PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

HIGHER EDUCATION (FREEDOM OF SPEECH) BILL

Second Sitting

Tuesday 7 September 2021

(Afternoon)

CONTENTS

No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Saturday 11 September 2021

The Committee consisted of the following Members:

Chairs: Sir Christopher Chope, † Judith Cummins

† Bacon, Gareth *(Orpington)* (Con)
† Britcliffe, Sara *(Hyndburn)* (Con)
† Bruce, Fiona *(Congleton)* (Con)
† Buchan, Felicity *(Kensington)* (Con)
† Donelan, Michelle *(Minister for Universities)*
† Glindon, Mary *(North Tyneside)* (Lab)
† Hardy, Emma *(Kingston upon Hull West and Hessle)* (Lab)
† Hayes, Sir John *(South Holland and The Deepings)* (Con)
† Holden, Mr Richard *(North West Durham)* (Con)
† Jones, Mr Kevan *(North Durham)* (Lab)
† McDonnell, John *(Hayes and Harlington)* (Lab)
Nichols, Charlotte *(Warrington North)* (Lab)
† Russell-Moyle, Lloyd *(Brighton, Kemptown)* (Lab/Co-op)
† Simmonds, David *(Ruislip, Northwood and Pinner)* (Con)
† Tomlinson, Michael *(Lord Commissioner of Her Majesty's Treasury)*
Webb, Suzanne *(Stourbridge)* (Con)
† Western, Matt *(Warwick and Leamington)* (Lab)

Kevin Maddison, Seb Newman, *Committee Clerks*

† attended the Committee

Witnesses

Professor Stephen Whittle OBE, Professor of Equalities Law at Manchester Metropolitan University

Smita Jamdar, Partner and Head of Education at Shakespeare Martineau

Thomas Simpson, Associate Professor of Philosophy and Public Policy, University of Oxford, and Associate Fellow at Policy Exchange

Dr Bryn Harris, Chief Legal Counsel at Free Speech Union

Public Bill Committee

Tuesday 7 September 2021

[Judith Cummins *in the Chair*]

Higher Education (Freedom of Speech) Bill

2 pm

The Committee deliberated in private.

2.1 pm

Examination of Witness

Professor Stephen Whittle gave evidence.

The Chair: We are now sitting in public, and the proceedings are being broadcast. We will hear oral evidence from Professor Stephen Whittle, Professor of Equalities Law at Manchester Metropolitan University, who is joining us remotely via Zoom. We have until 2.45 pm for this session.

Professor Whittle, welcome. I am Judith Cummins, and I am chairing this session. Would you please introduce yourself for the record?

Professor Whittle: My name is Stephen Whittle, Professor of Equalities Law at Manchester Metropolitan University. I have worked at Manchester Metropolitan University since 1993, and I have taken an extensive interest in transgender equality issues all my academic career.

Q71 Matt Western (Warwick and Leamington) (Lab): Thank you very much for joining us, Professor Whittle, and for your written submission. I want to start by making a few points. Looking through your submission, I was interested in what you said about trans rights and the trans rights group Press for Change. You said:

> "Trans academics have mostly tried really hard not to accuse, and certainly not to 'no platform' anybody. Yet these voices are making trans people look like the extremists. Sadly, it will have the effect of shutting down the debate."

You have spoken about the challenges of living as an openly trans man. If the Bill gets passed into law, allowing anti-trans campaigners the right to speak on campus, what effect do you think that will have on anti-trans campaigners' speech on campus?

Professor Whittle: It is important to state from the beginning that I am totally for people having the opportunity to speak and voice their opinions on campus—particularly academics, as long as they base their presentations on their research, work, experience and knowledge. I have absolutely no hesitation about acknowledging that right. My main concern about the legislation is not so much the lack of ability for people who do not believe in trans rights in the same way that I do to have the opportunity to speak. On the whole, people who present a valued and evaluated opinion have had many opportunities to speak on campuses, as well as in the media. The problem is that the way it is presented at the moment is that protesters, or people who disagree with their point of view, are putting what is often termed a chilling effect on academics and their freedom of speech.

I have been speaking about trans rights for a very long time—nearly 30 years—and, as an activist for nearly 50 years, I have spoken in many different forums, run many events and had many challenges to that right to speak and to express those opinions, not just in the UK but worldwide. I have run conferences that have been threatened by Christian activists and so on and so forth.

I have even been in my own lecture theatre and had students stand up and heckle me and accuse me of being the worst parent on earth who ought to have my children removed from me etc. To respond by saying that those people do not have a right to say that is not the correct way forward. We have to have the conversations. I absolutely believe in having the conversations. Being persistent and willing to have the conversations over the years has ultimately led to many legal changes that have been positive for the trans community.

What has happened has been a hypersensitivity. Politicians, academics and external speakers have always faced hecklers, barracking and external protesters. I think about Leon Brittan coming to Manchester University. He would never have spoken at a university ever again if he had felt that that was the only experience of academia. Those protests were a long time ago. He carried on speaking, and that is exactly what we do. I always take the view that you engage. If there have been serious threats to a conference or event that I have been organising, I have made it ticket only. I find that charging £5 to £10 focuses people's minds on whether they really want to spend the money to get in and barrack at something.

I have organised protests outside events myself but that has never been to close down the conversation. It has been to express an alternative point of view—to say, "Here are many voices who disagree with the voice inside." The very first time I ever took part in action was probably 1974 at Bradford University, invading a British Medical Association conference, where a doctor was going to speak who definitely thought trans people should not have treatment. He chose to leave the platform. What we asked for was to have a speaker who presented an alternative point of view.

My main concern about the Bill is that it will provide an additional chilling effect overall, not to speakers but to potential protesters. It will result in people who want to express an alternative viewpoint, who are not speakers and do not have that opportunity to participate in the event, to have a voice on the platform, having no way of expressing that without appearing to challenge somebody's right to free speech. As I say, I absolutely believe in freedom of speech, in expressing opinions and having conversations, but the conversation has to be inclusive of everybody. If we exclude any one group by making them a potential wrongdoer, we are going to close down those conversations.

Q72 Matt Western: If I understand correctly, you are saying that it is possible within the institutions of universities to resolve this; that we need open debate; that this should be allowed; that academics welcome this. Perhaps the actions of certain activists are making things difficult and that should be dealt with through separate legislation. Do I understand that you believe the Bill is not necessary?

Professor Whittle: Absolutely. I have never ever felt so unsafe that I was not able to speak. I have never felt that I could not run an event because it was so unsafe. I

have never felt that my speakers are threatened. I recognise student protest for what it is—student protest. It is a right to express a viewpoint, and I have often provided capacity for that protest to take place so that we are not shutting it down but listening.

Q73 Matt Western: Moving on, I understand you faced many challenges over a long period of time, as you just articulated. How do you define academic freedom, and how do you perceive the relationship between academic freedom and freedom of speech?

Professor Whittle: Academic freedom is always problematic, because we are always in a situation where some opinions are considered so off the wall and out of the water that we really do not feel that this thing should be voiced within academia. We can think of far right movements and extreme left movements. They connect extremist Christian views and extremist Islamic views, and we have to sit and make a reasonable judgment about what is acceptable. Is it acceptable to have somebody who espouses views that I might consider extremely fascist or Nazi views within a university setting? I would say probably not, but we have to have the conversation and assess what that speaker is saying. If, for example, somebody who clearly denies the holocaust wishes to speak at a university, I would think that was not acceptable. There are certain historical facts that are sacrosanct and you cannot say that they do not exist, unless you have extremely good evidence to the alternative. It is always a balance—looking at what we consider as a society to be acceptable speech within the notion of freedom of speech and academic freedom.

Within academic freedom, I have a curriculum that I teach and that I speak to, but I have a certain freedom within that to reflect the research of myself and my peers through the classes that I give. However, if I sat in a classroom and was talking about black civil rights movements of the 1950s and then started giving parts of the speeches of anti-civil rights campaigners at that time, I would have to think very carefully about how I did that. For example, I remember reading from a speech by Enoch Powell many years ago and a student complained. Basically she had not been awake properly and listened to the fact that I said, "These are not views I agree with. These are the views of a politician at the time, and these were the views that were publicised in the paper and these were the views that caused X consequence." Fortunately, somebody had tape-recorded the lecture and it was all there. I have to be able to decide when and when not to say those things.

I have never felt that I have to be so careful of student views. There are some issues, for example—sexual assault, rape, female genital mutilation—where I thought very, very carefully about what I would show, what I would say and what I would present, but I have always taught those subject areas because that is part of my academic freedom, and no amount of students saying, "I feel offended by that" or "I am upset by that" will stop that being taught. I have had colleagues say, "Do you think that is the right thing to teach?" and I have had to defend it and say, "Absolutely. My job is to educate the whole student body in this area of law and this is what I will do, but I will not be doing this and I will not be doing that. I will be doing the other." So it is about judgment and what we feel. One of the sad things that I have really found upsetting about this debate is the number of academics who have felt personally unsafe where I think they probably do not need to, because what they have to say—if they have the evidence and they have done the work—will be listened to. It may not be agreed with—there may be students outside shouting at the door, disagreeing with them—but that is part of the process of academia.

Q74 Matt Western: To make one final point in terms of what you were just describing: we heard from a couple of academics this morning, I do not know if you listened in—

Professor Whittle: I have been in hospital for the last couple of days so I have been a bit out of it.

Matt Western: Well, thank you for joining us in those circumstances. Professor Stock from Sussex University said she felt that perhaps the university did not promote her enough in terms of her freedom of speech. Do you feel like you do get promoted by Manchester Metropolitan University? The second point she made was that there could be some improvements to current processes on campus; can you suggest any that would obviate the need for this Bill?

Professor Whittle: I have never personally felt that Manchester Metropolitan has not supported me in what I have done, what I have organised or the events that we have had, some of which have been potentially quite contentious. For example, we have had gender critical feminists and trans activists speaking at the same event. The university has always been supportive.

I do not think that universities do enough to promote what we do, to either our student body or to the external world. I often think it is a great shame that we do not get the message out about what our academics are talking about to a wider group than just my department, for example. There must be a better way than sending out a bland email to everybody saying X event is taking place—which most people will then delete. It is thinking about how we want to promote the events that take place; about how we could do that through calendars, through doing more public events, where we invite the public in to listen to what we do and the conversations that we have. That is really important because, the fact is that we have very serious discussions. We often have multidisciplinary and interdisciplinary groups having extremely important conversations about the way we consider the world that we want and how we might live in it. However, in order to do that we have to have the support of the university, in the sense that it believes that we are public-facing and student-facing—we are not little isolated islands within little isolated faculties. There is not a sense, for example, even within the university budget that there is money to promote anything. You have always got to dip into your own budgets. Things like that—the idea that universities really think about looking outwards—would be a really positive change.

Q75 Sir John Hayes (South Holland and The Deepings) (Con): I am interested to hear your view that, essentially, this is a Bill that is not addressing a problem, because the evidence we have received, both in writing and verbally earlier today, suggests the opposite; academics were saying that it is indeed a problem. They claimed

[Sir John Hayes]

that criticism of the Bill by saying what you have said today is, and I quote, "not true." There is empirical evidence that the freedom to speak and research of a significant minority of university students and teachers is being inhibited. Specifically, in the summer of 2017, at Bath Spa university, research into transgender detransitioning was prohibited on the grounds that it was politically incorrect. There is in other universities, and in the minds of other academics, a problem. How do you explain that?

Professor Whittle: At that time there was clearly a media scare about the power of transgender activists and about the rights of transgender people. I read the research proposal of that particular piece and I looked at why it was not approved. I do not think that I would have approved it for my university, because it was not sufficiently sound. It was not sufficiently based on preliminary research. I think it had a political motivation, which I would not expect from any of my students; I would expect a certain level of objectivity from them.

I looked at that quite closely, thinking, "Have Bath made a big mistake here?" but I think what happened was that their decision to refuse to go ahead with that research at that time became a media story that they had refused because the transgender world would attack them for accepting it. Good research has been done on the question of young people and whether they would continue to transition or would detransition—a lot, in fact—and I have never known anyone else have their research stopped, but that was not sound. When you read it, it did not feel as if it was a good piece of research. Maybe had Bath addressed it properly, they could have done more to say, "This needs sorting and this does before we will consider it."

Q76 Sir John Hayes: I want to follow that up. In the light of your advice, Mrs Cummins, I declare my interest as a part-time professor at Bolton University, as recorded in the register. Professor, you talked earlier about ideas that are "so off the wall and out of the water"—your words, not mine—but is that not the nature of all academic inquiry, its cutting edge? To disturb, to alarm and perhaps even to shock, is that not the character of that kind of inquiry?

Professor Whittle: Not all research, of course. Not all research is out there to alarm, to shock and to tear down the wall, but a body of research is. We have to have an opportunity to do what I would call blue-sky thinking in the humanities as much as in the sciences. My own research would have got nowhere if it had been left to the people who thought they knew how the system worked—it was completely off the wall, but it brought new ideas and presented the evidence for those changes.

There will, however, always be concerns that some students and some researchers will always want to do work that is very problematic. For example, I am thinking of a student who applied to do a PhD but never actually got his research proposal approved before he presented his dissertation. The dissertation, which looked into the far right in Europe, was basically a presentation of why we should all move to far-right politics. It was not going to go anywhere. I could not ever have signed it off, because he had not gone through the proper processes. If he had, I think he would have come up with different answers, but we will never know.

I do not say to the students who are researchers, "You shouldn't do this," or, "You shouldn't do that," but I do say, "You need to think about what it is that you are trying to achieve. Are you just trying to make a statement, or are you trying to contribute to the academic debate and to improve the world in which we live?" Some just want to make a statement. I think the research that we referred to this morning on detransitioning was exactly that—a piece of research that was preset to provide an answer that the academic wanted—whereas other research is out there to explore the issues properly.

We have academics who are reviewing research all the time. One of my primary functions is to read research papers of various forms, to make those judgments as to whether the research is sound or could be sound, and to decide whether it will receive support from me, or whatever else.

