



Call for Evidence on the Higher Education Governance Bill
Response from the Scottish Council of Jewish Communities

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The Scottish Council of Jewish Communities (SCoJeC) is the representative body of all the Jewish communities in Scotland. SCoJeC advances public understanding about the Jewish religion, culture and community, by providing information and assistance to educational, health, and welfare organisations, representing the Jewish community in Scotland to Government and other statutory and official bodies, and liaising with Ministers, MSPs, Churches, Trades Unions, and others on matters affecting the Jewish community. SCoJeC also provides a support network for the smaller communities and individuals and families who live outwith any Jewish community, and assists organisations within the Scottish Jewish community to comply with various regulatory requirements. SCoJeC also promotes dialogue and understanding between the Jewish community and other communities in Scotland, and works in partnership with other organisations and stakeholders to promote equality, good relations, and understanding among community groups.

In preparing this response we have consulted widely among members of the Scottish Jewish community including, amongst others, Jewish students studying at post-16 education bodies in Scotland, and Jewish Student Chaplaincy Scotland, which provides support to students studying at post-16 education bodies throughout Scotland.

1. What do you consider to be the existing problems (if any) with higher education governance, particularly around modernity, inclusion and accountability?

Higher education governance should not only be concerned with the financial stability and day-to-day administration of post-16 education bodies, but also with the well-being of those who study, teach, and carry out research in such institutions. We are concerned that, in practice, the current governance system does not always facilitate a fair hearing for students, many of whom are living away from home, and therefore from their established support network, for the first time, and who may, therefore, be more than usually vulnerable. This is particularly an issue for students who may have been discriminated against or victimised, on account of a protected characteristic.

2. What do you consider the extent to which the Bill:

a. will improve higher education governance, particularly in the areas above?

We consider that, in its current format, Part 2 of the Bill (Academic Freedom) will be a detriment to higher education governance: whilst it strengthens the rights of one sector (academic and research staff), these statutory rights are not balanced by equivalent responsibilities towards the student body, and it is therefore likely that the rights of students will be weakened. Please see below for further information.

We do not have any opinion as to the likely impact of the other measures included in the Bill.

b. may alter the higher education sector's current level of autonomy?

We have concerns about the potential for “autonomy” to be abused as an excuse for practices such as allowing donors to influence policy or staff appointments.

c. may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector?

We have no comment on this question.

3. The Bill is part of a wider package of recent reforms to higher education governance, including the development of a Scottish Code of Good Higher Education Governance. Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed?

The Scottish Code of Good Higher Education Governance is a much more balanced document than the Bill, recognising not only the rights of the academic and research staff, but also their responsibilities, and the rights of students. It states (p8) that the “main principles” of the Governing body are, amongst other things to:

“ensure that [the Higher Education Institution] observes good practice in regard to equality and diversity;”

and

“foster a suitable environment whereby knowledge may be advanced and the potential of learners fulfilled;”

Furthermore, it states (p9) that:

“The governing body has a duty to enable the Institution to achieve and develop its mission and primary objectives of learning and teaching and research.”

We particularly note that “learning” is listed first.

We are concerned that providing one group of people in post-16 education bodies with a strengthened statutory right to academic freedom whilst their associated responsibilities, and the rights of the larger student body, remain non-statutory, is unbalanced, and

sends the wrong message to the Governing Body, academic and research staff, and students. The Code defines risk (p14) as: “the threat or possibility that an action or event will adversely ... affect an organisation’s ability to achieve its objectives”, and we fear that, by increasing the power of those who already, of necessity, have the greatest influence, without also introducing statutory safeguards, this Bill risks exposing the most vulnerable to discrimination and even abuse in situations in which that power and influence may be misused. That does not “ensure ... good practice in regard to equality and diversity”, and is an obstacle to “foster[ing] ... the potential of learners”.

4. The Bill proposes a number of specific changes to higher education governance:

- **To require higher education institutions to appoint the chair of their governing body in accordance with a process set out in regulations made by the Scottish Ministers;**
- **To require HEIs to include various persons within the membership of their governing bodies;**
- **To require HEIs to ensure that their academic boards are comprised of no more than 120 people, and include various persons.**

Please provide your views on the merit of each of these proposals.

We have no comment on these issues.

5. The Bill will also replace the current legal definition of academic freedom “with a view to strengthening it and making explicit the freedom to develop and advance new ideas and innovative proposals”.

While the other provisions in the Bill only focus on higher education institutions, this provision will apply to publicly-funded colleges and all higher education institutions (collectively known as post-16 education bodies). Post-16 education bodies are to uphold the academic freedom (within the law) of all relevant persons i.e. those engaged in teaching, the provision of learning or research.

