

Written evidence submitted by Universities UK (EAPBB05)

Economic Activity of Public Bodies (Overseas Matters) Bill

Executive Summary

1. Universities UK (UUK) is the collective voice of 142 universities in England, Scotland, Wales and Northern Ireland.
2. It is made clear that universities fall in scope of the Economic Activity of Public Bodies (Overseas Matters) Bill. Section One of the Bill applies to a procurement decision or an investment decision in relation to which the decision-maker is subject to section 6 of the Human Rights Act 1998 (acts of public authorities). In [introducing the Bill](#), universities were highlighted as organisations where groups may 'want to impose their own subjective views about foreign policy'.
3. We have wide-ranging reservations about the scope, intent, and implications of the Bill. We are very concerned that the Bill would create a chilling effect on universities' international partnerships and collaborations, as well as on academic freedom and free speech.
4. The Bill is a disproportionate solution to the problem it aims to solve. We acknowledge that a key aim of the Bill is to stop campaigns such as the Boycott, Divestment and Sanctions' (BDS) movement focused on Israel, however, there is little evidence of widespread support of BDS campaigns by UK universities and indeed [UUK publicly opposes](#) any blanket academic boycott of Israeli universities. The Bill's [briefing paper](#) primarily cites examples relating to the BDS movement from local councils. As the briefing paper notes, in higher education, most issues relating to the BDS campaign involve student unions, which are considered private bodies by the Human Rights Act 1998 and are therefore excluded from the Bill.
5. It is also unclear which activities and decisions of a university would be captured by the Bill. Universities engage in whole range of international activities, including procurement and investments, academic and business partnerships, international research collaborations, and transnational education. Further, the Bill's [explanatory notes](#) outline that any 'hybrid' public authorities (private bodies which are public authorities by virtue of the fact they are performing a public function) will not be in scope of the Bill in relation to their private functions and acts.
6. We have significant practical and legal concerns over the current drafting of the Bill. These include:
 - The Bill contradicts duties placed on universities via the [Higher Education \(Freedom of Speech\) Act 2023](#) to uphold freedom of speech and academic freedom. Universities have both legal and moral duties in this space.
 - A potentially damaging effect on due diligence, inhibiting open discussion and debate and limiting transparency in decision making.
 - Contradicting existing government policy, guidance, legislation, and good practice in relation to establishing international partnerships and collaborations.
 - Giving significant new powers and functions to the Office for Students (OfS) and impinging on universities' autonomy. The core provisions of the Bill

extend and apply across England and Wales, Scotland and Northern Ireland, but there are contrasting mechanisms as to how this is enforced.

7. To address these concerns, we have included several recommendations which we invite the Committee to consider. These have been outlined in further detail below, but in summary, we believe the government should:

- (i). Remove Clause 4 from the face of the Bill, via amendment at Public Bill Committee.
- (ii). Clarify a) what specific activities and decisions of universities will be within scope of the Bill, and b) what would be considered as a private act or function of a university, and therefore fall out of scope.
- (iii). Introduce amendments that allow for due diligence and duty of care considerations to be a factor in relevant decisions.
- (iv). Clarify a) how they understand powers set out by the Bill will interact with the OfS's existing regulatory framework, in particular those relating to academic freedom and free speech, and b) how this enforcement would be aligned across the UK.

Contradiction with the Higher Education (Freedom of Speech) Act

8. The Bill contradicts duties placed on universities via the Higher Education (Freedom of Speech) Act 2023 to uphold freedom of speech and academic freedom.
9. Freedom of speech and academic freedom sit at the heart of the UK's higher education sector. Universities are rightly championed for the role they play in driving forward research and innovation, as well as providing students with the opportunity to think critically and engage with different perspectives. Without them, universities would not be able to fulfil one of their most essential aims: the advancement of understanding and pursuit of truth.
10. UK universities also have legal duties to uphold academic freedom and freedom of speech. Alongside several existing legislative and regulatory duties placed on universities in this area, the government also recently passed the Higher Education (Freedom of Speech) Act 2023. The Act strengthens the existing 'Section 43' duty to require higher education providers in England to 'actively promote' freedom of speech and academic freedom, and also extends this duty to directly cover students' unions. The Act also:
- allows for civil claims in the case that a university is found to be in breach of its duty to promote freedom of speech on campus.
 - places a new duty on universities to provide information to the OfS on overseas funding arrangements, so that they can monitor how this funding may inhibit freedom of speech or academic freedom.
11. The explanatory notes state that Clause 4 of the Bill prohibits bodies from 'publishing statements indicating that they would participate in [a boycott] if it were lawful to do so. This stops public bodies from expressing support for

themselves engaging in boycotts and divestment campaigns'. This contradicts the policy aims of the Higher Education (Freedom of Speech) Act, by banning the right to express support for boycott or divestment campaigns.

12. The Bill also contradicts the HE Freedom of Speech Act's duty to promote academic freedom. As the Bill is drafted, universities would only have to be 'influenced by' moral or political disapproval of foreign state conduct to be non-compliant. This could, for example, deter a group of academics from researching and discussing views on a boycott or divestment decision due to the fear of potential litigation or fines for the university. This could have the unintended consequence of restricting academic freedom, especially for those academics with expertise in foreign policy.