Q77 Michelle Donelan: Thank you very much for sharing your experiences, Professor Whittle. I am interested to hear whether you have spoken to any academics or students whose experiences have differed from your own. We heard from Professor Stock this morning about, in effect, a threshold that academics should be expected to experience. Some of them, such as you and her, may have pushed past that and almost ignored the pressures on them and the challenges that they faced, but not everyone is prepared to do that, hence the chilling effect. I would be interested to hear whether you think there is room for manoeuvre there and whether we need to open up some of these academic forums.

Professor Whittle: Absolutely. I absolutely believe we need to really think, particularly in terms of recruitment and promotion, how we do it. There is an insularity, particularly in promotion, within universities and between universities that prevents people who speak out, or seem to be doing something that is not common enough, getting those opportunities for promotion.

Manchester Met has been incredibly supportive of me and my work over the years, but in 27 years I have never been shortlisted for a job, which means I have never even got to the point of sitting in the chair and being interviewed. It is those things. I know I am facing the concrete ceiling in that because I am doing research that is considered to be a minority interest. I actually do not think I am. I think I am talking about core human rights and about how identity fits within that legal framework of core human rights, but the universities and university departments are incredibly cautious about taking somebody on who might be considered too challenging to a sort of mantra of "we are a safe space."

Q78 Michelle Donelan: How can you be 100% confident that legislation is not the right answer to tackle the problem that you have just identified?

Professor Whittle: There is different legislation. This legislation focuses specifically on how universities promote free speech, but most specifically on what they do to make sure that speakers, academics etc. speak, which means what they do to stop other people disturbing that space.

In terms of promotion, opportunities and things like that, I think it is not legislation. We need a real sea change in how universities think about the academics who work for them and what they are trying to achieve. I certainly think that the promotional system that we have, which consists of small circles of people supporting certain other small circles of people, is too narrow. We need external experts in areas, to be prepared to call people out from other disciplines to look at professorial applications, say, and to bring a range of voices to that.

I like the fact that my own university is thinking in terms of readerships not just for pure researchers, but also for people who look at the pedagogy of teaching within universities and who are interested in improving teaching quality and how we get ideas over to students. That is a start, by not just saying, "There are these ones who research and these ones who teach," but thinking that we cross over constantly.

This piece of legislation seems to me to be unnecessary because it is about controlling the external to the university. Can a university do that? How can a university stop people protesting, although they could bring on security and bar people from campus? The whole nature of student life is to protest, or it should be, anyway. I sometimes think they don't do it enough nowadays.

Universities already have an obligation in relation to freedom of speech. This creates an obligation on them to stop other people's freedom of speech, and that is the problem. It will narrow freedom of speech overall. It is a fine balance, but I don't think stopping student protests or external anger about what academics do is going to make, a, academics feel any safer or, b, improve our freedom of speech.

Q79 Michelle Donelan: Do you think it would be useful at this moment in time to clarify that the Bill does not prevent protest of free speech? I would be happy to have conversations offline or further written evidence on that.

Professor Whittle: It does not appear to, but combined with other legislation that has come in and the whole idea of what universities can do? What can a university do to stop people saying, "We don't want this speaker."? Can they stop it on Twitter? No. Can they stop it on Facebook? No. But they can stop it on the ground within the space of the university. I actually think that that is a much more valid place to hear student protests than on Twitter.

Q80 Emma Hardy: Professor Whittle, I want to turn again to the evidence submitted by the University of Cambridge, which highlights the tension that the Bill presents in balancing free speech with the existing legislation in the Equality Act 2010 against harassment, abuse and threats of violence. As I mentioned to Trevor Phillips in the last evidence session, the Secretary of State verbally promised that the right to lawful free speech will remained balanced by important safeguards, but the University of Cambridge is suggesting that that should be in the Bill, and the Bill should present greater clarity on where the line is drawn between existing legislation around harassment and what the Bill proposes. I wondered, with your experience in equalities, what your thoughts were on that.

Professor Whittle: The Equality Act provides little protection for anybody who feels that their rights are being disturbed by somebody else's freedom of speech. For example, if somebody is speaking and they are antisemitic, unless it directly relates to that person, unless they have some sort of standing, the Equality Act cannot protect them as such. The Bill is interesting in that you do not have to have any standing to use the potential new provisions within it. I think that that is equally problematic, because it means that literally the butcher down the road could decide that they do not want the speaker, or could make a complaint that a speaker had had their freedom of speech challenged.

I think that that is very problematic, but I accept that it should be absolutely clear in the Bill that this is not about stopping legitimate student protest. There is a difference between legitimate and illegitimate protest, and illegitimate protest is always illegitimate in my view and should never be perpetrated, except in the direst circumstances. Legitimate protest, which includes shouting, making a noise and being an irritating bloody nuisance is just part and parcel of academic life. As I say, I have faced it in my own lecture theatre and I have not felt comfortable, but I did not feel so challenged.

Q81 Emma Hardy: That is really interesting. So you would want to see amendments to the Bill that gave students the right to continue to protest, and not therefore fall under the guidance of the Bill.

Professor Whittle: Absolutely. Legitimate protest within universities is an absolute must. If we make it different from the rights externally, does that somehow create a different space for universities? Universities are, on the whole, still part and parcel of the public sphere—not all of them, but most of them. They do not have the same rights, for example, as a pub landlord to say, "You can't come in here," but they have certain levels of control on their sites. To just bar student protest, or to make it impossible, would drive protest into those online spheres, and I think it would be much worse there.

Q82 Emma Hardy: Finally and quickly, I think I have almost achieved the impossible in that so far every academic has agreed. Do you share the concern around the change in wording from the original wording to insist that academics speak only about what the Government define as their field of expertise, in terms of academic freedom?

Professor Whittle: Absolutely. What do we count as our field of expertise? As a lawyer, as an activist, as an individual, as a parent, my expertise is widespread, and I bring all of those things into my academic life. If you told me that I could only speak on equalities law, I would say I have just done a big presentation in relation to the European Union and rights across the European Union. Does that not include me? Can I not speak on that? When the economists have a panel on free trade, can I not come and talk about how it impacts on different people's rights across the world? Of course I can—that is part of our conversation, and I think that most academics would say that we do not sit in little boxes. We read widely; we bring all these ideas together. If we are very lucky, one day we will become Noam Chomsky and produce a great book, but most of us will just retire.

Q83 Mr Richard Holden (North West Durham) (Con): Thanks, Professor. It has been really interesting to hear what you have to say. I was particularly struck that you said you had never felt that you had been unable to speak on a topic. Do you understand that 35% of

[Mr Richard Holden]

academics in the UK, roughly twice the average of that in the European Union, according to a recent study, feel that they have had to self-censor their remarks? I understand you personally might feel that you can push ahead, but do you understand that other academics might feel that they cannot?

Professor Whittle: Yes, I accept that. If we go back 15 years to people complaining about the noise in the library, I stood up and said, "Why don't you just ask them to stop? That is what I do." They said, "It is all very well for you. You feel brave enough to do that." I do not feel any braver than anybody else, but I am going in the library to work and I can ask the students to be considerate and quiet and, on the whole, I get a certain amount of listening to and respect out of that. If academics do not feel that they are able to speak out, I am very sorry they feel like that, but part of me wants to say, "Pull your socks up and get on and do it, because nothing is that frightening."

I have spoken across the world, in different places, from Moscow to China and India, in circumstances where many people would go, "Oh my God—what are you doing?" but I have always received, on the whole, respect. There has been some heckling, but I handled it and never felt that my life was in danger in any way, shape or form. I sometimes have felt that my career has ridden a little bit close to the edge, but, as I say, I accepted a long time ago that other universities were not going to interview me, so I might as well make my mark here and I think I have been able to.

Q84 Mr Holden: You are sort of saying, Professor Whittle, that you have essentially accepted a curtailment of your career in some aspects because you have been prepared to be outspoken and not self-censored on some of the topics you talk about, which have been quite out there. Would you say that is fair?

Professor Whittle: I do not think people have not considered me for my appointments because I am outspoken. I think they have not considered me for appointments just simply because I am trans. I have no doubts that it is just because I am a transgender person and I do transgender politics and they do not want to be pigeonholed like that.

Q85 Mr Holden: Do you accept that other academics might feel that they cannot speak up about topics of interest to them academically—topics that they want to talk about in that broader academic freedom—because of their careers being curtailed, due to unorthodoxy, say, within an academic establishment?

Professor Whittle: I have accepted that some academics feel like that. I think they are wrong to feel like that.

Q86 Mr Holden: Okay. We all have our own individual lived experience, as you do.

Professor Whittle: Yes, and all I can do is encourage people to feel that they can speak up.

Q87 Mr Holden: Of course. One of the interesting things that I thought that we might agree on was where you talked about wanting to promote what the university is doing in terms of freedom of speech. I thought that was an interesting and important point. That promotion of freedom of speech is a big part of the Bill—not just protecting it, but advocating for its promotion. Would you support that one aspect of the Bill?

Professor Whittle: Completely. I do not think it has to be legislated; it should be in university charters almost from the beginning. As universities, we promote freedom of speech. We participate in our local and national communities and we talk about what we are doing. We are completely open and frank about the research, information and teaching that we do, and we make it widely available to the public.

Q88 Lloyd Russell-Moyle (Brighton, Kemptown) (Lab/Co-op): As in the last session, I declare my interests. I am a trustee at the University of Bradford Union. I work with the University of Sussex and UCU, the lecturers', professors' and academics' union.

I want to ask about employment practices. We know that there is an ongoing problem. We heard earlier on today that there is a problem with academics often not being given tenure, and too many people being on short-term contracts. That means they constantly think about promotion and saying the right thing rather than producing the right academic work. Is that an area that you feel could be addressed? Would that help solve some of the issues around confidence in people speaking out, rather than trying to put legal duties here and there?

Professor Whittle: Absolutely. I think there is a great deal of insecurity for younger academics, and even some older ones who have been on the short-term contract system forever and a day. We see those academics constantly losing teaching, gaining teaching, and being asked at the last minute to do stuff without any security of tenure. I think that is really problematic because people try to second-guess what they might need to do to get that security.

Within that system, there is a lot of pressure for people to do often what we might call the teaching, marking and examining duties; not enough emphasis is given to their personal development through an academic career, so they miss out on the opportunities, the time and the support—often financially, say—to go to conferences or to do research because they have not got a tenured position of some sort. That is really problematic, and it has a knock-on effect. Academics often feel disempowered. Again, they try to think, "What do I need to do that will satisfy the system, give me a chance to get some research done and make sure I provide good quality teaching?"

I work in a post-'92 university, so I am not at a university that ever gives sabbatical time, for example. I have done most of my research at weekends, holidays and things like that, so I fully understand the problem that exists within that.

Q89 Lloyd Russell-Moyle: Might a duty on universities to provide security in terms of contracts for academics to express different views help you so that you had security and you knew you would be offered interviews and promotion opportunities, but so would people of alternative views? At the moment the Bill takes it by the tort and courts under contract law, but would employment law be a better basis for defining some of these rights for everyone?

Professor Whittle: Yes. I believe that there should absolutely be an obligation on academic employers not to misuse academics, and to properly consider them for permanent posts when they are available. They should not sidestep them and get external applicants always, but they should consider them. The right to apply and be seriously considered is a really important right that academics do not have. I would really like to see some way of embodying within people's contractual rights or legal rights a right to be considered for the post if they have done the job.

One of the things I have really found distressing across the years is to watch academics do the work, for years sometimes, apparently satisfactorily, but not get the job at the end of the day. Often they do not get the job because they do not have the research background, but they have not had the opportunity to get the research background. Nobody has even asked them what they are doing in their own time, never mind consider it. Instead, they bring in somebody from outside with a research background and a year later I discover they will not teach that subject anyhow, so we are back to ground one. It is a bit despairing. I have said for years that we really must provide more security for young academics in developing their careers, whatever their views.

The Chair: If there are no further questions from Members, I thank Professor Whittle for his evidence and we will move on to the next panel. Thank you very much, Professor Whittle, and we wish you well.

We will now hear oral evidence from Smita Jamdar, partner and head of education at Shakespeare Martineau, who is also joining us via Zoom. We have until 3.30 pm for this session.

Examination of witness

Smita Jamdar gave evidence.

2.45 pm

Smita Jamdar: Hello. My name is Smita Jamdar and I am a partner and head of education at Shakespeare Martineau. I am here in my capacity as an adviser to a number of universities, over many years.

Matt Western: Under the Register of Members' Financial Interests, I declare that my wife works at a university. I am not sure if it is necessary to declare that, but I want to put it on the record for this session.

Mr Kevan Jones (North Durham) (Lab): Chair, this morning it was said that hon. Members have to declare their interests every time they speak. My understanding, and that of the right hon. Member for South Holland and The Deepings (Sir John Hayes), was that as long as the interest is declared at the beginning of the session that should be enough. Have the rules changed or are the right hon. Member and I just being old fuddy-duddies?

The Chair: I thank you for that plea for clarification. I am happy for any Member to make a declaration at the beginning of each session, as making a declaration every time they speak seems excessive.

Mr Kevan Jones: The old fuddy-duddies win, then.

The Chair: It takes one to know one.

Q90 Matt Western: Thank you for joining us today, Ms Jamdar. One of the areas I want to explore with you is around the tort. There seem to be widespread concerns about what this will mean and the implications it will have for universities and student unions. In an article published in *Times Higher Education* in May 2021, you wrote that the

"introduction of the statutory tort will almost certainly involve universities in more legal action".

Could you briefly expand on the consequences, both intended and unintended?

Smita Jamdar: As I understand it, the tort is designed to enable people who feel that their right to freedom of speech, as defined in the legislation, has been infringed to go to court and argue their cases. The reason why I fear that could have a number of consequences, not all of them intended, is that in order to issue a case before court you simply have to pay an issue fee, in most cases, write the particulars of claim and set it out, so you set out your case. It then locks both parties into a set of proceedings. Ultimately, you can cut those proceedings short, so you can apply to the court to have a case struck out, but that nevertheless involves a certain amount of time, expense and resource in dealing with the litigation.

