



Uncomfortable,  
but educational:  
Freedom of expression  
in UK universities



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This document was compiled with the support of Clifford Chance and Jonathan Price, Doughty Street Chambers.



# Executive summary

Free speech is vital to the free flow of thoughts and ideas. Nowhere is this perhaps more important than in universities, which are crucibles for new thought and academic discovery, and whose remit is to encourage and foster critical thinking.

In recent years, however, there has been a concerning rise in apparent attempts to shut down debates on certain subject areas in universities in the UK and elsewhere. Speakers whose views are deemed “offensive”, “harmful” or even “dangerous” have been barred from speaking at events, conferences on particular topics cancelled and new laws introduced that some students and academics argue encourage an atmosphere of self-censorship that is inimical to the spirit of open debate essential for the testing and development of ideas.

Free speech on campus is not a new issue but, for a number of reasons, it has recently become more high profile in the UK and worldwide. For example, in the past three years:

- Repeated attempts were made at an event at Goldsmiths, University of London by its Islamic Society to prevent ex-Muslim and feminist campaigner Maryam Namazie from speaking. Students heckled Namazie and accused her of “intimidation”.
- The University of Manchester’s students union banned feminist speaker Julie Bindel and right-wing commentator Milo Yiannopoulos from speaking at a student society debate on free speech.
- A proposed conference at Southampton University questioning the legitimacy of the Israeli state was cancelled amid fears of mass protest.

A freedom of expression organisation with an international remit, Index on Censorship seeks to highlight violations of freedom of expression all over the world. Our approach to the principle of freedom of expression is without political affiliation.

In Free Speech on Campus we look at the situation today on UK campuses and in particular examine the existing legal and other protections for free speech in universities. This comes in the wake of renewed government commitments to protect freedom of expression on campus. We point out examples where rights to free speech are being curtailed by students, academics and student unions and highlight the ways in which both higher education institutions and student bodies could do more to protect freedom of expression.

Our findings suggest that existing legislation already provides a strong framework for protecting freedom of expression in this country. However, we are concerned that Prevent legislation in particular – which compels universities to refer students who seem at risk of being drawn into terrorism – is at odds with the statutory duty on universities to protect free speech and echo the call by the Joint Committee on Human Rights for a review of the Prevent policy.

Furthermore, our findings show that universities and student bodies could do more to explicitly demonstrate, and fulfil, their commitment to freedom of expression.

The main recommendations from this report are that:

1. Universities strengthen and simplify codes of practice  
We recommend universities revise regularly and publicise more effectively their codes of practice on freedom of



expression to make clear their responsibilities and commitment to protecting free speech on campus. See Appendix 1 for examples of good practice.

#### 2. Student unions clarify policies

We urge student unions to reaffirm a commitment to freedom of expression in their policies and remove “no-platforming” policies that involve outlawing speakers who are not members of groups already proscribed by government.

#### 3. Prevent review

We encourage the government to undertake an immediate independent review of the Prevent policy that assesses the Prevent duty’s effectiveness in the context of higher education and its impact on freedom of speech and association, as recommended by the Joint Committee on Human Rights and others.

#### 4. Reject fines system to punish non-compliance

We do not believe that fines are the mechanism to promote freedom of expression on campus. Rather, a clearer commitment to freedom of expression from governing bodies and student unions would encourage this.

#### 5. Survey attitudes to free speech and make rights education part of 11-18 curriculum

A comprehensive survey of staff and students’ attitudes and experiences would help to better identify strategies for promoting the value of freedom of expression on campus. Since free speech has been identified by government as a

central British value, developing strategies for its better promotion – including developing educational training material for young people in secondary education – is a key component in ensuring its protection.

Our recommendations are aimed at all policy-makers involved with universities and other higher education institutions (HEIs), including the new regulator, the Office for Students (OfS). The recommendations are designed to help universities and their stakeholders navigate the current legislative requirements to protect public safety while balancing the need for free speech on campuses.

We hope that they help to empower HEIs against self-censorship for fear of undue media attention or reaction from students as “consumers” of education at private institutions. This work is not intended to be a conclusion to the subject, but rather a living document that continues to spark innovative ways of approaching free speech on campus. As a result, we welcome discussions and interactions with universities to continue the debate and resolve any unanswered questions.

