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Freedom of speech in universities - is there a problem?

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Contents:

1. Background
2. What are the issues?
3. Government proposals
4. Comment
5. Next steps
Annex A

Contents

Summary **3**

1. Background **4**
1.1 Legal framework 4
1.2 Codes of practice on freedom of speech 5
1.3 Students' Unions (SUs) 6
1.4 Office for Students 8

2. What are the issues? **9**
2.1 The government's view 9
2.2 Prevent Duty 10
2.3 'No-platforming' 11
2.4 'Safe spaces' 12
2.5 Self-censorship 13
2.6 Do universities have a left-wing bias? 14

3. Government proposals **16**
3.1 Policy paper 16

4. Comment **20**
4.1 Labour 20
4.2 Sector responses 20
4.3 Articles 21

5. Next steps **23**

Annex A **24**

Summary

The debate around freedom of speech in universities has become increasingly heated in recent years in part due to a small number of high-profile incidents involving the **banning of well-known speakers** from campuses. Concerns have also been raised about universities allegedly curtailing freedom of speech through '**no-platform' policies** and '**safe spaces'** and it has been suggested that higher education providers (HEPS) are permitting a general atmosphere of intolerance towards differing opinions.

There is some evidence to suggest that some staff and students of all political persuasions **self-censor** their views on campus and online, but research has found that most UK students do not think that free speech nor academic freedom is under threat in their university.

Official figures by the Office for Students show that **only a tiny proportion of events or speakers on university campuses have been cancelled** in recent years, and these incidents have occurred at only a very small number of HEPs.

The legal framework around freedom of speech is complicated. The Education (No. 2) Act 1986 section 43(1) requires higher education establishments to take **reasonably practicable** steps to ensure that **freedom of speech is protected** and the Education Reform Act 1988 s202 protects academic inquiry. But freedom of speech is only protected within the law and certain statutory duties such as the Prevent Duty and public order legislation may curtail freedom of speech.

The Conservative election manifesto 2019 contained a commitment to "strengthen academic freedom and free speech in universities and continue to focus on raising standards" and on 17 February 2021 the government published a **policy paper** containing proposals to strengthen freedom of speech in higher education. The paper proposes:

- creating a **Free Speech and Academic Freedom Champion** to champion free speech, investigate infringements of free speech and recommend redress
- requiring the Office for Students (OfS) to introduce a **new, registration condition on free speech with the power to impose sanctions for breaches**
- strengthening section 43 of the Education (No. 2) Act 1986 to include **a duty on HEPs to 'actively promote' freedom of speech**
- extending the s43 duty to **apply directly to SUs**
- introducing a **statutory tort for breach of the duty, enabling individuals to seek legal redress**
- **widening and enhancing academic freedom protections**
- setting **minimum standards for free speech codes of practice**

There has been a lot of comment on these proposals and many of the responses stated that **universities are committed to free speech** and questioned the government's decision to focus on this issue at a time when staff and students are coping with the consequences of the Covid-19 pandemic.

This briefing sets out the legal framework for freedom of speech in higher education, outlines the issues around free speech and gives the government's proposals for change.

1. Background

For a number of years concerns have been raised around the alleged curtailing of freedom of speech in higher education. These concerns have been raised in the context of the **Prevent Duty**, the **banning of external speakers** and **safe space policies**.

In response to these concerns in 2018 the House of Commons and House of Lords Joint Committee on Human Rights (JCHR) conducted and inquiry into freedom of speech in higher education to find out if free speech was being suppressed at universities. The committee found that **a number of factors could be inhibiting freedom of speech**:

- intolerant attitudes, often incorrectly using the banner of "no platforming" and "safe-space" policies;
- incidents of unacceptable intimidatory behaviour by protestors intent on preventing free speech and debate;
- unnecessary bureaucracy in organising events;
- fear and confusion over what the Prevent duty entails;
- regulatory complexity;
- unduly complicated and cautious guidance from the Charity Commission;
- concern by student unions not to infringe what they perceive to be restrictions[1]

The report made a number of recommendations including that coherent, consistent and accessible guidance material should be produced for institutions and that the Office for Students (OfS) should report annually on free speech issues.

1.1 Legal framework

The current legal and regulatory context on freedom of speech in higher education is set out in the Department for Education (DfE) policy paper, Higher education: free speech and academic freedom February 2021 pages 12-16 and in Annex A.

The legal framework around freedom of speech is complicated – higher education providers (HEPs) are subject to a number of statutory duties and these have the potential to conflict with each other and to interfere with freedom of speech.

Duty to protect freedom of speech

The Education (No. 2) Act 1986 section 43(1) requires higher education establishments to take such steps as are **reasonably practicable** to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers. This law applies UK wide.

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[1] House of Commons House of Lords Joint Committee on Human Rights, Freedom of Speech in Universities, 27 March 2018 , HC 589 p9

Also the Education Reform Act 1988 s202, which applies across the UK, contains provisions on academic freedom and states that university commissioners should have regard to the need to **protect academic inquir**y:

> ensure that academic staff 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 their institutions.

