



BRIEFING PAPER

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Higher Education (Freedom of Speech) Bill 2021 [Bill No 12 of 2021-22]

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Contents:

1. Background
2. Legal framework for freedom of speech
3. Reports on freedom of speech in higher education
4. Areas of concern
5. Government proposals
6. The Bill
7. Reaction to the Bill
8. Comments on the provisions



Contents

Summary	3
1. Background	4
1.1 Role of the Office for Students (OfS)	4
2. Legal framework for freedom of speech	6
2.1 Duty to protect freedom of speech	6
2.2 Duty to act within the law	7
2.3 Duty to protect from radicalisation	7
3. Reports on freedom of speech in higher education	9
4. Areas of concern	11
4.1 Complexity of the current legal framework	11
4.2 Students' Unions	11
4.5 Self-censorship and academic freedom	15
4.6 Prevent Duty	15
5. Government proposals	17
5.1 Government policy paper February 2021	17
5.2 Responses to the proposals	18
6. The Bill	21
6.1 Overview of the Bill	21
6.2 Clauses 1 to 3: Duties to protect freedom of speech	22
6.3 Clauses 4 to 8: Functions of the Office for Students (OfS)	23
6.4 Schedule	24
7. Reaction to the Bill	25
8. Comments on the provisions	27
8.1 Cost of the new system	27
8.2 Potential confusion over the new complaints system	27
8.3 Antisemitic speakers on campus	28

Summary

This paper has been written for the House of Commons Second Reading debate on the [Higher Education \(Freedom of Speech\) Bill](#). The Bill was presented in the House of Commons on 12 May 2021. It seeks to bring forward a range of measures aimed at strengthening and extending existing legislation on freedom of speech and academic freedom in higher education. The Bill implements the legislative proposals in the Department for Education policy paper, [Higher Education: free speech and academic freedom, February 2021](#) CP394.

Provisions in the Bill would: allow the Office for Students (OfS) to monitor and enforce freedom of speech measures at higher education institutions, introduce a complaints system and redress for breaches of free speech duties through the introduction of a statutory tort, extend duties on free speech to students' unions and create a role of Director of Freedom of Speech and Academic Freedom at the OfS.

The Bill is a piece of amending legislation. It primarily amends the Higher Education and Research Act 2017 but it also makes amendments to the Counter-Terrorism and Security Act 2015, the Higher Education Act 2004 and the Education (No. 2) Act 1986.

The Bill has eight substantive clauses: clauses 1-3 relate to the duties to protect freedom of speech; clauses 4-8 relate to the functions of the OfS; and clauses 9 and 10 are general minor amendments and commencement provisions. The Bill has one schedule; part 1 contains amendments to the Higher Education and Research Act 2017, part 2 contains amendments to the Counter-Terrorism and Security Act 2015 and part 3 contains amendments to other Acts.

This briefing paper provides background on the main provisions of the Bill, contains reaction to the Bill and raises issues. The Paper follows the outline of the Bill but is not intended to be an exhaustive clause-by-clause analysis; the Explanatory Notes to the Bill, published alongside it, provide explanation of individual clauses. The Bill and accompanying documents are available on the Parliament website at Parliamentary Bills, [Higher Education \(Freedom of Speech\) Bill](#).

Most provisions of the Bill extend to England and Wales, but some apply to England only; the provisions which amend the Counter-Terrorism and Security Act 2015 extend to England, Wales and Scotland. Clause 10 and Annex A of the Bill sets out the territorial extent of the Bill.

Commons Library Briefing Paper, [Freedom of speech – is there a problem? CBP 9143, 4 March 2021](#) discusses the proposals.

The following documents are relevant to the Bill:

- [Higher Education \(Freedom Of Speech Bill\) Explanatory Notes](#), Bill 12-EN
- [Higher Education: Freedom of Speech and Academic Freedom, Impact Assessment \(IA\)](#),
- Department for Education, press release, "[Universities to comply with free speech duties or face sanctions](#)", 12 May 2021
- House of Commons and House of Lords Joint Committee on Human Rights (JCHR), [Freedom of Speech in Universities](#), 21 March 2018, HC 589, 2017-19

1. Background

The debate around freedom of speech in universities has become increasingly heated in recent years in part due to a small number of high-profile incidents involving the banning of well-known speakers from campuses. Concerns have also been raised about the alleged curtailing of freedom of speech through the use of 'no-platform' policies, 'safe spaces' and self-censorship.

It has been suggested that higher education providers (HEPS) are permitting a general atmosphere of intolerance towards differing opinions to develop on campuses and that this has had a 'chilling effect' on free speech.

The legal framework around freedom of speech is complicated. Section 43(1) of the [Education \(No. 2\) Act 1986](#) requires higher education establishments to take reasonably practicable steps to ensure that freedom of speech is protected and section 202 of the [Education Reform Act 1988](#) protects academic inquiry. But freedom of speech is only protected within the law and other statutory provisions such as the Prevent Duty and public order legislation may impact on freedom speech and curtail debate.

Under current legislation there is no means of enforcing the statutory duties on providers and there is a gap in provisions in that students' unions are not directly covered by the legislation.

1.1 Role of the Office for Students (OfS)

The [Higher Education and Research Act \(HERA\) 2017](#) established an independent regulator for higher education in England, the [Office for Students \(OfS\)](#). As part of its remit the OfS oversees a register of English HEPS – all providers wishing to access public funding must be on the OfS register of providers.

All universities and colleges seeking to be on the OfS register of providers must comply with specified initial and ongoing conditions of registration which are set out in the OfS [Regulatory Framework](#). Conditions E1 and E2 of the Framework give the OfS a role in protecting freedom of speech in HEPS by requiring HEPS to have in place governing documents which uphold and deliver Public Interest Governance Principles. Two Public Interest Governance Principles cover freedom of speech, one relates to academic freedom and states that:

Academic staff at an English HEP have freedom within law

- to question and test received wisdom; and
- to put forward new ideas and controversial or unpopular opinions

without placing themselves in jeopardy of losing their jobs or privileges they may have at the provider.

