MillionPlus

The Association for Modern Universities

PARLIAMENTARY BRIEFING

Higher Education (Freedom of Speech) Bill 2021

Adam Haxell, Head of Advocacy and Stakeholder Engagement 28 May 2021

MillionPlus is the Association for Modern Universities in the UK, and the voice of 21st century higher education. We champion, promote and raise awareness of the essential role played by modern universities in the UK's world-leading university system. Modern universities make up 52% of all UK undergraduates and 37% of all postgraduates, with over one million students studying at modern institutions across the UK.

All UK universities give the utmost priority to defending free speech and academic freedom - it remains a core part of their DNA as institutions of free inquiry. Universities have long had clear requirements in these areas, both through acts of Parliament and from the formal governance 'expectations' of the Office for Students (OfS) since 2018.[1] MillionPlus universities are committed to ensuring these values are upheld, and we will therefore work with the Government and parliamentarians to help us all underline our commitments in this area.

The introduction of the Higher Education (Freedom of Speech) Bill, however, does leave a range of questions that need to be addressed in order for the Bill to live up to its laudable aims by ensuring a consistent, fair, and accountable framework. Some of our principal matters are highlighted below, and we look forward to engaging with the UK Government and parliamentarians to deliver improvements to the extant legislation concerning free speech and academic freedom where these are necessary and proportionate.

How will this Bill, if passed, interact with previous legislation in this area?

The Education Act 1986 gives a clear duty to universities to "take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers", and it also details how institutions must not deny the use of their premises on the basis of beliefs of political principles. Much of what is proposed for universities in the new Bill is clearly already enshrined in law from 1986, and some of the ambiguities around definitions of harm were made clearer through the Equality Act 2010, which defines the protections an individual can expect to have from harm, including verbal harassment. Universities are charged under the Equality Act 2010 with the promotion of good relations between people with protected characteristics (including race, gender reassignment and sexual orientation) under the Act and those who do not have protected characteristics.

A key question therefore is what areas of this Bill are indeed new and which areas of these previous Acts are being superseded and implicitly disapplied. For example, does this new legislation, if passed, mean that the duties under the Equality Act to keep people from harm are now less important as the duty to protect free speech, however unpopular or controversial, takes precedence? Alternatively, if this is not the case, then how could this new Bill promote free speech in a way that is not already defined in law, such as in the (human) right to free speech in the Human Rights Act 1998.

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[1] Such as the Education Act 1986 and the Higher Education and Research Act 2017 on academic freedom, the Human Rights Act 1998 on the right to free speech for all persons, and the Equality Act 2010 on fair treatment and combatting harassment for university staff and members (universities are directly bound by that Act through their coverage under the Public Sector Equality Duty).

Limitations to rights

Rights limitations are an established element of human rights law and practice globally. The Bill is unclear however what limitations apply to the right to free speech in the university context.

A key part of the new Bill is the duty it places on universities, and indeed the OfS, to ensure academic freedom, as defined by the ability to "question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions". One issue clearly then lies with the application of this provision vis-à-vis opinions that are controversial or unpopular because they undermine the basic dignity and respect due to all employees and students of the university as set out in the Equality Act 2010.

The advance of science and the growth of human knowledge has been built on advancing new ideas and testing theories - this is a core mission of all universities. However, aside from the legal implications and protections that are already in place, particularly around protected characteristics, the determination of where a topic or idea crosses a line and goes against the very values of a university, or indeed of rigorous academic debate, is an highly complex one.

Manifestly racist - including anti-Semitic - speech is an example of a 'controversial opinion' that should not be freely accepted on campus. Yet those using racist and anti-Semitic speech in the past have claimed that this is an expression of their free speech rights or of their academic freedom. The Bill as it stands does not help clarify how a university might treat instances of clearly racist or anti-Semitic speech which may not be obviously prosecutable in the criminal law, such as in the case of a speaker who might propound Holocaust denial. This matter should be addressed by parliamentarians.

Will this effectively make the OfS a state censor of controversial topics?

This preceding point leads to a further critical question about the role in this of the OfS. If the decisions are being taken as to the acceptability of a speaker or idea, and these are challenged, requiring the OfS to make a determination, does this, in effect, make the decisions the OfS makes a de facto list of all speakers and topics that should or should not be able to be brought onto a university campus? This is the logical extension of the current proposals, and it invests substantial power in the hands of this body, as well as a vast pressure to be have expertise in a range of areas to make such a determination. Will the regulator have a set criteria that will need to be met? Will the regulator be responsible for not only interpreting this Act if passed, but also determining the application of the Public Sector Equality Duty concerning verbal harassment as these closely intersect?

As the OfS Board is appointed directly by a politician this potentially opens up free speech debates to a more overtly partisan angle than previously, with the risk that this critical topic is viewed through an particular ideological prism rather than the current legal route though the judicial review of university actions in this space.

How can it ensure consistency of approach to staff – and who are university 'members'?

The academic freedom element of the Bill also needs clarification. Firstly, who constitutes a 'member' of the university in the words of the Bill – does this include people who have no contractual relationship or employment status at the university, such a professors emeriti and unremunerated visiting lecturers/professors. If these groups are to be included, will this deter universities from entering into such emeriti or visiting arrangements out of caution that they might get unduly entangled in ideological disputes about what truly constitutes free speech with people who they do not employ and with whom they have no contractual relationship.

How can this Bill deliver the Government's ambition to reduce bureaucracy within higher education?

The new OfS Chair, Lord Wharton, this month helpfully announced plans for the OfS to start measuring the reduction of red tape and bureaucracy emanating from the regulator in the course of its legal duties. How can this new system of duties and OfS responsibilities align itself with this ambition, and furthermore how can we also ensure that in so doing universities are not impelled to divert resources away from student-facing services towards a potentially complex and unclear compliance regime run by the OfS? It is noteworthy that the Bill's impact assessment does not include fresh compliance costs for Higher Education Providers.

OUR VIEW

Freedom of speech and academic freedom are, and will always remain, the core animating principles for modern universities. We hope that the Bill can strengthen these values if properly amended. The Bill as it stands, however, poses too many unanswered questions that will generate unintended consequences for providers if Parliament does not address them. If these issues are not addressed through Government or backbench amendments we may not only be unable to advance further the cause of academic freedom, but we run the risk of politicising the debate on this critical right, while adding more bureaucracy and cost onto universities against the expressed aim of the Government and regulator to reduce red tape.

We therefore hope to work with the Government and parliamentarians to improve this legislation.

For more information please contact Adam Haxell, Head of Advocacy and Stakeholder Engagement, at **adamhaxell@millionplus.ac.uk**