In relation to the statutory tort, there is not any threshold level of harm that anyone has to show. Ultimately, for a remedy, any tort requires some form of damages, but that would not necessarily stop people from bringing claims simply to make the point. Especially where the threshold of harm is very small, it could be brought in the small claims court, where no costs are recoverable by either party. On one analysis, you would say that is at least a level playing field, but again it could mean that a few thousand pounds in every case could be spent getting rid of claims that are either very trivial or unmeritorious generally. That is the concern.

Q91 Mr Kevan Jones: You cover the issues of frivolous and vexatious, and even they will cost some money, but if you get individuals who are well financed this could lead to a lot of expense for the universities.

This morning, my right hon. Friend the Member for Hayes and Harlington (John McDonnell) raised the issue of Chinese students. We all—or I do and at least one other person in Committee does—know about the United Front activities of the Communist party on campuses throughout the UK. Sometimes they are intimidating students, and they are pushing an agenda—for example, on the Uyghurs in China—that is pro the Chinese regime. Under the Bill, I fear that that could be opened up, as my right hon. Friend raised this morning.

A group of students could on the face of it just be students, but they might have financing behind them that we and other people do not know about so that they could pursue a freedom of speech claim to push an agenda that might, for example, be in the interests of the Chinese Government. That would not only involve a lot of cost, but would clearly be financed by some very deep pockets, so it could lead not only to that agenda being pushed but to a lot of expense for the universities. Do you agree with that?

Smita Jamdar: The legislation obviously covers freedom of speech within the law, so as long as what these people were purporting to want to speak about was within the

law—or at least arguably within the law, because obviously one of the things that you might wish to have the court adjudicate on is whether the speech was within the law—I cannot see anything that would stop that kind of funded litigation. Ultimately, you can try to seek clarification about where money has come from to fund litigation, but there are always ways of passing money through so that it comes from the pockets of the claimants in the first instance. So, yes, we would not necessarily know who was funding the litigation, or to what end. Ultimately, the question for the court to decide would be: was it an infringement of freedom of speech within the law?

Q92 Matt Western: To pursue this a little further, you and others have been talking about getting into a compensation culture—we might have the equivalent of ambulance chasers going around chasing, whether through social media or on campus. You are obviously very familiar with the legislation and I think you are the first lawyer we have had so far as a witness. Is it clear to you how this would work with the tort and how, when a complainant wishes to pursue some damages, that will work through the complex relationships between the three bodies involved? We will have the Office for Students, the Office of the Independent Adjudicator for Higher Education and the Charity Commission. That looks like a minefield and super-complex—a lawyer's goldmine. What do you think?

Smita Jamdar: There is definitely a lot of complexity here about the different roles that these bodies will play and the different routes that somebody could go through to get compensation. The Charity Commission, for example, would not normally be involved in making decisions about compensation for individual complainants; it would be looking more at whether the body in question had complied with the charity law obligations. But the other three, under the model that we have seen in the Bill, could all be involved.

Without a great deal of clarity about the relative responsibilities or indeed the pecking order—there is a rule that you cannot go to the OIA, and I think under the Bill you could not use the OfS free speech complaints process without first exhausting the internal processes of the university to challenge the decision that you are unhappy about. However, there is no such restriction when you go to court. You are free to go to court when you feel that your rights have been infringed, rather than having to go through another internal process. That said, the courts tend to encourage people to utilise internal processes first, because it is a good way of managing court resources. Does that answer the question?

Matt Western: It does.

Q93 Emma Hardy: On that direct point—thank you for letting me come in—the Secretary of State said on Second Reading that this "legal route", the "new statutory tort", is "an important backstop"—

"we do not want all cases going to court where they could otherwise be resolved by other means."—[*Official Report*, 12 July 2021; Vol. 699, c. 50.]

However, as you have just outlined, there is no requirement in the Bill to go through the internal processes before going to the freedom of speech tsar—or whatever title they are given. Is that of concern to you?

Smita Jamdar: I think there is a restriction on going to the freedom of speech tsar; I think they are proposing that you have to go through the internal complaints procedure before you go through the OfS's complaint process. However, I do not think there is any such restriction on going to court.

Emma Hardy: Yes—sorry.

Smita Jamdar: I may have misunderstood; I do apologise. Yes, that is a concern. Built into certain types of court proceedings—judicial review, for example—is the expectation that you will first exhaust all alternative remedies, and that would include any internal remedies available under the complaints process. However, that is not the case in statutory torts; you could bring a claim outside the processes and the only thing that would then stand in your way is this—sometimes very vigorously encouraged—preference not to proceed with the court process but to go through the internal complaints process. However, you would still have issued and there would still need to be some reaction to that claim.

Q94 Emma Hardy: Would you therefore recommend an amendment to the Bill to make it explicit that local complaints processes should first be exhausted?

Smita Jamdar: Absolutely.

Q95 Michelle Donelan: I would be interested to know whether you think there are currently clear routes for individuals to seek redress where they do have their freedom of speech infringed on and restricted.

Smita Jamdar: The main route that you would see a student, for example, going through would be by way of judicial review. Judicial review has the advantage of allowing the court to make a declaration or requirement that the university should reconsider the case and, if necessary, readmit the student—they are entitled to go as far as that, but very often they will keep it to requiring that the case be reconsidered. They can also concurrently award damages, if you can prove that there is a loss associated with whatever has happened to you.

Our view, as a firm, is that if you had a situation where a student was excluded on the basis of exercising their right to freedom of speech, and it was a rightful exercise of the freedom and a wrongful interference with the freedom, then the clause permitting you to do that might also be regarded as a unfair term under the consumer contracts legislation, because you are losing a right that you have as a matter of general law. So routes are available. It is fair to say that the vast majority of these cases are probably dealt with at the internal appeals stage; I am not aware of a huge amount of case law that relates to students pursuing their claim. I think for academics it would be via employment tribunals.

Q96 Michelle Donelan: Do you acknowledge that judicial review is an expensive process, so it will exclude a number of people? You reference the internal process, but we have heard from various students and academics outside this Committee who have felt that the internal process has let them down. That is why we are bringing forward legislation: to assist and to acknowledge that the current process is not capturing all of those people.

Smita Jamdar: There are two answers to that, Minister: the first is that when we talk about the range of complaints that people are bringing under the overarching ambit of freedom of speech, they do reflect quite different

circumstances. They might be people who feel that they have not been allowed to speak at an event; they might be people who feel that they have expressed views on social media and have then been disciplined for that; they might be people who feel that they have not had a promotion, or have been subject to a detriment, in their employment context. Judicial review would not necessarily be the right route for all those.

Is judicial review expensive? In comparison with the kind of litigation you could get into if you are dealing with a statutory tort—where there are days of witnesses giving evidence, assuming it goes all the way to trial—judicial review is not expensive. Civil proceedings of this nature can be far more expensive because they are so oral evidence and fact driven. That said, currently, if a student was unhappy with an internal process of a university they could also go to the Office of the Independent Adjudicator—they have got that route. The OIA would look at that because they can look at any act or omission on the part of a university. I do not know who you have spoken to about this, but I have not seen via the OIA's own case studies many examples of people raising issues around free speech through them. That does make me wonder why that is not happening because that is a free and perfectly acceptable route through which to bring the kind of issues that people might wish to complain about.

Q97 Michelle Donelan: But it would not be the route available for academics and visiting speakers.

One last question. I was interested to know your views on the new duty to promote the importance of free speech and whether you feel that would shift culture on campus.

Smita Jamdar: That is probably the best part of the Bill as far as I am concerned. Ultimately, the way we will address the concerns around freedom of speech is very unlikely to be through litigation or regulatory intervention because it is a cultural point. Many universities that we have worked with are already keen to promote freedom of speech. If they have a statutory duty to do so, I am sure it will help to some extent. For me, the central question will be the definitional problem of what is the mischief that we are trying to address because it is very wide-ranging.

A duty to promote free speech would not necessarily in my view get over things like people feeling nervous about expressing views that they think are unpopular, because you are not necessarily worried there about somebody taking formal action against you; you are worried about how your peers might react to you. In reality, we cannot legislate out the fact that people will naturally react to views. It is part of how we all communicate with each other.

I think the duty is a good thing. It is the best part of the Bill as far as I am concerned because it is the one most likely to achieve what everybody wants to achieve. But we do have that definitional problem—some of this stuff is just human nature, and I am not sure that you can legislate or promote that out of existence.

Q98 Matt Western: To come back to my opening question about unintended consequences, what we have heard a lot from various people and prior to these sessions is about the uncertainty and the real fear out there that employment contracts may get shortened and the insecurity of tenure in employment at universities will become greater. In your professional view, Ms Jamdar, is there any risk that the tort could be used to circumvent employment law?

Smita Jamdar: I am not sure I follow in what way the statutory tort would circumvent employment law remedies. What I can see is that if you present any institution that has a duty to safeguard its resources, to manage them effectively, to deliver them in most cases for a charitable objective—education and research—with a risk that they could be sued at any time, they are going to look for ways of minimising that risk before it happens. It is too late once you are already in court. There are all sorts of challenges to getting yourself out of court very quickly.

The concern would be that governing bodies, who are rightly there to try to make sure that the assets are used for the proper purpose and not diverted to unnecessary litigation, take steps to introduce preventative measures. I hesitate to use this phrase because I know it has been used a lot already in this discussion, but it creates another sort of chilling effect, which is risk aversion on the part of institutions, who say, "Actually, I need to manage this risk and therefore I am going to take whatever steps I need upfront to reduce the likelihood of someone challenging me."

I am talking on behalf of universities because they are my client base, but if you looked at student unions and particularly the fact that they may not have as many resources to start with, they too may start to feel that they need to find ways of reducing the opportunity for problems to arise, rather than doing what I think we would all prefer them to do—create an environment where lots of conversations are happening and lots of debate and discussion is taking place.

Q99 John McDonnell (Hayes and Harlington) (Lab): I want to seek your advice about another piece of the Bill: subsection 12 of clause 7 about the review that will take place. It states:

"This paragraph applies if the Secretary of State requests the OfS to—

(a) conduct a review of the scheme or its operation (or any aspect of either of those matters), and

(b) report the results of the review to the Secretary of State."

We are not sure about what the contents of that review will be and we have not seen any guidance on that yet, but I would expect it to start looking at cases—potentially individual cases. We could get into a situation where individuals are named as a part of that review, because we are talking about the operation of the scheme.

Clause 7(13) states:

"For the purposes of the law of defamation, absolute privilege attaches to the publication of—

(a) any decision…and

(b) any report".

I raise this point about this particular legislation because, although I can understand why privilege is awarded to Ministers, Secretaries of State and others in certain instances, we could be in a situation where individuals could be named, and in a way that could affect their whole careers and lives, without having any ability to take action with regard to anything defamatory that is said about them. It seems to narrow down the

[John McDonnell]

ability to secure redress and, for me, that cannot be right in any piece of legislation, particularly when we are talking about individual rights. What is your view on that?

Smita Jamdar: That raises a problem that permeates the Bill. We are often talking about essentially legal judgments, because we have to judge whether speech is within the law or outside the law. You can see a situation where somebody wants to say something that somebody else regards as defamatory, and therefore says, "You can't say this about me." It goes off to the Office for Students, who, on some basis—I have to say it is not clear to me—is supposed to form a view on whether or not the statement was or was not defamatory, and then it will publish a report on that.

The OfS is protected under this legislation, because it has that absolute privilege, and the Ministers are protected, but in some ways what you will have done is taken the original defamatory statement and published it more widely, as far as the individual is concerned.

To my mind, if you want to resolve these matters through a legal lens, you should go to court and court will decide. I am not sure how the OfS would have the expertise to do it and therefore there is a risk that what it then publishes does not necessarily protect the rights of the individuals who are either named or identifiable through the reporting.

Q100 John McDonnell: I use this example. For a number of years I was in local government, as both an elected member and a civil servant. There have been cases within local government, such as inquiries with regard to the involvement of directors of social service in individual cases. Even though there have been inquiries and published reports, those reports have never had absolute privilege. There has always been the right of that individual to go to court to resolve any matters, including any elements where they thought they had been identified or any comments about their actions were seen as defamatory. I have not seen this before in legislation. Is it common?

Smita Jamdar: I do not know if I can answer whether it is common or not; I am not a defamation expert. From memory, there is something similar in relation to the OIA under the Higher Education Act 2004. If it is okay, I will check that after this and let you know in writing. If it exists, that would be the only place that I have seen it before.

Q101 John McDonnell: How will people have redress under this? If they were defamed, is there any right of redress? Is there any method of redress where there is absolute privilege like this?

Smita Jamdar: Again, that is something I would have to try and work through in my mind. If it is okay with you, I will give a written response to that.

John McDonnell: That would be really helpful.

Q102 Fiona Bruce (Congleton) (Con): Good afternoon. Can I take you to the very first clause and the wording "reasonably practicable"? Do you think the duty to take "reasonably practicable" steps to secure freedom of speech is adequate? That phrase is used both for the governing bodies of an institution and for student unions, particularly bearing in mind that it is the same phrase that was used over three decades ago in the Education (No. 2) Act 1986. How do you think this Bill will change what, as we heard in this morning's evidence session, is really an inadequate situation for many academics and students?

Smita Jamdar: The phrase "reasonable practicability" is quite a common one used in legislation—another example of it would be in health and safety legislation—and what it recognises is that it is very difficult for somebody to ensure that something happens without any caveat, because clearly there will be things that you have no control over that are preventing freedom of speech happening. In this case, if we go back to the self-censorship point, you may not know that people are self-censoring, so how do you address that?