Another relates to freedom of speech and states that "[the] governing body must take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider".

The OfS can impose sanctions in the form of monetary penalties for a breach of conditions of registration.

The role of the OfS with regard to freedom of speech is set out on the OfS website at [Freedom of speech](#).

2. Legal framework for freedom of speech

There is already a legal framework in place which imposes duties on HEPs to ensure freedom of speech in higher education. The legal and regulatory context on freedom of speech in higher education is set out in the Department for Education (DfE) policy paper, [Higher education: free speech and academic freedom February 2021](#) CP 394 pages 12-16 and in Annex A.

2.1 Duty to protect freedom of speech

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

The duties imposed by subsection 43(2) include a duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual, or body of persons, on any ground connected with the beliefs or views of that individual, or of any member of that body.

Section 43(3) requires the governing body of HEPs to issue and keep up to date a code of practice and under section 43(4) disciplinary measures can be imposed for non-compliance with the code.

The Act applies UK wide.

Also, section 202 of the [Education Reform Act 1988](#), which applies across the UK, contains provisions on academic freedom; it states that university commissioners should have regard to the need to protect academic inquiry by ensuring that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges that they may have at their institutions.

Provisions in the [Higher Education and Research Act](#) (HERA) 2017 state that the OfS, in the operation of its duties, must have regard to the need to protect the institutional autonomy of English HEPs. Under section 2(8)(c) and 14(7) of the Act institutional autonomy includes the freedom within the law for academic staff to question and test received wisdom and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges.

HEPs must also comply with wider legislation on protection from discrimination and harassment which is contained in the [Equality Act 2010](#) and in the [Public Sector Equality Duty](#) set out in section 149 of that Act.

2.2 Duty to act within the law

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

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

Institutions also have a common law duty of care towards their students which includes taking steps to protect the health, safety and well-being of students and this may be relevant on occasions in this area.

2.3 Duty to protect from radicalisation

HEPs also come within the Prevent Duty, which is a legal obligation imposed on specified bodies by the [Counter-Terrorism and Security Act 2015](#). Under the [Prevent Strategy](#) institutions must have due regard to the need to prevent individuals from being drawn into terrorism. It has been suggested that the Prevent Duty creates a tension with other statutory duties regarding freedom of speech. The Home Office document, [Prevent duty guidance: for higher education institutions in England and Wales](#), updated 1 April 2021, provides advice in this area.

Library Briefing Paper, [Freedom of speech and preventing extremism in UK higher education institutions](#), CBP 7199, 20 May 2015 also gives background and issues around the Prevent Duty.

2.4 Codes of practice on freedom of speech

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

The House of Commons and House of Lords Joint Committee on Human Rights (JCHR) report, [Freedom of Speech in Universities](#), stated that some codes on freedom of speech and procedures for inviting external speakers put barriers in the way of events, rather than facilitating them;¹ it also said that codes could be too complicated and bureaucratic.²

In February 2019 the Equality and Human Rights Commission published new guidance for universities, [Freedom of expression: a guide for higher education providers and students' unions in England and Wales](#). This

¹ House of Commons House of Lords Joint Committee on Human Rights, [Freedom of Speech in Universities](#), 27 March 2018, HC 589, 2017-19 p5

² Ibid para 87

guidance is to be used by all institutions and student unions when formulating their policies on freedom of speech. A press release announcing the new guidance stated the sector's commitment to freedom of speech:

The Equality and Human Rights Commission has collaborated with leading organisations from across the sector to develop new [guidance](#) to be used by all institutions and student unions, demonstrating the sector's commitment to upholding freedom of expression.

This guidance is the first time that legal rights and obligations around free speech have been defined so coherently, empowering institutions, student unions and individuals to stand up for free speech and creating a structure for them to work together. It clarifies the limited occasions where free speech can lawfully be limited, allowing it to flourish for current and future generations of students.

Sector leaders agreed to create new guidance during a Department for Education free speech summit in May 2018, which has been produced by the Equality and Human Rights Commission, with input from the National Union of Students, Universities UK, Charity Commission for England and Wales, Office for Students, Independent HE, Guild HE, Commission for Countering Extremism and Home Office.³

³ GOV.UK, "[Free speech to be protected at university](#)", 2 February 2019

3. Reports on freedom of speech in higher education

In 2018 the House of Commons and House of Lords Joint Committee on Human Rights (JCHR) conducted an inquiry into freedom of speech in HEPs promoted by growing concerns expressed in Parliament and in the media about the undermining of free speech on campuses. Their report, [Freedom of Speech in Universities](#), concluded that there was no blanket censorship of debate:

Any inhibition on lawful free speech is serious, and there have been such incursions, but we did not find the wholesale censorship of debate in universities which media coverage has suggested. There are real problems which act as disincentives for students to put on challenging events and whilst most student union officers who responded to our survey (comprising 33 responses in all) say they are confident that they and their companions can speak freely, such disincentives could be having a wider 'chilling effect', which is hard to measure. A much broader survey of students' opinion would be needed to assess levels of confidence amongst the student body as a whole. (Paragraph 37)

However, the report stated that free speech legislation was complex and it suggested that the Government should consider whether the OfS should take over the regulation of student unions from the Charity Commission.

A report by Policy Exchange, [Academic freedom in the UK](#) (2020), surveyed academics to explore concerns that strongly-held political attitudes were restricting the freedom of those who disagreed to research and teach on contested subjects. The report found that there was some chilling effect on free speech and that some academics were self-censoring – it also suggested that political beliefs may impact on career progression.⁴ The report recommended:

- Establishing a Director for Academic Freedom at the Office for Students.
- Establishing a tort for breaches of the duties concerning freedom of speech or academic freedom, with HEPs being liable for damages for violating these duties.
- Extending the existing statutory duty to ensure freedom of speech to include students' unions.
- The OfS should be willing to exercise its existing powers to fine HEPs, for breaches of academic freedom and freedom of speech.

