

HIGHER EDUCATION (FREEDOM OF SPEECH BILL)

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Higher Education (Freedom of Speech) Bill as introduced to the House of Commons on 12 May 2021 (Bill 12).

1. These Explanatory Notes have been produced by the Department for Education in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
3. These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

- 1 This Bill includes a range of measures aimed at strengthening existing legislation on freedom of speech and academic freedom in higher education, including:
 - a. Strengthening the duties regarding freedom of speech which are currently imposed by section 43 of the Education (No. 2) Act 1986 on higher education providers registered with the Office for Students (OfS), the higher education regulator in England.
 - b. Creating a new duty for registered higher education providers to promote lawful freedom of speech and academic freedom in higher education.
 - c. Creating new duties regarding freedom of speech for students' unions at approved (fee cap) providers (a category of registered higher education provider).
 - d. Creating a new statutory tort for breach of specified freedom of speech duties, enabling individuals to seek legal redress for loss they have suffered as a result of breach of the duties.
 - e. Enhancing academic freedom protections by extending coverage to include recruitment and promotion and making clear it applies to speech within an academic's field of expertise.
 - f. Introducing new registration conditions for registered higher education providers on freedom of speech and academic freedom.
 - g. Introducing regulation by the OfS of students' unions at approved (fee cap) providers in relation to their compliance with the new duties.
 - h. Creating a new role within the OfS of a Director for Freedom of Speech and Academic Freedom, with a remit to champion freedom of speech and academic freedom on campus, and responsibility for investigations of infringements of freedom of speech duties in higher education which may result in sanctions or individual redress via a new complaints scheme.

Policy background

- 2 The policy underlying many of the provisions in this Bill was published in the policy paper 'Higher education: free speech and academic freedom' in February 2021. In this paper the Government committed to several policy and legislative changes to strengthen freedom of speech and academic freedom in higher education. These were to:
 - a. Legislate for a Free Speech and Academic Freedom Champion to be appointed as a member of the OfS Board with responsibility to champion free speech and investigate alleged breaches of registration conditions related to freedom of speech and academic freedom.
 - b. Legislate to require a new OfS registration condition on free speech and academic

freedom.

- c. Explore further the option of strengthening the section 43 duty to include a duty on higher education providers to 'actively promote' freedom of speech.
 - d. Legislate to extend the strengthened section 43 duty to cover students' unions directly.
 - e. Set clear minimum standards for the code of practice required under section 43.
 - f. Introduce a statutory tort that would give private individuals a right of redress for loss as a result of a breach of section 43.
 - g. Wider and enhanced academic freedom contractual protections.
- 3 The policy paper followed the statement in the Conservative Manifesto of 2019: "We will also strengthen academic freedom and free speech in universities".
 - 4 This Bill enables the Government to meet these commitments.

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 speech¹. 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 complexity².
- 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 universities³. The report also found signs of a 'chilling effect': some students reported reluctance to express their views for fear of disagreeing with their peers.
- 8 Further, Policy Exchange polling shows that a number of current and retired academics choose to self-censor.⁴ 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.

¹ Policy exchange (2019) [Academic-freedom-in-the-UK-1.pdf \(policyexchange.org.uk\)](#). When asked which policy their university should support, 'Prioritise free speech, even if this makes people upset' or 'Prioritise emotional safety, even if this limits free speech', students broke 52-38 for free speech, with 11% not sure.

² Freedom of Speech in Universities, JCHR, 2018. [Freedom of Speech - Joint Committee on Human Rights - House of Commons \(parliament.uk\)](#)

³ KCL (2019) [Freedom of expression in UK universities \(kcl.ac.uk\)](#)

⁴ Academic freedom in the UK, Policy Exchange, 2020, p8. [Academic-freedom-in-the-UK.pdf \(policyexchange.org.uk\)](#). Based on a survey of UK academics administered on 27 March 2020 by YouGov. The sample consists of 820 respondents (484 currently employed and 336 retired).

- 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.
- 10 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.