The Higher Education and Research Act (HERA) 2017 created a new regulator for higher education the Office for Students (OfS). The OfS has a **duty to promote freedom of speech** in registered HEPs.

Duty to act within the law

However, freedom of speech **is not an absolute right** - it is a freedom '**within the law'**, so the criminal and civil law can **set limits** on the lawful exercise of this right.

HEPs must comply with laws governing **public order** and they must also comply with provisions in the **Equalities Act 2010** which prevent discrimination and provisions in the **Public Order Act 1986** on the prevention of racial and religious hatred

> Institutions also have a common law duty of care towards their students which may be relevant in some situations.

Duty to protect from radicalisation

HEPs also come within the **Prevent Duty,** which is a legal obligation imposed on specified bodies by the Counter-Terrorism and Security (CTS) Act 2015. Under the Prevent Strategy institutions must have due regard to the **need to prevent individuals from being drawn into terrorism**. It has been suggested that the Prevent Duty creates a tension with other statutory duties regarding freedom of speech. The Home Office document, Prevent duty guidance: for higher education institutions in England and Wales, 10 April 2019 provides advice in this area.

Library briefing CBP 7199, *Freedom of speech and preventing extremism in UK higher education institutions*, 20 May 2015 also gives background and issues around the Prevent Duty.

1.2 Codes of practice on freedom of speech

Under the Education (No. 2) Act 1986 all HEPs are required to have codes off practice on freedom of speech. These codes set out the **procedures to be followed** by students and staff in connection with **meetings and activities** taking place on the HEP's premises (including SU premises) and on the conduct of persons in connection with meetings and activities. These codes can be found on universities' websites. The codes should **promote** freedom of speech and governing bodies must ensure that the **code is kept up to date and complied with**. Institutions may also have **separate policies on external speakers**.

> Increasing reported concerns in relation to freedom of speech, however, suggest that this duty [to ensure freedom of speech] is not being fully complied with and that there is insufficient enforcement of the duty; and the existing legal framework has been criticised as being overly complex
>
> **DfE, *Higher education: free speech and academic freedom,* February 2021 p7**

The House of Commons and House of Lords Joint Committee on Human Rights (JCHR) report, *Freedom of Speech in Universities*, stated that some codes on freedom of speech and procedures for inviting external speakers put barriers in the way of events, rather than facilitating them;[2] it also said that codes could be too complicated and bureaucratic.[3]

In February 2019 the Equality and Human Rights Commission published new guidance for universities, Freedom of expression: a guide for higher education providers and students' unions in England and Wales. This guidance is to be used by all institutions and student unions when formulating their policies on freedom of speech. A press release announcing the new guidance stated the sectors commitment to freedom of speech:

> The Equality and Human Rights Commission has collaborated with leading organisations from across the sector to develop new guidance to be used by all institutions and student unions, demonstrating the sector's commitment to upholding freedom of expression.
>
> This guidance is the first time that legal rights and obligations around free speech have been defined so coherently, empowering institutions, student unions and individuals to stand up for free speech and creating a structure for them to work together. It clarifies the limited occasions where free speech can lawfully be limited, allowing it to flourish for current and future generations of students.
>
> Sector leaders agreed to create new guidance during a Department for Education free speech summit in May 2018, which has been produced by the Equality and Human Rights Commission, with input from the National Union of Students, Universities UK, Charity Commission for England and Wales, Office for Students, Independent HE, Guild HE, Commission for Countering Extremism and Home Office.[4]

1.3 Students' Unions (SUs)

A number of the recent issues around freedom of speech in HEPs have been in relation to SUs barring external speakers.

The position of SUs with regard to the Education (No. 2) Act 1986 s34 is somewhat complicated.

Education (No. 2) Act 1986 section 43(8) provides that where a students' union occupies premises which are not the university's premises the university is nonetheless required to comply with the s.43 duties in relation to the students' union premises.

A briefing published by Universities UK, *Freedom of speech on campus*, explains the effect of the Education (No 2) Act 1986 s43 on students unions:

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2 House of Commons House of Lords Joint Committee on Human Rights, Freedom of Speech in Universities, 27 March 2018 , HC 589 p5

3 Ibid p

4 GOV.UK, Free speech to be protected at university, 2 February 2019

> **Student unions are not directly subject to the legal duty relating to free speech** explained above, in the sense of student unions themselves having a legal duty to secure freedom of speech. However, the duty on universities will often require a university to take actions which will affect the student union, or encourage a particular course of action on its part. In addition, the duty on universities to prevent the denial of use of premises extends to their own premises and student union premises where these are not owned by the university.[5]

An older publication by the NUS, *Managing the risks associated with external speakers, Guidance for HE students' unions in England and Wales* July 2011 gives further explanation of the legal position of SUs with regard to freedom of speech (p12-13):