Universities should appoint an Academic Freedom Champion.

A report for the University and Colleges Union in 2017, [Academic Freedom in the U.K. Legal and Normative Protection in a Comparative](#)

⁴ Policy Exchange, [Academic freedom in the UK](#), 2020, p9

[Context](#), examined the legal protection for academic freedom in the UK, compared with the other 27 EU nations. The report said that the constitutional and legal protection of academic freedom in the UK was negligible:

In sharp contrast with the other 27 EU nations, the constitutional protection for academic freedom (either directly, or indirectly via freedom of speech) in the UK is negligible, as is the legislative protection for the substantive (teaching and learning) and supportive (tenure and governance) elements of academic freedom⁵

The report found that the protection of academic freedom in the UK was “among the very worst of all the EU nations”.⁶

⁵ University and College Union, [Academic Freedom in the U.K. Legal and Normative Protection in a Comparative Context](#), 2017 p1

⁶ *ibid*, p80

4. Areas of concern

In Gavin Williamson's foreword to the policy paper [Higher education: free speech and academic freedom](#), the Secretary of State for Education outlined his belief that university campuses were witnessing a "rise of intolerance and 'cancel culture'".⁷

There is evidence to suggest that some staff and students of all political persuasions self-censor their views on campus and online, but research published in December 2019 by [King's College London](#) found that most UK students do not think that free speech, nor academic freedom, is under threat in their university.⁸

4.1 Complexity of the current legal framework

The legal framework around freedom of speech is complicated. As set out above, HEPs are subject to a number of statutory duties and these have the potential to conflict with each other and to interfere with freedom of speech.

A report by the House of Commons and House of Lords Joint Committee on Human Rights (JCHR) in 2018, [Freedom of Speech in Universities](#); said that the regulatory regime of freedom of speech was complex and could lead to confusion about what is and is not permissible.⁹

Enforcement of legal duties

Under the current legal framework there is no clear means of enforcing compliance with the duties to protect freedom of speech and no consequences for any provider in breach of the duties.

Also, there is no specific complaints process, or means of redress for individuals who feel they have suffered adverse consequences as a result of breaches of freedom of speech.

4.2 Students' Unions

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

The position of students' unions with regard to the [Education \(No. 2\) Act 1986](#) s43 is somewhat complicated. Students' unions, unlike HEPs, are not considered as public bodies and are not directly subject to the legal duties relating to free speech.

However, s43(8) of the 1986 Act applies to students' union's premises. This provides that where a students' union occupies premises not

⁷ Department for Education, [Higher education: free speech and academic freedom](#), CP 394, February 2021, pp4-6

⁸ King's College London, [Freedom of expression in universities](#), December 2019

⁹ House of Commons House of Lords Joint Committee on Human Rights, [Freedom of Speech in Universities](#), 27 March 2018, HC 589 p6

belonging to the university, the university is nonetheless required to comply with the s.43 duties.

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

Student unions are not directly subject to the legal duty relating to free speech explained above, in the sense of student unions themselves having a legal duty to secure freedom of speech. However, the duty on universities will often require a university to take actions which will affect the student union, or encourage a particular course of action on its part. In addition, the duty on universities to prevent the denial of use of premises extends to their own premises and student union premises where these are not owned by the university.¹⁰

Furthermore, Section 22 of the [Education Act 1994](#) explicitly makes HEPs responsible for taking reasonably practicable steps to secure that students' unions operate in a fair and democratic manner.

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

The OfS does not currently have the power to regulate students' unions; they are regulated by the Charity Commission.

In February 2021 a group of students' unions published a report [Taking the debate forward](#) which proposed a new code to establish and reinforce principles of political diversity and freedom of expression on campus. It also set out a roadmap for the regulation of students' union activity and clarity for those who wish to raise a complaint or concern.

4.3 No-platform policies

The NUS No Platform Policy is a very specific and narrow policy which prevents individuals or groups known to hold racist or fascist views from speaking at NUS events – currently there are six organisations on the NUS list. The policy aims to ensure a safe environment on university campuses. A NUS leaflet [NUS' No Platform Policy. Key information, background and FAQs](#)¹¹ gives further information.

Not all students' unions have a No Platform Policy.

Despite the narrowness of the core NUS definition, the term 'no platforming' is regularly used to describe a range of student actions that are not covered by the NUS policy,¹² including any occasion when a speaker has been denied the right to speak at an event organised at a

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

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

¹⁰ Universities UK Parliamentary briefing, [Freedom of speech on campus](#), November 2015

¹¹ NUS, [NUS' No Platform Policy. Key information, background and FAQs](#), 13 February 2017

¹² House of Commons House of Lords Joint Committee on Human Rights, [Freedom of Speech in Universities](#), 27 March 2018, HC 589, 2017-2019 p22

university.¹³ An article on the Wonkhe website from 2018, "[To platform or not to platform?](#)", analyses some of the most commonly cited examples of 'no-platforming' at UK universities.¹⁴

Cancelled events

In December 2020, a [survey](#) of 61 university students' unions carried out by Wonkhe found that in 2019-20, just 6 events from almost 10,000 involving an external speaker (0.06%) were cancelled.¹⁵

The OfS's own [data](#) also shows that only a tiny percentage of events and speaker requests are rejected. Figures from 2017-2018 (the most recent year for which data has been made available), showed that out of nearly 60,000 reported events only 53 were rejected – this is fewer than 0.1% and these cases concerned only 17 HEPs out of more than 250.¹⁶ However over 2,153 events were approved with mitigations and conditions – these would be imposed after a risk assessment and would include measures such as putting in place experienced chairs to manage and moderate events where needed, ticketing events, or having senior staff present to monitor an event and intervene where necessary.¹⁷

