

The HE Free Speech Bill Must Recognise Equality Act Obligations by Hugh Tomlinson KC, Dr David Renton, barrister and SOAS Professor of Practice and Prof Alison Scott-Baumann, SOAS (31 Oct 2022)

Summary: In mid-May, the then universities minister Michelle Donelan insisted that the Higher Education (Freedom of Speech) Bill will not require universities to accept speech that contravenes the Equality Act: "[We can hold and articulate views which are objectionable to others as long as they don't cross the threshold of hate speech](#)". **Yet this is not made clear in the Bill which is now before Parliament, which appears to require universities to protect the speech of Holocaust deniers and others seeking to deliberately provoke and offend;** this is contrary to accepted university norms of civil discourse. Exceptions would be those labelled 'extremists' under Prevent.

This Bill strips universities of **the discretion** they previously enjoyed **to state that, of course, free speech is important – but it is not the only value at stake, and equality law must also apply.** From its very first clause, the Bill creates a new and absolute "Duty to take steps to secure freedom of speech", which overrides the Equality Act. The Bill also insists that universities "must take steps that [...] are reasonably practicable" to uphold free speech, as per stated objectives ([see A1](#), clauses (2), (3) and (4)). These objectives, however, are so all-encompassing that universities **can no longer refuse to host a speaker.**

Further, the Bill allows anyone who wishes, to sue a university for damages, an injunction, or a declaration in circumstances where they believe that free speech has been limited. Contrary to the statement in the Explanatory Notes, the right to sue under this clause is not confined to those whose rights have been infringed. In fact, this provision gives free rein to any third-party individual or organisation that wants to use "lawfare" tactics to harass universities and student unions.

The government could have put into the legislation a "saving clause" - words that clearly state that the Equality Act still applies - but they opted not to. As such, Members of Parliament should:

propose the following amendments to clause 1 (the new text is in square brackets):

"The governing body of a registered higher education provider must take the steps that, having particular regard to the importance of freedom of speech, [and the need to give due regard to eliminate discrimination etc. pursuant to the Equality Act 2010], are reasonably practicable for it to take in order to achieve the objective in subsection (2)..."

AND propose to amend clause 2 to incorporate the same wording

AND, in relation to legal claims, amend clause 4 to clarify when the individual right to sue will arise, and to limit it to cases where material loss is suffered:

Civil claims for breach of duty

A person [who has suffered material loss as a result of such breaches] may bring civil proceedings against—

- (a) a registered higher education provider, in respect of a breach by the governing body of the provider of any of its duties under section A1,
- (b) a constituent institution of a registered higher education provider, in respect of a breach by the governing body of the institution of any of its duties under section A1, or
- (c) a students' union, in respect of a breach by it of any of its duties under section A5 [and may be awarded damages to compensate them for such material loss].

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