> **Students' unions**
>
> Students' unions also need to have regard to the legal frameworks. Whilst they are not public bodies for Public Sector Equality Duty23 and Human Rights Act purposes, they are mostly charities subject to the requirements of charity law. They also need to have regard to the scope of the criminal law and potential civil liability in relation to external speaker events.
>
> A particular question for universities arises where a students' union decides that an external speaker event should not proceed, but the university considers that this decision may conflict with its duty to secure freedom of speech within the law under s.43 of the Education (No 2) Act 198624 (see 'Charity law').
>
> As noted in the section 'The duty to secure freedom of speech within the law', universities' duty under s.43 extends to students' union premises even if these are not owned by the university. This means that universities owe duties in relation to their students' union premises, regardless of whether those premises are, for example, leased by the union from the university, or indeed from a third party.
>
> Whilst s.43 undoubtedly places a duty on a university in relation to the students' union premises, here is a separate question of how it complies with that duty, given that the students' union is a distinct legal entity with its own policies and procedures. There are two aspects to this question
>
> The first aspect is whether the s.43 duty also applies to the legal entity that is the students' union 25 rather than just creating a duty on the part of the university in respect of speaker events in the students' union premises. The s.43 duty applies to 'every individual and body of persons concerned in the government' of the institution. Whether that definition includes a students' union might be open to legal argument, taking account of the particular facts, including the legal status of the students' union and its relationship with the institution.
>
> The second aspect is that the s.43 code of practice should set out the procedures to be followed by students, and should make non-compliance with the code a disciplinary matter. Under s.43(4) universities are under a duty to 'take such steps as are reasonably practicable (including where appropriate the initiation of

[5] Universities UK Parliamentary briefing, *Freedom of speech on campus*, November 2015

> disciplinary measures)' to secure compliance with the s.43 code of practice.
>
> Institutions and students' unions should therefore seek to align their policies and procedures in relation to external speakers, taking account of the institution's s.43 duty.
>
> Ultimately, if there is a conflict between the decisions taken by a students' union and those of the institution, the institution will need to consider what steps it is 'reasonably practicable' to take to secure compliance with the code of practice and s.43 duty, for example through disciplinary action and/or arranging an alternative event.

1.4 Office for Students

Under the Higher Education and Research Act (HERA) 2017 all universities and colleges which register with the OfS must, as a **condition of registration**, uphold the existing laws around freedom of speech.

The OfS regulatory framework states that the governing body must take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider. The OfS can impose sanctions for a breach of conditions of registration.

The role of the OfS with regard to freedom of speech is set out on the OfS website at Freedom of speech.

2. What are the issues?

Concerns have been raised about universities allegedly curtailing freedom of speech through **'no-platform' policies**, **'safe spaces'**, and **perpetuating a general atmosphere of intolerance** towards differing opinions.

There is evidence to suggest that some staff and students of all political persuasions **self-censor** their views on campus and online, but research published in December 2019 by King's College London found that **most UK students do not think that free speech nor academic freedom is under threat in their university**.[6]

Official figures show that **only a tiny proportion of events or speakers on university campuses have been cancelled in recent years**, and these incidents concern **only a very small number of HEPs**.[7]

2.1 The government's view

In Gavin Williamson's foreword to the policy paper *Higher education: free speech and academic freedom*, the Secretary of State for Education outlines his belief that university campuses are witnessing a **"rise of intolerance and 'cancel culture'"**.[8]

The Secretary of State says this has been shown in a number of ways:

- Codes or statements introduced by universities limiting free speech
- Students' unions having inappropriate levels of control over which speakers can visit
- Prohibitive security costs being imposed on student societies when inviting speakers
- Schemes in which students are paid to report others for perceived offences
- Academics pressured to keep silent about their views for fear of discrimination in appointment or promotion
- The abuse and personal harassment of those with heterodox views.

In a written statement to the House of Commons on 22 February 2021, the Secretary of State said that the **government were committed to strengthening freedom of speech and academic freedom within universities**:

> This Government have always been clear in their commitment to strengthen academic freedom and ensure that our universities are places where free speech can thrive. Without action to counter attempts to discourage or even silence unpopular views,

6 King's College London, *Freedom of expression in universities*, December 2019
7 OfS, Prevent monitoring accountability and data returns, 21 June 2019, p10
8 Department for Education, *Higher education: free speech and academic freedom*, CP 394, February 2021, pp4-6

> intellectual life on campus for both staff and students may be unfairly narrowed and diminished.[9]

The policy paper argues that there has been a **"chilling effect"** affecting both staff and students at HEPs.[10] It states that "a growing atmosphere on campuses that is antithetical to constructive debate where differing opinion is respected" may have left individuals feeling **"unable to express their cultural, religious or political views without fear of repercussion"**.[11]

Challenges to freedom of speech

The policy paper states that **sizeable minorities of students do not feel able to express their views at university "for fear of disagreeing with their peers"**[12]

It argues that a lack of tolerance for debating different views can give rise to **'no platforming'** of speakers, as well as intimidation of academics and students who have expressed controversial opinions.

The government is particularly concerned that "no platforming and similar campaigns" may lead staff and students to **'self-censor'** themselves on campus or online, because they fear discrimination for expressing their views.

Challenges to academic freedom

The paper suggests that **some academics believe that their ability to research and teach freely without facing disadvantage due to their political views is not being adequately protected**.

The government is particularly concerned that a sizeable minority of academics feel constrained in their ability to express themselves for fear of losing their jobs or privileges.

