The Higher Education (Freedom of Expression) Bill 2021

Does it actually do what it says on the tin?

An English PEN Briefing on the Free Speech Implications of the HE Bill

Introduction

English PEN is one of the world's oldest human rights organisations, championing the freedom to write and read from its foundation in 1921. As part of this central mission, PEN centres around the world – often led by prominent academics[i] - have worked to advance academic freedom[ii], support academics[iii], and promote speech on campus[iv] for the last one hundred years. English PEN itself has been supporting academics in the UK since at least the 1930s[v].

Our first instinct would therefore be to embrace a bill with the stated purpose of "strengthening protections for free speech and academic freedom in higher education". Certainly, we are concerned by the myriad of problems impacting academic freedom and speech on campus today, including:

- A climate of intolerance to dissenting viewpoints, creating a "chilling effect" among both academics[vi] and students[vii] in relation to certain politically sensitive issues.
- An increasingly complex set of legal obligations with implications for free speech, from the Prevent duty to the Equality Act[viii].
- The internationalisation of higher education and the growing pressure of market forces[ix], enabling foreign state powers to influence academic research in the UK[x].

To some extent, many of the principles underpinning the government's Higher Education Bill are to be embraced. In theory, for example, a free speech champion is a welcome development: student unions and societies are increasingly having to navigate their way through a delicate environment of conflicting rights and interests, and are often in need of genuine guidance as to how these different considerations can be reconciled.

Likewise, strengthening the duties of higher education providers (HEPs) – requiring them to *promote* rather than just *protect* free speech – and making these duties legally actionable could be considered a necessary means of strengthening the resolve of HEPs in the face of divisive free speech controversies.

Given certain problems in the current bill, however, these provisions could well end up achieving the opposite of their intended purpose: compounding tensions on campus and further chilling the exercise of free speech.

The Threat of Polarisation

The reason why the Bill in its current form could make the situation on campus worse is due to an issue that fuels many of the free speech issues affecting HEPs today: polarisation.

The more divided we become as a society, the more inclined we are to think of the other side in uncompromising terms. Political identities become all-encompassing and toxic political disputes pervade every area of public life[xi]. In line with these general social trends, we are seeing a general

politicisation of academia – something which is particularly evident in the context of academic research and curricula. From government intervention in the "decolonisation" of the curriculum[xii], to the oft-cited example of Nigel Biggar's "Ethics and Empire project[xiii], the idea that academics should have autonomy in shaping their own course material appears to be falling out of favour.

If these polarised conditions give rise to the free speech issues targeted by the Bill – fuelling a climate in which even entertaining or exploring novel ideas can create a cultural backlash – then we must consider the extent to which the Bill addresses these conditions.

In two crucial respects, the Bill falls short of this standard. These are the introduction of a new Free Speech Director (Clause 8) and of a new statutory tort (Clause 3).

A Free Speech Champion – or Provocateur?

The new Free Speech Director (described in accompanying material as a "champion") is responsible, among other things, for overseeing the performance of the Office for Students' (OfS) free speech functions. This includes a duty to promote the importance of free speech and advise on best practices (Clause 4); a duty to monitor compliance and issue penalties where necessary (Clause 6); and a new free speech complaints scheme (Clause 7). It is how these three functions interact that is the main cause of concern.

As has been commented on by others[xiv], the complaints scheme introduced under Clause 7 duplicates a complaints mechanism that already exists in the Office of the Independent Adjudicator (OIA), as designated under the Higher Education Act 2004. While the Clause 7 scheme is focused narrowly on freedom of speech, there is little clarity as to which mechanism an aggrieved student should pursue. In both cases, means of redress is limited to the issuance of recommendations under Clause 7(7) of the Bill.

At the same time, the Free Speech Director *does* have the power to impose penalties under Clause 6. Furthermore, they will be responsible for promoting free speech with all they understand that to entail. All of which prompts the question: is this an adjudicatory, advisory, or advocacy function?

What may be a source of confusion becomes a source of concern due to the way the OfS is structured. Under Schedule 1 of the Higher Education and Research Act 2017, OfS Directors are appointed directly by the Secretary of State. Given that the express purpose of the reforms are to address what the government understands to be a "creeping culture of censorship", it would follow that the new "champion" would be expected to build on the political interventions of government ministers: interventions that have included condemning, among other things, the teaching of "contested political ideas" such as Critical Race Theory[xv] and the removal of a portrait of the Queen from an MCR common room[xvi].