Reasonable practicability is actually quite a high legal threshold. It is beyond what is reasonable, for example: it is saying, "If this is something that is practically possible, then subject to a general sense of, say, cost-benefit analysis, you would be expected to do it." It starts from that quite high threshold; it sounds like a low threshold, but actually it is not necessarily a low threshold and in this case it is enhanced by the fact that what is reasonably practicable will have to be determined by reference to the particular importance of freedom of speech. It is highlighting freedom of speech as something that is of itself important—so, having particular regard to the importance of free speech, steps that are reasonably practicable to take. I think it is strengthening the current position.

In relation to the evidence you heard this morning—I did not hear all of it, but I heard some—I would go back to the point that I made earlier, which is that I am not convinced that even this duty would necessarily address some of the things that people are talking about, because I am not convinced those things are best addressed by legislation, or capable of being adequately addressed by legislation. That would be my view.

Q103 Fiona Bruce: Thank you. Can I just probe you a little further? What is the distinction between "reasonably practicable" and "reasonably necessary"?

Smita Jamdar: Again, the question of why you would use that formulation is not something I know the answer to. My instinctive reaction to that is that something can be practicable but not necessary, as in not solely necessary—so, there are things that you could do that go beyond strictly what is necessary. They could enhance, for example, rather than just achieve the bare minimum. My instinctive reaction is that "reasonably necessary" is a lower threshold than practicability.

Fiona Bruce: That is very interesting.

Smita Jamdar: I know. I may not be right about that, so I would have to look at the legislation.

Fiona Bruce: I think the Committee would be very interested—I certainly would be—in any further thoughts you have on that, because I do have a concern that we are not raising the bar sufficiently high, bearing in mind

that we have had 30 years of the same bar and we have some major problems that appear to have been escalating over that period. Your thoughts on that would be much appreciated.

Smita Jamdar: I will definitely do that, because it is not something I have thought about before, so that was very much a "reacting on my feet"-type response.

Q104 Lloyd Russell-Moyle: I wanted to bring it to student unions. This Bill puts a liability on student unions, and I have just set the budget for the University of Bradford's student union in the lunch break. They are, of course, very often financially perilous bodies, relying on money from their parent institution.

Is there a danger that this provides a chilling effect for trustees, such as myself and others across the country, to allow students to exercise their full autonomy? For example, what I mean is that we have the Conservative society, the Labour society and so on, which are all autonomous in their organisation within the student union, affiliating to the student union. Is there a danger that if one of them suddenly decided that they did not want a speaker to come along, we would then have liability for those students' autonomous actions?

Smita Jamdar: The answer to that has to be potentially, yes. It would very much depend on what the relationship between the group in question and the student union was: whether it was a formal society of the student union, or a more informal gathering. This morning I heard a suggestion that student unions could make a decision at an institutional level about certain events, but then the individuals would still be free to go to the university and say, "We want to hold this event even though the student union has not allowed us to."

On the face of it, because the duty is to secure freedom of speech within the law for students, rather than societies as a whole, you could find that you were caught between what was essentially an internal dispute on the part of a society about whether a particular speaker was or was not welcome to speak at that society. I know that purists would say, "If one person wants this person to speak, we should allow it." But there are resource issues for student societies and rules about their own internal operation about how decisions are made. I do not think the legislation recognises that nuance. All that would happen would be that, yes, the complaint would potentially land at the feet of the trustees, who would then have to adjudicate on it.

Q105 Lloyd Russell-Moyle: You could have a Conservative society that had invited a Conservative Member who then defected to the Labour party. The society would want to disinvite them but would be compelled to listen to the defector, in that fantasy scenario.

The University of Sussex, which I am involved with, and the University of Brighton have a joint medical school, so many of our student societies are joint ones at both institutions and their respective student unions—they are one body, but they affiliate to both. Where is the liability in those complex situations, which would also come about with federated universities in London and elsewhere? Would everyone be liable? Would they have to follow each institution's rules, which might be slightly different?

Smita Jamdar: I am going to give a slightly lawyerly answer. If it got to court, the starting point would be to understand the matrix of relationships and to try to identify who was ultimately the decision maker in the case. But in practice if you are in a claimant situation, unless there are really obvious reasons not to bring a complaint against a particular student union or organisation, you will include everybody to begin with. You want to have your net cast as wide as possible; then it gets filtered down either because you have received your own legal advice that some of those are not tenable or ultimately you go to court and the court concludes that some are just not relevant parties.

Q106 Lloyd Russell-Moyle: That could be very expensive.

Smita Jamdar: We should all take it for granted that any of this is going to be quite expensive. There is not a way round that. These cases are likely to require legal advice; it is going to be hard for individuals to just pursue the claims themselves. The bodies resisting will undoubtedly want legal advice and, as I said earlier, once you start a process of litigation it is sometimes hard to extricate yourself from it very easily.

Q107 Lloyd Russell-Moyle: Sometimes some of the public debate has been about debating societies—the Oxford Union, Cambridge Union, Durham and so on—but also other informal societies. Am I right in thinking that because they have no funding relationship with the university they would not be covered by this legislation. Does that not defeat part of the point?

Smita Jamdar: Absolutely. It only applies to universities and student unions as defined, so it would not apply to the Oxford Union or the Cambridge equivalent.

As for informal societies, again, you would have to look at exactly what the grouping was and whether it was even an entity you could define in any way, shape or form—it might just be the individuals within it. What might happen in those situations is that the dispute among the group about what they wanted to do would become escalated up to the university and again resource would have to be spent on trying to resolve what was essentially a dispute between a small group of students over a single event.

Q108 Lloyd Russell-Moyle: Universities often lease out their venues and spaces for external conferences and meetings. Those meetings might well include their students and academics, but they are effectively external activities. Those conferences might invite and disinvite whoever they wanted, depending on whether they were political or academic conference. Would the university then start having to have regard to every single external organisation that was using their buildings?

Smita Jamdar: Only if the speaker fell within the definition of "visiting speakers"—the problem here is that there is an absence of a definition. If you read "visiting speakers" in the context of the preceding subsections, you would clearly read it to mean people invited by staff of the provider, a member of the provider or students of the provider, rather than an external organisation that is using the premises.

Q109 Lloyd Russell-Moyle: But the external organisation might include staff, so the staff might have done the inviting but not in their staff role. Does this become very complex?

Smita Jamdar: It does become very complex. The more you move away from the big obvious case of somebody being denied the right to do the research they want to do or somebody not being able to speak or teach about something they want to, all those complexities really do become quite challenging from a legal perspective, but we can see that they may well materialise.

Q110 Lloyd Russell-Moyle: On a slightly different topic—I would really appreciate your input here—you touched on employment law earlier. In the current employment law protections for academics, are there weaknesses that could be strengthened but are not being strengthened in the Bill?

Smita Jamdar: Again, people have highlighted the fact that in some ways, what the Bill is doing is narrowing what limited existing protection there is for academic freedoms—that is being narrowed. Currently, academic freedom is protected largely through the constitutional documents of universities. Chartered universities—those with royal charters—have to have a provision in their charters, and the post-92s have a provision in their instruments and articles of government. Those do not currently restrict academic freedom to matters within the expertise of the academic, and I know from speaking to employment law colleagues—one of the other things I am not an expert in is employment law—that there are often cases where there is a very vigorous disagreement about whether something was an exercise of academic freedom or not when it relates to criticism of the institution.

I think that the Bill makes it clearer, but probably, from the point of view of those who feel that academic freedom is inadequately protected, it is clearer by narrowing it rather than by addressing any of those wider concerns.

Q111 Emma Hardy: I am interested in hearing your opinions on a couple of things. Earlier, when you were answering questions from John, you were talking about tort and how the process works. I wonder whether you are supportive of the idea of the right to appeal decisions made by the freedom of speech director, as submitted from Universities UK.

Smita Jamdar: Absolutely. As I alluded to earlier, my concern about having a stop at the OfS is that that individual may be required to interpret law, so they may well be required to decide if something is defamatory, harassment, contrary to the Equality Act or potentially a public order offence. I find the idea that those legal judgments cannot then be appealed to the people who are actually able to make legal judgments really quite worrying.

Certainly, if that were to be the case, the process for appointing that individual, and the statutory requirements that must be observed for that individual in their role, need to be much tighter, because you could end up with somebody who is effectively an appointment of whatever Government is in place at the time, and who does not necessarily have any skills or expertise to make those judgments but is the last word on them. Again, in terms of freedom, that does not feel terribly free.

Q112 Emma Hardy: Absolutely. You could have someone who has lost an election and is put in a position of power by the Government of the day making the final decision on what is or is not freedom of speech, with no redress to court to change it. That is a little less free than the Government had perhaps intended.

On the OfS director, earlier we heard evidence that they would be giving guidance to universities and that their role would be in providing that guidance. Can you foresee a situation where a university follows the guidance by the OfS director of the day, the OfS director is changed, and the university is then told that the guidance it followed under the previous administration is no longer correct and it is liable for breaking the law under the Freedom of Speech Act? Do you see that there could be a difficulty with the OfS director being both the judge and the person giving the guidance?

Smita Jamdar: That is always a situation with potential for conflict, because how can you then judge impartially the complaint that comes in, even if it is another part of the organisation that is submitting it? Under the Bill, it would be within the oversight of the director, so there is definitely a problem there. Until quite recently I would have been confident that, as a matter of rule of law, you could not retrospectively apply conditions in that way. However, I am less confident about that than I have been in the past.

I think there are regulatory trends that say that people do sometimes try and retrospectively shift the goalposts. Normally, you would then potentially be able to go for judicial review, and say that this is a decision that is in breach of public law principles, either because it is irrational or in some way procedurally flawed. However, under the Bill you would not have that right because you cannot challenge the decisions of the free speech champions. Bearing in mind that we have to look at the worst-case scenarios, it is possible that, through change of policy, a piece of guidance that was given and followed is now no longer considered to be adequate.

Q113 Emma Hardy: I wonder what you would suggest as a solution to the OfS director—as is stated at the moment—giving both the guidance and being the judge. Do you think there should be a recommended separation?

Smita Jamdar: I would have thought that one of the most useful things the OfS could do is give the guidance, and look at this through its regulatory lens. Having seen how regulation has started to change behaviour at universities in other cases, that might be where we see most of the cultural change we all feel is at the root of this.

The two obvious things that would change the position would be to build in additional safeguards, so that the freedom of speech complaints process is dealt with separately to the guidance. However, that then calls into question the role of the director—it is quite a fundamental shift. Another thing you could think about is saying that if the challenge is about the lawfulness of the speech, rather than some other breach of process, then that has to first go to court before the OfS can adjudicate on it. Then, at least, legal issues are dealt with by someone else—they are not dealt with by the OfS. The final thing would be to introduce a level of judicial oversight into what is happening, so that any particularly difficult and egregious cases could go to court and say that the OfS has not done its job in the way that Parliament intended.

Q114 Emma Hardy: I promise that this is the final question—although I did say that last time. Would you therefore recommend that the OfS director should be someone with a legal background, if not an in-depth knowledge of higher education?

Smita Jamdar: I would definitely say that the OfS director should have a legal background because there is so much law in here to get your head around. My preference would be to say that that person is not allowed to make legal decisions—even if they have a legal background. It just strikes me as conceptually a very difficult idea; somebody who is not a court and not a tribunal making legal decisions. That should not happen. I would go one step further and say take that out of the role.

In terms of understanding the higher education sector, I know that there is always a concern that if you bring in people who are too familiar with the sector then they will not be impartial about these issues. However, everybody in the sector recognises the importance of free speech. The problem is that there are a small number of areas that are highly contested, where different people have different views about what free speech should be. I do not think knowledge of the sector would prevent someone from being able to judge those things impartially. In fact, it might help, because it would speed up understanding the context where this is all taking place.

The Chair: If there are no further questions from Members, I thank Ms Jamdar for her evidence, and we will move on to the next panel.

Examination of Witness

Thomas Simpson gave evidence.

3.29 pm

Q115 The Chair: We will now hear from Tom Simpson, who is an associate fellow at Policy Exchange. We have until 4.15 pm for this session. Mr Simpson, welcome. Could you please introduce yourself?

Thomas Simpson: Thank you very much for having me at the Committee. It is a real pleasure to be here this afternoon. I am Tom Simpson, and I am associate professor of philosophy and public policy at the Blavatnik School of Government, University of Oxford, and a senior research fellow at Wadham College, Oxford. I was one of the co-authors of two Policy Exchange papers on this topic recently.

Q116 Matt Western: Thank you, Mr Simpson, for joining us today. I understand that you are also a veteran of Iraq and Afghanistan. Thank you for your service. I just want to pick up on a few points. I want to start with a general question about how you envisage the provisions of this Bill changing the culture of freedom of speech on our campuses.

Thomas Simpson: My disciplinary contribution here is as a philosopher—that is my academic discipline—and from working in the context of a school of government and public policy. I have spent quite a lot of time trying to think through what conceptual issues are at stake and what institutional means might try to address them.

Many of the reasons that media controversy around this issue arises is that there are these high-profile instances of dismissal or no-platforming. The really deep question is to what degree are they representative of a wider, underlying chilling effect across the sector. In my view, the real significance of this Bill is the long-term impact it will have over 10 years. One way to think about the Bill for those who are cautious about it is that it is really a form of anti-discrimination legislation. In the same way as the Equality Act 2010 has had, over a 10-year period, a really fundamental foundational shift in our public culture in the UK, my vision for this Bill is that, over a 10-year period, it will have a foundational, fundamental shift in culture within the university sector.

One of the complicated questions is really a sociological question. What seems at stake is that these high-profile controversies create a sociological order where a certain viewpoint is considered toxic, or is off the table or not up for discussion, which sends out a chilling message across the sector that you should not engage in that. The legal remedies that plug the gaps of previous legislation will start to stop that happening so that people will start to claim their free speech rights because they know that they are no longer subject to the risks they were previously subject to. As people claim their free speech rights, and as the courts uphold that, that should spread an opening effect across the sector.

