



EXPLANATORY NOTES

Higher Education (Freedom of Speech) Act 2023

Chapter 16

£6.90

HIGHER EDUCATION (FREEDOM OF SPEECH) ACT 2023

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Higher Education (Freedom of Speech) Act 2023 which received Royal Assent on 11 May 2023 (c. 16).

- These Explanatory Notes have been provided by the Department for Education in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act.

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Overview of the Act

- 1 This Act includes a range of measures aimed at strengthening previous legislation on freedom of speech and academic freedom in higher education, including:
 - Strengthening the duties regarding freedom of speech previously imposed by section 43 of the Education (No. 2) Act 1986 on higher education providers registered with the Office for Students (OfS), the higher education regulator in England.
 - Creating a new duty for registered higher education providers to promote the importance of lawful freedom of speech and academic freedom in higher education.
 - Creating duties regarding freedom of speech for constituent institutions of registered higher education providers.
 - Creating new duties regarding freedom of speech for students' unions at approved (fee cap) providers (a category of registered higher education provider).
 - Creating a new statutory tort for breach of specified freedom of speech duties, enabling individuals who have suffered loss to seek legal redress for loss they have suffered as a result of breach of specified duties.
 - Creating a new complaints scheme to be operated by the OfS, allowing individuals to seek compensation for loss they have suffered as a result of breach of specified duties.
 - Enhancing academic freedom protections by extending coverage to include recruitment and promotion.
 - Banning the use of non-disclosure agreements (NDAs) by registered higher education providers to silence victims of sexual misconduct, and other forms of bullying or harassment in higher education settings.
 - Introducing new registration conditions for registered higher education providers on freedom of speech and academic freedom.
 - Introducing regulation by the OfS of students' unions at approved (fee cap) providers in relation to their compliance with the new duties.
 - Introducing transparency measures concerning overseas funding as regards the risk to freedom of speech and academic freedom.
 - Creating a new role within the OfS of a Director for Freedom of Speech and Academic Freedom, with a remit to champion freedom of speech and academic freedom on campus, and responsibility for investigations of infringements of freedom of speech duties in higher education which may result in sanctions or individual redress via the new complaints scheme.

Policy background

- 2 The policy underlying many of the provisions in this Act was published in the policy paper ‘Higher education: free speech and academic freedom’ in February 2021. In this paper the Government committed to several policy and legislative changes to strengthen freedom of speech and academic freedom in higher education. These were to:
 - 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.
 - Legislate to require a new OfS registration condition on free speech and academic freedom.
 - Explore further the option of strengthening the section 43 duty to include a duty on higher education providers to ‘actively promote’ freedom of speech.
 - Legislate to extend the strengthened section 43 duty to cover students’ unions directly.
 - Set clear minimum standards for the code of practice required under section 43.
 - Introduce a statutory tort that would give private individuals a right of redress for loss as a result of a breach of section 43.
 - Ensure wider and enhanced academic freedom contractual protections.
- 3 The policy paper followed the statement in the Conservative Manifesto of 2019: “We will also strengthen academic freedom and free speech in universities”.
- 4 This Act enables the Government to meet these commitments.

Legal background

- 5 The Act is a piece of amending legislation. It primarily amends the Higher Education and Research Act 2017 but it also makes amendments to the Counter-Terrorism and Security Act 2015, the Higher Education Act 2004 and the Education (No. 2) Act 1986.
- 6 The Higher Education and Research Act 2017 created a new regulatory body overseeing the English higher education sector, the OfS. The OfS maintains a register of English higher education providers, with the categories of approved (fee cap) providers and approved providers. The OfS regulates English higher education providers by way of registration conditions.
- 7 The Counter-Terrorism and Security Act 2015 sets out the Prevent duty, which has specific provision in relation to further and higher education institutions.
- 8 The Higher Education Act 2004 allows for the Secretary of State to designate a body corporate providing a scheme for reviewing complaints of students at higher education institutions in England and Wales.
- 9 The Education (No. 2) Act 1986 imposes a duty regarding freedom of speech on those governing further and higher education institutions.