Legal background

- 11 The Bill is a piece of amending legislation. It primarily amends the Higher Education and Research Act 2017 but it also makes amendments to the Counter-Terrorism and Security Act 2015, the Higher Education Act 2004 and the Education (No. 2) Act 1986.
- 12 The Higher Education and Research Act 2017 created a new regulatory body overseeing the English higher education sector, the OfS. The OfS maintains a register of English higher education providers, with the categories of approved (fee cap) providers and approved providers. The OfS regulates English higher education providers by way of registration conditions.
- 13 The Counter-Terrorism and Security Act 2015 sets out the Prevent duty, which has specific provision in relation to further and higher education institutions.
- 14 The Higher Education Act 2004 allows for the Secretary of State to designate a body corporate providing a scheme for reviewing complaints of students at higher education institutions in England and Wales.
- 15 The Education (No. 2) Act 1986 imposes a duty regarding freedom of speech on those governing further and higher education institutions.

Territorial extent and application

- 16 Clause 10 sets out the territorial extent of this Bill. The extent of a piece of legislation refers to the jurisdiction (or jurisdictions) in which it forms part of the law. The extent of an Act can be different from its application. Application concerns where an Act produces a practical effect, disregarding effects that are minor or consequential.
- 17 Most provisions of this Bill extend to England and Wales and apply to England.
- 18 The provisions which amend the Counter-Terrorism and Security Act 2015 extend to England and Wales and Scotland. One set of amendments applies to England only and two apply to England and Wales. These are consequential amendments and minor technical corrections. The

commentary on these provisions includes a paragraph explaining their extent and application.

- 19 See the table in the Annex for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions and matters relevant to Standing Orders Nos. 83J to 83X of the Standing Orders of the House of Commons relating to Public Business.

Commentary on provisions of Bill

Duties to protect freedom of speech

Clause 1: Duties of registered higher education providers

Clause 1 inserts sections A1, A2 and A3 into the Higher Education and Research Act 2017.

Section A1: Duty to take steps to secure freedom of speech

- 20 This section imposes duties on the governing body of a higher education provider registered with the OfS, similar to provision in section 43 of the Education (No. 2) Act 1986.
- 21 The governing body must take reasonably practicable steps to achieve the objective of securing freedom of speech within the law for the provider's members, staff and students and for visiting speakers. There is a duty to have particular regard to the importance of freedom of speech when determining what steps are reasonably practicable.
- 22 The duty includes that the use of premises is not refused because of a person's ideas, beliefs or views, or a body's policy or objectives, and that the terms on which premises are provided are not based on those grounds. It also includes taking reasonably practicable steps to secure academic freedom for academic staff at the provider, an existing principle which is extended to include the circumstances of seeking promotion or a different job at the provider, and which makes clear that the freedom applies to speech within the academic's field of expertise. There is also a new separate duty with similar provision in respect of external applicants for an academic role at a provider.

Section A2: Code of practice

- 23 This section imposes duties on the governing body of a higher education provider registered with the OfS, similar to provision in section 43 of the Education (No. 2) Act 1986.
- 24 The governing body must maintain a code of practice with a view to facilitating the discharge of the duty in section A1(1). The content of the code of practice must include a statement of the provider's values relating to freedom of speech and an explanation of how those values uphold freedom of speech. It must also set out the procedures to be followed by staff and students when organising meetings and activities, the conduct required in relation to such meetings and activities, and the criteria for specified decisions.
- 25 The governing body must take reasonably practicable steps, including where appropriate the initiation of disciplinary measures, to secure compliance with the code of practice.
- 26 The governing body must, at least once a year, bring the provisions of section A1 and the code of practice to the attention of all its students.

Section A3: Duty to promote the importance of freedom of speech and academic freedom

- 27 This section creates a new duty on the governing body of a higher education provider registered with the OfS to promote the importance of freedom of speech within the law and academic freedom for academic staff in higher education.

Clause 2: Duties of students' unions

Clause 2 inserts sections A4 and A5 into the Higher Education and Research Act 2017.

