

HIGHER EDUCATION (FREEDOM OF SPEECH) BILL

ECHR MEMORANDUM FOR THE BILL AS INTRODUCED INTO THE HOUSE OF COMMONS

1. This Memorandum has been prepared by the Department for Education (“the Department”) and addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Higher Education (Freedom of Speech) Bill (“the Bill”).
2. On introduction of the Bill into the House of Commons, the Secretary of State for Education made a statement that in his view the provisions of the Bill are compatible with the Convention rights.
3. This Memorandum deals only with those parts of the Bill that raise significant ECHR issues. The Department considers that the clauses and Schedule to the Bill which are not mentioned in this Memorandum do not give rise to any ECHR issues.

SUMMARY OF THE BILL

4. The Bill implements the 2019 Conservative Manifesto commitment to “*strengthen freedom of speech and academic freedom in universities*”. Freedom of speech, and the related right to academic freedom, is central to the purpose of higher education. There is a concern in government that this may now be under threat by actions such as no-platforming, or by students and staff self-censoring. There are also concerns that the threat of disorderly protest and the resulting need for security might have a dampening effect on those seeking to organise events where controversial views might be aired.
5. There is already a legal framework in place, which in particular imposes on those concerned in the governance of higher education providers a legal duty to take reasonably practicable steps to ensure freedom of speech within the law is secured for their members, students, employees and visiting speakers. Increasing reports of concerns in relation to freedom of speech, however, suggest that this duty may not be being fully complied with, and highlight the limited options for enforcement; and the Joint Committee on Human Rights in its 2018 report on Freedom of Speech in Universities found regulatory complexity is one of a number of factors which may interfere with freedom of speech at universities.

6. Clause 1 of the Bill builds on existing freedom of speech duties of higher education providers registered with the Office for Students (“OfS”), the higher education regulator in England, to strengthen those duties and impose a new duty to promote lawful freedom of speech. Clause 2 imposes new freedom of speech duties on the students’ unions of approved (fee cap) providers (a category of registered higher education provider).
7. Clause 3 of the Bill creates a new cause of action (a tort for breach of statutory duty) against registered higher education providers and students’ unions which breach specified freedom of speech duties.
8. Clauses 4 to 8 of the Bill amend the functions of the OfS. In particular, they provide for new registration conditions for higher education providers in relation to freedom of speech and academic freedom, reflecting the new freedom of speech duties, and also provide for the OfS to regulate students’ unions in relation to compliance with their freedom of speech duties. They also create a new complaints scheme in relation to breaches of the freedom of speech duties, alongside a new office on the OfS Board of the Director for Freedom of Speech and Academic Freedom. The Director’s remit is to champion freedom of speech and academic freedom on campus, and to be responsible for investigations of infringements of freedom of speech duties in higher education which may result in sanctions or individual compensation via the new complaints scheme.

ECHR ISSUES

Duties to protect freedom of speech

9. Clause 1 of the Bill imposes a duty on governing bodies of registered higher education providers to take reasonably practical steps to secure freedom of speech within the law for their 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. This will strengthen and replace the existing duties on higher education providers currently set out at section 43 of the Education (No. 2) Act 1986. The clause provides that freedom of speech includes the freedom to express ideas, beliefs and views without suffering adverse consequences. The clause makes clear that taking reasonably practicable steps to secure academic freedom is part of the duty and extends the existing scope of academic freedom to include protection in relation to a staff

member's promotion. It also makes clear that academic freedom is limited to speech within an academic's field of expertise. Finally, there is a new separate duty that gives an external applicant for an academic role at a higher education provider similar protection to an internal applicant as regards academic freedom.

10. Clause 2 imposes similar duties on students' unions. These are new duties. The duties are in respect of freedom of speech only, and not in respect of academic freedom.

Articles 8, 9, 10, 11 and 14

11. Measures to strengthen rights to freedom of speech most obviously engage Article 10 ECHR. Indeed, the fundamental purpose of the provisions is to strengthen freedom of speech rights and thereby uphold/promote compliance with Article 10. Other relevant articles could include Article 8 (the right to private and family life), Article 9 (freedom of thought, conscience and religion - including freedom to manifest religion or belief) and Article 11 (freedom of peaceful assembly and association with others). Article 14 (discrimination) could also come into play in conjunction with one or more other Convention rights.

12. Rights-based arguments could be advanced on the one hand by speakers and those who want to listen to them, and on the other hand by those opposed to speakers or offended by what they say. The speaker and those who wish to listen are exercising (or seeking to exercise) their Article 10 rights to freedom of expression, which includes freedom to receive as well as impart information¹, as well as their Article 11 rights to freedom of assembly. Freedom of expression includes the right to express one's views aloud (for example, through public protest and demonstrations) or through published articles, books or leaflets, television or radio broadcasting, works of art, or the internet and social media. It extends to speech that shocks, offends or disturbs.

