

Higher Education (Freedom of Speech) Act 2023, or how to disagree without being disagreeable

AHUA Position Statement

November 2023

Executive Summary

Culture wars. Identity Politics. The War on Woke. Snowflakes. The past decade has seen a proliferation of (often derogatory) terms work their way into the popular lexicon to describe what feels like an increasingly entrenched and embittered battle between opposing political, cultural and ideological positions.

The political ramifications of this tension are evident to all. The Government has stepped into this disputed, combustible and already-regulated landscape with the lit match of further legislation and regulation.

Designed to ensure that all views can be heard, the Higher Education (Freedom of Speech) Act 2023 presents universities with a series of challenges as they seek to balance their enhanced duty around freedom of expression with an imperative to foster a sense of belonging and community amongst and between their students and staff. This position statement sets out the existing landscape, the key features of the Act, the challenges the sector will need to address in response and the support universities will need to meet their obligations.

What is the current position?

The principles of freedom of speech and academic freedom are well established in law and practice. They are respectively considered cornerstones of a free and democratic society and a functioning higher education environment.

Universities are already subject to obligations to uphold freedom of speech and academic freedom not only under domestic and international law¹, but also via the Office for Students' (OfS) Conditions of Registration².

The previous duty is for University's to *"take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees... and for visiting speakers."*³ which included the need to maintain a code of practice. The limitation of *"within the law"* is significant – not all speech is lawful. Where it constitutes a criminal or civil wrong it will not be protected. For example, speech which constitutes harassment or inciting hatred would not be 'within the law'.

¹ Education (No 2) Act 1986 Section 43 and Article 10 European Convention on Human Rights

² Conditions E1 and E2, referencing the Public Interest Governance Principles, which include upholding Freedom of Speech and Academic Freedom.

³ S43(1) Education (No 2) Act 1986

Freedom of speech and academic freedom are not the only concepts in this space and universities also need to consider their obligations under:

- The Prevent Duty, aiming to safeguard people from engaging with or supporting terrorism;
- The Public Sector Equality Duty, aiming to eliminate conduct inconsistent with the Equality Act 2010; to advance opportunity between those with protected characteristics and those without; and to foster good relations between those with protected characteristics and those without;
- Human Rights Act, including the right to freedom of expression, which universities must act consistently with. The legislation itself notes that it is not unfettered “*since it carries with it duties and responsibilities*”.

There is tension between the rights to freedom of speech and the different duties on universities. Universities are places which should be inclusive and welcoming – spaces where people can safely disagree with each other and learn different perspectives. However, where topics are controversial or have potential to offend, there is a precarious tight-rope walk ahead. Views on controversial issues are increasingly linked to an individual’s identity. The language used in a debate can be as problematic as the point being advanced.

Universities are in a unique position of having to juggle competing duties and considerations, often in advance of an event or act actually occurring – an uncomfortable balance of crystal ball gazing and legal and regulatory compliance.

What does the Act require?

The Freedom of Speech Act 2023 (which amends the Higher Education and Research Act 2017) changes the landscape for universities and students’ unions significantly.

The existing duty to *secure* freedom of speech within the law, will expand to active *promotion* of freedom of speech and academic freedom. A code of practice is still required, which must now be highlighted to students annually. The duty to promote freedom of speech includes within it promoting academic freedom.

The OfS’s role in policing this space will grow significantly, led by a new Director of Freedom of Speech and Academic Freedom. The OfS itself will be subject to a duty to promote freedom of speech and academic freedom within the law, which it will do (as a minimum) via imposing new conditions of registrations on universities.

Students’ unions are now subject to parallel duties to those on universities and will be liable to fines levied by the OfS for non-compliance.

A new complaints scheme, overseen by the OfS, will enable students, members, employees and visiting speakers to raise concerns of non-compliance by a university or students’ union.

Where, as a result of a breach of the duty, the complainant has suffered loss (financial or reputational) they will be able to bring a civil claim under a new tort introduced by the Act, but only after having followed the complaints process to conclusion. In acute, time limited

situations, complainants will be able to apply for an injunction against a university or students' union.

The OfS must now monitor overseas funding which could impact on a university or students' union's ability to discharge its duties under the Act. Where a university has been found in breach of its duty to promote freedom of speech, the OfS must consider whether overseas funding was a factor in that.

Additionally, new restrictions are included in the Act on the use of non-disclosure agreements relating to complainants sharing details of alleged or actual bullying or sexual abuse, harassment or misconduct at a university.

How does this change the landscape?

In December 2022, the OfS held an Insight event on Freedom to question, challenge and debate, which was accompanied by Insight Briefing 16⁴. With the impending passage of the Act, the OfS set out its expectations for universities on the topic, including reference to the Equality and Human Rights Commission guidance for universities from 2018⁵. Anyone attending the event or reading that guidance may conclude that the Act only introduces some procedural elements to this area, but that would be too simple a reading.

