



The
University
Of
Sheffield.

University
Secretary's
Office.

Council: 26 April 2021

Free Speech and Academic Freedom

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1. Recommendations

1.1. Council are asked to:

- i) Note the legislative proposals,
- ii) Note the current actions and add any necessary additional steps, thought appropriate at this stage,
- iii) To agree to receive a further briefing and an action plan when the Government proposals are clearer, informed by the work of UUK and others.

2. Introduction

2.1. The Secretary of State for Education, Gavin Williamson, presented policy proposals to Parliament to introduce new legislation regarding Higher education: free speech and academic freedom, February 2021. The proposals are wide-ranging and can be summarised as follows:

- i) **Proposal 1:** 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 and which can impose sanctions, and will have powers to investigate individual cases.
- ii) **Proposal 2:** Legislate to require a new, OfS registration Condition on free speech and academic freedom which will require Universities to 'actively support' free speech on campus.
- iii) **Proposal 3:** Explore the option of strengthening the section 43 duty (see below) to include a duty on Universities to 'actively promote' freedom of speech. This would be wider than the existing duty to take reasonably practicable steps to ensure free speech is secured within the law.
- iv) **Proposal 4:** Legislate to extend the strengthened section 43 duty to cover Students' Union's directly. The section 43 duty will be extended to cover Student Unions, and regulatory powers will be given to the OfS to enforce their compliance.
- v) **Proposal 5:** Set clear minimum standards for the code of practice required under section 43. Minimum standard for the Codes of Practice required under section 43.

vi) **Proposal 6:** Introduce a statutory tort that would give private individuals a right of redress for loss as a result of a breach of section 43. The intention is to compensate individuals for any loss suffered (e.g. a detriment or dismissal which breaches section 43), and to give the duty 'extra teeth'.

vii) **Proposal 7:** Wider and enhanced academic freedom contractual protections. Enhanced contractual protections for academic freedom for academic staff. The intention here seems to be to ensure consistency both across the sector in terms of the type of contractual protection an academic has, and across the range of academics who are covered.

2.2. If these proposals are introduced, there will be a significant shift in the balance of issues to be considered related to free speech and academic freedom. For example, the risk of a complaint under the Equality Act 2010 will have to be balanced against the risk of direct enforcement action for breach of rights to academic freedom. There could now be considerable reputational and financial risks of getting things wrong on both sides (either a breach of Equality legislation or a breach of the new academic freedom law). Free speech does not exist in a vacuum and a push for freedom of speech on campus has to be negotiated with other laws and rights. A guide on freedom of speech in universities (2019) produced by the Joint Committee on Human Rights identified nine different Acts that needed to be taken into consideration when inviting external speakers, for example, including the Equality Act 2010, Public Order Act 1986, Counter-Terrorism and Security Act 2015, Terrorism Act 2000 and the Terrorism Act 2006.

2.3. The legislative regime is likely to become more complex and careful advice will be needed. Proper compliance in terms of updated policies, procedures and contracts will be also be very important.

3. Existing Duties on the University Council

3.1. Section 43 of the Education (No. 2) Act 1986 places a duty on those concerned in the governance of all Universities registered with the OfS to take reasonably practicable steps to ensure that freedom of speech within the law is secured for their members, students and employees, and for visiting speakers. This covers academic freedom as well as freedom of speech more broadly.

3.2. All registered universities are required to comply with the ongoing conditions of registration set by the OfS in its Regulatory Framework that are applicable to them. Conditions E1 and E2 require the governing documents to uphold the Public Interest Governance Principles that apply to them (Condition E1), and to have in place adequate and effective management and governance arrangements to operate in accordance with their governing documents and to deliver the Public Interest Governance Principles in practice.

3.3. Two Public Interest Governance Principles are relevant:

"I. **Academic freedom:** Academic staff at an English higher education provider have freedom within the law: 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 provider".

"VII. **Freedom of speech:** The governing body takes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider".

These were added, in terms, to Council's responsibilities in the Regulations prior to seeking Registration with the OfS.

4. Existing Legal Protections

4.1. The Equality and Human Rights Commission produced a useful guide in Freedom of expression: a guide for higher education providers and Students' Unions which describes the existing legal protections. There are three main pieces of legislation requiring Universities to protect freedom of expression:

- i) The Education (No 2) Act 1986
- ii) The Human Rights Act 1998
- iii) The Higher Education and Research Act 2017

4.2. These have to be balanced against rights and obligations placed by:

- i) The Equality Act 2020,
- ii) Charity Law,
- iii) Duty of Care,
- iv) The Prevent Duty,
- v) The Public Sector Equality Duty.