Territorial extent and application

- 10 Section 12 sets out the territorial extent of this Act. The extent of a piece of legislation refers to the jurisdiction (or jurisdictions) in which it forms part of the law. The extent of an Act can be different from its application. Application concerns where an Act produces a practical effect, disregarding effects that are minor or consequential.
- 11 Most provisions of this Act extend to England and Wales and apply to England.
- 12 The provisions which amend the Counter-Terrorism and Security Act 2015 extend to England and Wales and Scotland. One set of amendments applies to England only and two apply to England and Wales. These are consequential amendments and minor technical corrections. The commentary on these provisions includes a paragraph explaining their extent and application.
- 13 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

Commentary on provisions of Act

Part 1: Duties to protect freedom of speech

Section 1: Duties of registered higher education providers

14 Section 1 inserts sections A1, A2 and A3 into the Higher Education and Research Act 2017.

Section A1: Duty to take steps to secure freedom of speech

- 15 This section imposes duties on the governing body of a higher education provider registered with the OfS, similar to provision in section 43 of the Education (No. 2) Act 1986.
- 16 The governing body must take reasonably practicable steps to achieve the objective of securing freedom of speech within the law for the provider's 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.
- 17 The duty includes taking reasonably practicable steps to ensure that the use of premises is not refused because of a person's ideas or opinions, or a body's policy or objectives, and that the terms on which premises are provided are not based on those grounds. It also includes taking reasonably practicable steps to secure academic freedom for academic staff at the provider, an existing principle which is extended to include the circumstances of seeking promotion or a different job at the provider. In addition, there is a new separate duty with similar provision in respect of external applicants for an academic role at a provider.
- 18 In order to achieve freedom of speech within the law, the governing body must also secure that individuals or bodies that use its premises are not required to bear some or all of the costs of security, unless there are exceptional circumstances.
- 19 The governing body must also secure that the provider does not enter into non-disclosure agreements with members, staff and students and visiting speakers in relation to complaints of sexual abuse, harassment or misconduct, or other bullying or harassment.

Section A2: Code of Practice

- 20 This section imposes duties on the governing body of a higher education provider registered with the OfS, similar to provision in section 43 of the Education (No. 2) Act 1986.
- 21 The governing body must maintain a code of practice with a view to facilitating the discharge of the duties in section A1(1) and (10). The content of the code of practice must include a statement of the provider's values relating to freedom of speech and an explanation of how those values uphold freedom of speech. It must also set out the procedures to be followed by staff, students and any students' union for students at the provider when organising meetings and activities, the conduct required in relation to such meetings and activities, and the criteria for specified decisions (including whether there are exceptional circumstances for the purposes of section A1(10)).
- 22 The governing body must take reasonably practicable steps, including where appropriate the initiation of disciplinary measures, to secure compliance with the code of practice.

- 23 The governing body must, at least once a year, bring the provisions of section A1 and the code of practice to the attention of all its students.

Section A3: Duty to promote the importance of freedom of speech and academic freedom

- 24 This section creates a new duty on the governing body of a higher education provider registered with the OfS to promote the importance of freedom of speech within the law and academic freedom for academic staff in higher education.

Section 2: Duties of constituent institutions

Section A4: Duties of constituent institutions

- 25 Section 2 inserts section A4 into the Higher Education and Research Act 2017, which provides that sections A1 to A3 also apply to the governing body of a constituent institution of a registered higher education provider.
- 26 The duties of the governing body of a constituent institution of a registered higher education provider under these sections do not affect the application of registration conditions imposed on the provider under the Higher Education and Research Act 2017.

Section 3: Duties of students' unions

- 27 Section 3 inserts sections A5 and A6 into the Higher Education and Research Act 2017.

Section A5: Duty to take steps to secure freedom of speech

- 28 This section imposes new duties on a students' union at a registered higher education provider that is eligible for financial support for the purposes of section 39 of the Higher Education and Research Act 2017. This does not include a students' union for students at a constituent institution of such a provider.
- 29 The students' union must take reasonably practicable steps to achieve the objective of securing freedom of speech within the law for members and staff of the students' union, students of the provider, members and staff of the provider or its constituent institutions, and visiting speakers. There is a duty to have particular regard to the importance of freedom of speech when determining what steps are reasonably practicable.
- 30 The duty includes taking reasonably practicable steps to ensure that the use of premises occupied by the students' union is not refused because of a person's ideas or opinions, or a body's policy or objectives; that the terms on which premises are provided are not based on those grounds; and that affiliation to the students' union is not denied to any student society on those grounds.
- 31 In order to achieve freedom of speech within the law, the students' union must also secure that individuals or bodies that use its premises are not required to bear some or all of the costs of security, unless there are exceptional circumstances.