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

- when protests become so disruptive that they prevent the speakers from speaking or intimidate those attending;
- if student groups are unable to invite speakers purely because other groups protest and oppose their appearance; and
- if students are deterred from inviting speakers by complicated processes and bureaucratic procedures.¹⁸

The Office for Students and no-platforming

On 28 February 2018, a [written statement](#) by Sam Gyimah, the then-Universities Minister, set out the role of the OfS with regard to no-platform policies:

Freedom of speech - I have asked the OfS to champion and promote freedom of speech, including calling out and challenging

¹³ See, for example, "[10 victims of campus cancel culture](#)", Spiked, 16 February 2021 (accessed 23 March 2021)

¹⁴ "[To platform or not to platform?](#)", Wonkhe, 8 February 2018, (accessed 23 February 2021)

¹⁵ [Taking the debate forward: A new code to secure and champion freedom of speech and political diversity on campus](#), Wonkhe, p8, February 2021.

¹⁶ OfS, [Prevent monitoring accountability and data returns](#), 21 June 2019, p10

¹⁷ *ibid*

¹⁸ House of Commons House of Lords Joint Committee on Human Rights, [Freedom of Speech in Universities](#), 27 March 2018, HC 589, 2017-2019, p23, para 3

attempts to shut down debate such as ‘no platforming’. Free speech is essential in ensuring that higher education exposes students to new and uncomfortable ideas, and encourages robust, civil debate and challenge.¹⁹

4.4 ‘Safe spaces’

Some students’ unions have adopted ‘safe space’ policies - a [report](#) on freedom of speech described these policies as follows:

Students’ unions centrally operate a number of democratic meetings and forums that allow students to obtain experience of debate and discussion with others. In some cases, they will adopt so-called “safe space” policies for the operation of these events, which generally set out the standards of conduct that the SU might expect during those meetings.²⁰

The University of Cambridge outlined its safe space policy in [written evidence](#) submitted to the JCHR inquiry in 2018:

Within the student community at Cambridge there are various discussion and support groups, including for those who self-define into a particular category. These groups provide opportunities for those with similar experiences to meet for productive discussion; they are sometimes referred to as “safe spaces”.

In Cambridge, ‘safe spaces’ include FLY (the BME women and non-binary peoples’ network), survivors’ groups for men and women, certain meetings of the women’s campaign, BME campaign and LGBT+ campaign and the Disabled Students’ Campaign. The sabbatical officers of CUSU have highlighted to us their view that the existence of these groups and campaigns plays an important role in aiding the retention and supporting the progression of under-represented groups, for example by combatting potential isolation and loneliness. We further hope that these opportunities help students to develop the confidence to express themselves outside of the safe spaces, and continue to emphasise the importance of this as a vital part of participation in a university education.

The University supports unequivocally the right of students to meet in safe spaces. We believe that the concepts of safe spaces and of no-platforming are distinct. However, if no-platforming (such as preventing others from attending or expressing their views within the law) occurs within a safe space environment, this could be contrary to the University’s statement on freedom of speech and may even be illegal.²¹

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

We accept that there is a significant danger that policies that stress “safety” may end up perceived as trying to create an

¹⁹ HC Deb 28 February 2018 vol. 636 c28WS

²⁰ [Taking the debate forward: A new code to secure and champion freedom of speech and political diversity on campus](#), February 2021, p34

²¹ House of Commons House of Lords Joint Committee on Human Rights, Freedom of Speech in Universities, 27 March 2018, HC 589, 2017-2019, [Written evidence from the University of Cambridge \(FSU0059\)](#)

environment where robust debate, challenge and difficult ideas are not welcome.

This issue was highlighted in the JCHR [report](#), which noted that the concept of safe spaces has proved problematic at times, and that universities and students' unions needed to do more to ensure that such policies co-exist with and respected free speech:

While the intention behind safe spaces is understandable and whilst there must be opportunities for genuinely sensitive and confidential discussions in university settings, we received evidence which showed that safe space policies, when extended too far, can restrict the expression of groups with unpopular but legal views, or can restrict their related rights to freedom of association.²²

4.5 Self-censorship and academic freedom

A 2020 report by Policy Exchange, [Academic Freedom in the UK](#) gave evidence which suggested that some students and staff choose to self-censor their views. The reasons given for self-censorship were generally perceived hostility from colleagues, and a fear of reputational harm and damage to career prospects.²³

4.6 Prevent Duty

The [Counter-Terrorism Act 2015](#) section 26 places a duty on certain specified bodies to have due regard to the need to prevent people from being drawn into terrorism – this provision is known as the Prevent Duty. HEPs come within the Prevent Duty.

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

We have not found evidence of providers systematically not allowing events to proceed because of Prevent. We do not comment on individual events, but we have not seen any evidence that has caused us concern that providers are not appropriately balancing their free speech obligations with the Prevent duty. We remain mindful of the need to monitor this carefully, however, as we do not want providers over-interpreting their requirements under the duty and harming other legal responsibilities like free speech.²⁴

However [research](#) by Professor Scott-Baumann at SOAS University of London has suggested that the Prevent Duty is having a chilling effect on open discussion on campuses.²⁵

A parliamentary question was asked on policy changes and the Prevent Duty in the House of Lords on [5 March 2021](#):

²² House of Commons House of Lords Joint Committee on Human Rights, [Freedom of Speech in Universities](#), 27 March 2018, HC 589, 2017-2019, pp27-29, para 56

²³ Policy Exchange, [Academic freedom in the UK](#), August 2020, pp53-58

²⁴ OfS [Prevent monitoring accountability and data returns 2017-18 FAQs](#)

²⁵ ["A new 'free speech champion' may end up doing the opposite"](#) *The Guardian*, 17 February 2021

Universities: Freedom of Expression

Lord Smith

To ask Her Majesty's Government whether the free speech duties they intend to place on universities will prohibit the implementation by universities of the duties placed on them under the Prevent programme.