13. Academic freedom – including here the freedom of academic staff to freely express their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence, without the risk of losing their jobs, privileges or the likelihood of securing promotion - is considered effectively to be a subset of freedom of expression.

¹ See for example *Khurshid Mustafa and Tarzibachi v Sweden* [2008] ECHR 23883/06, *Leander v Sweden* [1987] ECHR 9248/81, *Gaskin v United Kingdom* [1989] ECHR 10454/53, *Autronic AG v Switzerland* (1990) 12 EHRR 485 and *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v Ireland* (1992) 15 EHRR 244.

14. The Bill aims to strengthen Article 10 rights by increasing protections for freedom of speech and academic freedom, provided the speech/academic work is within the law.
15. In certain circumstances, permitting one person's freedom of speech could interfere with other rights – notably the right to private and family life under Article 8, and the right to freedom of thought, conscience and religion under Article 9. For example, homophobic or anti-Muslim speech might come up against the Article 8 or 9 rights of others (and potentially Article 14, in connection with the enjoyment of those rights). There could also be an element of engagement with Article 11 which protects freedom of association. Article 11 rights may be relevant for those gathering to protest against speech or speakers; those who wish to disassociate themselves from speech or speakers; and associations whose internal affairs are interfered with by measures regulating who can and cannot speak at meetings.
16. As with Article 10, these are qualified rights, and higher education providers will need to carry out a balancing exercise between potentially competing rights. This is required by the Human Rights Act 1998 ("HRA 1998") and will be dealt with, where necessary, at the implementation stage, rather than being set out in the Bill itself.
17. The obligations on higher education providers and students' unions are to take reasonably practicable steps to secure freedom of speech within the law, having particular regard to the importance of freedom of speech. As these obligations will not dictate any particular outcome in any particular case, the Department considers they are unlikely to fall foul of the ECHR. This is because it is possible to consider what steps are reasonably practicable in a particular case, while eventually concluding that freedom of speech must, in the end, give way to other competing rights.
18. The requirement to have particular regard to the importance of freedom of speech could, in a particular case, prompt a higher education provider or students' union to prioritise freedom of speech over another Convention right, but this would remain subject to its assessment of what is reasonably practicable, and would need to be lawful. Indeed, section 6 HRA 1998 (for a higher education provider) would dictate that, to the extent that prioritising freedom of speech resulted in a disproportionate interference with the Convention rights of another person, the higher education provider would have to refrain from doing so. The higher education provider would not be able to rely on section 6(2)

HRA 1998, which provides that it is not unlawful for a public authority to act incompatibly with the Convention rights if it could not act differently as a result of primary legislation, because the legislation would not be dictating that the higher education provider must adopt the ECHR-incompatible outcome.

19. In respect of the duty on students' unions, which are unlikely to be public authorities, the Department has further considered whether imposing the new duties could put the State in breach of its positive obligations to secure respect for the Convention rights between private persons. However, this is considered unlikely because:

- a) imposing such an obligation on a private actor does not dictate the outcome of the decision which the private actor makes, and so it remains possible for students' unions to respect countervailing rights of others even while giving significant regard to freedom of speech; and
- b) the State has a wide margin of appreciation in how it regulates conduct between private actors so as to strike a balance between their competing Convention rights².

20. The Department is therefore of the view that the duties on higher education providers and students' unions are framed in a way which permits them to reach decisions that are consistent with the ECHR, where relevant. The Bill requires only that higher education providers and students' unions take such steps as are "reasonably practicable" to secure freedom of speech, having particular regard to the importance of freedom of speech; in doing so, it leaves it to the individual higher education provider or students' union to balance the competing rights and considerations that may be engaged in any given case. Accordingly, the Department considers that these provisions do not interfere with the Convention rights.

21. As for academic freedom in particular, the case law of the European Court of Human Rights has afforded particular protection to academic freedom under Article 10³. For example, in the case of *Erdoğan v Turkey*⁴ the Court considered the importance of academic freedom (in particular the right to criticise the judiciary). The Court stated that "*academic freedom in research and in training should guarantee freedom of expression*

² See for example *Martinez v Spain* (2015) 60 EHRR 3, §§123-135.

³ See, for example, *Sorguç v. Turkey*, no. [17089/03](#), § 35, 23 June 2009; and *Sapan v. Turkey*, no. [44102/04](#), cited above, § 34, 8 June 2010) and of academic works (see *Aksu v. Turkey* [GC], nos. [4149/04](#) and [41029/04](#), § 71, ECHR 2012; and *Hertel v. Switzerland*, 25 August 1998, § 50, *Reports of Judgments and Decisions* 1998-VI).

⁴ *Mustafa Erdoğan and others v Turkey* [2014] ECHR 673

and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction...This freedom, however, is not restricted to academic or scientific research, but also extends to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence."