13. Recommendation one: To remove Clause 4 from the face of the Bill, via amendment at Public Bill Committee.

Damaging effect on due diligence and regulatory compliance

14. In developing new relationships with overseas higher education institutions, businesses and states, UK universities comply with national security regulations to help protect national interests. They also consider both moral and political issues as part of their due diligence and duty of care for students and staff:
 - The [Committee of University Chairs Higher Education Code of Governance](#) notes that it is the responsibility of university Councils / Boards to consider the reputational impact of all partnerships and collaborations, which often include financial aspects.
 - The National Protective Security Authority's [Trusted Research Guidance for Academia](#) encourages universities to 'know their partners'. Considerations include, 'Are there any potential ethical or moral concerns for the application of your research?', and 'Could your research be used to support activities in other countries with ethical standards different from our own, such as internal surveillance and repression?'
 - UK Research and Innovation's [Trusted Research and Innovation Principles](#) note that 'It is important to understand the democratic and ethical values of the country that the partner is based in and where these might differ from our own'.
 - Working with the government, UUK created guidelines on [Managing risks in internationalisation](#), designed to explicitly protect values of the academic freedom, freedom of speech and institutional autonomy. Recommendations include 'due diligence processes, with consideration of the government's and other guidance and to consider the efficacy of their due diligence processes and how they assess reputational, ethical and security risks.' There are dedicated chapters on protecting universities' reputation and values, people, campuses and partnerships.
15. In addition to this guidance, universities comply with regulation aimed at improving national security, including the [National Security and Investment Act](#)

[2021](#). The [National Security Act 2023](#) has also recently received Royal Assent, which includes a Foreign Influence Registration Scheme.

16. We are concerned that the Bill may contradict the intentions of the aforementioned regulation and guidance. In making decisions relating to international investments and procurements, universities take moral, political and reputational considerations into account. As outlined above, this is actively encouraged and backed up by several pieces of government regulation and guidance.
17. In the Bill's current wording, universities only have to be 'influenced by' moral or political disapproval of foreign state conduct to be non-compliant. Should merely discussing moral or political considerations potentially leave a public body open to litigation or penalties, it may inhibit transparency, by discouraging open discussion in decision making, and also hinder effective due diligence. By unintentionally discouraging transparency and effective due diligence, there is also potential for this legislation to undo the progress the government and higher education sector had made to help manage security-related issues.

18. Recommendation two: To clarify a) what specific activities and decisions of universities will be within scope of the Bill, and b) what would be considered as a private act or function of a university, and therefore fall out of scope.

19. Recommendation three: To introduce amendments that allow for due diligence and duty of care considerations to be a factor in relevant decisions.

Suggested amendment: Clause 1, page 1, line 5 remove "the decision was influenced by" and insert "was the primary or sole factor in the decision" after "conduct".

Explanatory statement: This amendment would raise the threshold for non-compliance, allowing for considerations around due diligence and a university's duty of care not to be captured by the ban.

Role and responsibilities of the Office for Students (OfS)

20. The Bill would give significant new powers and functions to the OfS, impinging on universities' autonomy. The OfS would take on responsibility for overseeing a hugely complex and contentious area of regulation which effectively counters their new regulatory powers to ensure universities uphold freedom of speech and academic freedom.
21. Clauses 6-10 of the Bill provide the OfS with powers to issue written notices requiring a person to provide a wide array of information and to penalise breaches and non-performance. As has been noted, a public body merely needs to be 'suspected of being in the process of making a prohibited decision or about to make a prohibited statement'. They are obliged to hand over all information 'likely to be useful' to the enforcement authority in determining whether an offence has, or is likely to be, carried out.

22. This power would normally be protected by legal privilege and would enable the OfS to have greater powers than those available to the security services. [According to Richard Hermer KC](#), 'this would therefore be handing the enforcement authorities more powers than those enjoyed by anti-terrorism police and the security services'. Granting such powers would place significant bureaucratic burden on the regulator and would be a significant overreach into universities' autonomy.
23. There are existing concerns within the sector about the costs and time resource associated with regulation. UUK understands that the OfS is planning to increase its fees for universities in the 2023–24 academic year by 18.5%, some of which is to account for the increased remit of the organisation to oversee its new free speech responsibilities.
24. Although the OfS is named on the face of the Bill, as the enforcer / authority for universities in England, we understand that for universities in Scotland, Wales or Northern Ireland, this would be the Secretary of State and Treasury. It is unclear why it is the Secretary of State and Treasury in the rest of the UK, but the OfS in England. It is also unclear how this enforcement would be aligned.
25. We are deeply concerned that for universities in England, the same body (the OfS) that is responsible for investigating where universities have not upheld their duty to promote freedom of speech and academic freedom on campus, would also be tasked with investigating potential breaches of this Bill, which includes merely expressing a legally held view on UK foreign policy.

26. Recommendation four: For the government to clarify a) how they understand powers set out by the Bill will interact with the OfS's existing regulatory framework, in particular those relating to academic freedom and free speech, and b) how this enforcement would be aligned across the UK.

August 2023