# Introduction

Freedom of expression and freedom from discrimination are intertwined rights. Both have been the subject of much debate in their application to HEIs, especially about the balance between the protection of free speech versus the duty of universities to prevent discrimination and provide a safe working environment for staff and students alike. Often these duties are presented as somehow mutually exclusive.

Activism on UK campuses is nothing new and the debate on free speech has been present since at least the 1960s. However, Index is concerned that laws passed in the last 30 years relating to free speech, anti-discrimination and counter-terrorism – as well as cultural attitude shifts towards freedom of expression among some in the student population – have the potential to make academic free thinking, social debate, and political activism that encourages diverse viewpoints more difficult.

## University policies and practice

A survey by freedom of expression group Spiked in 2018 of 115 universities across the UK – in England, Wales, Northern Ireland and Scotland found that 54% actively censor speech. Some had rules that speakers could not appear on university platforms unless their speeches were cleared by university authorities. Some have banned or disinvited speakers in recent years, such as the former leader of the English Defence League, Tommy Robinson<sup>1</sup>. Others have codes of conduct that prescribe (with threats of disciplinary action) acceptable ways of talking about certain issues in order to “promote an atmosphere in which all students and staff feel valued”. Universities have argued that the latter simply make clear that homophobic, sexist and racist language will not be tolerated as per their duties on promotion of equality (see page 10 Public Sector Equality Duty). Critics of the rankings say that the freedom of speech violations are exaggerated by the “red ratings” given in the survey results and overstate the restrictions on freedom of expression on UK campuses.

Universities UK, the representative organisation for UK universities, has asserted the importance of protecting freedom of expression in higher education establishments and a number of leading academics have also spoken publicly on the issue. In early 2016, on the day of her formal installation as the new vice chancellor of Oxford University, the political scientist Professor Louise Richardson, said: “Education is not meant to be comfortable. Education should be about confronting ideas you find really objectionable, figuring out why it is you should find them objectionable, fashioning a reasoned argument against them, confronting the person you disagree with and trying to change their mind, being open to them changing your mind. That isn't a comfortable experience, but it is a very educational one.”

## Students' behaviour

Students in the UK have also been responsible for limiting speech: boycotting pro and anti-Israel speakers; banning tabloid newspapers in the student union; and “no-platforming” feminists who have been critical of transgender men and women.

Sometimes universities and students work in tandem. For instance, when the student union at the London School of Economics objected to t-shirts being worn at the LSE Freshers Fair with the “Jesus and Mo” motif, the university's security staff became involved and the students wearing the t-shirts were told they would be removed from the premises if they did not cover up the shirts.<sup>2</sup>

## UK government policy

The current UK government has stated on a number of occasions in recent years its commitment to ensuring freedom of expression in universities.