Lord Parkinson of Whitley Bay

Answered on 5 March 2021

My right hon. Friend, the Secretary of State for Education, set out new measures to strengthen free speech and academic freedom at universities in England on 16 February 2021, in order to stamp out unlawful silencing on campuses. The new measures set out in the policy paper will help to ensure that our universities are places where free speech can thrive.

Higher education providers will continue to be subject to the Prevent duty under Section 26(1) of the Counter-Terrorism and Security Act 2015. The government is clear that the Prevent Duty should not be used to suppress free speech; rather, it requires providers, when exercising their functions, to have due regard to the need to prevent people being drawn into terrorism. There is no prescription from government (or the Office for Students) in regard to what action providers should take once they have had due regard. The legislation imposing the Prevent duty in relation to higher education specifically requires that providers must have particular regard to their duty to ensure freedom of speech and to the importance of academic freedom. As they already do, providers will continue to balance their legal duties, both in terms of ensuring freedom of speech and academic freedom, and also of protecting student and staff welfare.

5. Government proposals

The Conservative [election manifesto 2019](#) contained a commitment to “strengthen academic freedom and free speech in universities and continue to focus on raising standards”.

5.1 Government policy paper February 2021

On 17 February 2021 the Government published a policy paper [Higher education: free speech and academic freedom February 2021](#) CP 394. The paper set out the case for change, outlined the government’s expectations of providers and set out proposals to strengthen freedom of speech. A Department for Education [press release](#) gave an overview of the proposals ²⁶

Case for change

The policy paper stated that there had been a “chilling effect” campuses which had impacted both staff and students at HEPs.²⁷ It argued that there was a growing atmosphere on campuses that was antithetical to constructive debate where differing opinion was respected and may have left individuals feeling “unable to express their cultural, religious or political views without fear of repercussion”.²⁸

The Government is particularly concerned that “no platforming and similar campaigns” may lead staff and students to ‘self-censor’ themselves on campus or online, because they fear discrimination for expressing their views.

The paper also suggested that some academics believed that their ability to research and teach freely without facing disadvantage due to their political views was not being adequately protected.

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

Proposals

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

The paper proposed:

- creating a Free Speech and Academic Freedom Champion to champion free speech, investigate infringements of free speech and recommend redress,

²⁶ DfE, “ [Landmark proposals to strengthen free speech at universities](#)”, 16 February 2021

²⁷ DfE, [Higher education: free speech and academic freedom](#), p7

²⁸ [ibid_](#)pp7, 19

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

5.2 Responses to the proposals

A number of responses to the proposals questioned the need for new legislation and said that HEPs were already committed to protecting and promoting freedom of speech under their current legal duties.

There were concerns about the impact of the proposals on institutional autonomy and the role of the Free Speech Champion. The response by the Office for the Independent Adjudicator voiced a concern that a new complaints process could confuse students by creating an overlap with current systems.

Labour

Emma Hardy, shadow Universities Minister, [said](#) with respect to the Bill that the Government were focusing on the "wrong priorities":

When students need urgent help with their finances, accessing online learning and their mental health, ministers have manufactured an argument to distract from their failings.²⁹

Kate Green, Labour's Shadow Education Secretary said that the Government was "manufacturing" a 'culture war' controversy to take the focus off other policy issues:

Students are worrying about when they can return to campus, how to pay their rent and how they will get a job," she said.

The government has abandoned them throughout this crisis and is manufacturing this debate to distract from their own failures.³⁰

Universities UK

A Universities UK spokesperson said:

"UK universities are committed to promoting and protecting free speech, which we see as critical to the success of this country's higher education system. There are already significant legal duties placed on universities to uphold freedom of speech and universities are required to have a code of practice on free speech and to update this regularly.

²⁹ "[Labour accuses Government of 'manufacturing' free speech row at universities](#)", Evening Standard, 16 February 2021 (accessed 26 February 2021).

³⁰ "[Labour accuses government of 'manufacturing' free speech culture war to distract from failures](#)", The Independent, 16 February 2021 (accessed 26 February 2021).

"While it is important that universities continually reflect on ways they can further enhance and support free speech, we await further details on the proposals – including about the role of the Free Speech Champion – before we can comment further about the implications for university and student union activities." ³¹

Russell Group

A Russell Group spokesperson said:

"Our universities are committed to protecting free speech on campus. Robust academic debate and the opportunity to engage with challenging ideas are fundamental to the educational experience at UK universities.

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

"Evidence shows the overwhelming majority of speaker events go ahead, but it is right that we are constantly vigilant to threats to campus free speech. We support efforts to help universities and students' unions protect free expression and broaden the range of views students are exposed to, including recent student-led proposals to extend the existing legal duty to protect free speech to students' unions." ³²

University and College Union (UCU)

University and College Union (UCU) general secretary Jo Grady said:

"It is extraordinary that in the midst of a global pandemic the Government appears more interested in fighting phantom threats to free speech than taking action to contain the real and present danger which the virus poses to staff and students.

"In reality the biggest threats to academic freedom and free speech come not from staff and students, or from so-called 'cancel culture', but from ministers' own attempts to police what can and cannot be said on campus, and a failure to get to grips with the endemic job insecurity and managerialist approaches which mean academics are less able to speak truth to power." ³³

Office for Students

Nicola Dandridge, chief executive of the OfS, said:

'Free speech and academic freedom are essential to teaching and research. Universities and college have legal duties to protect both free speech and academic freedom, and their compliance with these responsibilities forms an important part of their conditions of registration with the OfS. We will ensure that the changes that result from today's proposals reinforce these responsibilities and embed the widest definition of free speech within the law.'

³¹ Universities UK, "[Universities committed to promoting and protecting free speech](#)", 16 February 2021

³² Russell Group, "[Russell Group responds to free speech measures](#)", 16 February 2021

³³ University and College Union, "[UCU response to Government 'free speech' proposals](#)", 16 February 2021

Office of the Independent Adjudicator (OIA)

We are carefully considering the government's policy paper, Higher education: free speech and academic freedom. We are concerned about some elements of the proposals outlined in the paper that relate to our role and remit and look forward to working with Government and others to try to resolve these concerns.