Section A4: Duty to take steps to secure freedom of speech

- 28 This section imposes a new duty on a students' union at a registered higher education provider that is eligible for financial support for the purposes of section 39. The duty is to take reasonably practicable steps to achieve the objective of securing freedom of speech within the law for members and staff of the students' union, students, members and staff of the provider, and visiting speakers. There is a duty to have particular regard to the importance of freedom of speech when determining what steps are reasonably practicable.
- 29 The duty includes that the use of premises occupied by the students' union is not refused because of a person's ideas, beliefs or views, or a body's policy or objectives; that the terms on which premises are provided are not based on those grounds; and that affiliation to the students' union is not denied to any student society on those grounds.

Section A5: Code of practice

- 30 This section imposes new duties on a students' union to which section A4 applies.
- 31 The students' union must maintain a code of practice with a view to facilitating the discharge of the duty in section A4. The content of the code of practice must include a statement of the students' union's values relating to freedom of speech and an explanation of how those values uphold freedom of speech. It must also set out the procedures to be followed when organising meetings and activities, the conduct required in relation to such meetings and activities, and the criteria for specified decisions.
- 32 The students' union must take reasonably practicable steps, including disciplinary measures, to secure compliance with the code of practice.
- 33 The students' union must, at least once a year, bring the provisions of section A4 and the code of practice to the attention of all its members who are students of the provider.

Clause 3: Civil claims

- 34 This clause amends the Higher Education and Research Act 2017 to insert section A6, which creates a new statutory tort for breach of specified freedom of speech duties. It enables civil proceedings to be brought against a higher education provider in respect of a breach of section A1, and against a students' union in respect of a breach of section A4. This will enable individuals to seek legal redress for loss they have suffered as a result of breach of those duties.

Functions of the Office for Students

Clause 4: General functions

- 35 This clause amends the Higher Education and Research Act 2017 to provide that, in performing its functions, the OfS must have regard to the need to promote the importance of freedom of speech within the law in higher education, and the need to protect the academic freedom of academic staff at English higher education providers.
- 36 This clause inserts section 69A, which provides that the OfS must promote the importance of freedom of speech within the law and academic freedom in higher education. This section also sets out provisions similar to sections 35 and 37 concerning advice by the OfS on good practice in relation to the promotion of freedom of speech and academic freedom, and the power of the Secretary of State to require the OfS to report on freedom of speech and academic freedom matters.

Clause 5: Regulation of duties of registered higher education providers

- 37 This clause amends the Higher Education and Research Act 2017 to insert section 8A, which provides for new mandatory registration conditions relating to freedom of speech and academic freedom. These include initial and ongoing registration conditions regarding the institution's governing documents and management and governance arrangements, an ongoing registration condition requiring the governing body of the provider to comply with its duties under sections A1 to A3, and an ongoing registration condition requiring the governing body of a provider that is eligible for financial support for the purposes of section 39 to keep the OfS informed of its students' unions.

Clause 6: Regulation of duties of students' unions

- 38 This clause amends the Higher Education and Research Act 2017 to provide for the regulation by the OfS of students' unions to which sections A4 and A5 apply in relation to their duties under those sections.
- 39 The OfS must monitor whether students' unions are complying with those duties. It may impose a monetary penalty on a students' union if it appears to the OfS that it is failing, or has failed, to comply with its duties. This is to be paid to the OfS and the amount is to be determined by the OfS in accordance with regulations made by the Secretary of State. The Secretary of State may also make regulations making provision about matters to which the OfS must, or must not, have regard when imposing a monetary penalty.
- 40 This clause requires the OfS to maintain and publish a list of the students' unions to which, according to the information held by the OfS, sections A4 and A5 apply.
- 41 Students' union to which sections A4 and A5 apply must provide the OfS with information that it may require. If a students' union fails to do so, the OfS may enforce the duty with an injunction.

Clause 7: Complaints Scheme

Clause 7 inserts section 69C and Schedule 6A into the Higher Education and Research Act 2017.

Section 69C and Schedule 6A: Free speech complaints scheme

- 42 This section makes provision for the OfS complaints scheme relating to the duties of registered higher education providers and students' unions in respect of freedom of speech and academic freedom.
- 43 Paragraphs 1 to 4 of Schedule 6A set out the nature of the complaints that can be brought to the complaints scheme that the OfS must provide for, as well as the individuals who are eligible to make complaints. Paragraph 5 sets out the scope of the scheme. Paragraphs 6 to 8 set out provision regarding the decisions and recommendations that the OfS may make under the complaints scheme, including that the scheme must provide that, where the OfS considers a complaint to be justified (wholly or partly), it may recommend that the higher education provider or students' union should do anything specified (which may include the payment of compensation but could also include, for example, reinstatement of the complainant's job or place on a course) or refrain from doing anything specified. Paragraphs 9 to 13 set out various other requirements relating to the complaints scheme.