Section A6: Code of practice

- 32 This section imposes new duties on a students' union to which section A5 applies.
- 33 The students' union must maintain a code of practice with a view to facilitating the discharge of the duties in section A5. The content of the code of practice must include a statement of the students' union's values relating to freedom of speech and an explanation of how those values uphold freedom of speech. It must also set out the

procedures to be followed when organising meetings and activities, the conduct required in relation to such meetings and activities, and the criteria for specified decisions (including whether there are exceptional circumstances for the purposes of section A5(5)).

- 34 The students' union must take reasonably practicable steps, including disciplinary measures, to secure compliance with the code of practice.
- 35 The students' union must, at least once a year, bring the provisions of section A5 and the code of practice to the attention of all its members who are students of the provider.

Section A7: Civil claims

- 36 This section amends the Higher Education and Research Act 2017 to insert section A7, which creates a new statutory tort for breach of specified freedom of speech duties. It enables civil proceedings to be brought against a registered higher education provider or a constituent institution of such a provider in respect of a breach of section A1, and against a students' union in respect of a breach of section A5, if the claimant has suffered a loss (either monetary or non-monetary).
- 37 A claim may only be brought if the claimant has first exhausted either of the available complaints schemes (operated by the OfS or the Office of the Independent Adjudicator for Higher Education). An exception to this is where the claimant is applying only for an injunction.

Part 2: Functions of the Office for Students

Section 5: General functions

- 38 This section amends the Higher Education and Research Act 2017 to provide that, in performing its functions, the OfS must have regard to the need to promote the importance of freedom of speech within the law in higher education, and the need to protect the academic freedom of academic staff at English higher education providers and their constituent institutions.
- 39 This section inserts section 69A, which provides that the OfS must promote the importance of freedom of speech within the law and academic freedom in higher education. This section also sets out provisions similar to sections 35 and 37 concerning advice by the OfS on good practice in relation to how to support freedom of speech and academic freedom, and the power of the Secretary of State to require the OfS to report on freedom of speech and academic freedom matters.

Section 6: Regulation of duties of registered higher education providers

- 40 This section amends the Higher Education and Research Act 2017 to insert section 8A, which provides for new mandatory registration conditions relating to freedom of speech and academic freedom. These include initial and ongoing registration conditions regarding the institution's governing documents and management and governance arrangements, an ongoing registration condition requiring the governing body of the provider to comply with its duties under sections A1 to A3, and an ongoing registration condition requiring the governing body of a provider that is eligible for financial support for the purposes of section 39 to keep the OfS informed of its students' unions.

Section 7: Regulation of duties of students' unions

- 41 This section amends the Higher Education and Research Act 2017 to provide for the regulation by the OfS of students' unions to which sections A5 and A6 apply in relation to their duties under those sections.
- 42 The OfS must monitor whether students' unions are complying with those duties. It may impose a monetary penalty on a students' union if it appears to the OfS that it is failing, or has failed, to comply with its duties. This is to be paid to the OfS and the amount is to be determined by the OfS in accordance with regulations made by the Secretary of State. The Secretary of State may also make regulations making provision about matters to which the OfS must, or must not, have regard when imposing a monetary penalty.
- 43 This section requires the OfS to maintain and publish a list of the students' unions to which, according to the information held by the OfS, sections A5 and A6 apply.
- 44 Students' union to which sections A5 and A6 apply must provide the OfS with information that it may require. If a students' union fails to do so, the OfS may enforce the duty with an injunction.

Section 8: Complaints scheme

Section 69C and Schedule 6A: Free speech complaints scheme

- 45 Section 8 inserts section 69C and Schedule 6A into the Higher Education and Research Act 2017, which make provision for the OfS complaints scheme relating to the duties of registered higher education providers, their constituent institutions and students' unions in respect of freedom of speech and academic freedom.
- 46 Paragraphs 1 to 4 of Schedule 6A set out the nature of the complaints that can be brought to the complaints scheme that the OfS must provide for, as well as the individuals who are eligible to make complaints. Paragraph 5 sets out the scope of the scheme. Paragraphs 6 to 8 set out provision regarding the decisions and recommendations that the OfS may make under the complaints scheme, including that the scheme must provide that, where the OfS considers a complaint to be justified (wholly or partly), it may recommend that the higher education provider, constituent institution or students' union should do anything specified (which may include the payment of compensation but could also include, for example, reinstatement of the complainant's job or place on a course) or refrain from doing anything specified. Paragraphs 9 to 13 set out various other requirements relating to the complaints scheme.

Section 9: Overseas funding

- 47 Section 9 inserts sections 69D and 69E into the Higher Education and Research Act 2017.