Indeed, in a letter sent earlier this year to the ongoing and incoming heads of the OfS, Gavin

Williamson expressed his desire in relation to speech on campus that the OfS "work closely with the Department to deliver [their] shared agenda and ensure our work is closely aligned", and that they "take more active and visible action to challenge concerning incidents that are reported to it or which it becomes aware of""[xvii].

This politicisation matters because it risks compounding the division and polarisation that is fuelling problems of speech on campus. If the OfS mechanism is understood to be a partisan tool, with the Free Speech Director considered a mouthpiece for a particular ideological agenda, it will only ever be invoked by those aligned by one side of the political divide. This risks creating a situation where one party to a dispute triggers the OIA mechanism, while the other pursues the OfS scheme. Such a conflict would both undermine the perceived neutrality of the OfS and further inflame tensions, particularly in the event that the two schemes issue competing judgements. Far from assisting universities in navigating their way through such matters, the scheme could end up further muddying the waters.

Cancel Culture – or Activism?

What is referred to as "cancel culture" can often be understood as a form of a digital activism. Efforts to delegitimise unethical professional practices or advance corporate accountability, for example, might involve marginalising those responsible – whether by removing a CEO from a board of trustees, naming-and-shaming offenders, or otherwise exposing and isolating the individuals in question.

If one person pursues such a campaign the impact is likely to be minimal. If hundreds or even thousands rally behind the campaign, the impact can be enormous. Sometimes this impact can be negative, disproportionately targeting individuals who express unorthodox opinions and inhibiting free speech in the process. But when it's broken down, the activities clustered together under the banner of "cancel culture" - protest, advocacy, or indeed simple expressions of opinion - are themselves acts of public participation protected under the Human Rights Act.

None of this is to diminish the potential threat of "cancellation campaigns" to free speech. It does, however, underscore the morally ambiguous climate in which students and university administrators are having to operate. Add to the mix university protocols on the Equality Act 2010 and other legal duties and it's understandable how those responsible for facilitating external speakers may on occasion strike the wrong balance.

What is needed, therefore, is guidance – not punitive measures. If the sensitivity of students to principles of universal free speech is waning in the face of polarisation, government compulsion is not likely to reverse this process – on the contrary, it will further politicise the issue and aggravate tensions on campus.

A Tort for Trolls?

Nowhere are these issues more pronounced than with Clause 3, which makes breaches of the duties under Clause 1 and 2 legally actionable. Giving legal teeth to these duties, where serious harm – such as the expulsion of a student or dismissal of an academic - is caused as a result of the breach, could strengthen the resolve of universities to protect their members and resist "cancellation campaigns". The problem again lies in the detail – or rather, the lack thereof.

As universities find themselves centre-stage in the so-called culture wars, abusive lawsuits aren't just vaguely possible – they're highly probable[xviii]. To ensure lawsuits under Clause 3 aren't weaponised for political purposes, it's important therefore that robust safeguards are built into the new tort. Unfortunately, such safeguards are notably absent from the HE Bill.

There are three main areas where the current proposal falls short:

i. *The extension of the tort's application to students:* Clause 3 extends beyond HEPs to student unions. Since student unions are funded by HEPs, the costs of any litigation would ultimately be borne by the taxpayer. The prospect of a protracted court process could however chill speech, discouraging risk averse student unions from hosting contentious speaker events and emboldening others – who may see the courtroom as a platform to challenge government-imposed standards on campus speech - to take a more uncompromising line.

ii. *The lack of standing requirements:* under the current wording of the bill, *anyone* can file a complaint with the court. This contrasts with the new OfS complaints procedure, which limits eligibility to students, members of staff, and visiting speakers. Under the current draft, therefore, civil proceedings could be launched by groups and individuals with no connection to the HEP in question – and with no harm threshold (see below) there is little to prevent bad faith actors from using court processes for political purposes.

iii. *The lack of a harm threshold:* with no harm threshold built into the new tort, an individual or group who has suffered little or no injury from an alleged breach can file a lawsuit against an HEP or SU. When considered in conjunction with (ii), this could open the litigation up to bad actors with little direct involvement in the relevant dispute – and make it easier for abusive claims to survive a motion to strike.

These three issues together could derail the stated purpose of the tort – to enable individuals to seek redress for the loss they have suffered – and instead make the courts a new battleground in the culture wars. The new tort could be invoked by provocateurs and trolls more interested in stoking division than in advancing individual rights.