22. The Department considers that the amendment to the definition of academic freedom, and the new protection provided by the Bill, strengthens the rights of academic staff under Article 10. As with other examples of asserting freedom of speech rights, the rights of others must be carefully balanced, in particular in respect of freedom of speech by academic staff which could infringe the Article 8 and Article 9 rights of others. The strengthening of academic freedom in clause 1 of the Bill does not mean that there can be no restrictions on the freedom of speech of academic staff. Higher education providers will have to balance their duties under these new provisions against the rights of others affected by the statements or writings of the academic in question. The Department therefore does not consider that the provisions in question interfere with rights under Article 8 or 9.

Functions of the Office for Students

General functions

23. The Higher Education and Research Act 2017 ("HERA") provides that the OfS is currently under a duty, in performing its functions, to have regard to the need to protect the institutional autonomy of English higher education providers. One of the elements of institutional autonomy under the current legislation is academic freedom: *"the freedom within the law of academic staff at English higher education providers (i) to question and test received wisdom, and (ii) to put forward new ideas and controversial ideas without placing themselves in jeopardy of losing their jobs or any privileges they may have."* A similar (but amended) definition applies in respect of the duty on higher education providers to take reasonably practicable steps to secure the academic freedom of academic staff, having particular regard to the importance of freedom of speech, which forms part of the freedom of speech duties in clause 1.

24. Clause 4 of the Bill amends the requirement in HERA as to what the OfS must have regard to when performing its functions so as to include freedom of speech and also

academic freedom as a separate provision (a concept which the Bill carves out from the concept of institutional autonomy). The clause also inserts a new duty on the OfS to promote the importance of freedom of speech, and academic freedom for academic staff of registered higher education providers, in the provision of higher education by registered higher education providers.

Article 10

25. The Department considers that the addition of explicit matters concerning freedom of speech and academic freedom to which the OfS must have regard when performing its functions strengthens the rights of those involved in higher education under Article 10. The new duty on the OfS to promote the importance of freedom of speech and academic freedom in higher education does the same. The Department does not consider that the provisions in question interfere with the Convention rights.

Regulation of freedom of speech duties

26. Clause 5 amends provisions already in HERA concerning the regulation by the OfS of higher education providers' duties in respect of freedom of speech. These are not new duties or otherwise reflect the new duties provided by the Bill and therefore do not raise any ECHR issues not already discussed above.

27. Clause 6 provides the OfS with an enforcement power to impose monetary penalties on students' unions of approved (fee cap) providers if it appears to the OfS that the students' union is failing or has failed to comply with any of its freedom of speech duties under sections A4 and A5 of HERA (as inserted by clause 2). This is a new function for the OfS in respect of students' unions, although the regulatory regime and enforcement powers already exist in relation to higher education providers.

28. This clause allows the Secretary of State to determine the amount of the penalty by regulations, and to make regulations about matters to which the OfS must, or must not, have regard in exercising its power to impose a monetary penalty.

Article 6

29. Article 6(1) is relevant because the procedure for imposing financial penalties involves the determination of a students' union's civil obligations. The Department considers that Article 6(2) and (3) is not engaged for the reasons set out below.
30. The decision to impose a penalty will be made following the decision-making procedure which applies in respect of monetary penalties imposed on registered higher education providers, and which is set out in paragraph 2 of Schedule 3 to HERA. Clause 6 of the Bill applies these provisions to penalties imposed on students' unions.
31. The provisions in Schedule 3 allow for representations to be made to the OfS and subsequently an appeal to the First-tier Tribunal against the imposition of any penalty, therefore providing for a fair and public hearing to an appropriate court. Given this, the Department considers that the requirements of Article 6(1) are satisfied.
32. As regards the need for additional safeguards in relation to criminal offences, the Department does not consider that Article 6(2) and (3) is engaged. The financial penalty regime here is not classified as criminal, either by the clauses themselves or by a general application of the law. Although there is a deterrent or punitive element to the penalty scheme proposed, it is only applicable to a specific group in the form of students' unions, rather than being of a generally binding character. The Department believes the penalty will be set at a proportionate level, subject to a maximum amount to be prescribed by regulations. Regulations will also set out the matters to which the OfS must, or must not, have regard when exercising its power to impose a penalty. For these reasons, and applying the test provided by the European Court of Human Rights in *Engel v Netherlands*⁵, the Department considers that this matter is unlikely to be classified as criminal in nature, so Article 6(2) and (3) does not apply.

Article 1, Protocol 1

33. These provisions could also engage Article 1, Protocol 1, insofar as the financial penalties amount to a deprivation of the possessions of natural or legal persons. However, Article 1, Protocol 1 makes it clear that there is no prohibition on penalties being applied, and, in any event, the Department considers that any interference arising under these provisions would be in the public interest by seeking to support more effective oversight by the OfS of students' unions' compliance with their freedom of

⁵ *Engel v Netherlands (No 1)* 1976 1 EHRR 647

speech duties, and would be proportionate, as the penalties are subject to the safeguards outlined above.