Section 69D: Overseas funding: registered higher education providers

- 48 This section requires the OfS to monitor the overseas funding of registered higher education providers and their constituent institutions so that it can assess the risk which the funding poses to freedom of speech and academic freedom in the provision of higher education. The OfS must also consider whether such funding is relevant to a breach of section A1.
- 49 Higher education providers must provide information on relevant funding to the OfS. Relevant funding is specified funding from a relevant overseas person where that exceeds a threshold (to be set in regulations) in a period of 12 months, as received by the provider,

a constituent institution, or a member or member of staff of the provider or constituent institution (in their capacity as such). A relevant overseas person includes a government of an overseas country, a body headquartered in such a country, or a politically exposed person (as defined) in relation to such a country. The overseas country concerned excludes countries that will be prescribed in regulations.

Section 69E: Overseas funding: students' unions

- 50 This section requires the OfS to monitor the overseas funding of students' unions at a registered higher education provider that is eligible for financial support for the purposes of section 39, so that it can assess the risk which the funding poses to freedom of speech for their members, students, staff etc. The OfS must also consider whether such funding is relevant to a breach of section A5.
- 51 Students' unions must provide information on relevant funding to the OfS. Relevant funding is funding from a relevant overseas person where that exceeds a threshold (to be set in regulations) in a period of 12 months. A relevant overseas person includes a government of an overseas country, a body headquartered in such a country, or a politically exposed person (as defined) in relation to such a country. The overseas country concerned excludes countries that will be prescribed in regulations.
- 52 If a students' union fails to comply with its duty, the OfS may seek an injunction.

Section 10: Director for Freedom of Speech and Academic Freedom

- 53 This section amends Schedule 1 to the Higher Education and Research Act 2017. It provides for the role of a Director for Freedom of Speech and Academic Freedom as a member of the OfS Board and sets out the responsibilities of the Director in relation to the OfS's functions.

Part 3: General

Section 11: Minor and consequential amendments

- 54 This section introduces the Schedule which makes minor and consequential changes to legislation.

Section 12: Extent

- 55 This section provides for the extent of the provisions of the Act. See the commentary on Part 2 of the Schedule and Annex A.

Section 13: Commencement

- 56 This section provides for the coming into force of the provisions of the Act.

Section 14: Short title

- 57 This section provides the short title of the Act.

Schedule: Minor and consequential amendments

Part 1: Amendments of the Higher Education and Research Act 2017

- 58 This Part makes consequential amendments to the Higher Education and Research Act 2017.

Part 2: Amendments of the Counter-Terrorism and Security Act 2015

- 59 This Part makes minor and consequential amendments to the Counter-Terrorism and Security Act 2015.
- 60 Paragraph 15 makes consequential amendments regarding the definitions in section 31 (freedom of expression in universities etc.) of freedom of speech and academic freedom.
- 61 Paragraphs 16 and 17 make technical corrections to definitions in section 32 (monitoring of performance of Prevent duty) and Schedule 6 (authorities subject to the Prevent duty).
- 62 This Part forms part of the law of England and Wales and Scotland. The amendments to section 31 apply to England only; the amendments to section 32 and Schedule 6 apply to England and Wales.

Part 3: Amendment of other Acts

- 63 This Part makes consequential amendments to section 43 of the Education (No. 2) Act 1986, and to the Higher Education Act 2004.

Commencement

- 64 Section 13 makes provision about the coming into force of the provisions of this Act. Certain provisions come into force on the day on which the Act is passed. These include sections 7 and 9, for the purpose of enabling the exercise of the powers to make regulations conferred by sections 69B(3) and (4) and 69D of the Higher Education and Research Act 2017 (as inserted by sections 7 and 9 of the Act). In addition, paragraph 9 of the Schedule comes into force two months after the Act is passed, for the purpose of enabling the OfS to comply with its statutory duty to consult on changes to the regulatory framework set out in section 75 of the Higher Education and Research Act 2017. The section otherwise provides the Secretary of State with power to make regulations to commence its provisions. Different days may be appointed for different purposes. Such regulations may include transitional provisions and savings.