Q117 Matt Western: We have heard from various contributors, and there are obviously differing points of view, but it strikes me that in any organisation you have different points of view. I presume that you are able and confident enough to speak out. Why do you think others are not? As we heard from Stephen Whittle, you should just make your points loud and clear.

Thomas Simpson: I decided not to speak out. The first issue I spoke out on was Brexit in 2016. This was a really catalytic issue for me. I was a year away from what is called reappointment to retirement age at that stage. Once I went through that process, which I did successfully, it becomes very difficult to sack me within the University of Oxford's governing statutes, but I would not have spoken on academic freedom as an issue before I went through the reappointment to retirement age process because the public discourse around academic freedom as an issue is sufficiently controversial, even within academia, to mean that I risked jeopardising these formal processes of appointment. That was a personal judgment that I made. Now, the question is: is that a rational judgment?

In the summer of 2019, as I was beginning to think more formally about this, a research paper came out looking at an international sample of philosophers. It asked people to identify their ideological affiliation. What you get in that is that approximately 75% of philosophers identified as left leaning, about 11% as moderate centrists and about 14% as conservative. It then asked people, "To what extent are you willing to discriminate in job appointments, refereeing of journal articles and grant applications, against people of a different ideological persuasion?"

Q118 Matt Western: This was an international study?

Thomas Simpson: It was a study of academics based internationally, so it bears on, but not directly, the UK situation. The finding there is that the willingness to discriminate is bipartisan, so people identifying as both left and right are willing to discriminate against those on the opposite side. In this particular study, it was 55% left against right and 45% right against left.

The consequence of that is that my expectation that, were I to express publicly that, as it happened, I voted leave in 2016 with half the country—half the country went the other way; there were reasonable people on both sides—the likelihood is, given that there is a right-left orientation to that now, that were I to sit on an appointments panel, approximately half of those who identified as on the left, the majority, would be willing to discriminate against me for that position. That is beginning to give evidence that there are rational grounds for that concern.

Q119 Matt Western: You mentioned the figure of 75% being left leaning and you said that it was an international study. I think that in the report you talk about 75% of UK academics being left leaning, so it sounds like the UK is very much in correlation with the international picture, from what you have just said.

Thomas Simpson: Our study really bore out figures that were consistent with the international picture.

Q120 Matt Western: All organisations have different mixes. I would be very interested to know what the poll would be for officers within the UK armed forces—the political balance between them. Is it not just the case that that is the way it is? Academics who work in UK universities—you were also talking about the international picture—come into this work because they have an interest in those subject areas and they want to explore them. That is just the nature of it. I do not believe that heads of department hire people—perhaps you have a different point of view—or heads of department have a different point of view about whom they hire, based on their political allegiance or what their leaning may be. It is perhaps more about an interest in the topics that they have and what that will bring to the university. I think that in this report you talk about balance. This has been discussed during today's sessions: how is it that you imagine balance gets achieved on our campuses through this piece of legislation?

Thomas Simpson: What I agree with absolutely is that most institutions will have some kind of prevailing culture—it may have a political orientation or it may emerge in different respects, so on non-political issues. What is at stake then is whether those who have the majority viewpoint see themselves as entitled to take action against those who have the minority viewpoint, or differ from the culture in some important respect. And that tipping point is what I began to get the sense had changed. Clearly, the public sphere has been under real pressure—in turmoil—over the last five years, but there has been an emergence of a kind of animus associated with political viewpoint, which has made it very difficult to engage on these topics.

Part of the complexity of academic life is that so many of the really substantial decisions—for instance, on research grants, publications and appointments—take place in the privacy of your office. So you are reading documents; you just make a judgment. You are making a judgment of quality; that should be the primary consideration. But your judgment of quality is very difficult to disentangle, as we move into a more polarised environment, from a judgment of, "Is this the kind of person that I would like to have around? Is this the kind of person who is on my side?" And the moment we shift into that thinking, that is absolutely lethal for academia.

My view is that the great proportion of academics are committed to academic freedom, do their work with real integrity and do not fall into these traps. We saw that with the Cambridge University vote. But a relatively small proportion can then exert a chilling effect across a wider set of issues, which then make you, the individual, very reluctant to speak out publicly on that.

Q121 Matt Western: But I sense that you are quite hung up about the figure that 75% of staff or academics in our universities are left-leaning and that somehow this is really a distortion, when clearly it is not, as you said, across the international academic landscape. I mentioned the alternative example of officers within our military. It is just that people of a certain persuasion gravitate to that line of work because that is what motivates and interests them. Surely that is simply the case at our universities.

Thomas Simpson: The question is whether those who do not conform to the majority viewpoint feel a freedom and a permission to speak publicly, and whether they are welcomed in doing that, and my experience has been that that cannot be freely assumed in all the situations that it should be.

Just moving on to the work of the Bill, one of the lines that felt like it was becoming taking for granted in the last session, and that I might want to push back on, was the idea that the OfS would have the last word and that this director of academic freedom would be, in some sense, judge and jury. What the Bill really sets out is a series of persuasive measures by which that director can influence the culture within the sector. Indeed, any particular judgments that they make are not judgments on a particular individual case; they are recommendations, which both parties are free to ignore.

I think that is a very powerful scheme, because what it sets out is that it is a persuasive recommendation; whether or not a particular university would feel subject to it would depend on how well argued it is. The university will be free to take its own legal advice and say, "We think this is not persuasive and would not hold up in a court of law. We will therefore ignore the recommendation." That would then set off a series of events, where the other party felt like the recommendation had not been enacted. It would be up to them to make the decision: "Am I sufficiently confident about the OfS's recommendation and my view on this case that I want to take it to court?" So it would remain the case that the courts would be able to adjudicate on recommendations by the OfS.

Q122 Lloyd Russell-Moyle: Can I come in on this effect whereby you are saying that right-leaning academics are more likely to feel that they need to self-censor, which is kind of what you are suggesting, in an institution? Your report says of academics that are

"'fairly right' or 'right', 32%... have refrained from airing views"

in front of colleagues. However, the report of general academics showed that 35% had refrained from sharing their views in front of colleagues. Now, that may be too high on all sides, but actually it shows that more left-wing academics than right-wing academics feel that they cannot share their views in front of colleagues. Surely this is not a right or left thing. I just wanted to move it away from this right or left thing. This is about making

sure that colleagues feel safe to talk in the workplace, and surely a workplace-based or employment-based law would be better than a law that seems to address some other kind of issues.

Thomas Simpson: I am very grateful for that intervention. I should really be clear again that I start off by saying I am a philosopher. My co-author, Eric Kaufmann, who I believe may be coming tomorrow, is far better placed to answer these questions. So questions of how the study relates to others are absolutely for him.

I think one of the real tragedies of the current situation is that this is seen in the general media discussion of academic freedom as a right-left thing. The history of the issue is a very different situation. So this has been a concern for the political left at very important points—the 1950s in America, most obviously, and the early 1900s in America—

Q123 Lloyd Russell-Moyle: And academics in economics departments?

Thomas Simpson: Right. So my view is that there is a really obvious coalition here of those who are concerned with the long-term health of the sector, to make it a place where tolerance of different viewpoints exists. I think that is very helpful.

There was the final point, on the role of the employment tribunal. One of the important issues here is that this is a multi-strand approach, so I do not think it is necessarily "not this, but that". However, I think there is a very serious question, which lawyers would be better placed to comment on than me, about whether employment tribunals should be a first port of call in cases of dismissal, for instance.

Q124 Michelle Donelan: What do you think is the main threat to academic freedom as things currently stand?

Thomas Simpson: The main threat is the chilling effect.

Q125 Michelle Donelan: And will this legislation address that, in your opinion?

Thomas Simpson: It provides the best means that we have got of addressing it. Whether it will succeed or not, I do not know. We have evidence—I gave you the example earlier of the Equalities Act. The test for the success of this Bill is not what happens in the six months afterwards—whether there are controversies, what happens afterwards. The test for success is in 10 years' time, when it is more embedded.

Q126 Michelle Donelan: Some commentators have said that legislation is not the answer. What is your response to that point?

Thomas Simpson: I think they underestimate the power of law to shape culture. This is a cultural issue within the sector, but I think the law will influence how that culture evolves over time.

Q127 Michelle Donelan: What importance do you place on the role of the director, which this legislation will create?

Thomas Simpson: As I read the Bill, and certainly I suppose in my vision, the director plays a co-ordinating role for the OfS's functions, but the director's decisions should not be decisions that the director makes individually; they are decisions that the board would sign off on. As I have discussed earlier, I think there is a legal recourse for testing what the director's decision should be. But the director should be someone who is active, who is energetic and who wants to drive this.

One of the other questions here at stake—it is one of the missing pieces from prior evidence—is that we have a very valuable document from 2019, the Equality and Human Rights Commission's guidance on free expression. That really carefully walks through very practical details of how the section 43 freedom of speech duty should be implemented in particular situations. Ten key public bodies were brought in to agree to that guidance. There is both a process and an end point that is similar to that for the wider question of academic freedom that the Bill sets out provision for.

There is an outstanding question, which people are right to ask: what is the relationship between this and the Equality Act? In practice, the EHRC guidance threads the needle on most of those issues, and there will be a comparable process for academic freedom more widely.

Q128 Emma Hardy: Welcome. I have a few different questions. Picking up on your point about the Equality Act and how they interplay, would you recommend greater clarification of that in the Bill? I know that we have been promised guidance to follow, but it is very interesting, looking at the evidence that has come out. There seems to be a bit of a coalition between the Free Speech Union and various universities that that clarification is needed. I wondered what your thoughts were.

Thomas Simpson: In the ideal world, that would be great. I do not know what the appetite is within the House of Commons for pressing on that, but I think it would be valuable, were it possible. The EHRC guidance generated considerable consent on how that relationship should be managed in practice. As an advocate of academic freedom and free speech, I think it does so in a way that is respectful of both the demands of the Equality Act, right and proper, and those of academic freedom.

Q129 Emma Hardy: The concern that I have read in the evidence is that it could be left to individual universities to try to manage what is freedom of speech versus somebody's rights under the Equality Act.

Thomas Simpson: In my view, the greatest challenge is awareness within the sector of what the Equality Act requires and, particularly, what it does not require. That is something that the EHRC guidance does a really good job on. I would leave it to the legal people to say whether that should be in the Bill, but it seems to me that the question of how to adjudicate that has already been quite carefully thought through.

One of the areas of extension that has not had the same consideration, and one of the shortfalls of the guidance—this is not a criticism of it, because it fulfils its purpose—is its scope. It focuses only on the section 43 duty as was. There is a wider set of questions about academic freedom, and freedom of teaching in particular, that it does not address.

Q130 Emma Hardy: To press further on that, at the moment the universities have this question of fulfilling freedom of speech "within the law", but they of course have to adhere to non-statutory guidance as well. Do

[Emma Hardy]

you think that needs greater clarification? What guidance exactly are universities meant to follow on protecting free speech "within the law"?

Thomas Simpson: That is not an issue that I have considered previously.

Q131 Emma Hardy: Okay. Finally, I dare not provoke the wrath of Sir John by using the words "unconscious bias training", but you seem to suggest in your role that people unconsciously choose people who are like them and have similar thoughts to them for roles. Do you think that legislation can address the unconscious bias that people have?

Thomas Simpson: Pass—that is a very wide question. I certainly envisage that part of what will be involved in fulfilling the duty to promote academic freedom would be something like holding and convening events for freshers to think about how a university functions, and what it looks like to promote a place of free debate. My understanding is that it has proven very difficult through direct unconscious bias training to unpick that, but someone who is better versed in the evidence could speak to that.

Q132 Emma Hardy: Do you think the Bill as it stands addresses the unconscious bias that people have? We will not mention training, Sir John.

Thomas Simpson: Whereas 30 years ago you might have had a situation where in a small business people said, "We don't want to employ X because maybe she'll be pregnant in six months' time", people now would rightly be very cautious about saying that, and ought to be, and they ought not to believe it. The fact that we have come to that position is in part due to anti-discrimination legislation, which has helped bring to people's minds the dangers of thinking in that way.

One of the challenges that we need to think through in the sector is avoiding the risk of partisan thinking, because such thinking, whatever partisan tribe you are sucked into, generates the possibility of seeing people as indicative of a particular tribe that you might not like. Over time, that norm should embed itself. That is the view and the vision.

Q133 Emma Hardy: So there is nothing explicitly within the Bill other than your hoping that in 10 years we might see an impact.

Thomas Simpson: No, it provides for the means by which that would happen. The functions of the director of free speech are to identify good practice and give advice on how that will take place. I think the vision is that the advice on what that good practice is would be what is required to fulfil the A3 statutory duty to promote academic freedom. Universities that are taking that advice would then start to implement that form of training, whatever it is.

Q134 Emma Hardy: So you see the bonus as being the advice that is given. Is it not possible for the OfS to give advice on something without having to legislate?

Thomas Simpson: I think the crucial thing is that the legislation puts it within the OfS's remit. It mandates that this should be within its remit. I think it was already within its remit beforehand; it just was not being carried out.

Q135 Fiona Bruce (Congleton) (Con): Good afternoon, and thank you for coming to speak to us, Mr Simpson. You have written extensively on this issue, including a substantial paper you co-wrote in 2020 entitled "Academic freedom in the UK". You wrote that you were focusing largely on improving oversight of academic freedom to ensure compliance with existing laws. I would be interested to know whether you feel that the Bill will satisfactorily improve oversight by governing bodies of higher level educational institutions, and whether it will also provide satisfactory extra university appeal mechanisms.

Thomas Simpson: One of the really urgent amendments to the Bill, in my view, relates to the opening duty, what you might call the source duty, in clause 1. The point has already been made, and I think that there is some truth to it, that the Bill changes the emphasis of the statutory duty—I do not think intentionally. If we look at the detail, it states:

"The governing body of a registered higher education provider must take the steps that, having particular regard to the importance of freedom speech, are reasonably practicable for it to take".

