels a speaker in these circumstances, their HEP has a duty to take reasonably practicable steps to ensure the speaker event can proceed.” (p27)

“However, if a student group or member of staff invited a speaker from an organisation that is subject to a ‘no-platform’ policy and the SU, their officials or other students attempt to stop them from speaking, the HEP must decide whether the speech is protected by the s.43 duty. If so, the HEP has a legal duty to take steps to enable them to speak.” (p35)

## What type of challenges?

- Office for Students?
- Student unions?
- Universities

## Challenging universities

1. Code breaches Article 10/11 ECHR;
2. Decisions that breach Article 10/11 ECHR and/or contrary to Code – e.g. *Ben-Dor* scenario;
3. Insufficient steps in requiring Student Unions/other student organisations to comply with Code;
4. Insufficient steps to ensure use of premises not denied to invited guest due to their beliefs or actions – e.g. EHRC guidance.

# The Higher Education (Freedom of Speech) Bill 2021 : the government's concerns



**Hannah Gibbs**

## The government's concerns

- Netflix's new comedy series, "The Chair", neatly encapsulates the Government's concerns.



## The government's concerns: Explanatory Notes

*“The case for change*

*5 Over recent years there have been a number of reports of students who have attempted to shut down legitimate freedom of speech under the banner of ‘safe spaces’ and ‘no-platforming’.*

*6 In addition to the cases cited in the press, a Policy Exchange (2019) report showed evidence of some students favouring emotional safety over freedom of speech. In addition, the Joint Committee on Human Rights (JCHR) found in 2018 there are a number of factors which may interfere with freedom of speech at universities, one of which was regulatory complexity.*

## The government's concerns: Explanatory Notes

“  
...

*7 Despite legislation currently in force, some research has reported students feeling unable to freely express their views. For example, the 2019 report by King's College London, 'Freedom of expression in UK universities', shows that 97% of students thought it was important for freedom of speech and academic freedom to be protected in universities. The report also found signs of a 'chilling effect': some students reported reluctance to express their views for fear of disagreeing with their peers.”*

## The government's concerns: Explanatory Notes

“  
...

*8 Further, Policy Exchange polling shows that a number of current and retired academics choose to self-censor. The survey shows that 32% of those who identify as 'fairly right' or 'right' have refrained from airing views in teaching and research, with around 15% of those identifying as 'centre' or 'left' also self-censoring.*

*9 This evidence is emphasised by a small number of high-profile incidents in which staff or students have been threatened with negative consequences, including loss of privileges or dismissal, sometimes successfully, confirming that the fear of repercussion is not always unfounded.”*

## Other “high profile” examples



- No platforming by Essex University of Open University criminology professor Jo Phoenix
- She was booked in 2019 to give a lecture entitled 'Trans rights and justice: complicated contours in contemporary sex, gender and sexualities politics when thinking about issues of justice and punishment'.

## Other “high profile” examples

- No platformed by UN Women Oxford UK Society.
- On twitter, Ms Rudd urged students to "stop hiding and start engaging"



## But, free speech is already protected by the law?

- As Explanatory Notes make clear, *“Those concerned in the government of higher education providers are required by section 43 of the Education (No. 2) Act 1986 to take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students, employees and visiting speakers. Academic freedom is a principle recognised in legislation as the freedom within the law of academic staff at higher education providers to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at the providers.”*
- So what is really driving this?

## Control of a socio-cultural phenomenon?

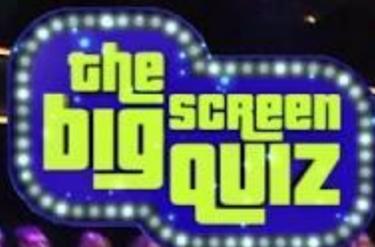
*That consensus is now being challenged. There are some in our society who prioritise ‘emotional safety’ over free speech, or who equate speech with violence. This is both misguided and dangerous. The social psychologist Jonathan Haidt makes the case powerfully: not only do such attitudes suppress speech, they make it harder to draw a clear line against violence. A shocking finding from a recent study by King’s College London was that a quarter of students saw violence as an acceptable response to some forms of speech – and indeed we have seen this played out in the appalling scenes in London, when Jewish societies invited speakers who other students did not approve of.*

*There are some who try to downplay this issue by pretending it is just about no-platforming. It is true that most speaking events are able to proceed – though even one no-platforming incident is too many. But there are far more significant concerns.*

## Control of a socio-cultural phenomenon?

*The rise of intolerance and ‘cancel culture’ upon our campuses is one that directly affects individuals and their livelihoods. Students have been expelled from their courses, academics fired and others who have been forced to live under the threat of violence. These high profile incidents are but the tip of the iceberg. For every Ngole, Carl or Todd whose story is known, evidence suggests there are many more who have felt they had to keep silent, withheld research or believe they have faced active discrimination in appointment or promotion because of views they have expressed.*

*Though there are noble exceptions, often a blind eye has been turned to the creeping culture of censorship. A culture has been allowed to develop in which it is seen as acceptable, even virtuous, for an academic to sign an open letter that calls for another to be dismissed or defunded.*



BIGSCREENQUIZ.COM

# ASK THE AUDIENCE



A blue rectangular panel with rounded corners and a white border. It contains several horizontal white lines for writing. At the bottom of the panel, the letters 'A', 'B', 'C', and 'D' are displayed in white, each with a small green light above it.

Four large, blue-outlined, rounded rectangular boxes arranged in two rows of two, intended for audience responses or questions.

## Ask the audience: point for discussion

**For those members of our audience who work, or advise, in the field of higher education, or have any experience of it (in fairly recent times!), do you think there is any merit in the government's concerns?**

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



**Admas Habteslasie**

## 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

## 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?

## Q&A

**We will now answer as many questions as possible.**

**Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.**

# Thank you for listening

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