As James Murray has argued[xix], with regards to academic freedom there is a much more effective way to ensure individual redress for academics against their employing institutions: by handing jurisdiction to employment tribunals. By making dismissal in breach of the A1 duty automatically unfair, claimants would be able to avoid the high costs associated with civil lawsuits in the courts, as well as potentially crippling adverse costs orders if they lose. Unlike in civil courts, the employment tribunal would also be able to issue reemployment orders – thereby providing claimants with the most immediate (and

most symbolically important) form of redress.

Free Speech – or Academic Freedom?

The failure to empower employment tribunals is indicative of a broader failure in the bill – to disentangle academic freedom from broader questions of free speech.

This is important as while issues of speech on campus are notionally addressed in the bill, most of the problems impacting academic freedom are entirely absent. By conflating the two concepts the bill suggests that the latter is only impacted when forms of self-expression are limited, thereby restricting the potential scope of the legislation. Treating the two as synonymous also overlooks the occasions where the two rights may collide: e.g. where a student's opinions are deemed by an academic to undermine the quality of an assignment.

To understand what the bill is missing as a result it is instructive to look at international standards on what academic freedom entails. The *Recommendation concerning the Status of Higher Education Teaching Personnel*, passed by UNESCO after extensive consultation with academic and legal experts, is considered a particularly authoritative statement in this regard[xx]. By bringing the definition of academic freedom in the HE Bill into compliance with this document, the Bill's ability to protect academics could be significantly strengthened.

Academic freedom is currently defined in Clause 1(A1)(6) of the Bill:

> '*"Academic freedom", in relation to academic staff at a registered higher education provider, means their freedom within the law and within their field of expertise –*
>
> *(a) To question and test received wisdom, and*
>
> *(b) To put forward new ideas and controversial or unpopular opinions*
>
> *Without placing themselves at risk of being adversely affected in any of the ways described in subsection (7)'*

The Bill's definition therefore consists of just two constituent freedoms: to question and test received wisdom and to put forward new ideas and opinions. Furthermore, these freedoms can only be exercised within the academic's "field of expertise". In both respects, the definition falls short of academic standards.

Section VI of the UNESCO definition consists of five constituent freedoms, namely:

1. Freedom of teaching and discussion;
2. Freedom in carrying out research and disseminating and publishing the results thereof;
3. Freedom to express freely their opinion about the institution or system in which they work;
4. Freedom from institutional censorship; and
5. Freedom to participate in professional or representative academic bodies[xxi]

Simply by expanding the subsections of Clause 6 to encompass points 2, 3 and 5 the HE Bill could be

brought more closely in compliance with international law, providing more robust protections for academics in the process. The recommendation further notes that HE teaching personnel should play a "significant role in determining the curriculum" – an important clarification given recent controversies over course material.

Similarly, the scope of protected activities under Paragraphs 29 and 30 of the Recommendation has a broader reach than the language of the HE Bill. While Clause 1 limits the HE Bill's application to the academic's "field of expertise", Paragraph 29 of the Recommendation recognises the right to academics to carry out research work "in accordance with their professional responsibility". Given the interdisciplinary approach advanced by many universities in the UK, and the cross-fertilisation of ideas and opinions that takes place across different areas of expertise, the wording of the Recommendation is clearly preferable.

The limitations of the HE Bill are evident not just in its definition of *academic freedom*, but in its definition of *academics.* The UNESCO Recommendation applies not just to staff or members of the HE provider in question, but to HE "teaching personnel" – defined as "all those persons in institutions or programmes of higher education who are engaged to teach and/or to undertake scholarship and/or to undertake research and/or to provide educational services to students or to the community at large". This definition could therefore stretch to honorary professors, emeritus professors, and visiting professors – all of whom could be excluded by the wording of Clause 1 of the HE Bill.

Recommendations and Proposed Amendments

There are a number of ways the above issues with the HE Bill can be addressed and mitigated, thereby strengthening the bill's potential to promote academic freedom and speech on campus. In particular, we recommend the following amendments are introduced:

- In order to strengthen provisions on academic freedom we recommend bringing the definition of academic freedom in Section A1(6) in line with international standards, specifically Section VI of the UNESCO Recommendation. This means extending protected activities to include the freedom to:
    - Carry out research and disseminate and publish the results thereof;
    - Express freely their opinion about the institution or system in which they work;
    - Participate in professional or representative academic bodies; and
    - Play a significant role in determining the curriculum
- For the same reason, the reference to "academic staff" in Section A1(5) needs to be broadened to "academic members", thereby encompassing positions (e.g. sessional lecturers and honorary, visiting, and emeritus professors) that are not formalised as members of staff.