I just want to focus on the governing body issue. It focuses the statutory tort from which everything else follows— the statutory duties—on the steps that the governing body must take rather than on the way that constituent parts of the university conduct themselves.

Let me just put that in concrete terms. Suppose there is a case in which someone is not appointed because they are judged to have the wrong view on whatever issue, and they wish to test this and they have evidence that makes them think that is the case. What that person wants to do is test in the courts, "Did I not get the job because of my view?" That is what they want to test. What the statutory duty implies is that the courts will ask, "Did the governing body take the steps that were required to stop that happening?" Okay. That is a very, very different thing. Testing that is asking, "Have they had a discussion on the governing body of which there are minutes to record this happened? Did they put the right training in place? Did they appoint the right people? Is there some error that they have made?" What wants to be tested is whether the individual was treated unfairly in some sort of way.

Sending in the report, we advocated for a direct duty to be placed on higher education providers and not on the governing body of it to take steps. That is a really vital measure.

Q136 Fiona Bruce: May I look at the subsection after the one you have quoted from. Subsection (2) states that the

"objective is securing freedom of speech within the law".

Is there some merit in considering an amendment so that it reads, "the objective is securing freedom of speech without unlawful interference"? That would focus the minds of those who are assessing the situation on whether the interference has been unlawful, as opposed to whether the speech is within the law or not, which brings into play all the complexities about the interpretation of what is within the law and is not, in terms of harassment and so forth.

Thomas Simpson: I would need to think more carefully about the specific wording that is at stake there. Perhaps I can come back on that, because another really important question is raised by clause 2: the coverage of the duty.

The coverage of the duty is currently specified as the staff of the provider, members, students and visiting speakers. In academic life, there is a really important category of what you might call affiliated academics—people with visiting fellowships or emeritus professorships, guest scholars or life fellows. The wording does not make it plain that such people would be included. Many of the specific controversies are about people not losing their jobs, because part of the charter of the university prevents that from happening or makes it very difficult for it to happen. But honorific positions lead to people being dropped like a hot potato.

Q137 Fiona Bruce: Thank you. That is a very relevant point. In fact, I will turn to proposed new part A3 of the Higher Education and Research Act 2017, which is the

"Duty to promote the importance of freedom of speech and academic freedom."

It talks about promoting academic freedom for academic staff, and what you call affiliated academics could probably be included. What about academic freedom for students?

Thomas Simpson: That is a very good question. One of the possibilities that exist, and that I would commend for revision of the Bill, is to think about a wider definition of academic freedom. In the English law context, we talk about the duty to protect freedom of speech in section 43 of the Education (No. 2) Act 1986, and the Education Reform Act 1988, which prevents dismissal. The much longer discussion of academic freedom tends to associate a number of other activities with it. Freedom as to how you teach would be a classic component of academic freedom—your freedom not to have your curriculum dictated to you as a teacher—as would your freedom to criticise your own institutions. The case law of the European Court of Human Rights has established that, and it goes back to UNESCO's 1997 definition and prior cases.

The ability to publish and disseminate the results as you see fit is another activity that would classically be viewed as part of academic freedom. Currently, the Bill does not provide any specific protection for that, so a valuable addition to the Bill would be to expand the definition of academic freedom to include those kinds of activities. The wording for that needs to be carefully thought through, because this would be an innovation in terms of the recent history of legislation in the UK, but I think that would be a really valuable function for it.

Fiona Bruce: That was my next question, so thank you for answering it in advance.

The Chair: Four more Members have indicated that they want to ask a question. I call Kevan Jones.

Q138 Mr Jones: I am very clear that where we need legislation to protect people, I will support it. That is the way we should operate. I struggle with the Bill and understanding what the problem is. You used the phrase "chilling effect". We heard this morning about people self-censoring, which is a very difficult concept to understand. You seem to be saying that the legislation will be a bit like equal rights legislation, but may I respectfully say that it will not? With equal rights legislation, at least you can define things—for example, you can define whether a woman is pregnant and whether she has been discriminated against. Defining notions of free speech will be very difficult.

Perhaps I am old-fashioned, because I do not believe that the state should intervene where it is not necessary. That is why I find the Bill, which comes from the Conservative party, very interesting. I am someone who believes that, with guidance—I am not suggesting that the existing guidance should not be used—academic institutions should be allowed to police themselves. Apart from Policy Exchange wanting to do a paper, and the examples that you have picked up, what is the extent of the problem? No one has been able to explain it to me. The Minister did not explain it on Second Reading, and you have not done so either. What is it?

Thomas Simpson: One of the things that really strikes me is often overlooked in this debate is the structural similarity between discussions around free speech and discussions around other forms of discrimination. We have rightly been thinking very seriously about racial discrimination in the past year and a half in particular, and one of the features of that debate is that people who may not themselves be subject to discrimination on those grounds are often cautious or outright sceptical that there is a problem here, whereas those who are subject to it, or at risk of being subject to it, are often very clear that there is a problem here. There is an asymmetry of perspectives.

Q139 Mr Jones: With respect, Mr Simpson, that is nonsense. If someone is black and they are discriminated against, whether in delivering a service or in a job, you can define that. What we have here—what I am trying to get to—is that you have used this phrase, "chilling effects", which might get nice headlines, but does not actually define what the issue is. In terms of existing legislation, given that most universities have charters that protect freedom of speech, what is it that is not there at the moment? I have to say, I do not agree at all with the analogy with equality legislation, because it is not the same at all.

Thomas Simpson: There are two problems. One is that existing statutory duties have very weak means of enforcement, so my view is that those gaps should be plugged. Two of the controversies in Cambridge in 2019 were around the dismissal of Noah Carl and its rescinding of the visiting fellowship invitation to Professor Jordan Peterson. Regardless of the merits of either case—I do not know the details of them—the astonishing thing about that was the lack of due process. The university in one case, and the college in the other case, made the decision, and there was nothing that the people involved could do, or very little that they could do: there were not ready legal means. There needs to be legal remedy.

Actually, one of the really surprising things about this discussion is that it is not an argument against taking measures, specifically in the human rights case, to guard against human rights being breached. You do not need to show that there are lots of patterns of human rights being breached.

Q140 Mr Jones: But, with respect, those are covered already by the equality legislation and the Human Rights Act. You do not need another piece of legislation.

[Mr Kevan Jones]

You said earlier on that you would get a situation where, for example, somebody was not appointed because of their views, and you came up with this issue around right-left academics. My experience is that the reason people are appointed is usually old boys' networks—and it is usually boys—within universities, not because of their political views, but this legislation is not going to stop someone not being appointed. You are not going to get someone at an interview saying, "I wouldn't appoint you because I disagree with you on x, y and z and what you have said." They will find some other reason, so can you explain where the Bill is going to actually do that? I cannot see it. It will not happen.

Thomas Simpson: Exactly the same charges were made against the original passage of anti-discrimination legislation.

Q141 Mr Jones: No, it is different. In those cases, you can actually define it: if, for example, a woman is pregnant and there is evidence that the individual did not get the job or was not promoted because of their sex, their gender or because they were pregnant, for example, you can define that. You can't in here, and the problem with this Bill is the same problem that we had—with great respect to Policy Exchange—with the Overseas Operations (Service Personnel and Veterans) Bill, which set out to solve a problem that was not there and ended up in a situation where we took rights away from veterans and made things worse.

The issue I have with this is that, with a Conservative Government, shouldn't we be upholding the freedoms of universities to decide what they want to do within the legal framework that is there, rather than what this is? It is going to put the director in a position whereby they will be able to dictate terms. Now, that might be okay when you have a Conservative Government, but what happens if you have a radical Government of a different persuasion that then starts saying to universities, "You will do x, y and z"? That is why I find it very difficult to understand the reasons why Conservatives are backing this piece of legislation, because interventions on that level are not what it says on the tin of conservatism.

Thomas Simpson: The legislation does define it. It says that one of the objectives is

"securing that, where a person applies"

for a given job,

"the person is not adversely affected in relation to the application because they have exercised their freedom within the law",

referring to an earlier clause.

Q142 Mr Jones: How do you prove that? You cannot. In future, let's say you get a Government of a different persuasion who puts a director in there who says, "Right, the new guidance is X, Y and Z. You will not be able to teach certain right-wing views on economics or various things." The state is intervening in an area that I find remarkable that the Conservatives should be supporting.

Thomas Simpson: The current situation is one in which universities mark their own homework about whether they have complied with the duty.

Mr Jones: They do not.

Thomas Simpson: There is no accountability mechanism.

Q143 Mr Jones: That is not true, because there are boards of universities. There is the advice put out in present legislation—I accept it might need updating, but you do not need legislation to do that. There is an idea that university boards just sit there and nod through things with academics—they do not. They challenge; that is their job. But it is not the job of the state to run universities. That is the thin end of the wedge with this legislation.

Thomas Simpson: What this creates is an ecosystem of accountability, both within the sector and external to it.

Mr Jones: I beg to differ with you on that.

Q144 Sir John Hayes: I am grateful to Emma for drawing attention to my views of the relationship between consciousness and unconsciousness. That is a philosophical debate we could have. I am interested to talk about your views on trust and truth, and whether you think trust is found through synthesis or, as Hegel said, truth was—but let us talk about that on another occasion and in a different place. Dealing with truth and trust, how far has the culture in universities changed? Has this concern about free speech and openness altered in recent years, in your view?

Thomas Simpson: I can give my personal experience. I am cautious about drawing too strong conclusions from that. My personal experience was that as an undergraduate from 1999 to 2002, I felt free to argue a position in my final year dissertation that I knew my markers would reject, but would recognise the quality of the work on its own merits. I had the confidence to do that. The topic was whether God existed, broadly speaking. Cambridge was a very secular faculty at that time; I was examining a recent contribution to that debate.

I had a moment about three years ago where an undergraduate student in a different department from where I work was talking to me about their political philosophy paper. They had written all the ethics of migration, which is a sensitive subject. The philosophical debate is whether countries have the right to control who crosses the borders into their country. The two positions are what is called open and closed borders. The philosophical debate is already right on the edge of the Overton window for public discourse on that topic. It became clear in the conversation that the student's personal views were in favour of closed borders, so I said, "What did you argue for in the essay?" The student replied, "Oh, I argued for open borders. It would be silly not to do that, because that is where the lecturers were coming from."

That to me had a sense of tragedy: here was an individual who believes something different and thought they had arguments for that, but felt that the grade they would receive on the exam would be different because of the content of what they argued for. That sense of danger about particular viewpoints is something I have sensed grow within the university over the last five or six years. I think it roughly tracks some of the turmoil we have had in the public space more generally in that time. It is mitigating somewhat now, but the patterns are in place and we need to take steps to counter that.

Q145 Sir John Hayes: The implication from earlier witnesses, Arif Ahmed, Nigel Biggar and others, is that there is what amounts to a culture of fear. You are setting out the very reason why the Bill is pertinent now there

has been a change. Is it that what is acceptable has been redefined, and what is unacceptable is now no longer permissible? It will always be true that there will be differences of opinion, and some people would find certain views agreeable, but is the change that ideas have gone from being disagreeable to, in effect, prohibited?

Thomas Simpson: I have been really inspired by the observation that Scalia and RBG, the two SCOTUS justices, used to go to the opera together. They were ideological opposites and I am sure that they even viewed the other person's views as reprehensible at times, but there was a collegiality about their ability to do their work together. That collegiality exists in very many places, but it is under pressure, and that is the challenge that we are facing.

Q146 Mr Jones: Where is the evidence?

Thomas Simpson: I have already given the evidence.

Mr Jones: We need figures, facts and this, that and the other, but we are not seeing any of that.

Sir John Hayes: Perhaps a way of resolving the difference of view between the right hon. Member for North Durham and the witness is for the witness to cite some of that evidence in writing as a follow up? I would like to know about courses that have been cancelled, stopped or never delivered, speakers who have not been invited or where invitations have been withdrawn, and funding that has not been granted on the basis of all of those things being "unacceptable". It would be very useful if you could provide some kind of note with that as a follow up, which will hopefully allow us to move on.

Q147 Gareth Bacon (Orpington) (Con): Paraphrasing slightly, you talked about the chilling effect when you were answering the Minister earlier. Over what period of time do you think the chilling effect, as you put it, has developed?

Thomas Simpson: In my view, the past five years have been particularly difficult. I think it is a longer-running trend and probably stretches back to early 2010s. I was out of academia for a key period during the early 2000s. I do not know where the data is on that. If I may come back on the data question, Professor Eric Kaufmann is in a much better position on that, as that is his speciality, whereas I am the philosopher here, so he would be well placed to speak to about those challenges.

Q148 Gareth Bacon: You also said—again, I paraphrase, so if I get it wrong, correct me—that you did not know if the legislation would succeed, but it was the best chance of leading to a cultural change over, perhaps, a 10-year period. If I were to ask you to speculate, if the Bill were not taken through, what would we see happening over the next 10 years?

Thomas Simpson: At the moment, the crucial question is the position of those involved in university leadership and administration. At the moment, if someone says something controversial, even reprehensible, a group of people on social media organise a campaign against the person, but for a university administration making a decision on whether to allow the event to go ahead, whether to rescind availability of premises, whether to allow this person to stay in post or whatever it is, their incentives are, "I am concerned for the reputation of the institution and what I am seeing is a lot of outrage on social media; that is what I am seeing." The incentives are to give way to that and that is what we have seen. That is the presenting issue in these high-profile controversies.

What we need is to change the incentive structure for individuals in that, and not just change the incentive structure but affirm through legislation and through, as it were, the public speech of Parliament that academic freedom matters. When this happens, it will allow people to hide behind the legal duty. The conversation is such now that even speaking in favour of academic freedom makes one liable to accusations of being a reprehensible person and what a horrid attitude it is that you are hiding. Even universities feel that pressure, I think. The danger is that we just carry on in the current trajectory, which is that events do not go ahead and people hold their tongue. Our research environment and the hurly-burly of debate on campus just becomes not a hurly-burly, but one in which there is a prevailing viewpoint.

