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Rt Hon Harriet Harman MP
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7th July 2021

Thank you for your letter dated 24 June on behalf of the Joint Committee on Human Rights in relation to the Higher Education (Freedom of Speech) Bill. Please see below the Government's response to your queries which I hope will satisfactorily support your scrutiny of the Bill.

Risk to Free Speech

- 1. Clause 3 would allow a 'person' to bring civil proceedings against a higher education provider or student union which does not meet its obligations around free speech. It appears that this 'person' need not have been personally affected and could, for example, simply have heard about an incident on social media. It also appears that a person would be able to bring civil proceedings without having suffered any material loss. Is this interpretation correct? Could you explain the reasoning behind this clause?**

That interpretation is not correct. The existing legislation under the Education (No. 2) Act 1986 does not give a specific right to individuals to seek compensation for breach of the freedom of speech duties, leading to concerns that it does not offer sufficient protection – the tort under this Bill will provide this. Individuals, such as visiting fellows and speakers, who may not be able to seek redress through the employment tribunal will benefit from this.

When bringing a claim on the basis of a tort, the claimant must generally prove the following elements:

- a) the claimant was owed a duty of care by the defendant (this can be created by statute, as in the Bill),
- b) the defendant breached that duty,
- c) this breach caused damage or harm to the claimant, and
- d) the damage or harm caused was not too remote.

Accordingly, a claimant would need to be able to show that the Higher Education Provider or Students' Union (SU) owes them a duty of care – which means that a person who can bring a claim is likely to be someone listed at section A1(2) or A4(2). They would also need to be able to show that they have suffered damage or harm as a result of a breach of the freedom of speech duties in the Bill.

In the case of a vexatious claim, the claimant would struggle to make their case if they could not clearly point to a genuine loss. In addition, a vexatious claimant would risk having to pay substantial legal costs as a result of bringing a claim that does not succeed, not only their own but potentially also the legal costs of the provider or SU.

This, together with the availability of free routes for seeking redress (in particular the new Office for Students' (OfS) complaints scheme), means that we expect the tort will likely only be used as a back stop.

2. Events have been cancelled due to security concerns after anonymous threats on social media, which may or may not have come from students. Is there a risk that the complaints scheme and possibility of civil action could see HEPs and SUs being held accountable for circumstances beyond their control?

Providers will be required to take steps which are “reasonably practicable for it to take” to secure lawful freedom of speech for their members, staff, and students, as well as visiting speakers. SUs will have a similar duty under section A4. In deciding what is reasonably practicable, they must have particular regard to the importance of freedom of speech.

This means that both providers and SUs will only be liable where they have failed to take reasonably practicable steps that are available for them to take. This would not include circumstances which a provider or SU had no control over, which may mean that there are no reasonably practicable steps that they could take to secure freedom of speech.

The duty to take reasonably practicable steps means that providers can take account of all their legal duties on a case-by-case basis. If another legal duty requires or gives rise to certain action, it would not be reasonably practicable to override that.

If speech is lawful but controversial, there may be a need for ticketing or security to allow the event to go ahead safely. There may be a need to ensure that there is appropriate challenge by inviting another speaker to put forward an opposing view. Another option may be to invite a chair to manage the event. The purpose of the legislation is to ensure that providers and SUs are doing all that is reasonably practicable to ensure that events go ahead, but recognises that there may be circumstances beyond their control where they cannot.

3. If higher education providers and student unions risk being sanctioned if an event has to be cancelled, then is it not possible that they may decide not to invite controversial speakers at all?

In respect of sanctions, the Bill will directly address the gaps within the existing law, specifically the fact there is no clear way of enforcing the current law if a

provider breaches it. It is important that there are clear consequences for a breach of a duty and the Bill provides for this.

The OfS has powers to issue sanctions to registered providers where a breach of a registration condition has occurred, including financial penalties. This is already the case in relation to the public interest governance principles (under registration conditions E1 and E2), which include freedom of speech and academic freedom. Under the Bill, the power of the OfS to issue sanctions will apply where the new registration conditions relating to freedom of speech or academic freedom are breached.

Providers and SUs will not be fulfilling freedom of speech or academic freedom duties if they simply view it as a paper-based exercise or a checklist. They should strive to drive forward a culture on campus where students, staff and visiting speakers are confident to express their lawful views, even where these may be uncomfortable or offensive to others. That is the purpose of the new duty in the Bill to promote the importance of freedom of speech and academic freedom under section A3. There should be no unwillingness to invite speakers as a result of this Bill.

Interaction with other legal obligations

- 4. Would ensuring that universities are properly informed on the current law around freedom of expression and how this interacts with other legal obligations, including criminal law and equalities law, have a greater effect on protecting free speech than additional legislation? Do you have any plans to ensure that university guidance properly reflects the law?**

The Bill is designed to address gaps in the current legislative framework, including to ensure that anyone to whom this Bill offers protection and who believes their lawful freedom of speech has been improperly restricted has a route available to them to seek individual redress. The Bill also extends the freedom of speech duties to directly apply to SUs.