Related documents

- 65 The following documents are relevant to the Act and can be read at the stated locations:
 - Higher education: free speech and academic freedom (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961537/Higher_education_free_speech_and_academic_freedom_web_version_.pdf) – Government policy paper, February 2021
 - Freedom of Speech in Universities (<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/589/589.pdf>) – Joint Committee on Human Rights report, March 2018

Annex A – Territorial extent and application in the United Kingdom

Provision	England	Wales	Scotland	Northern Ireland
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?
Section 1	Yes	No	No	No
Section 2	Yes	No	No	No
Section 3	Yes	No	No	No
Section 4	Yes	No	No	No
Section 5	Yes	No	No	No
Section 6	Yes	No	No	No
Section 7	Yes	No	No	No
Section 8	Yes	No	No	No
Section 9	Yes	No	No	No
Section 10	Yes	No	No	No
Section 11	Yes	Yes	No	No
Section 12	Yes	Yes	No	No
Section 13	Yes	Yes	No	No
Section 14	Yes	Yes	No	No
Schedule	Yes	In part	No	No

These Explanatory Notes relate to the Higher Education (Freedom of Speech) Act 2023 which received Royal Assent on 11 May 2023 (c. 16).

Annex B - Hansard References

66 The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

Stage	Date	Hansard Reference
<i>House of Commons</i>		
Introduction	12 May 2021	Vol. 695 Col. 163
Second Reading	12 July 2021	Vol. 699 Col. 46
Public Bill Committee	7 September 2021	First Sitting: Col. 1-34 Second Sitting: Col. 35-86
	13 September 2021	Third Sitting: Col. 87-116 Fourth Sitting: Col. 117-142
	15 September 2021	Fifth Sitting: Col. 143-172 Sixth Sitting: Col. 173-214
	16 September 2021	Seventh Sitting: Col. 215-238 Eighth Sitting: Col. 239-268
	20 September 2021	Ninth Sitting: Col. 269-296 Tenth Sitting: Col. 297-324
	22 September 2021	Eleventh Sitting: Col. 325-358 Twelfth Sitting: Col. 359-398
Carry-over motion	25 April 2022	Vol. 712 Col. 549
Introduction	11 May 2022	Vol. 714 Col. 147
Second Reading	11 May 2022	Vol. 714 Col. 147
Report and Third Reading	13 June 2022	Vol. 716 Col. 64
<i>House of Lords</i>		
Introduction	14 June 2022	Vol. 822 Col. 1477
Second Reading	28 June 2022	Vol. 823 Col. 581
Grand Committee	31 October 2022	Vol. 825 Col. 1GC
	2 November 2022	Vol. 825 Col. 57GC
	14 November 2022	Vol. 825 Col. 705
Report	7 December 2022	Vol. 826 Col. 181
Third Reading	13 December 2022	Vol. 826 Col. 557
Commons Consideration of Lords Amendments	7 February 2023	Vol. 727 Col. 854
Lords Consideration of Commons Amendments	21 March 2023	Vol. 828 Col. 1680
Commons Consideration of Lords Message	2 May 2023	Vol 732 Col. 45
Lords Consideration of	10 May 2023	Vol 829 Col 1870

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Commons Amendments		
Royal Assent	11 May 2023	House of Lords Vol. 829 Col. 1996

Annex C - Progress of Bill Table

67 This Annex shows how each section and Schedule of the Act was numbered during the passage of the Bill through Parliament.

Section of the Act	Bill as Introduced in the Commons	Bill as amended in Committee in the Commons	Bill as amended on Report in the Commons	Bill as introduced in the Lords	Bill as amended in Report in the Lords
Section 1	Clause 1	Clause 1	Clause 1	Clause 1	Clause 1
Section 2		Clause 2	Clause 2	Clause 2	Clause 2
Section 3	Clause 2	Clause 3	Clause 3	Clause 3	Clause 3
Section 4	Clause 3	Clause 4	Clause 4	Clause 4	
Section 5	Clause 4	Clause 5	Clause 5	Clause 5	Clause 4
Section 6	Clause 5	Clause 6	Clause 6	Clause 6	Clause 5
Section 7	Clause 6	Clause 7	Clause 7	Clause 7	Clause 6
Section 8	Clause 7	Clause 8	Clause 8	Clause 8	Clause 7
Section 9			Clause 9	Clause 9	Clause 8
Section 10	Clause 8	Clause 9	Clause 10	Clause 10	Clause 9
Section 11	Clause 9	Clause 10	Clause 11	Clause 11	Clause 10
Section 12	Clause 10	Clause 11	Clause 12	Clause 12	Clause 11
Section 13	Clause 11	Clause 12	Clause 13	Clause 13	Clause 12
Section 14	Clause 12	Clause 13	Clause 14	Clause 14	Clause 13
Schedule	Schedule	Schedule	Schedule	Schedule	Schedule

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