Gareth Bacon: It seems to me that what you are describing the difference between mob rule and the rule of law.

Mr Kevan Jones: Oh for God's sake.

Gareth Bacon: You have had your say, thank you very much.

Thomas Simpson: I am very cautious about the language I would use to describe that situation, but I want the rule of law rather than the rule of politics. That is the frank truth.

Q149 Matt Western: You cited the examples of the two academics at Cambridge to illustrate your position. Surely those particular cases needed to be dealt with by changes to employment law—and that is the issue with this Bill. The Opposition understand that there are certain things that need to be updated in employment law, the online harms Bill legislation and maybe in equalities, but this seems to be the wrong way of going about it. In the two cases you quoted, surely employment law would have sorted that?

Thomas Simpson: As I said earlier in the evidence, I would seriously support considering introducing the employment tribunal as the first court to consider cases of dismissal in that situation, in addition to the existing measures in here.

The Chair: There are no further questions from Members, so I thank Mr Simpson for his evidence, and we will move on to the next panel.

Examination of Witness

Dr Bryn Harris gave evidence.

4.15 pm

The Chair: We will now hear oral evidence from Bryn Harris, who is the chief legal counsel at the Free Speech Union. May I ask you to move forward, Mr Harris? I remind Members that we have very limited time for

[The Chair]

these sessions, and we have until 5 o'clock for this one. Welcome, Mr Harris; please introduce yourself for the record.

Dr Harris: Thank you very much. I am Bryn Harris, and I am chief legal counsel at the Free Speech Union.

Q150 Matt Western: Thank you for joining us today. I am not very familiar with the Free Speech Union—can you just explain to us where the FSU receives its funding?

Dr Harris: From our members and from donors. We are a member-based organisation, and people pay a subscription to be members of the FSU. That accounts for a large part of our funding.

Q151 Matt Western: Would you mind giving some examples of the range of membership you might have—being transparent about it?

Dr Harris: The prices, do you mean?

Q152 Matt Western: Not the prices—the bodies, the members. Who are they? At the moment, perhaps I am the only person here who does not know much about the FSU, but we are about to take experienced witness evidence from you, so I am trying to understand more about who is behind you and what the purpose of the FSU is.

Dr Harris: In terms of the range of members, certainly we have a good number of students, and we have had a good number of higher education cases. The last time we did the figures, it was about 30%. There is then a large number of employment cases—when I say cases, I mean when someone comes to us with a dispute relating to freedom of speech—I think another 30%, although I can check the figures later if you would like. They obviously vary very much in their background and the disputes they bring to us.

One thing I would say is that the people who come to us in trouble are very often not at all privileged. They are people who are in trouble with an employer or a university that, we believe, is abusing its power and essentially punishing that employee or student for saying something that it finds distasteful.

Q153 Matt Western: So you are funded from fees from those who can afford it, and from donations? Would that be right?

Dr Harris: That is correct, yes. We also have a discount fee for students and those on benefits.

Q154 Matt Western: I will bear that in mind.

Dr Harris: You already have free speech—you are an MP. You are protected.

Q155 Matt Western: Let me move on. You have described the statutory tort, which we discussed at great length earlier, as a real game changer. Is it not merely a game changer for vexatious complaints that might just happen to come your way, from the likes of vexatious litigants, climate change or genocide deniers, who can shelter behind this very wide tort?

Dr Harris: There are quite a few things there to pick up on. First, contrary to what you might believe, our ambition for this Bill is not to be racing to court every so often bringing cases. We want to see that universities are urged to comply with it and that they respond to avoid the new liabilities that it creates by protecting freedom of speech. I know the issue of vexatious litigants was an issue that concerned a lot of Members on Second Reading, but I see little chance that this will be particularly attractive for the vexatious litigant. There are a number of reasons for that. First, the new OfS complaints scheme has the power to filter out vexatious litigants. We do not know yet, but it is likely that anyone who wants subsequently to bring a claim in the courts will be required to go through the OfS first, as a form of alternative dispute resolution. That is one way in which I think we are likely to see the weeding out of vexatious litigants.

The other point to note is that any right potentially attracts vexatious litigants, including fundamental human rights such as freedom of speech. We have to be careful about backsliding on protecting fundamental rights on the basis that there is a potential risk of vexatious claims.

The other point I would make, which is very important, is that I think a lot of criticism of the Bill seems to portray the courts as supine—as passive. It completely misrepresents the fact that the courts have considerable case management powers—that they can strike out vexatious claims and that a claim with no real prospect of success can be disposed of at summary judgment. That is not to mention the practical difficulties of bringing a meritless claim. You are going to be open to adverse costs, because you are wasting the court's time. All of those protections are in place and restrain the vexatious litigant, so there is no real reason to identify this particular new statutory duty and correlative right as enticing the vexatious.

Q156 Matt Western: I understand that you have commented elsewhere that you believe that the normative power of changes to the law can shift social values. Do you not recognise that the Bill could have the inverse effect and shift social values towards being less willing to hear a diversity of views, for fear of being sued?

Dr Harris: I am not sure I said that, but it is still a good question. It is hard to see in that situation where the danger of being sued arises. My understanding is that this is likely to make it much easier to secure diversity of opinion in the higher education section, because it will be difficult to punish students who say things that are distasteful to some and it will be difficult to rescind invitations to speaking events, and there will also be this enhanced freedom—the academic freedom—for members of staff. That creates a framework, but no more than a framework. I am trying to answer your question; if I have not, I am sure you will tell me.

Nothing in the Bill will make people value freedom of speech. The law cannot make anyone ethically say that freedom of speech is a good idea. It will not, of itself, create a culture of free speech, which is what we really need, and it will not, of itself, make academics start disagreeing with one another, but it will create the conditions by which that can happen. It will allow those who seek to restrain such diversity—those who believe there should be a degree of uniformity—to now be restrained. It creates the conditions by which those changes can happen, but I very much believe that it is for the autonomous institutions themselves to change those cultures. All the law can do is set the ball rolling and create the framework.

Q157 Mr Jones: Why do we need legislation to do that for those institutions? Most university charters have such points in them. The 1987 Act has it in there as well. Why do you need legislation to do that? Surely it is about upgrading the guidance and so on.

Dr Harris: You are right that—at least following the 1988 Act—many universities have in their statutes clauses protecting academic freedom, and that tends to be in the same wording. In terms of why we need law, again, I think we come back to the question of whether we regard and respect freedom of speech as a fundamental right. I think most people here—and, I hope, most lawmakers in a liberal democracy—would agree that it is a fundamental right and that it is fundamental to the flourishing of the individual and the running of civil society. Universities certainly pay lip service—if I can say that—and when challenged, they will always say, "Freedom of speech is our lifeblood."

Q158 Mr Jones: It depends how you define it. What the Bill is doing is letting the state determine what freedom of speech is going to be. I accept that everyone agrees what its broad definition should be, but as I said to the last witness, there is a danger here that you will actually have the state, whatever its political persuasion, intervening in academic institutions. Surely that is bad?

Dr Harris: On the definition question, I heard your questions to Professor Simpson. All rights are difficult to define, but that does not mean therefore that we are at a loss. I think the court in Strasbourg, and certainly the US courts, would disagree that freedom of speech is something that is impossible to define. I do not think the idea that we will sort of give up or backslide because it is difficult to define a fundamental right is a serious position. Yes, it is much more difficult to define than pregnancy, which is famously binary—you are either pregnant or you are not—but nevertheless, courts and legislatures are able to define more closely what a right should be.

Q159 Mr Jones: And define it in their own image as well.

Dr Harris: I am not entirely sure. What do you mean by that? Those who are favoured by the powerful are allowed to speak?

Q160 Mr Jones: I am sure if we were sat in the Russian Duma, they would argue that they have freedom of speech there. I think we would take a very different view.

Dr Harris: To go back to the point about the intervention by the state, I think it is important that we are clear what we mean by "the state". There is obviously a role for the OfS—an administrative form of adjudication—and perhaps we can come back to that, as I think it is a very relevant issue. It is entirely in keeping with any right that it is enforced by law and that there is a remedy when there is infringement of that right. That is simply what a right is. There are a number of people who are saying, "I believe in free speech as a right," and then they baulk when we say that it must be enforced by the courts and there must be a remedy. That suggests to me that they do not take free speech seriously as a right, which as I say, is not a credible position in a liberal democracy.

Q161 Mr Jones: But its definition could be determined by who the Government appoint as director or by the advice that they are given at the time, so that is a highly political situation. It might be comfortable for the present Government who are in control at the moment, but if you had a Government at the other extreme who want to take a very different view, by being able to appoint an individual or make an intervention like that, they could define freedom of speech in a completely different way that you and I would completely disagree with.

Dr Harris: To a degree, I agree, but the director must enforce free speech within the law, and the director will have no power to say what the law is. If the director misdirects him or herself as to what the law says on free speech, it can be challenged in the courts—it would be an error of law.

On the question, I think that, ultimately, what will happen is that there will be definition and enforcement by the courts of those duties and rights created by the Bill. It is correct to say that there is a role for an administrative body, the OfS. That is a trade-off that it is often necessary to make. It is worth while to have a cheap, informal and quick form of adjudication. The idea that every dispute—especially for students—should be taken to court, is simply impractical. Even though there can be drawbacks with administrative adjudication, it is essentially a stopgap so not everything has to go to the courts. Ultimately, the free speech that we are talking about here is defined and enforced by the courts. It is free speech within the law. We should all be happy with the idea that free speech is a right enforced by the courts.

Q162 Matt Western: You say that this is a real game changer, this piece of legislation. According to the OfS, we have had fewer than five events cancelled in universities in the two years between 2018 and 2020. In your submission, something like less than one incident a month for the last five years has come to you. There is quite a mixture of cases and incidents that have been brought to your attention, including several WhatsApp messages from students on campus and so on. Are you not guilty of a bit of hyperbole to say that this is a real game changer? The universities need to work with the OfS to tighten up processes, adopt best practice and change individual legislation, as we discussed earlier today, as opposed to adopting the Bill.

Dr Harris: Every MP must decide for themselves how happy they are to turn a blind eye to infringement of a fundamental right and how happy you are to pay that political price.

Matt Western *indicated dissent.*

Dr Harris: I see you shake your head, but I think that is an important question. At what point do we say we see here abuse of bureaucratic procedure, essentially to enforce a monoculture? We see abuse of disciplinary processes, and those who are affected are predominantly, as we see, our young and very often people who are in their first year at university—very young people—who do not know what to do. They feel bullied. We are talking about, in some cases, particularly with many gender critical female academics, lives and mental health ruined. We need to have a sense of what is our quantum here. How much of this are we prepared to tolerate before we decide that something needs to be done in order to change it?

The reason I think the Bill is necessary is that the mere existence of the legislation as it is on the statute book—there can be no doubt that it is there on the statute book, and you will find the Education (No. 2) Act 1986—is not enough. It needs to have practicable, reliable means of enforcement. That is why, in too many of these instances of people's lives being ruined and of people being bullied, it has happened too much because it is too difficult for there to be a realistic threat of enforcement. That is because judicial review, which is the means of bringing a claim under section 43, is very expensive. You really have to lawyer up and it is not practical.

Matt Western: I think you are misrepresenting me there.

The Chair: In the interest of trying to get every Member in, can you keep your answers a bit more succinct? I recognise that they are very complicated and it is a complex issue.

Q163 Michelle Donelan: We have heard a great deal that is counter to your view about this notion that you can achieve this without legislation and that you can achieve that cultural change. What would you say in response to somebody who says that you can actually achieve it without the legislation?

Dr Harris: Again, the question is how much of a risk are we willing to take? I think there is some truth in that, and going back to the previous question, it seems to me likely that there has been a tail-off in speaker cancellations, and many people on Second Reading brought up that fact. It is very possible as well—I can only speculate—that it is probably the negative press attention that cancellations attract that has led to that downturn. So you may say that is an example of a good result without legislation.

I think the problem is that, given the importance of what is at stake here—not just protecting people who stand to be bullied and have their lives made miserable, but also looking at a value that is pretty much integral to universities as public bodies and to their function and their value—it seems to be rather remiss to say that we will entrust those things to, essentially, unreliable mechanisms—"As long as *The Telegraph* keeps on publishing these stories, we know the universities will keep on the straight and narrow." I do not think that is an adequate safeguard. I think it is absolutely the job of Parliament to say that public bodies must protect fundamental rights and deliver the value that is central to their public function. That is not simply a good thing; I think it would be odd if Parliament did not.

Q164 Michelle Donelan: Do you think that breaches of the current duties are going under the radar? What impact do you think they are having on individuals? That is what Bill is intending to impact—it is intending to change the lives of academics and students.

Dr Harris: To give an example, one of our members is Dr Abhijit Sarkar, a scholar of Indian political history at the University of Oxford. He specialises in research into far-right Indian politics, or so-called Hindutva. He posted on Instagram about the president-elect of the students' union. He alleged that she herself was a Hindutva, a far-right Hindu nationalist. He backed it up with the fruits of his research and pointed out the various signs and tell-tales of codes that British people like me would not pick up on. It is sort of like what *Searchlight* do in pointing out the signs of the far right.

There was an extreme campaign against Dr Sarkar, and I have some details of the threats made against him, which have gone to the university. They include: "You die with your spine broken", "You and your subhuman kin need to be culled and wiped from the subcontinent" and, "I request to start a campaign to bring that bastard to India" In response, the university disciplined Dr Sarkar and called him in for investigation. I cannot, and Dr Sarkar cannot say, what the outcome of that was. What is telling for me is that this was a situation where an academic was really fulfilling a public watchdog role. He was telling people that these were the tell-tale signs of far-right nationalism. When his life was threatened, the university still could not bring itself to take his side. They could not stand behind him and say, "We are with you and we support your academic freedom."