2.2 Prevent Duty

It had been suggested that the Prevent Duty was having a negative impact on freedom of speech however the OfS has said that they have not found any evidence that this is the case:

> We have not found evidence of providers systematically not allowing events to proceed because of Prevent. We do not comment on individual events, but we have not seen any evidence that has caused us concern that providers are not appropriately balancing their free speech obligations with the Prevent duty. We remain mindful of the need to monitor this carefully, however, as we do not want providers over-interpreting their requirements under the duty and harming other legal responsibilities like free speech.[13]

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9 HC Deb 22 February 2021 vol. 689 c22WS
10 DfE, *Higher education: free speech and academic freedom*, p7
11 ibid, pp7, 19
12 ibid, pp18-19
13 OfS Prevent monitoring accountability and data returns 2017-18 FAQs

2.3 'No-platforming'

The NUS No Platform Policy is set out in the leaflet NUS' No Platform Policy. Key information, background and FAQs :

> The No Platform Policy is a very specific and narrow policy that NUS first introduced in 1974. It is democratically decided and voted on by National Conference every year. **At present it lists just six fascist and racist organizations, and is there to enfranchise freedom of speech and keep students safe.**
>
> The policy prevents individuals or groups known to hold racist or fascist views from speaking at NUS events. It also ensures that NUS officers will not share a public platform with individuals or groups known to hold racist or fascist views.

"The six organisations currently on the list are: Al-Muhajiroun; British National Party (BNP); English Defence League (EDL); Hizb-ut-Tahir; Muslim Public Affairs Committee; and National Action."

NUS' No Platform Policy: Key information, background and FAQs

Not all SUs have a No Platform Policy, but for those that do, the NUS argue that it is intended to **ensure a safe environment** on university campuses:

> Students' unions are private bodies, and have a right to refuse individuals and groups who threaten the safe environment students' unions provide for their members. No platform policies as well as equal opportunities policies are tools in which students' unions provide and maintain a safe environment for their members.
>
> Creating an environment that promotes multiculturalism and equality is not just, therefore, for the sake of some students, but it is a tool for reducing potential conflict among the diverse communities that exist in campuses.

Despite the narrowness of the core NUS definition, the term 'no platforming' is regularly used in media reports to describe a range of student actions that are not covered by the NUS policy,[14] including any occasion when a speaker has been denied the right to speak at an event organised at a university.[15]

In recent years there have been several high-profile examples, including:

- In March 2020, the former Home Secretary Amber Rudd was due to speak to the UN Women Oxford UK society, but following student complaints about Rudd's links to the Windrush scandal, the society's committee held a vote and the invitation was pulled.[16] As a result, the University of Oxford deregistered UN Women Oxford UK from its affiliated societies.
- In May 2019, a European elections husting organised by the debating society of the University of the West of England was cancelled due to security concerns. The event was due to involve the UKIP candidate Carl Benjamin, who at the time was under police investigation for speculating whether he would rape the MP Jess Phillips.[17]

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14 House of Commons House of Lords Joint Committee on Human Rights, Freedom of Speech in Universities, 27 March 2018, HC 589, p22

15 See, for example, "10 victims of campus cancel culture", *Spiked,* 16 February 2021 (accessed 23 March 2021)

16 "Amber Rudd 'no platformed' by Oxford University society", *BBC News,* 6 March 2020 (accessed 23 March 2021)

17 "University cancels EU election debate over Ukip candidate", *The Guardian,* 15 May 2019 (accessed 23 March 2021)

An article on the *Wonkhe* website from 2018, "To platform or not to platform?", considers the evidence for some of the most commonly cited examples of 'no-platforming' at UK universities.[18]

The Office for Students and no-platforming

One of the roles of the Office for Students is to ensure that freedom of speech is upheld in universities. On 28 February 2018, a written statement by Sam Gyimah, the then Universities Minister, set out briefly the role of the OfS with regard to no-platform policies:

> **Freedom of speech** - I have asked the OfS to champion and promote freedom of speech, including calling out and challenging attempts to shut down debate such as 'no platforming'. Free speech is essential in ensuring that higher education exposes students to new and uncomfortable ideas, and encourages robust, civil debate and challenge.[19]

The OfS's own figures, however, show that in 2017-2018 (the most recent year for which data has been made available), **fewer than 0.1% of requests for events or external speakers were blocked**, and these cases concerned **only 17 HEPs out of more than 250**.[20]

In December 2020, a survey of 61 university students' unions conducted by Wonkhe found that in 2019-20, **just 6 events from almost 10,000 involving an external speaker (0.06%) were cancelled**.[21]

These findings are in line with the JCHR report from 2018, which stated that the joint committee **"did not find the wholesale censorship of debate in universities which media coverage has suggested".** Nevertheless, the report noted that while student groups were not obliged to invite a particular speaker, nor continue with an invitation if they change their minds, freedom of speech and expression on university campuses had been interfered with on the following occasions:

- when protests become so disruptive that they prevent the speakers from speaking or intimidate those attending;
- if student groups are unable to invite speakers purely because other groups protest and oppose their appearance; and
- if students are deterred from inviting speakers by complicated processes and bureaucratic procedures.[22]

2.4 'Safe spaces'