- Likewise, the qualification "within their field of expertise" should be replaced with "in accordance with their professional responsibility" or alternatively "within their professional competence".

- In order to prevent abuse of the new statutory tort, we recommend that robust safeguards are built into Clause 3. Specifically:

    - Clause 3(b) should be deleted so as to narrow the scope of the tort to registered HEPs.

    - Standing requirements should be instituted that mirror the eligibility requirements of the proposed new Schedule 6A(2)(2) in Clause 7.

    - Plaintiffs should be required to show that the harm caused by the breach is more than merely trivial.

- In order to strengthen provisions on academic freedom, dismissal in breach of the A1 duty should be considered automatically unfair and employment tribunals should be given jurisdiction to hear complaints.

- In order to prevent two competing adjudication schemes emerging, we recommend that the Government issues detailed guidance to students (and those supporting students) on the type of complaints that would be best suited to the OfS scheme.

- In order for the Free Speech Director to have the credibility needed to promote speech on campus, it is critical that the position is perceived to be politically neutral. Precedents exist to safeguard the neutrality of political appointments in politically sensitive areas[xxii]. We therefore propose that Clause 8 be amended to either:

    - Devolve appointment decisions to the Education Select Committee, to be made in consultation with higher education authorities; or

    - Require the Secretary of State to secure the agreement of the Education Select Committee on any appointment decision.

Post Note

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[i] Majid Khadduri, who became Director of Iraqi PEN in 1951, was a hugely influential academic in International Relations whose career spanned seventy years; Pompeu Fabra, the famous Catalan linguist and University Professor, was President of Barcelona PEN in the 1930s; members of the 'Thomas Mann' group of German exiles,

meanwhile, included academics as well as novelists and poets. This tradition continues today: the current Chair of English PEN's Board of Trustees, Maureen Freely, is a professor at Warwick University.

[ii] For a recent example see PEN International, *Hungary's academic freedom and expression at risk due to changes to education law',* 25 April 2017, available at https://pen-international.org/news/hungarys-academic-freedom-and-expression-at-risk-due-to-changes-to-education-law

[iii] For a recent example see PEN International, *India: Human Rights Organisations Call for Release of Imprisoned Academic G.N. Saibaba*, 13 January 2021, available at https://pen-international.org/news/india-human-rights-organizations-call-for-release-of-imprisoned-academic-g-n-saibaba

[iv] See as an example the work of PEN America on Campus Free Speech: https://pen.org/advocacy-campaign/campus-speech/

[v] In the 1930s, for example, English PEN supported the academic F.R. Leavis, who had problems from Cambridge University authorities about his teaching of 'Ulysses'.

[vi] See Terence Karran and Lucy Mallinson, *Academic Freedom in the UK: Legal and Normative Protection in a Comparative Context,* Report for the University and College Union, 7th May 2017, which found that 35.5 percent of UCU members have refrained from discussing, teaching, or researching a particular topic for fear of negative repercussion. Available at https://www.ucu.org.uk/media/8614/Academic-Freedom-in-the-UK-Legal-and-Normative-Protection-in-a-Comparative-Context-Report-for-UCU-Terence-Karran-and-Lucy-Mallinson-May-17/pdf/ucu_academicfreedomstudy_report_may17.pdf

[vii] See *Freedom of Expression in UK Universities,* Jonathan Grant, Kirstie Hewlett, Tamar Nir and Bobby Duffy for King's College London, December 2019*,* which found that 25% of students felt unable to express their views at university because they were scared of disagreeing with their peers. Available at https://www.kcl.ac.uk/policy-institute/assets/freedom-of-expression-in-uk-universities.pdf

[viii] See Chapter 2 ("The legal and regulatory framework") and the discussion of the Prevent Duty (pages 29 to 33) in the Joint Committee on Human Rights' Fourth Report of Session 2017-18, *Freedom of Speech in Universities,* available at https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/589/589.pdf. See also James Murray for Taylor Vinters, *Can Academic Freedom of Speech in the UK withstand its current threats?*, 2 May 2019, available at https://www.taylorvinters.com/article/can-academic-freedom-of-speech-in-the-uk-withstand-its-current-threats. For details of how the Prevent Duty has led to no-platforming in universities, see *Freedom of Speech in Universities: Islam, Charites and Counter-terrorism,* Alison Scott-Baumann and Simon Perfect, Routledge 2021 (page 51)

[ix] Freedom House Special Report 2020, *The Internationalization of Universities and the Repression of Academic Freedom*, Saipiria Furstenberg, Tena Prelec, and John Heathershaw, available at: https://freedomhouse.org/report/special-report/2020/internationalization-universities-and-repression-academic-freedom