Clause 8: Director for Freedom of Speech and Academic Freedom

- 44 This clause amends Schedule 1 to the Higher Education and Research Act 2017. It provides for the role of a Director for Freedom of Speech and Academic Freedom as a member of the OfS Board and sets out the responsibilities of the Director in relation to the OfS's functions.

Clause 9: Minor and consequential amendments

- 45 This clause introduces the Schedule which makes minor and consequential changes to legislation.

Clause 10: Extent

- 46 This clause provides for the extent of the provisions of the Bill. See the commentary on Part 2 of the Schedule and Annex.

Clause 11: Commencement

- 47 This clause provides for the coming into force of the provisions of the Bill.

Clause 12: Short title

- 48 This clause provides the short title of the Bill.

Schedule: Minor and consequential amendments

Part 1: Amendments of the Higher Education and Research Act 2017

49 This Part makes consequential amendments to the Higher Education and Research Act 2017.

Part 2: Amendments of the Counter-Terrorism and Security Act 2015

50 This Part makes minor and consequential amendments to the Counter-Terrorism and Security Act 2015.

51 Paragraph 13 makes consequential amendments regarding the definitions in section 31 (freedom of expression in universities etc) of freedom of speech and academic freedom.

52 Paragraphs 14 and 15 make technical corrections to definitions in section 32 (monitoring of performance of Prevent duty) and Schedule 6 (authorities subject to the Prevent duty).

53 This Part forms part of the law of England and Wales and Scotland. The amendments to section 31 apply to England only; the amendments to section 32 and Schedule 6 apply to England and Wales.

Part 3: Amendments of other Acts

54 This Part makes consequential amendments to section 43 of the Education (No. 2) Act 1986, and to the Higher Education Act 2004.

Commencement

55 Clause 11 makes provision about the coming into force of the provisions of this Bill. Certain provisions come into force on the day on which the Act is passed. These include clause 6, for the purpose of enabling the exercise of the powers to make regulations conferred by section 69B(3) and (4) of the Higher Education and Research Act 2017 (as inserted by clause 6 of the Bill). In addition, paragraph 7 of the Schedule comes into force two months after the Act is passed, for the purpose of enabling the OfS to comply with its statutory duty to consult on changes to the regulatory framework set out in section 75 of the Higher Education and Research Act 2017. The clause otherwise provides the Secretary of State with power to make regulations to commence its provisions. Different days may be appointed for different purposes. Such regulations may include transitional provisions and savings.

Financial implications of the Bill

56 There are financial implications of the Bill. These include costs to the OfS arising from monitoring and enforcing the freedom of speech duties, including staff costs and the cost of the Director for Freedom of Speech and Academic Freedom. This will fall to registered higher education providers via registration fees or will be funded via other fees imposed by the OfS in accordance with regulations to be made by the Secretary of State. The Bill provides that the OfS may recover costs

of investigation where it imposes a sanction on a students' union, or where a complaint against a higher education provider or students' union is found to be justified (wholly or partly).

- 57 Registered higher education providers and students' unions are the main affected groups that are expected to incur costs including: familiarisation costs; compliance costs: the direct costs of complying with the regulation and enforcement (including the new registration conditions for all registered providers); and administrative burden (the costs associated with the paperwork burdens on the administrative structures of providers and students' unions as a result of regulation e.g. updating codes of practices for providers, and introducing codes of practice for students' unions).
- 58 The direct impact on business (Equivalent Annual) is estimated to be -£4.9m per year, with a range of between -£4.6m and -£5.3m. There are uncertainties and sensitivities around this estimate, as it largely depends on how higher education providers and students' unions react. Further details of the costs are set out in the impact assessment published alongside the Bill.
- 59 There are no financial consequences of the Bill anticipated in terms of public expenditure.