Some SUs have adopted 'safe space' policies - a report on freedom of speech described these policies as follows:

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18 "To platform or not to platform?", *Wonkhe,* 8 February 2018, (accessed 23 February 2021)
19 HC Deb 28 February 2018 vol. 636 c28WS
20 OfS, Prevent monitoring accountability and data returns, 21 June 2019, p10
21 Taking the debate forward: A new code to secure and champion freedom of speech and political diversity on campus, p. 8, February 2021.
22 House of Commons House of Lords Joint Committee on Human Rights, Freedom of Speech in Universities, 27 March 2018, HC 589, p23, para 3

> Students' unions centrally operate a number of democratic meetings and forums that allow students to obtain experience of debate and discussion with others. In some cases, they will adopt so-called "safe space" policies for the operation of these events, which generally set out the standards of conduct that the SU might expect during those meetings.[23]

Not all universities have adopted 'safe space' policies, and while the report asserts that they exist to uphold principles of freedom of speech and ensure that everyone can feel comfortable engaging in debate, it does acknowledge that **their titling and framing can cause confusion**:

> We accept that there is a significant danger that policies that stress "safety" may end up perceived as trying to create an environment where robust debate, challenge and difficult ideas are not welcome.

This issue was highlighted in the JCHR report, which noted that the **concept of safe spaces has proved problematic at times**, and that universities and SUs needed to do more to ensure that such policies co-exist with and respected free speech:

> While the intention behind safe spaces is understandable and whilst there must be opportunities for genuinely sensitive and confidential discussions in university settings, we received evidence which showed that safe space policies, when extended too far, can restrict the expression of groups with unpopular but legal views, or can restrict their related rights to freedom of association.[24]

2.5 Self-censorship

Gavin Williamson's foreword to the recent policy paper said that **there is evidence that suggests some students and staff choose to self-censor their views**. The reasons given by university staff for self-censorship were generally because of perceived hostility from colleagues, and a fear of reputational harm and damaging their career prospects.[25]

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23 *Taking the debate forward: A new code to secure and champion freedom of speech and political diversity on campus*, February 2021, p34

24 House of Commons House of Lords Joint Committee on Human Rights, *Freedom of Speech in Universities*, 27 March 2018, HC 589, pp27-29, para 56

25 Policy Exchange, *Academic freedom in the UK*, August 2020, pp53-58

Students

Research conducted by Policy Exchange in 2019 found that while nearly 90% of Remain-supporting students would be comfortable espousing that opinion in class, only 40% of Leave-supporting students felt the same.[26]

A report by King's College London showed that **sizeable minorities of students on both sides of the Brexit debate felt unable to express their beliefs openly**, with 32% of Leavers and 23% of Remainers reluctant to do so.[27] The report found similar results for political views in general, but slightly more right-leaning students said that they felt the need to self-censor, including 34% of Conservative-supporting students compared with 24% Labour-supporting students, because they were **"scared of disagreeing with [their] peers"**.[28]

> "59 per cent of students who identify as a Conservative voter believe that students with conservative views self-censor on campus. However, far fewer say they have been inhibited from expressing their own views."
>
> **KCL, *Freedom of expression in UK universities*, p15.**

Staff

There is evidence that similar pressures to self-censor are felt by academics. A 2020 report by Policy Exchange found that **44% of academics who identified as 'fairly right', and 63% who identified as 'very right', experienced a hostile climate for their political beliefs in their department**.[29]

As a result, 32% of academics who identify as 'fairly right' or 'right' have stopped airing their views in teaching and research, compared with around 15% of academics who identify as being in the centre and on the left of political debate.[30]

It should be noted that the methodology and recommendations of this report were challenged in an article in The Guardian.[31]

2.6 Do universities have a left-wing bias?

In 2017, a report by the right-wing thinktank the Adam Smith Institute argued that individuals with left-wing and liberal views are overrepresented in British academia, and that this may have had a number of adverse consequences, including "curtailments of free speech on university campuses".[32]

An article in the *British Journal of Sociology* demonstrates that while professors in European universities may be more liberal and left leaning than other professionals, **there is little evidence that there exists an exceptional ideological monoculture on university campuses**:

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26 Policy Exchange, *Academic freedom in the UK*, November 2019, pp14-15
27 KCL, Freedom of expression in universities, December 2019, p16
28 King's College London, Freedom of expression in universities, December 2019, p6
29 Policy Exchange, *Academic freedom in the UK*, August 2020, p8
30 ibid, pp54-55
31 "The rightwing defence of 'academic freedom' masks a McCarthyite agenda", *The Guardian*, 4 August 2020 (accessed 26 February 2021). Of the 820 academics who were polled, only 484 were currently in employment at a university in the UK, while the remainder were retired: Policy Exchange, *Academic freedom in the UK*, August 2020, pp51-52
32 Adam Smith Institute, *Lackademia: Why do academics lean left?*, 2 March 2017

> there is no greater homogeneity of political orientations among the professoriate relative to other specific professions, suggesting that there is a diversity of opinions which is similar to what professionals would find in other occupations.[33]

The article also notes that "**there is no evidence that professors bring their political orientation into the classroom**".[34]