After the Bill has achieved Royal Assent, the OfS will consult on and issue detailed guidance. This will include changes to the regulatory framework, which will set out guidance for providers on the new registration conditions, and guidance for SUs on compliance with their new duties. In addition to this, a key element of the role of the new Director for Freedom of Speech and Academic Freedom and the OfS will be to promote freedom of speech across the sector – they will advise on and highlight best practice on balancing a range of legal duties while complying with the new freedom of speech duties.

Academic Freedom

- 5. What is the effect of both these clauses in tandem – would an academic talking outside of their ‘field of expertise’ not be protected by the obligation to secure ‘freedom of speech within the law’?**

Freedom of speech is a broad concept which is protected under Article 10 of the European Convention on Human Rights (freedom of expression). Academic freedom is considered to be a subset of freedom of speech – a distinct element with particular considerations, within that broader concept. Therefore, in response

to your question on whether an academic speaking outside of their field of expertise would also have freedom of speech protections, I can confirm that academic staff effectively have two alternative provisions that may apply to them - those related to academic freedom and, if that does not apply to the speech in question, the broader freedom of speech provisions.

OfS role

6. Why does the Government believe that adding another regulator will lead to greater clarity rather than more confusion?

You highlighted that the Joint Committee found that the Charity Commission should do more to promote freedom of speech and also that “bureaucracy is not the best way to secure freedom”. The Government agrees with this. With the introduction of the complaints scheme and duties extended to directly cover SUs, it is right that there is a single regulator with a focus on freedom of speech across the sector. The OfS will only regulate SUs in regard to freedom of speech matters. The Charity Commission will still regulate SUs that are charities in all other areas and SUs will continue to be subject to the Charity Commission’s investigation and enforcement powers.

7. Under the complaints scheme in Clause 7, the Office for Students would be required to decide if free speech complaints against student unions or higher education providers are justified. What support, clarity, and safeguards will there be?

The Bill provides for the OfS to establish the complaints scheme, with certain provisions set out as requirements and others as discretionary. We anticipate that the OfS will consult on the detail of the complaints scheme. As a public body, the OfS will be required to comply with public law principles when creating and administering the scheme.

Under the scheme, the OfS may make a recommendation where a free speech complaint is found to be wholly or partly justified. A recommendation may be for the provider or SU to take, or refrain from, certain action. This may include, for example, a recommendation to pay compensation to the complainant for loss suffered due to the breach or to lift the suspension of a student from a course.

There will be guidance from the OfS to help providers and SUs in their compliance with their duties.

8. Will there be a means of appeal for student unions or higher education providers who disagree with a decision of the Office for Students?

The decisions made under the complaints scheme will only give rise to recommendations, not requirements. These will not be binding and so there will be no direct route of appeal. This is similar to how complaints schemes in other sectors operate. Decisions made by the OfS will continue to be capable of being subject to judicial review.

9. How does the Bill ensure that universities and academic courses are protected from interference from Government?

Higher Education Providers are independent and autonomous institutions which are therefore free to make their own internal decisions. Institutional autonomy is a principle already set out in the Higher Education and Research Act 2017 (HERA) (as amended by the Bill), defined as:

“(a) the freedom of English higher education providers within the law to conduct their day to day management in an effective and competent way, and

(b) the freedom of English higher education providers—

(i) to determine the content of particular courses and the manner in which they are taught, supervised and assessed,

(ii) to determine the criteria for the selection, appointment and dismissal of academic staff and apply those criteria in particular cases, and

(iii) to determine the criteria for the admission of students and apply those criteria in particular cases.”

In addition, clause 4(1) of the Bill amends section 2 of HERA to make clear that the OfS, in performing its functions, must have regard to the importance of freedom of speech and academic freedom, as well as institutional autonomy and other matters.

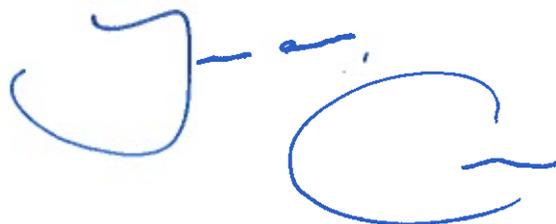
Under the Education (No. 2) Act 1986, a duty already exists for providers to take steps to ensure lawful freedom of speech, and this is already a matter that is regulated by the OfS. This Bill strengthens this duty without affecting the institutional autonomy of providers or the content of academic courses.

Funding

10. If security is needed to avoid events being cancelled, will higher education providers and student unions be adequately funded to provide this? Who should pay in these circumstances?

Higher Education Providers and SUs should not take action that will result in the cancellation of events by unreasonably passing on security costs to student societies. The Bill is clear that providers and SUs have a duty to take reasonably practicable steps to secure freedom of speech within the law for visiting speakers. In deciding what is reasonably practicable, they must have particular regard to the importance of freedom of speech. This duty also applies to where they are making decisions around liability for associated security costs. This could include funding the security for events, if it is reasonably practicable to do so, or seeking contributions to funding from other sources.

Thank you again for your detailed consideration of the Bill, and I look forward to continuing this constructive engagement during passage.



**Rt Hon Gavin Williamson CBE MP
Secretary of State for Education**