Please provide your views on the likely practical effect of these provisions, for example, whether there are any areas of teaching, learning or research that will be particularly enhanced.

On the contrary; it is irresponsible to widen the statutory definition of academic freedom, and strengthen the requirement for post-16 education bodies to “uphold” that freedom while not also imposing equivalent statutory responsibilities to protect those who may suffer detriment from careless or malicious use of that freedom. Even under the current legislation, we are aware of situations in which members of academic staff have employed or sought to employ their academic freedom in a manner that conflicts with the duty of care that they owe to students.

We have evidence that the manner in which some academic and research staff have expressed views about the situation in the Middle East has contributed to both Jewish and Israeli students feeling compelled to deny or hide their Jewish identity at the very

time in their lives when they should have the freedom to explore it.

The issue is not that some academic and research staff hold views about the situation in the Middle East; that is their right. Nor is it simply that they have expressed those views in public. What concerns us greatly is the manner in which some staff have done so, for example, by publicly campaigning against research collaborations with Israeli academic institutions, to deny visiting Israeli academics a platform, and even actively demonstrating against Jewish Student Society meetings relating to Israel, with a view to disrupting them and ultimately preventing them taking place, with the result that students are prevented from being able to examine the issue and express their own views.

For example, one postgraduate student told our 2015 inquiry into *What's Changed about Being Jewish in Scotland?*¹ that “grading is absolutely not objective when writing about the state of Israel or anything Jewish related.” She was disturbed that her presentation of a “fairly left wing paper about Israel and the US and their use of nationalist rhetoric to justify the war on terror” did not receive an academic critique, but only comments such as “Israel should not be called Israel but Palestine”, and that Hamas should not have been referred to as “a terrorist group”, despite the fact that it is formally recognised as such by the UK Government. The student believed that her academic freedom to investigate a particular point of view had been denied, and that she had been penalised on account of her tutor’s political views.

In any event it is not clear what “academic freedom” adds to “freedom of expression”, as discussed in paragraph 74 of the Policy Memorandum, or what different rights have to be balanced with those of others to go about their lives unmolested. As that paragraph notes, “the previous duty required post-16 education bodies to have regard to the desirability of ensuring academic freedom”. We strongly believe that to be the preferable position, since freedom of expression can never be unqualified (as the Convention recognises), and “having regard” requires the individual or institution exercising the right to conduct an assessment of the relevant benefits and disbenefits to all those who might be affected by that exercise. If, however, the impression is given that “academic freedom” is some form of enhanced freedom of expression, there is a danger that unqualified endorsement could be interpreted as a free pass.

We therefore regard it as essential that any statutory strengthening of the right to academic freedom must be accompanied by the introduction of a statutory duty of care, to strengthen compliance with obligations under the “Prevent Duty Guidance for Scotland”² (see below, p.8).

¹ *What's Changed about Being Jewish in Scotland?*
http://www.scojec.org/news/2015/15_bjis2/bjis2.html

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417941/Prevent_Duty_Guidance_for_Scotland.pdf

6. The Bill states that academic freedom is to be exercised “within the law”.

Are there likely to be any significant constraints – other than legal constraints – on academic freedom? For example, the particular ethos within an institution; funding pressures; institutions’ policies on equality and diversity; etc.

We are concerned that the import of “within the law” is unclear, in particular, with regard to whom the burden of proof would lie. Would the Bill, for example, require a victim to prove that a member of the academic or research staff had acted outwith the law, or the latter to prove that he or she had not acted in an illegal manner? But in either case, a member of staff would benefit from the prima facie protection provided by Part 2 of the Bill while a student who had been intimidated by remarks made by a lecturer would not – i.e. the person who already has the upper hand and, for example, by the way in which he or she grades papers, is able to influence the student’s future prospects, would appear to be the one to whom the Bill affords greater protection. That is not equitable.

It is conceivable that academic freedom could be constrained by the ethos of an institution; for example, an institution twinned with a university in China might feel constrained to limit outspoken support for Tibet, or not to work with Tibetan students, academics, or researchers.