That, I suspect, is a major part of the trauma that is caused by this. It is this feeling of isolation—that there is no one who has got my back. We see that with the gender critical feminists. There is a member whose mental health has been destroyed—I cannot mention her name. There was a campaign of harassment against her and it was brought to the attention of the university. Nothing happened and she was managed out in a sham redundancy. This is the effect. What has come before us—the cases we have dealt with—are not exhaustive; I suspect they are representative of a wider phenomenon, and I think it is too much already.

Q165 Fiona Bruce: Good afternoon, Dr Harris. Do you think the duty to take reasonably practicable steps to secure free speech is adequate—the duty in clause 1 and elsewhere in the Bill?

Dr Harris: It is difficult to say, and that is the problem. The Government and their lawyers have perhaps missed some opportunities to bring greater clarity and perhaps have not been as ambitious as they could have. "Reasonably practicable" steps largely replicates the wording of the 1986 duty. The problem is that in that interim there have been very few cases where the courts have considered the meaning of that. One ambiguity is if a court were asked to consider what "reasonably practicable" steps means. There is a possibility that they would say it is pretty much for the university's discretion to decide what is reasonably practicable, and the court will simply insist that it not be irrational—that it not be Wednesbury irrational. That is a very low standard of irrationality. It is: "Don't be completely unreasonable." In the light of that, it is disappointing that there has not been more to state what that means.

Another ambiguity is that obviously since 1986 the Human Rights Act has become law, which means that this duty now sits alongside the section 6 duty of the Human Rights Act that a university must not act incompatibly with the article 10 right to freedom of speech, so I think that there is a bit of a missed opportunity to say how the two duties sit alongside each other. Do they essentially mean the same thing or does the Bill superimpose a positive duty—the Human Rights Act says that you must refrain from incompatible acts, and then the Bill says further that you must positively take steps to secure freedom of speech?

That is one potential interpretation, so I think my answer is that there is too much pot luck in this. There is too much hoping that when the courts get around to asking what this means they will tell us. I think Parliament should decide what it wants to do and say it, rather than leave a gap to be filled by the courts. Saying "all necessary steps such as are reasonable to secure freedom of speech" would be a very clear way of at least achieving clarity. Some may disagree, but it has the benefit of being a clearly defined duty.

Q166 Fiona Bruce: The word "reasonable" qualifies it, so that for example if security costs were a quarter of a million pounds those steps probably would not come within the clause, but if security costs are modest to ensure that an event goes ahead then the university should take those steps.

The Chair: Dr Harris, may I remind you to keep your answers brief?

Dr Harris: Sorry. Yes, correct—that is possibly how it might be interpreted. This has been litigated in the case of Ben-Dor, where it is perhaps contestable whether the court was right to say that the amount that it would have cost was an unreasonable amount. Ideally, what we would see here is an elaboration of what "reasonably practicable steps" means. You could say it shall include a duty to cover such security costs as are necessary to enable an event to take place safely.

Q167 Fiona Bruce: In your evidence, you say that you "believe Parliament should decide, in this Bill, how this conflict is to be resolved"—

the conflict being that between whether provocative speech is free within the law or conduct having the effect of harassment. Can you clarify that, because this is a really complex but very important issue in our deliberations on the Bill?

Dr Harris: I will be as succinct as I can. Opponents and supporters of the Bill can hopefully find agreement that it potentially puts VCs and universities in a very difficult position. It will create borderline cases where it is difficult for the university to know whether in allowing an event to go ahead they may open themselves up to liability for harassment. It may be harassment of employees, for instance. Alternatively, if they decide that it is not quite harassment, could they then be sued because they failed to secure freedom of speech?

This is the result of the duty being essentially parasitic. It says that you must secure free speech as the law defines it. The Bill does not amplify or further define the right to free speech. I think that there is a conflict there. I do not think that it is fair to just lumber it on universities. I think there is a danger of universities responding by being completely risk averse—becoming simply anodyne—and I think it is for MPs to show some thought leadership. We have these two incommensurate values: the prevention of offence related to protected characteristics and protection of free speech, and I think it is for MPs to decide how we reconcile those two values. I do not think we should outsource the decision to universities.

Q168 Emma Hardy: Interestingly enough, those were the points that I was going to cover. That is interesting indeed, with your comments about the competing obligations under the Bill and the Equality Act. I know you have suggested that MPs resolve this, but, looking at some of the other evidence that we have had, would one step towards that be to make it explicit on the face of the Bill that universities, in doing this, must also take equality legislation into account, along with some of the non-statutory guidance—Prevent, and all of those other things? My concern is that none of that is in this at all.

Dr Harris: I think that there are a number of options. In the Bill at the moment, the OfS has the power to issue advice. However, as you say, there is nothing equivalent to the Counter-terrorism and Security Act 2015, whereby the university will be under a statutory duty to give due regard to that advice.

There are a number of options. One would be that there be new guidance, perhaps from the OfS and the Equality and Human Rights Commission, setting out clearly the scope of the Equality Act, when it is not a justifiable grounds for infringing free speech, and the true extent of a university's liability—for instance, like the fact that universities are not liable under the Equality Act for what their students do. That is quite important. That is a good, soft way of doing it, but the potential drawback of that is that the Equality Act is already fairly clear in its definition of harassment in section 26, in that it has this safeguard of

"whether it is reasonable for the conduct to have that effect.".

What we are seeing in relation to reporting websites where students can report harassment—it was seen at the University of Essex, regarding Rosa Freedman and Jo Phoenix—

Q169 Emma Hardy: I am interested in the Bill, rather than having a Second Reading debate on whether we should or should not have this. As the Bill stands, it does not contain anything about universities having to take account of existing legislation. It just says "within the law", which feels a little vague to me.

With your comments acknowledging these competing obligations, my question to you is more, as a lawyer, how can that be remedied in the Bill? Could there be a concern over primacy with new case law existing outside universities, and what an OfS decision is, in terms of interpretation of the Equality Act and interpretation of this?

Dr Harris: The Equality Act is already is there by virtue of "within the law", so it does not need to be explicitly stated. A university will have no duty to secure the right to harass someone, and it will not be in breach of the Bill if it censures an academic for discrimination or harassment. That is already there, in the Act. I am saying that one way to resolve the potential conflict that we were talking about, between the Equality Act and this Bill, would be to have guidance to help universities navigate this very fine line.

That is one way of doing it. The other is for Parliament to re-clarify the definition of harassment with relation to universities. I accept that getting into the Equality Act is very controversial and tricky terrain, but the explanatory notes of the 2010 Act, as enacted, quite clearly say that in making findings of harassment, courts should take into account academic freedom. I think there is a lot that can be done that would not substantially change the Equality Act, but that would clarify how it applies in the academic context.

Q170 Emma Hardy: It is interesting, because in some of the evidence that we have had from the universities, they have asked for that clarity. They said that,

"absent further clarity in the Bill, this would be an untested assumption, and an HEI/SU relying upon this assumption may carry a greater risk of being exposed to a free speech challenge".

They were requesting that clarity in the law, so your comment is interesting.

Dr Harris: Universities often go beyond what the Equality Act—

Emma Hardy: Because they have the Prevent legislation and much other non-statutory legislation that they are expected to follow.

Dr Harris: That is correct. I have not yet seen evidence of over-application of the Prevent duty—at least I have not seen it, and certainly one sees more of that in schools—but, first, universities need to agree on what the Equality Act actually requires of them. They need to—

Emma Hardy: Sorry, it is not just the Equality Act. Universities are expected to follow a number of statutory measures and non-statutory guidance. My concern with that—one shared by a number of people—is that it could have a chilling effect, with universities being risk averse.

Dr Harris: There will be a balance of competing obligations. That will always happen. One thing that I would certainly say is that, realistically, the risk in most cases will be quite low. Universities are not really dangerous places. It is not like serving in the infantry. There will be some instances where it is borderline, where it is very difficult to sort out a conflict between two competing obligations. One way to minimise the problem that you are talking about is for universities to start taking a more pragmatic approach to those liabilities. For example, if you look at a number of external speaker policies—they are essentially codes of practice under section 43—you would think that putting on an academic talk was a terribly dangerous event.

Q171 Emma Hardy: I am going to tie you down to talking about the Bill, because we are running out of time. Your recommendation, therefore, would be for guidance to clarify that possible tension between what the Bill is trying to do and existing legislation.

Dr Harris: That is one proposal. I think that universities would probably ignore it, just as they have ignored the Equality Act—

Emma Hardy: I was referring to guidance from the Bill, but okay.

Dr Harris: It is one option. You can create a duty to have due regard for guidance. That is one option. For universities, it would not be enough to get them—

Q172 Emma Hardy: You would want it in the Bill.

Dr Harris: One thing you could do is to amend the Equality Act in the Bill to state that, in the academic context, universities must have due regard—

Q173 Emma Hardy: As we said, it is not just the Equality Act but all the other pieces of legislation. Would you wish to amend them all through the Bill?

Dr Harris: No. Because I do not think that they pose the same difficulty and there is not as much systemic overreach.

Q174 Emma Hardy: Finally, the online safety Bill will be going through Parliament. What thought have you given to that Bill, how it will potentially limit freedom of expression and how it interacts with this Bill going through Parliament at the same time?

Dr Harris: I have not really thought about how it interacts with this Bill. Certainly I have considered it otherwise. There needs to be a joined-up approach between the various instances of reform. The danger is that we end up with an anomaly. For example, Twitter's house rules under the online safety Bill will have to be consistent with Ofcom codes of practice. There is a danger that something might be perfectly allowable under Twitter's house rules, but unlawful in some other way.

Q175 Sir John Hayes: Notwithstanding Kevan's point about university charters, is the real issue not about policy making? While it is true that a university in its charter is committed to openness and free expression, in policy making the story is far from that. Is it not really the case that universities persistently misinterpret the legal definition of harassment and underestimate freedom of expression and openness in their policy documents? You talked earlier about balance. Isn't the question about this Bill not the effect it will have on law, in the sense of legal cases, but more the effect it will have on universities looking again at their policies and policy-making process?

Dr Harris: Yes, I very much agree. I think that what the Bill needs to do—this fits with the previous question—is elevate freedom of speech to the policy decision-making process, or the matrix, so that it is one of those considerations that is always baked into decision making.

To give you an example, the University of Cambridge launched a really quite restrictive reporting website where it asked staff and students to report micro-aggressions, which could include raising your eyebrows and that sort of thing. Now, the FOI request that we did on that showed that there were something like 400 pages of planning, correspondence and decision making about this report and support website. How was there so much consideration of this policy, and at no point did anyone step in to say, "Is this compliant with our legal free speech duties?" It is this absence from decision making. I think all this Bill needs to do to be successful is to cause a momentary pause. It needs to cause a degree of reflection.

Q176 Sir John Hayes: And in that sense, it will change the balance of power between academics and university bosses, because there is a sense—and this is about governance as well, isn't it—that in that kind of process that you have described, academics are often not involved, so they are asked to do things that they have not had a role in helping to shape. Is this not also good in the sense that it only protects academics, but really curbs the power of some of the university chiefs, who sometimes impose these policies top-down? As an addendum to that, every time Kevan speaks about this dystopian future of a militant Government, he waves his hands vaguely in John's direction. I wanted to defend John.

Mr Jones: John and I disagree on quite a lot.

Sir John Hayes: It could be unconscious bias.

Mr Jones: No, it's conscious bias—*[Laughter.]*

Dr Harris: Yes, absolutely. For instance, in the determination of curriculum content, that is something where there absolutely must not be imposition of bureaucratic standards. The example that I cited in the written submission was that of the University of Oxford's music faculty, which decided to decolonise its curriculum. I should say that that is a legitimate exercise of academic freedom, but it then said, "Members of the faculty must not disparage the curriculum." Obviously, curriculums are changed by disparaging them—that is how they came to be decolonised in the first place—so we cannot stop the process.

There needs to be, and I think the Bill could include, a right of consultation. It is academic good practice anyway, and it slightly demeans universities that they need to be told that, because it should be part of academic ethics. There is also the right to criticise one's institution. That is part of the international law standard of academic freedom. It is embedded in a number of university statutes. Whatever happens, the standard adopted by the Bill should be at least what is already best practice in the sector. I do not think it should go beyond that.

Q177 Lloyd Russell-Moyle: The Bill is about trying to change cultures in universities. Surely that requires universities to train people about biases that they might have against right-wing or controversial views. Would you not agree that universities would need to implement training sessions and education programmes for their students and staff on those issues of freedom of speech?

Dr Harris: Yes—

Q178 Lloyd Russell-Moyle: Yes—thank you. I am not going to have waffle from you. Therefore, why has your group taken three universities to trial over them trying to implement non-conscious bias training for their staff? Why is your institution trying to shut down the universities implementing the kind of thing that the Bill would do?

Dr Harris: We did not take them to trial, I should say.

Q179 Lloyd Russell-Moyle: Well, you took them to either employment tribunals or to complaints procedures.

Dr Harris: We wrote letters to them, but to get to the central—

Q180 The Chair: Order. I am afraid that brings us to the end of the time allotted for the Committee to ask questions, and indeed for today's sitting. I thank Dr Harris, on behalf of the Committee, for his evidence.

Ordered, That further consideration be now adjourned. *—(Michael Tomlinson.)*

5 pm

Adjourned till Monday 13 September at half-past Three o'clock.

Written evidence reported to the House

HEFSB01 Benjamin Marler, Founder and Vice President of the Debate Society, Union of Students, University of Derby

HEFSB02 Jim Dickinson, Wonkhe

HEFSB03 Professor Nigel Biggar, CBE, Regius Professor of Moral and Pastoral Theology, University of Oxford

HEFSB04 Taylor Vinters LLP

HEFSB05 University of Cambridge

HEFSB06 Arif Ahmed MBE, Reader in Philosophy (and Fellow of Gonville and Caius College), University of Cambridge

HEFSB07 Universities UK

HEFSB08 Prof Ross Anderson FRS FREng, Professor of Security Engineering, Cambridge University and Edinburgh University

HEFSB09 Free Speech Union (*Confidential*)