The proposal for a Free Speech and Academic Freedom Champion on the OfS Board envisages that the Champion will have a role in recommending redress for individual complaints about freedom of speech, including those raised by students at OfS-registered higher education providers. We believe this could create confusion for students about the route through which they can pursue concerns relating to freedom of speech.

Students studying at a provider in England or Wales that is a member of the OIA Scheme can currently bring unresolved complaints involving freedom of speech to the OIA. Membership of the OIA Scheme is wider than OfS-registered providers so the proposals could result in students having different routes to complain about freedom of speech issues depending on where they are studying.

The proposals envisage that student complaints which are exclusively about free speech and academic freedom would be considered by the OfS. In our experience, student complaints that involve freedom of speech usually also involve other aspects, for example issues regarding academic research, or disciplinary or fitness to practise, and may involve professional standards. It's important that these complaints are reviewed holistically. While we welcome the government's intention to work with stakeholders on the demarcation of responsibilities, we are concerned that in practice it may be difficult to define clearly which complaints can be considered by which body. It could also be difficult for students to know where to raise their complaint depending on the precise issues of the complaint.³⁴

The proposals in the policy paper are discussed in an article on the Wonkhe website, [Government free speech proposals represent a breakdown of trust and confidence](#), 16 February 2021.

³⁴ Office of the Independent Adjudicator, "[OIA response to Government policy paper Higher education: free speech and academic freedom](#)", 16 February 2021

6. The Bill

The Bill is a piece of amending legislation. It primarily amends the Higher Education and Research Act 2017 but it also makes amendments to the Counter-Terrorism and Security Act 2015, the Higher Education Act 2004 and the Education (No. 2) Act 1986.

The Bill has eight substantive clauses; clauses 1-3 relate to the duties to protect freedom of speech, clauses 4-8 relate to the functions of the Office for Students and clauses 9 and 10 are general minor amendments and commencement provisions. The Bill has one schedule: part 1 contains amendments to the Higher Education and Research Act 2017, part 2 contains amendments to the Counter-Terrorism and Security Act 2015, and part 3 contains amendments to other Acts.

The Bill's amendments to the Higher Education and Research Act 2017 would give the OfS a greater role in the monitoring and enforcement of freedom of speech in HEPS.

6.1 Overview of the Bill

The Bill includes a range of measures aimed at strengthening existing legislation on freedom of speech and academic freedom in higher education, including:

- Strengthening the duties regarding freedom of speech which are currently imposed on HEPS registered with the OfS by section 43 of the Education (No. 2) Act 1986.
- Introducing new registration conditions on freedom of speech and academic freedom for HEPS registered with the OfS.
- Creating a new duty for registered HEPS to promote the importance of lawful freedom of speech and academic freedom in higher education.
- Creating new duties regarding freedom of speech for students' unions and enabling the OfS to monitor compliance with the new duties.
- Creating a new statutory tort for breach of specified freedom of speech duties, enabling individuals to seek legal redress for loss they have suffered as a result of breach of the duties.
- Enhancing academic freedom protections by extending coverage to include recruitment and promotion and making clear it applies to speech within an academic's field of expertise.
- Creating a Director for Freedom of Speech and Academic Freedom within the OfS.

6.2 Clauses 1 to 3: Duties to protect freedom of speech

Clauses 1 to 3 insert sections into the Higher Education and Research Act 2017 which strengthen and extend the freedom of speech provisions in section 43 of the Education (No. 2) Act 1986.

Duties of higher education providers

Clause 1 inserts a section (A1) into the Higher Education and Research Act 2017 which imposes duties on the governing bodies of HEPs registered with the OfS; these are similar to the duties in section 43 of the Education (No. 2) Act 1986.

Under the new section governing bodies must take reasonably practicable steps to secure freedom of speech for staff, students and visiting speakers – when determining what is reasonable the body must have regard to the importance of freedom of speech.

The duty includes that the use of premises is not refused because of a person's ideas, beliefs or views, or a body's policy or objectives. It also includes taking reasonably practicable steps to secure academic freedom for academic staff at the provider and it extends the existing principle to include the circumstances of seeking promotion or a different job at the provider, and it states that the freedom applies to speech within the academic's field of expertise. There is also a new separate duty with similar provision in respect of external applicants for an academic role at a provider.

Clause 1 also inserts new section A2 which states that HEPs must maintain a code of practice and this must include a statement of the provider's values relating to freedom of speech and an explanation of how those values uphold freedom of speech. It must also set out the procedures to be followed by staff and students when organising meetings and activities, the conduct required in relation to such meetings and activities, and the criteria for specified decisions.

The governing body must take reasonably practicable steps to secure compliance with the code of practice, including where appropriate, the initiation of disciplinary measures.

New section A3 inserts a duty to promote the importance of freedom of speech.

Duties of students' unions

Clause 2 inserts two new sections into the Higher Education and Research Act 2017 which impose new duties on students' unions - these duties are like those imposed on HEPs in clause 1. This clause will for the first time bring student's unions in line with HEPs with regard to freedom of speech requirements.

Section A4 imposes a new duty on a students' unions at HEPs that are registered as eligible for financial support under section 39 of the Higher Education and Research Act 2017. The duty is to take reasonably practicable steps to achieve the objective of securing freedom of speech

within the law for: members and staff of the students' union, students, members and staff of the provider, and visiting speakers. There is a duty to have particular regard to the importance of freedom of speech when determining what steps are reasonably practicable.

The duty includes the use of premises and persons must not be refused use because of their ideas, beliefs or views.

Section A5 imposes a new duty on students' unions to maintain a code of practice – this must include a statement of the students' union's values relating to freedom of speech and an explanation of how those values uphold freedom of speech. It must also set out the procedures to be followed when organising meetings and activities, the conduct required in relation to such meetings and activities, and the criteria for specified decisions.