[33] H.G. van de Werfhorst, 'Are universities left-wing bastions? The political orientation of professors, professionals, and managers in Europe', *British Journal of Sociology* 71.1 (2020), pp47-73

[34] van de Werfhorst, 'Are universities left-wing bastions?', p62

3. Government proposals

The Conservative election manifesto 2019 contained a commitment to "strengthen academic freedom and free speech in universities and continue to focus on raising standards".[35]

On 4 February 2020 the Education Secretary Gavin Williamson said that universities must do more to protect free speech and said that there could be further regulation:

> "Every university should promote such unambiguous guidance. If universities don't take action, the Government will.
>
> "If necessary, I'll look at changing the underpinning legal framework, perhaps to clarify the duties of students' unions or strengthen free speech rights.
>
> "I don't take such changes lightly, but I believe we have a responsibility to do whatever necessary to defend this right."[36]

3.1 Policy paper

On 17 February 2021 the government published a policy paper setting out proposals to strengthen freedom of speech in higher education - Higher education: free speech and academic freedom February 2021 CBP 394. The paper set out the case for change and outlined the government's expectations of providers.

The paper contained proposals to: **strengthen protections for free speech and academic freedom** in higher education, **increase the rights of redress** for those who are wronged and establish a new **Free Speech Champion** in the Office for Students:

We propose to:

- legislate for a **Free Speech and Academic Freedom Champion** with a remit to champion free speech, investigate infringements of free speech in higher education and recommend redress
- legislate to require the Office for Students (OfS), the higher education regulator in England, to introduce a **new, registration condition on free speech and academic freedom, with the power to impose sanctions for breaches**
- strengthen the free speech duty under section 43 of the Education (No. 2) Act 1986 (the section 43 duty) to include **a duty on HEPs to 'actively promote' freedom of speech**
- extend the duty to **apply directly to SUs**
- introduce a **statutory tort for breach of the duty, enabling individuals to seek legal redress** for the loss they have suffered as a result of breach of the duty

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35 Conservative election manifesto, Get Brexit Done Unleash Britain's Potential, p37

36 "Gavin Williamson gives universities final warning on free speech", *The Times*, 4 February 2020

- **widen and enhance academic freedom protections**, including extending protections so that **recruitment and promotion** are also covered
- work with HEPs to set **minimum standards for free speech codes of practice** (required under the legislation), making sure high standards become the norm across the sector.

Free Speech and Academic Freedom Champion

The OfS is the higher education regulator and as part of its remit it has a duty to promote freedom of speech in higher education providers (see section 1.4).

The policy paper states that a **Free Speech and Academic Freedom Champion** will be appointed by Ministers as a member of the OfS Board and will play a similar role to the Director for fair access and participation; they will **monitor** whether HEPs are meeting their freedom of speech condition of registration and will give **advice on sanctions** where these requirements are not being complied with.

The Champion will also have powers to i**nvestigate** and recommend **redress** where a clear breach of the relevant registration conditions have led to an individual suffering loss.

The Champion will also look into complaints regarding freedom of speech in place of the Office of the Independent Adjudicator – they will be able to consider and recommend redress for free speech concerns for staff, students and visiting speakers.

New OfS registration condition

All higher education providers who are registered with the OfS must comply with registration conditions which are set out in the OfS Regulatory Framework[37] document. Conditions E1 and E2 relate to management and governance and public interest governance and under these conditions all providers must comply with current statutory regulations on freedom of speech.

Under the government's proposals a **new condition of registration** will be introduced which will make HEPs' obligations on freedom of speech and academic freedom more explicit. The new condition will make it clear that providers have a **duty to actively promote** freedom of speech on campus. The new **Free Speech and Academic Freedom Champion will oversee compliance with this condition and will be able to enforce sanctions for breaches.**

Implementing this condition will **require legislation** to amend the Higher Education and Research Act 2017 so that the free speech and academic freedom condition becomes a mandatory initial and ongoing condition of registration.

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[37] OfS Securing student success: Regulatory framework for higher education in England February 2018

Strengthen the free speech duty

The Education (No. 2) Act 1986 section 43 requires HEPs to take such steps as are **reasonably practicable** to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers. There are subsidiary provisions including those relating to a code of practice and the application of the duty to SU premises.

The government proposes to strengthen the section 34 duty by either extending it to include a duty to **actively promote** freedom of speech on campus or by including **direct protections for individuals**. The government is seeking views from the sector on these proposals.

Extend strengthened section 43 duty to cover SUs

The section 43 duty on freedom of speech applies to **any premises occupied by a SUs**, even if they are not owned by the HEP **but it does not cover those who govern SUs**.

Extending the section 43 duty to those responsible for SUs would **make SUs directly responsible for taking reasonably practicable steps to ensure that lawful freedom of speech is secured**, as is the case with HEPs.

The policy paper proposes that the **OfS is given powers to regulate SUs in regard to free speec**h. The OfS would be able to apply its existing sanctions, including fines, to SUs that breached the requirements imposed on them in relation to free speech.[38]

Although the OfS does not currently regulate SUs directly, the free speech and academic freedom conditions E1 and E2 do apply to HEPs' interactions with SUs. SUs are currently regulated by the Charity Commission and would still, as registered charities, be subject to charity law as well as the expanded section 43 duty, but the OfS would be the principal regulator in regard to free speech.