Firstly, there is a significant enhancement of the duty on universities. The move from "secure" to "promote" freedom of speech and academic freedom is more than a nuance for lawyers to debate. The Act contains a combination of measures which pushes the arguably more passive and responsive duty under the previous legislation into a new gear, requiring universities to do much more. Not only that, but the significant expansion of the jurisdiction of the OfS to cover students' unions in this space, signals a whole campus approach we haven't seen before.

Secondly, the routes for recourse against universities has expanded significantly. Freedom of speech and academic freedom will now have a dedicated complaints route and beyond that a novel route for recourse against a university or students' union through the courts, without relying on the expensive and sluggish judicial review process.

One of the points of contention during the Act's passage through Parliament was the positioning of the new tort and how this would work in practice. While a pragmatic compromise has been reached by the legislators on the tort, there is still much to be understood about the complaints scheme and how the Courts will treat the early claims under the tort. Responding to an application for an injunction will come with a significant resource cost for a university, in addition to legal expenses.

Thirdly, the Act contains some additions which may be worthy of legislators' time, but have they ended up in the wrong piece of legislation? Restrictions on the use of NDAs in cases of sexual misconduct and bullying are not likely to be controversial, but it feels only remotely

⁴ <https://www.officeforstudents.org.uk/media/8a032d0f-ed24-4a10-b254-c1d9bfcfe8b5/insight-brief-16-freedom-to-question-challenge-and-debate.pdf>

⁵ <https://www.equalityhumanrights.com/sites/default/files/freedom-of-expression-guide-for-higher-education-providers-and-students-unions-england-and-wales.pdf>

related to the right to express oneself, especially in the context of the OfS's recent consultation on a new condition of registration in relation to harassment and sexual misconduct. Similarly, the jurisdiction for the OfS to examine overseas funding in the context of freedom of expression seems to be too narrow a focus to be meaningful and poorly timed, with the potential introduction of a foreign influence registration scheme under the National Security Bill.

These are, therefore, not matters of procedural change, but rather substantive and substantial changes to the landscape.

What are the key issues for the sector in responding to the Act?

Consistency and balance

The OfS Insights briefing from December 2022 articulated that freedom of expression is absolutely a part of and supportive of the concept of equality, diversity and inclusivity. The Public Sector Equality Duty is, according to the legislation, something which universities must have due regard to in the exercise of the functions and duties. The OfS is keen to reinforce that the freedom of speech and academic freedom duty comes first, but it should be exercised with due regard to the PSED outcomes and not the other way around.

This is an uncomfortable tension for universities who are trying to build diverse, inclusive and safe communities. Those belonging to minority groups will, in all likelihood, be exposed to more situations where they will be offended by what someone has to say – even if it is lawful for the person to say it.

Universities will also need to understand when something becomes an issue under Prevent, as opposed to freedom of speech. Additionally, while the Prime Minister has been clear that Holocaust denial would not be protected under the Act, this needs careful balancing of the [IHRA definition of antisemitism](#) against someone's right to express their disagreement with elements of that.

It is worthy of reflection as to whether those who belong to minority groups have the same access and agency to express themselves freely, as those who might be in the majority. How should universities help support them to have an equal platform?

Risk appetite

The Act provides that speech will only be protected where it is lawful, but is it possible, or even desirable, for universities to make a judgement about whether something constitutes a civil or criminal wrong? This is a role for the Courts. Moreover, how can one prospectively assess whether something *might* be unlawful, before an event or speech has taken place?

Universities will have to make judgements, often in very tight timescales, and are going to be challenged on those. Individual institutions – in the absence of clear and comprehensive guidance from the OfS – will need to establish their risk appetite and balance their approach against competing factors. While theoretically freedom of speech should be a core element of an inclusive campus environment, there is clear potential for the act to compel

universities to permit speech, events and activities which cause offence to certain groups, often those who are already minoritized.

The Act is clear that the costs of security for events (e.g. a controversial speaker) cannot be borne by the speaker, which means if the university must permit the event, then they are going to have to bear those costs too.

Good governance

Universities and students' unions will need to review their existing codes of practice, as well as considering interrelated policies, including those relating to recruitment, harassment, bullying and staff and student discipline. Universities will also need to consider course content policies and their constituting documents relating to academic freedom.

Concerns were raised during the passage of the Act that existing policies have been 'gold plated' to the effect (if not the purpose) of restricting freedom of expression. Governing bodies will need to be prepared for the changes and their role in compliance with the Act and universities need to demonstrate they have "adequate and effective management and governance arrangements to secure compliance". There will no doubt be as many iterations of this as there are institutions.

Preparing for complaints

The new complaints process and how this interacts with the jurisdiction of the Office of the Independent Adjudicator needs further articulation, but universities should consider whether their existing processes need to be adjusted to reflect the new categories of prospective job applicant and prospective visiting speaker. A policy position on determining between those with a genuine ground for complaint and vexatious complaints would be advisable, especially in the context of the multitude of deep-pocketed 'free speech' groups that have made themselves known in the sector.