The students' union must take reasonably practicable steps to secure compliance with the code of practice, and this may include using disciplinary measures. At least once a year students' unions must bring the provisions of section A4 and the code of practice to the attention of their members.

Civil claims

Clause 3 to insert section A6, which creates a new statutory tort for breach of specified freedom of speech duties. It enables civil proceedings to be brought against a higher education provider and/or students' union in respect of a breach of section A1. This will enable individuals to seek legal redress for loss they have suffered as a result of breach of those duties.

6.3 Clauses 4 to 8: Functions of the Office for Students (OfS)

Clause 4 inserts section 69A into the Higher Education and Research Act 2017 to provide that, in performing its functions, the OfS must have regard to the need to promote the importance of freedom of speech within the law in higher education, and the need to protect the academic freedom of academic staff at English higher education providers.

The section also sets out provisions concerning advice by the OfS on good practice in relation to the promotion of freedom of speech and academic freedom, and gives the Secretary of State power to require the OfS to report on freedom of speech and academic freedom matters.

Clause 5 inserts section 8A into the Higher Education and Research Act 2017 – this creates new mandatory registration conditions relating to freedom of speech and academic freedom. It creates an ongoing registration condition requiring the governing body of the provider to comply with its duties under sections A1 to A3, and an ongoing registration condition requiring the governing body of a provider that is eligible for financial support for the purposes of section 39 to keep the OfS informed of its students' unions.

Clause 6 provides for the regulation of students' unions by the OfS. It requires the OfS to monitor whether students' unions are complying with the duties in sections A4 and A5. The OfS may impose a monetary penalty on a students' union if it appears to the OfS that it is failing, or has failed, to comply with its duties. The Secretary of State will make regulations regarding the amount of penalties and about matters to which the OfS must, or must not, have regard when imposing a monetary penalty.

This clause also requires the OfS to maintain and publish a list of the students' unions to which sections A4 and A5 apply. These unions must provide the OfS with information that it may require, if a students' union fails to do so the OfS may enforce the duty with an injunction.

Complaints Scheme

Clause 7 inserts section 69C and Schedule 6A into the Higher Education and Research Act 2017. This section creates a complaints scheme relating to the duties of registered HEPs and students' unions in respect of freedom of speech and academic freedom.

Paragraphs 1 to 4 of schedule 6A set out the nature of the complaints that can be brought to the complaints scheme and the individuals who are eligible to make complaints. Paragraph 5 sets out the scope of the scheme. Paragraphs 6 to 8 set out provision regarding the decisions and recommendations that the OfS may make under the complaints scheme, for example where the OfS considers a complaint to be justified it may recommend that the HEP or students' union should take a specific action such as the payment of compensation, or the reinstatement of a job. Paragraphs 9 to 13 set out various other requirements relating to the complaints scheme.

Director for Freedom of Speech and Academic Freedom

Clause 8 amends Schedule 1 to the Higher Education and Research Act 2017. It creates the role of Director for Freedom of Speech and Academic Freedom and sets out the responsibilities of the Director in relation to the OfS's functions. The Director will be a member of the OfS Board.

6.4 Schedule

The schedule makes minor and consequential changes to the Higher Education and Research Act 2017 and the Counter-Terrorism and Security Act 2015.

7. Reaction to the Bill

The Bill received considerable comment from organisations in the higher education sector. Many of the comments stressed the fact that universities and colleges were already under duties to protect and promote free speech and that this Bill was duplicating existing legislation and could lead to increased bureaucracy and costs.

Universities UK

"Universities share the government's commitment to protecting and promoting free speech, which is critical to the success of the higher education sector."

"Universities are rightly already required by law to protect free speech and academic freedom, and they update their policies on this regularly. It is important that the Higher Education (Freedom of Speech) Bill is proportionate – focusing on the small number of incidents – and does not duplicate existing legislation or create unnecessary bureaucracy for universities which could have unintended consequences."³⁵

Russell Group

"Our universities have always protected the right to have free and open discussion of challenging or controversial ideas. Our recent statement of principles on free speech underlined our commitment to protect those ideals.

"We will always work constructively with Government to uphold the legal protections already in place and if it feels it is necessary to enhance them further. However, it is vital that any further changes or additions to an already complex system are proportionate, protect university autonomy and avoid creating unnecessary or burdensome bureaucracy."³⁶

MillionPlus

"Modern universities give the utmost priority to defending free speech and academic freedom. This is part of our DNA and institutions and requirements in these areas are already enshrined in two acts of parliament and the OfS's expectations on university governance. The Freedom of Speech Bill announced today should therefore avoid adding unnecessary bureaucratic burdens on universities which would risk diverting resources away from the frontline education of students. MillionPlus will work constructively with parliamentarians during the passage of this bill to ensure this is the case."³⁷

University and College Union

'There are serious threats to freedom of speech and academic freedom on campus, but they come from the government and university managers, not staff and students. If this authoritarian government is serious about strengthening freedom of speech,

³⁵ Universities UK, "[UUK response to the Higher Education \(Freedom of Speech\) Bill](#)", 12 May 2021

³⁶ Russell Group, "[Russell Group response to Higher Education \(Freedom of Speech\) Bill](#)", 12 May 2021

³⁷ MillionPlus, "[MillionPlus comment on the Higher Education \(Freedom of Speech\) Bill](#)", 12 May 2021

then why is it cracking down on the right to protest freely via the policing and crime bill?

'The truth is that widespread precarious employment strips academics of the ability to speak and research freely, and curtails chances for career development. Free speech and academic freedom are threatened more widely on campus by government interference in the form of the Prevent duty, and attempts to impose the IHRA definition and examples of antisemitism on universities.