It is also possible that some academic and research staff may feel intimidated by aggressive demonstrations or abusive rhetoric whether by students or their academic peers. For example, one member of academic staff told our 2013 *Being Jewish in Scotland* inquiry³ “*Especially in Dundee, the academic community is influential and academic life is very badly polluted by anti Israeli feeling. ... I’ve been described by a fellow academic as being “suspiciously knowledgeable about Judaism”.*

In addition, as we have described below, under “Academic freedom for members of the student body”, it is apparent that students’ academic freedom – a significant omission from the Bill – may be constrained by the political or other prejudices of the academic staff. It is not acceptable that one set of academic freedoms can be allowed to prevent the academic freedom of others, but the Bill does not even begin to address the issue of competing academic freedoms. The potential for lengthy and divisive court cases when such conflicts of rights exist is apparent from the litigation under the Equality Act 2010.

7. Are the situations in which relevant persons can exercise their academic freedom clear? For example, should their freedom be limited to their work within an institution, as opposed to views they may express outwith the institution?”

The extent and, indeed, limitations of the proposed academic freedoms are not clear from the Bill documents since, although the Policy Memorandum states (paragraph 59) that the Review’s recommendation was that the definition of academic freedom should be “based on the definition contained in Ireland’s Universities Act 1997”, which includes

³ *Being Jewish in Scotland* (Scottish Council of Jewish Communities, 2013)
<http://www.scojec.org/resources/files/bjis.pdf>

that the relevant freedoms should apply “in or outside the university”, the Bill itself does not state whether Part 2 (the new section 26 of the Further and Higher Education (Scotland) Act 2005, also applies to ideas, views, and opinions expressed or advanced outwith a post-16 education body.

We are concerned that certain views, even if expressed outwith a post-16 education body, could impact negatively on students studying at that institution, and, therefore, on the ability of the relevant member of academic staff effectively to carry out his or her teaching role.

The issue should not be where an individual happens to express a contentious view, but his or her *locus standi* to do so. Someone talking about the results of his or her research should be protected whether in a university or external lecture, a letter to the editor, or pub conversation, but the same person expressing personal prejudices, political opinions, etc should not be protected either in the lecture theatre or the pub even if they are indirectly related to his or her academic work.

Students’ Academic freedom

We are surprised that the Bill limits the right to academic freedom to people engaged in teaching, the provision of learning, and research, and does not extend it to those studying at post-16 institutions. We are aware of occasions when the academic freedom of both individual students and properly registered student organisations have been suppressed, in some cases by members of academic staff of the same or another post-16 education body.

On one occasion, for example, the Edinburgh University Politics and Economic Society invited a senior diplomat from the Israeli Embassy in London to address its members, and face what, it was anticipated, would be searching, and in many cases highly critical, questions about his country’s policies. Unfortunately, the society was put under such pressure from various organisations within and outwith the university that it felt compelled to withdraw the invitation. In the event, another student society stepped into the breach and took over the organisation of the meeting, but it was so disrupted that the speaker was not able to say a single word. Videos of the event show a group of demonstrators, one of whose leaders was a member of the academic staff at another university, intimidating the student audience, some of whom can clearly be seen to be frightened at the verbal, and occasionally physical violence of the demonstrators. The noisy and disorderly demonstration prevented the speaker from being able to say anything – the demonstrators would not even permit him to respond to their shouted claims and criticisms, and the event was abandoned after around half an hour. It does not bode well for the ability of academic authorities to exercise their “autonomy” responsibly, that university security stood by with their arms folded and did nothing to intervene to protect the freedom of expression of the speaker, or the academic freedom of the students who wished to hear – and indeed question – the speaker. In fact the university authorities refused to allow the police access despite the fact that they were

present outside the theatre and aware of the mayhem within. This is clearly the antithesis of academic freedom, since the students were prevented (by, amongst others, a member of academic staff) from hearing and questioning a particular point of view.

We are strongly of the opinion that the academic freedom of students freely to invite a wide range of speakers (except when the person concerned has a history of fomenting hatred and/or violence), and to express opinions contrary to those of the academic staff (provided also that these views do not foment hatred and/or violence), should also be protected under this legislation, and not be subject to manipulation by a contrived “majority” that in fact constitutes a tiny minority of the student body.

Equality and Diversity

As we have already observed, one of the “main principles” of the Scottish Code of Good Higher Education Governance is to “*ensure that [the Higher Education Institution] observes good practice in regard to equality and diversity*”. Although post-16 education bodies are, of course, required to comply with the Equality Act 2010, since we are aware of a number of failures in regard to equality and diversity issues, we regret that, since equality law is reserved, this principle could not be strengthened by inclusion in the current Bill.

A senior academic who participated in our 2013 *Being Jewish in Scotland* inquiry⁴ told us, for example, of having had to intervene to support a medical student who had been told in so many words by his professor to choose between his intended profession and his religion. The professor, who happened to be a vice-principal, then asked, “*why should the university give a dispensation from our rules; why can’t you give one from yours?*,” and when the academic explained that Judaism has no provision for dispensations, he was told, “*Well you should!*” (which, the senior academic further commented, is simply meta-discrimination: instead of “you should behave like me” we have “your religion should behave like mine”).