Consideration of those complaints will now have to have one eye on the potential civil claim arising at the end of it – assuming an injunction has not been applied for in the short term. These all come with significant costs and risks to the reputation and standing with the OfS for a university. The reputational damage may well have been suffered long before the resolution of a complaint, let alone a civil claim.

Double regulation

Indeed, the combination of the complaints process, the tort and the new condition of registration smacks of over regulation. During the final debate in the House of Lords, peers were keen to secure that universities do not become part of the 'public sector' and retain their autonomy. These layers of control seem at odds with that.

With the procedural, reputational, financial, legal and resource implications of getting this wrong (as well as all of the resource required now to help universities get it right), one might argue that this will in effect have a chilling effect on freedom of speech on campuses. Will a more cautious approach be adopted by institutions – despite that being the opposite of what the Government is trying to achieve.

Students' unions tend to be less well resourced than their related university – this could well drive an equally cautious mindset. Even if it had the opposite effect and organisations subject to the Act became more permissive one could ask whether this supports the sector's ambitions around diverse and inclusive communities?

Skills and knowledge

In implementing the Act, upskilling the decision makers and stakeholders will be critical. For some institutions this might require more than technical skills for colleagues on how to facilitate a sensitive discussion in a tutorial group or lecture – a cultural shift may be required and one that might be at odds, as noted above, with firmly held ambitions around inclusion.

Staff and students alike will need to be guided in how to express their views – some of which may be deeply unpalatable to others – respectfully and considerately, as well as how to receive the opinions of others which one might find offensive. Practitioners in some academic disciplines – like the social sciences – are much more likely to be inherently prepared for some of these difficult situations. Other disciplines may not lend themselves as well to readiness for sensitive debates, for example STEM subjects. Nonetheless, they will also need to be prepared to address such issues.

Aside from the organic debates which arise in teaching environments, consistency amongst the decision makers within a body will be key. Many of those outside of will see a university and its students' union as one monolithic entity. In reality, different decisions could be made between the university's professional services, faculties, students' union or student societies.

Universities should consider a whole campus approach to this, working with staff groups, trade unions and the local students' union on the practical steps that might need to be taken to implement the Act's requirements, but also to put safeguards in place for those who may benefit. For example, consistent guidance on the use of trigger warnings for events and the curriculum.

What does the sector need to respond to the key issues?

Clarity from the OfS

As at the time of writing, there is insufficient detail and clarity of both the government's and the OfS's expectations and how the procedural elements of the Act will operate. In particular, how the complaints process will work and what the role of the OIA will be, noting that claims under the tort will flow from exhaustion of those processes (save for where an injunction is applied for).

The regulatory approach and the new conditions of registration need to be understood, with the hope that the OfS will achieve some level of consistency across all conditions. In particular, the conditions relating to Public Sector Governance Principles and Harassment and Sexual Misconduct.

Fundamentally, the OfS must engage in proper and meaningful consultation with the sector on the conditions of registration and guidance, to ensure the approach is practical and sustainable for the sector. This is partly the role of the new OfS director.

Following such consultation, the guidance and indeed support offered by the OfS has to be as explicit as possible. It is critical that the OfS communicates what 'good' looks like, to ensure one consistent manifestation within the sector. This also needs to be cognisant of the need to avoid double (or indeed triple) regulation under universities' relationship with the OfS, the civil tort and indeed any future legislation (e.g. the National Security Bill).

Sharing of good practice between peers

While the OfS's position on the Act is critical to unlocking next steps, the sector should try to achieve a single response to implementing the Act, even if individual decisions vary institution to institution.

The response to the Act should not be political in nature and in scoping the practical steps to secure compliance, there are many opportunities to learn from each other and from institutions abroad. Indeed, the OfS' role in promoting freedom of speech and academic freedom, may include sharing of good practice and case studies, but the sector may not wish to wait for that.

A killer question to be answered is what happens when a university is faced with two people, holding opposing views, who both invoke the protections of the Act? Worked examples dealing with the most tricky of examples are essential.

Time, resource, capability and capacity

Fundamentally, the implementation of the Act and its ongoing administration has the potential to significantly grow the resource requirement for universities (and students' unions) around freedom of speech and academic freedom. This will be a complex governance and practical process to manage and a potential boom area for early or vexatious complaints and claims from within an institution and without.

Notwithstanding this, it is also an opportunity to take steps to upskill the different members of a university's community: to help students, staff and visitors to have difficult conversations, respectfully and openly. One might start with reflecting on a university's senior leadership – are they all equally equipped and willing to disagree, without being disagreeable?

Conclusion

Whatever the sector's feeling about the necessity (or not) of further legislation and regulation around freedom of expression, the act is a reality and the sector is likely to come under close scrutiny not just from the regulator but from those sections of the press and the political establishment with ideological investment in this topic. With careful thought, planning and consistent messaging around the implementation of this new duty, there is the

opportunity for universities to demonstrate that they are guardians of freedom of expression and that they can play that role, without alienating large sections of their community.