[x] John Heathershaw for the Higher Education Policy Institute, *To protect academic freedom from external 'threats', we must reverse the decline of academic participation in governance,* 29 March 2021, available at https://www.hepi.ac.uk/2021/03/29/to-protect-academic-freedom-from-external-threats-we-must-reverse-the-decline-of-academic-participation-in-governance/. Evidence of the influence of autocratic regimes in UK universities can be found in the House of Commons Foreign Affairs Committee report, *A cautious embrace: defending democracy in an age of autocracies,* Second Report of Session 2019 (Page 5), available at https://publications.parliament.uk/pa/cm201919/cmselect/cmfaff/109/109.pdf.

[xi] To take one example, a September 2017 YouGov poll found that just 24% of Conservative supporters and 19% of Labour supporters would be happy with their child marrying the other side. The same survey found that Conservative and Labour supporters both describe people from their own group as 'honest', 'intelligent' and 'open-minded'. The other side, however, is more likely to be deemed 'hypocritical', 'selfish' and 'closedminded'. See Sara Hobolt, Thomas Leeper, and James Tilley for LSE and University of Oxford, *Divided by the Vote: Affective Polarization in the Wake of Brexit,* available at https://s3.us-east-2.amazonaws.com/tjl-sharing/assets/DividedByTheVote.pdf

[xii] Jonathan Mountstevens, *The government's culture war is chilling for curriculum rigour,* 22nd November 2020, available at https://schoolsweek.co.uk/the-governments-culture-war-is-chilling-for-curriculum-rigour/

[xiii] *Academics accused of 'stirring up mob' against Nigel Biggar in free speech row,* The Times, December 28 2017, available at https://www.thetimes.co.uk/article/academics-accused-of-stirring-up-mob-against-nigel-biggar-in-free-speech-row-vzv6kxqnv

[xiv] Simon Jennings, Association of Heads of University Administration (AHUA), *The future of student complaints: a tale of two processes?,* available at https://www.ahua.ac.uk/the-future-of-student-complaints-a-tale-of-two-processes/

[xv] Conservatives on Facebook, *Kim Badenoch's speech on BLM and Critical Race Theory,* 21 October 2020,

available at https://www.facebook.com/watch/?v=645334856343463

[xvi] Gavin Williamson on Twitter: https://twitter.com/GavinWilliamson/status/1402329761565843461

[xvii] Letter to Sir Michael Barber and Lord Wharton of Yarm, *Guidance to the Office for Students (OfS) – Secretary of State's strategic priorities,* February 2021, available at https://www.officeforstudents.org.uk/media/48277145-4cf3-497f-b9b7-b13fdf16f46b/ofs-strategic-guidance-20210208.pdf

[xviii] A report by the Foreign Policy Centre found that the UK is "the highest international source" of legal intimidation and Strategic Lawsuits Against Public Participation (SLAPPs) – abusive civil lawsuits designed to harass and intimidate one side of a political debate into silence. See *Unsafe for Scrutiny: Examining the pressures faced by journalists uncovering financial crime and corruption around the world*, available at: https://fpc.org.uk/publications/unsafe-for-scrutiny/. A number of reports have shown a growing trend of SLAPPs across Europe – see the research compiled by the Coalition Against SLAPPs in Europe (CASE), available at: https://www.the-case.eu/slapps-in-europe.

[xix] James Murray for Taylor Vinters LLP, *Submission to House of Commons Public Bill Committee*, August 24 2021, available at: https://www.taylorvinters.com/wp-content/uploads/2021/08/Submission-to-Public-Bill-Committee-Academic-Freedom-24-August.pdf

[xx] Terrence Karran, *Academic Freedom in Europe: Reviewing UNESCO's Recommendation,* British Journal of Educational Studies, Vol. 57, No. 1, available at https://core.ac.uk/download/pdf/1644664.pdf

[xxi] Sections VI, Paragraph 27, of the Recommendation concerning the Status of Higher Education Teaching Personnel adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in Paris on 11 November 1997, available at: https://www.lboro.ac.uk/media/wwwlboroacuk/content/universitygovernance/StatuteXXI-%20Annexe.pdf

[xxii] See for example Schedule 2 of the Budget Responsibility and National Audit Act 2011, which requires the government to secure the agreement of the chair of the Committee of Public Accounts for the appointment of the chair of the National Audit Office (NAO), and which devolves other appointments to the NAO.