Minimum standards for the code of practice required under section 43

Under the Education (No. 2) Act 1986 section 43 all higher education institutions are required to have codes off practice on freedom of speech (see section 1.2).

The policy paper is considering **mandating clearer minimum standards** for the codes of practice to provide **more consistency** across the sector.

The proposal to extend section 43 to SUs directly would mean that **SUs could then be subject to these minimum standards** for their codes of practices.

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[38] DfE Higher education: free speech and academic freedom February 2021 CBP 394 para 97

Minimum standards could be introduced through non-legislative means by the OfS including minimum standards as part of its registration conditions or by the government issuing best practice guidance. [39]

Statutory tort to give private individuals a right of redress for loss as a result of a breach of section 43

The existing routes for higher education complaints generally do not give a right for individuals to seek redress for breach of section 43. Case law has established that the exercise of the section 43 duty can be judicially reviewed but it does not confer any private law rights.

The policy paper proposes the **introduction of a statutory tort, which would give private individuals a right of redress** if they have suffered loss because of breach of the section 43 duty. The aim of the tort is to provide a route of redress and to "give teeth" to the section 43 duty[40].

Wider and enhanced academic freedom contractual protections

The government is also exploring ways to ensure that academic staff have robust **contractual protections** in place that secure their right to academic freedom.

The policy paper states that academic freedom is not contractually protected in a comprehensive way across the sector:

> Currently, many HEPs include a measure of protection for academic freedom within their academics' contracts, though there is no consistent contractual protection applying across all institutions and certain categories of academic staff are not covered by these provisions.[41]

The protections would also cover **recruitment and promotion.**

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39 Ibid para 106
40 DfE Higher education: free speech and academic freedom February 2021 CBP 394 para 111
41 Ibid para 115

4. Comment

Many of the responses to the government's proposals stated that **universities are committed to free speech** but questioned the decision to focus on this issue at a time when universities are dealing with the consequences of the Covid-19 pandemic.

4.1 Labour

Speaking to the *Evening Standard,* shadow universities minister Emma Hardy said that the Government has **"all the wrong priorities"**:

> When students need urgent help with their finances, accessing online learning and their mental health, ministers have manufactured an argument to distract from their failings.[42]

Kate Green, Labour's shadow education secretary, similarly accused the government of "manufacturing" a 'culture war' controversy to take the focus off other policy issues:

> Students are worrying about when they can return to campus, how to pay their rent and how they will get a job," she said.
>
> The government has abandoned them throughout this crisis and is manufacturing this debate to distract from their own failures.[43]

4.2 Sector responses

National Union of Students

Responding to the proposals announced by the government, Hillary Gyebi-Ababio, NUS Vice President for Higher Education, said that **the NUS was looking forward to working with the proposed Free Speech Champion**.

While Gyebi-Ababio welcomed the opportunity to demonstrate that there is not an extensive problem with freedom of speech across higher education, she disagreed with the government's priorities:

> Students' unions are committed to freedom of expression and are the very home of rigorous debate and new ideas. There is no evidence of a freedom of expression crisis on campus, and students' unions are constantly taking positive steps to help facilitate the thousands of events that take place each year.
>
> At a time when students are facing untold hardship, the government would be much better advised to focus on providing the practical support that students desperately need, through maintenance grants, no detriment policies and funding to eradicate digital poverty, rather than attacking the very institutions that have stepped up to fill the gaps in support being offered.[44]

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42 "Labour accuses Government of 'manufacturing' free speech row at universities", *Evening Standard,* 16 February 2021 (accessed 26 February 2021).

43 "Labour accuses government of 'manufacturing' free speech culture war to distract from failures", *The Independent,* 16 February 2021 (accessed 26 February 2021).

44 NUS response to government's proposals on free speech at universities, 16 February 2021.

University and College Union

Jo Grady, the Universities and College Union general secretary dismissed the argument that students and staff currently pose a threat to freedom of speech and expression on university campuses:

> It is extraordinary that in the midst of a global pandemic the government appears more interested in fighting phantom threats to free speech than taking action to contain the real and present danger which the virus poses to staff and students.
>
> In reality the biggest threats to academic freedom and free speech come not from staff and students, or from so-called "cancel culture" but from ministers' own attempts to police what can and cannot be said on campus, and a failure to get to grips with the endemic job insecurity and managerialist approaches which mean academics are less able to speak truth to power.[45]

Russell Group

A spokesperson for the Russell Group, asserted that **universities are committed to free speech, and highlighted the fact that the overwhelming majority of speaker events go ahead on campuses.**

The response also expressed a concern that any proposals must take care **not to interfere with "institutional autonomy**":

> It is important that proposals in this Government policy paper, if taken forward, are **evidence-based and proportionate, with due care taken to ensure academic freedom and institutional autonomy**. Government should support existing work by universities and students' unions to defend and maintain freedom of expression on campus, rather than adding unnecessary and burdensome bureaucracy.[46]

It also highlighted student-led proposals to champion free speech on campus. These proposals were put together by a group of students' unions with the support of Wonkhe: "Radical student-led proposals will secure and champion campus free speech", *Wonkhe,* 1 February 2021.