Parliamentary approval for financial costs or for charges imposed

- 60 A money resolution is not required for the Bill as the Bill will not give rise to new or increased charges on the public revenue. The increased costs of the OfS in performing new functions placed on it by the Bill will be met from fees. Registered higher education providers and students' unions will not receive public funding to carry out their functions under the Bill.
- 61 A ways and means resolution is required for the Bill. A ways and means resolution is required where a bill authorises new charges on the people – broadly speaking, new taxation or other similar charges. Additional functions are placed on the OfS under the Bill and the additional spending resulting from these functions will result in increased fees charged under the Higher Education and Research Act 2017. The OfS charges registration fees under section 70 of that Act and also has power to charge fees under section 71 of that Act. It is anticipated that, mainly, fees will be charged under the powers in section 71.

Compatibility with the European Convention on Human Rights

- 62 The Secretary of State for Education has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.
- 63 The Government is publishing an ECHR memorandum which explains in detail its assessment of the compatibility of the Bill's provisions with the Convention rights.

Related documents

64 The following documents are relevant to the Bill and can be read at the stated locations:

- a) [Higher education: free speech and academic freedom \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/policy-papers/2021/02/25/higher-education-free-speech-and-academic-freedom) – Government policy paper, February 2021
- b) [Freedom of Speech in Universities \(parliament.uk\)](https://www.parliament.uk/resources/jchr/reports/freedom-of-speech-in-universities) – JCHR report, March 2018

Annex - Territorial extent and application in the United Kingdom

Most provisions of this Bill extend to England and Wales and apply to England. The provisions in Part 2 of the Schedule extend to England and Wales and Scotland; one paragraph in this Part applies to England only and two paragraphs apply to England and Wales. A Legislative Consent Motion is not sought in respect of any provision of the Bill⁵.

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of Senedd Cymru?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion sought?
Clause 1	Yes	No	No	No	Yes	Yes	Yes	No
Clause 2	Yes	No	No	No	Yes	Yes	Yes	No
Clause 3	Yes	No	No	No	Yes	Yes	Yes	No
Clause 4	Yes	No	No	No	Yes	Yes	Yes	No
Clause 5	Yes	No	No	No	Yes	Yes	Yes	No
Clause 6	Yes	No	No	No	Yes	Yes	Yes	No
Clause 7	Yes	No	No	No	Yes	Yes	Yes	No
Clause 8	Yes	No	No	No	Yes	Yes	Yes	No
Clause 9	Yes	Yes	No	No	No	No	No	No
Clause 10	Yes	Yes	No	No	No	No	No	No
Clause 11	Yes	Yes	No	No	No	No	No	No
Clause 12	Yes	Yes	No	No	No	No	No	No
Schedule	Yes	In part	No	No	No	No	No	No

⁵ References in this Annex to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

Minor or consequential effects

The following provisions that apply to England have effects outside England, all of which are, in the view of the Government of the United Kingdom, minor or consequential:

Clause 9: Minor and consequential amendments

This clause introduces the Schedule which makes minor and consequential changes to legislation.

Clause 10: Extent

This clause sets out the extent of the Bill.

Clause 11: Commencement

This clause sets out the commencement provisions of the Bill.

Clause 12: Short title

This clause sets out the short title of the Bill.

Schedule: Minor and consequential amendments

Part 2 of the Schedule makes minor and consequential changes to the Counter-Terrorism and Security Act 2015 which have effects in Wales and Scotland but are minor or consequential in nature.

Subject matter and legislative competence of devolved legislatures

The main subject matter of the Bill is education, which is within the legislative competence of each of the three devolved legislatures.

There are minor technical corrections and consequential amendments to the Counter-Terrorism and Security Act 2015 in Part 2 of the Schedule in relation to educational institutions, where the subject matter is terrorism, which is not within the legislative competence of each of the three devolved legislatures.

HIGHER EDUCATION (FREEDOM OF SPEECH) BILL

EXPLANATORY NOTES

These Explanatory Notes relate to the Higher Education (Freedom of Speech) Bill, as introduced to the House of Commons on 12 May 2021 (Bill 12).

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