Another student at a different medical school told us she was “*being hounded for taking off Jewish holidays, and refusing to sit exams on Friday evening*” (the Jewish Sabbath) and was “*repeatedly summoned for dressing-down from professors, the dean, and the head of the school. Others who were off (including Muslims) were advised not to fill in absence form but just to ‘be ill,’ and were not subjected to the same harassment.*” In a caricature of equality legislation, she was told by the Dean that “*because this is a secular university, we don’t need to take any account of students’ religion*”, and by another professor, whose class she missed on Friday afternoons (during the winter the Sabbath begins around 3.30pm), and who was also on the admissions committee, that she was “*not doing your people any favours as we’ll think twice about taking anyone with a Jewish name in future.*”

It is evident that the situation has not improved; a student who participated in this year’s *What’s Changed about Being Jewish in Scotland* inquiry told us: “*As a student having a university that refuses to reschedule my exams around Jewish holidays and Shabbat*

(the Jewish Sabbath), *I was told by my university that either I sit exams on Shabbat or I fail, period.*”

In another disturbing case, a student who was repeatedly the target of antisemitic jibes from fellow students, both face-to-face and on social media, told us that she no longer went to the Business School or library, and was worried about attending a class workshop “*due to fear of being harassed or attacked*” (in fact, she uses the word “fear” no less than five times in her report of the situation). Although the student submitted a formal complaint to the university, its procedures were so drawn out that she was further disadvantaged by not feeling able to attend classes or informal group activities.

It is troubling that, when the Jewish Student Chaplaincy Scotland, has intervened, with the support of the Scottish Council of Jewish Communities, to assist Jewish students who find themselves subject to such abuse, our concerns have been dismissed by senior university staff who appear not to recognise that there have been failures in the institution’s compliance with the Equality Act 2010 and the Scottish Code of Good Higher Education Governance, as well as the “Prevent Duty Guidance for Scotland”, which states (paragraph 95) that “*Universities have a responsibility to care for their students and we would expect, as part of the pastoral care and support available, there to be sufficient pastoral support for all students according to the needs of the particular institution. This is seen as a key element of compliance with the duty.*”

We are very conscious that students are particularly vulnerable in that their entire future may be affected by the treatment they receive from a single member of staff during a single course, and indeed that their membership of a particular institution may be as brief as one term and that they are unlikely to have the resources for protracted legal action, so there is an incentive for the institution to extend proceedings until the problem literally goes away, as has happened in several of the cases referred to above.

We are also conscious that changing procedures for the future, or disciplining staff after the event, does not assist the victim whose life has been ruined, and we therefore favour not only a statutory code, but also the creation of a swift, cheap, and accessible way of enforcing it.

Equality Impact Assessment (Policy Memorandum paragraphs. 71-2)

We are surprised that the Equality Impact Assessment “concluded that the Bill’s provisions are neither directly nor indirectly discriminatory on the basis of [any of the protected characteristics].” As we have described above, widening the definition of academic freedom, and strengthening measures to uphold academic freedom among the teaching and research staff while not extending similar rights to students, is likely to create a situation in which students may be victimised by a minority of unscrupulous staff with a particular axe to grind, be that political, racist, sexist, or discriminatory in any other way. Those most vulnerable, especially to intimidation by the very people who hold their futures in their hands. We note that there are other contexts, such as sexual offences, in which the potential for the abuse of a position of trust or authority has been

regarded overriding the consent of an otherwise competent young person. We have cited more than adequate evidence above that this is a real and not only a theoretical risk, and would therefore urge that legislation should address this potential for the abuse of power in this context too.

Human Rights (Policy Memorandum paragraph 74)

Similarly, whilst we agree that “section 26 clearly engages article 10 of the Convention ... [and] strengthens the protection of this right ... [for] persons involved in teaching and research”, we are concerned that the corollary of this is that protection has been reduced for individual students and groups of students who may have even less redress than at present if a “controversial or unpopular point of view” expressed by a member of the academic staff happens to abuse or denigrate an aspect of the students’ identity, or penalise them academically for putting forward a view that is at odds with that held by a member of the academic or research staff.

In summary

Balancing freedom of expression and freedom from intimidation and harassment is already a fraught legal area. These proposals for strengthening academic freedom do not assist academics or institutions to find the point of balance, but instead provide a defence for the bullies rather than their victims.