4.3 Articles

BBC News

An article on the BBC News website, Plan for campus free speech post prompts autonomy warning, 16 February 2021, gives further comment and analysis.

Wonkhe

In an article for *Wonkhe,* Geraldine Swanton, a lawyer, suggested that the proposed changes **added unnecessary complexity to existing legislation**:

> Both freedom of speech and academic freedom are expressly referred to by the OfS as public-interest principles.

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45 UCU response to government free speech proposals, 16 February 2021.
46 Russell Group responds to free speech measures, 16 February 2021.

> The Government's own first principle of good regulation provides that regulators should avoid imposing unnecessary regulatory burdens through their regulatory activities (Regulators' Code 2014 par 1.1).
>
> Increasing the number of registration conditions in response to isolated problems appears to be case in point – a government sledgehammer to crack a nut when there is already in existence a workable nutcracker. It also raises the spectre of regulatory conditions being used for wider ideological purposes, posing a risk to institutional autonomy.[47]

The Guardian

An article in *The Guardian* discussed the policy paper's use of research by Policy Exchange, and particularly the thinktank's 2019 report, Academic Freedom in the UK.[48]

It quoted Colin Riordan, vice-chancellor of Cardiff University, who argued that the Department of Education was using **"completely misleading" and "dubious" research** to justify introducing new legislation on free speech in universities.

The Telegraph

In an article for *The Telegraph,* Eric Kaufman, professor of politics at Birkbeck College – and co-author of the 2019 and 2020 Policy Exchange reports – **welcomed** the government's proposals:

> By instituting principles which protect the liberty of academics from emotional safety claims, this government gives us the confidence to perform our role of setting out challenging ideas and findings, however uncomfortable, inside and outside academia. As a result, we can all breathe a little easier.[49]

Kaufman said the government's intervention was necessary to enforce the law proactively in universities and safeguard the rights of individuals against "intolerant activists".

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47 "The free speech emperor has a smattering of new clothing", *Wonkhe*, 22 February 2021 (accessed 1 March 2021).

48 "Gavin Williamson using 'misleading' research to justify campus free-speech law", *The Guardian* 27 February 2021 (accessed 1 March 2021).

49 "Only government can break the spell of woke activists over our universities", *The Telegraph,* 16 February 2021 (accessed 1 March 2021)

5. Next steps

Some of the government's proposals in the policy paper will need **legislation** and **consultations** may be held on some of the changes.

The government policy paper stated that government is currently exploring how to strengthen the section 43 duty on HEPs to "actively promote" freedom of speech (see 1.1 and 1.3).[50]While no official consultation has been announced they have said that they would welcome input from across the HE sector:

> Government would welcome views from the sector about whether the section 43 duty as it is currently framed goes far enough to ensure that the fundamental values of free speech and academic freedom are not only secured but actively promoted on campus.[51]

The government have also said that the OfS will consult on legislating to require a new registration condition for HEPs on free speech and academic freedom:

> The OfS will consult on the detailed requirement for this but primary legislation may indicate the key principles, reflecting the strengthened section 43 duty.[52]

The Department for Education has said that the next steps for legislation would be set out "in due course".[53]

50 DfE, *Higher education: free speech and academic freedom*, p26
51 ibid, p27
52 ibid, pp25-26
53 BBC News website, Plan for campus free speech post prompts autonomy warning, 16 February 2021

Annex A

Devolved regions

Freedom of speech and academic freedom in the Devolved Administrations is set out in the policy paper on pages 35 and 36:

> The Higher Education Funding Council for Wales (HEFCW) is the HE regulator in Wales. **Section 48 of the Higher Education (Wales) Act 2015** places an obligation on HEFCW, when exercising its functions under that Act, 36
>
> to take into account the importance of protecting academic freedom, including, in particular, the freedom of institutions to determine the contents of particular courses and the manner in which they are taught, supervised or assessed, to determine the criteria for the admission of students and to apply those criteria in particular cases, and to determine the criteria for the selection and appointment of academic staff and to apply those criteria in particular cases.
>
> **Section 43 of the Education (No. 2) Act 1986** applies in Wales.
>
> **Section 26 of the Further and Higher Education (Scotland) Act 2005** requires institutions in Scotland to aim to uphold (so far as the institution considers reasonable) the academic freedom of all persons engaged in teaching, the provision of learning, or research at the institution. Institutions must also ensure (so far as the body considers reasonable) that such staff's appointments held or sought, and entitlements or privileges, are not adversely affected by their exercise of academic freedom. Academic freedom is defined to include freedom within the law to hold and express opinions, question and test established ideas or received wisdom, develop and advance new ideas or innovative proposals, and present controversial or unpopular points of view.
>
> In Northern Ireland, **article 3 of the Education (Academic Tenure) (Northern Ireland) Order 1988** requires the Department of the Economy, in exercising their functions under that Order, to have regard to the need to ensure that academic staff 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 their institutions.

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