'This bill should be seen for what it is: the government using freedom of speech as a Trojan horse for increasing its power and control over staff and students.'³⁸

Office of the Independent Adjudicator

As expected, the Higher Education (Freedom of Speech) Bill includes provisions that are relevant to our role and remit in respect of student complaints involving concerns about freedom of speech.

Following the earlier publication of the government's policy paper, Higher education: free speech and academic freedom, we continued to discuss relevant elements of the proposals with government and others. We raised some issues, especially around clarity for students, and we are pleased that the government has listened to some of our concerns.

The Free Speech and Academic Freedom Director on the OfS Board will have a role in relation to individual complaints about freedom of speech, including those raised by students at OfS-registered higher education providers. Under the Bill students would be able to choose whether to pursue their concerns through the OfS Scheme or through our Scheme. We remain concerned that it may be difficult for students to make a fully informed decision about which route is best for their individual circumstances and that the complexity of arrangements is still likely to create confusion for students.³⁹

³⁸ University and College Union, "[UCU slams government free speech plans as Trojan horse for increasing power over staff & students](#)", 12 May 2021

³⁹ Office of the Independent Adjudicator, "[OIA response to Higher Education \(Freedom of Speech\) Bill](#)", 12 May 2021

8. Comments on the provisions

8.1 Cost of the new system

The [Explanatory Notes](#) to the Bill state that there are financial implications to the provisions. These include costs to the OfS arising from monitoring and enforcing the freedom of speech duties, including staff costs and the cost of the Director for Freedom of Speech and Academic Freedom.

The [Impact Assessment](#) puts a best estimate of £48.1m on the overall costs of compliance over 10 years:

HEPs and SUs are the main affected groups that we expect to incur costs including: familiarisation costs; compliance costs: the direct costs of complying with the regulation and enforcement including the new registration conditions for all registered HEPs; and administrative burden – the costs associated with the paperwork burdens on the administrative structures of HEPs and SUs as a result of regulation - e.g. updating codes of practices, and introducing codes of practice for SUs. There are also costs to the OfS relating to the new Director for Freedom of Speech and Academic Freedom and the creation of an OfS complaints scheme.⁴⁰

The Impact Assessment states that up to ten additional OfS staff will be required to support the work of the new Director for Freedom of Speech and the total cost of the director role and the additional staff is assumed to be between £0.5m and £0.8m.

The Impact Assessment is discussed in an article by Wonkhe, [Free Speech Bill – Impact Assessment](#), 13 May 2021.

The costs of the new system will fall to registered HEPs via registration fees or will be funded via other fees imposed by the OfS in accordance with regulations to be made by the Secretary of State.⁴¹

8.2 Potential confusion over the new complaints system

The Office for the Independent Adjudicator (OIA) administers a complaints system for students; it has expressed concern that creating a new complaints system for freedom of speech grievances would cause confusion.

Felicity Mitchell the Independent Adjudicator stated in her [response](#) to the Bill that it was important to maintain a distinction between the two complaints systems. She also questioned how the new Free Speech and Academic Freedom Director would be able to act as a regulator and also as an impartial reviewer of complaints:

As the ombudsman service for student complaints about higher education providers, our role is to provide independent and impartial review of unresolved complaints about the bodies in our

⁴⁰ [Higher Education: Freedom of Speech and Academic Freedom, Impact Assessment \(IA\)](#) p3

⁴¹ [Higher Education \(Freedom of Speech\) Bill Explanatory Notes](#) Bill 12 EN, p11

jurisdiction. That is different from the role of a regulator, and it is important that this distinction is maintained. It will be challenging to make sure that the Free Speech and Academic Freedom Director, whose role includes championing free speech, will also be in a position to fairly and impartially review complaints about freedom of speech.”⁴²

Kate Green MP, the Shadow Secretary of State for Education, also raised concerns about the OfS having a role in complaints about free speech in a [debate](#) on the Queen’s Speech on 13 May 2021:

I also say very gently to Government Members, many of whom have a proud record of defending free speech, that handing over the power to determine whether free speech complaints on campus are justified to the Office for Students—a Government regulator, with an unqualified former Conservative MP appointed as its chair—smacks of the kind of thought control that we would rightly condemn in authoritarian Governments around the world. But it is not the way we do things in this country. I hope the Secretary of State will also think better of those proposals.⁴³

8.3 Antisemitic speakers on campus

There is a growing concern about antisemitism on university campuses and in response the Government has urged HEPs to adopt the International Holocaust Remembrance Alliance (IHRA) Working Definition of Antisemitism.⁴⁴ However, HEPs are autonomous institutions and as such, the decision on whether to adopt the definition rests with individual providers. It has been suggested by some that adopting the IHRA definition could inhibit freedom of speech, but others contest this.⁴⁵

Some commentators have expressed concern that provisions in the Bill could give a platform to holocaust deniers and other antisemitic speakers; Michelle Donelan MP, the Universities Minister, suggested in an interview on 12 May 2021 that this might be the possible.⁴⁶ However the Secretary of State for Education stated in a parliamentary debate that this would not be permitted:

Let us be absolutely clear that this legislation will never protect holocaust deniers. It protects free speech within the law. It protects the fact that—we know that antisemitic activity and antisemitism are not to be tolerated. It is clear in the Equality Act 2010. We will never tolerate it, and this legislation will not allow holocaust deniers to be able to spread their hate and misinformation on our campuses.⁴⁷

⁴² Office of the Independent Adjudicator, “[OIA response to Higher Education \(Freedom of Speech\) Bill](#)”, 12 May 2021

⁴³ HC Deb, [A Brighter Future for the Next Generation](#), 13 May 2021 col 304

⁴⁴ Department for Education, [Guidance to the Office for Students \(OfS\) — Secretary of State’s strategic priorities](#), 8 February 2021

⁴⁵ “[Antisemitism definition is undermining free speech](#)”, The Guardian, 7 January 2021

⁴⁶ HC Deb, [A Brighter Future for the Next Generation](#), 13 May 2021 col 304

⁴⁷ Ibid

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