5. University of Sheffield Examples

5.1. In national events and media coverage three Sheffield related examples are being regularly used, amongst others, to illustrate claims that freedom of speech and academic freedom need further protection, as follows:

5.2. **The think-tank Civitas (Institute for the Study of Civil Society).** Civitas published a report 'Academic Freedom in Our Universities: the Best and the Worst' (2020) examining the policies and actions of all 137 registered UK universities¹ – including the Students' Unions. The University of Sheffield is listed as MOST RESTRICTIVE: one of 48 of the universities (35%) claimed to be performing badly on free speech, and causing the think-tank to argue the government should take some action to resolve the issues by a change of policy and legislation. The Civitas Report highlights the public policy and legal tensions involved as universities (including Sheffield) are marked down by Civitas, for example, for having restrictions imposed on speech by existing policies on bullying and harassment, restrictions imposed by 'Equal Opportunities policy,' Universities with a Transgender policy defining gender offensive speech terms/pronouns and so on.

5.3. **Court of Appeal in 2019.** In 2016, Felix Ngole, a social work student was expelled by the University of Sheffield, after he commented on Facebook that the Bible says homosexuality is a sin. The University claimed that the expression of disapproval of same-sex relationships breached the professional guidelines for social workers. Ngole won his case at the Court of Appeal in 2019. Overturning a previous High Court decision, the Court of Appeal criticised the University for its Procedures. In its decision it ruled: "The mere expression of views on theological grounds does not necessarily connote that the person

expressing such views will discriminate on such grounds.” This case is cited in the Secretary of State’s Foreword to his White Paper.

- 5.4. **Race-equality champions.** In January 2020 there was negative media coverage in some sections of the press about a plan to introduce ‘race-equality champions’ to change the way people think about racism through initiating ‘healthy conversations’ including tackling ‘micro aggressions’ — that is, comments or actions which might be unintentional, but which can cause offence to a minority group.

6. Next Steps

A series of actions are already being progressed, as follows:

- 6.1. **Amending the Terms of Senate’s Learning and Teaching Committee and Research and Innovation Committee.** Senate was invited by Council to consider additions to the terms of its Senate Learning and Teaching and Research and Innovation Committee’s to make explicit the existing duty to ensure academic staff have freedom within the law to question and test received wisdom and to put forward new ideas and controversial or unpopular opinions. Senate considered this and supported recommendations from L&TC and RIC to amend their terms.
- 6.2. **A new policy or guidance on academic freedom in relation to security and international collaboration.** Following the annual review of the Code of Ethics, UEB and Council agreed that under the existing Research theme of the Code a new policy or guidance on academic freedom in relation to security and international collaboration should be added. Professor Sue Hartley asked Global Engagement, working with Research Services, to consider the guidance. This will need approval through UEB and RIC, and through RIC be reported to the Senate, and if agreed sit under the University Code of Ethics. Malcolm Butler, Director of Sheffield Global, is preparing a report at Professor Sue Hartley’s request.
- 6.3. **Council briefing on free speech and academic freedom.** It is suggested the Council agree to receive a legal briefing on free speech and academic freedom, so that members are equipped to consider the changes proposed by government and their implications, can consider and agree the relevant internal policies and procedures as they come forwards for review, and act as required in relation to specific issues or complaints within the scope of their powers.
- 6.4. **Notifying Students of the Code at Registration.** Under the Education Act 1994, Council has an obligation to bring to the attention of all students the Code of Practice on free speech (relating to meetings and other activities on University premises) which the University is obliged to produce under section 43 of the Education Act (No 2) 1986. This is published and reviewed regularly. It appears in the University Calendar, and all students have access to this. Council is asked to note that the Student Administration Service intends to add a specific reference to these matters to the information provided to students on registration.
- 6.5. **Universities UK have convened an Advisory Group to help shape the sector’s response to the government’s proposals.** The primary role of the Advisory Group will be to scrutinise the proposals set out by DfE in further detail and provide recommendations to the UUK Board to inform how the sector should respond over the medium-to-long-term and where further evidence and research could be needed. The University Secretary has been invited ad personam to be a member, and can share updates as relevant.

- 6.6. **A review of the Code of Practice.** As the government policy proposals become clearer the Council may wish to request a review of its Code of Practice relating to meetings and other activities on University premises, and other related policies and procedures, to ensure continued compliance.
- 6.7. As the legislative proposals become clearer further actions may be required.