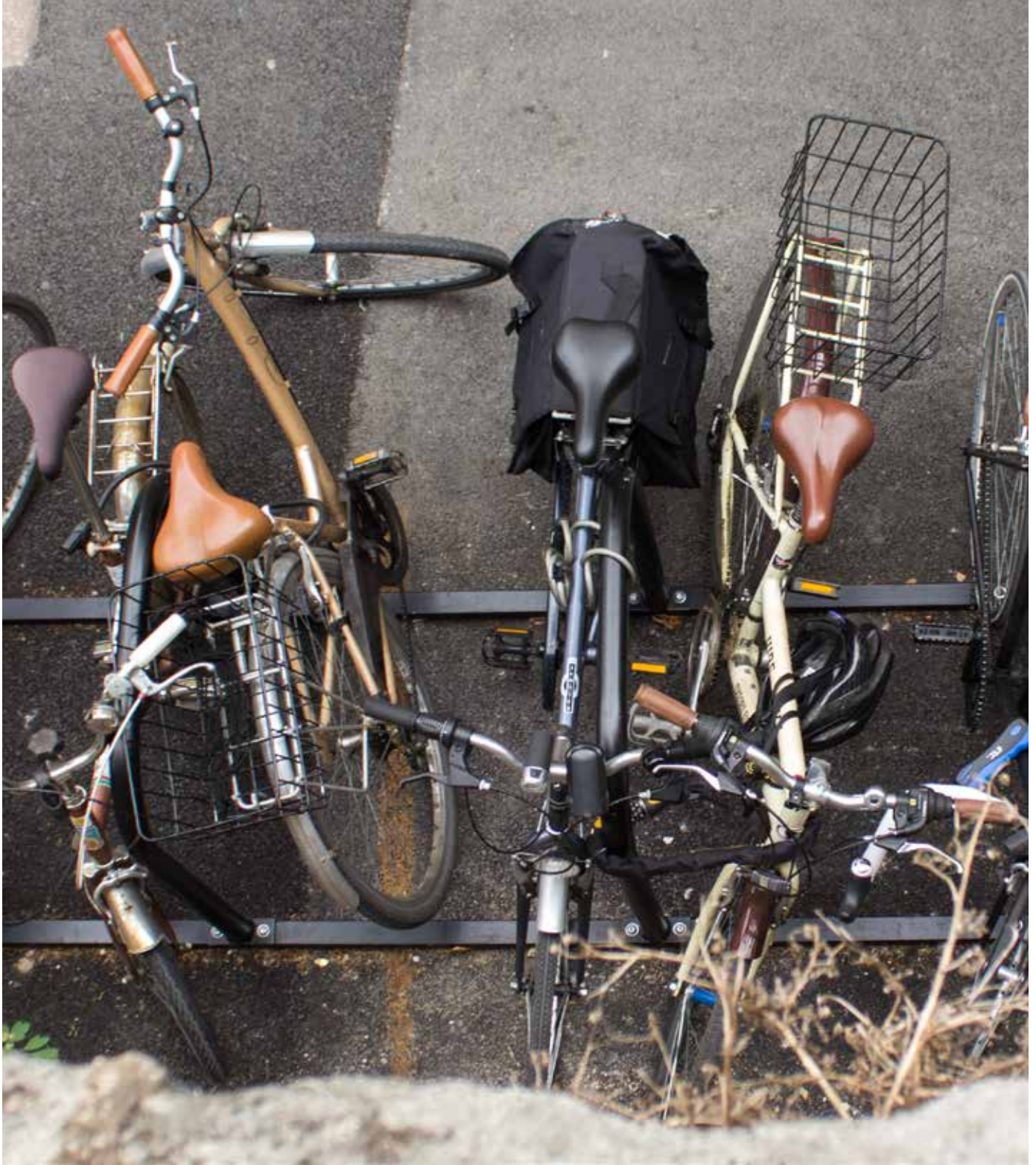
The new Office for Students was announced in January 2018 and took up operation as the new regulator for higher education in England from April 2018. The issue of free speech is already at the forefront of the regulator's mind, as one of its key responsibilities is to assess students' access to free speech and penalise institutions that do not comply with their own freedom of speech code.

Unlike the USA, the UK has no first amendment protection on speech. In recent times, while condemning bans on free speech, the UK government has put free speech limitations on a seemingly statutory footing, with the Counter-Terrorism and Security Act 2015 (CTSA) leading to the government's Prevent policy, which – whether intended to or not – is having a chilling effect on freedom of expression.

Prevent aims to curb home-grown terrorism. The Prevent policy applies across schools, further education colleges and universities to deny a platform to those who might promote terrorism unless the risks can be mitigated. The strategy has been interpreted as encouraging teachers and lecturers to report those who might have been radicalised or might radicalise others – although the CTSA does require institutions to have “particular regard to the duty to ensure free speech” and to “the importance of academic freedom” when carrying out the Prevent duty.

1 [https://www.huffingtonpost.co.uk/entry/tommy-robinson-free-speech-oxford-brookes-university-cancelled-protest-fears\\_uk\\_589b0b2fe4b076856217bd47](https://www.huffingtonpost.co.uk/entry/tommy-robinson-free-speech-oxford-brookes-university-cancelled-protest-fears_uk_589b0b2fe4b076856217bd47)

2 <https://newhumanist.org.uk/articles/4363/lse-jesus-mo-t-shirt-incident-raises-questions-about-free-speech-on-campus>



Simon Q / flickr

# The road to legislation: a brief history

Freedom of expression at higher education institutions has a specific protection under the Education (No 2) Act 1986.

The act states that everyone involved with the governance of an HEI must take such steps as are “reasonably practicable” to ensure freedom of speech is secured for members, students, employees and visiting speakers.

This means that universities have an explicit duty to protect freedom of expression in their institutions. Notably it requires universities to keep up to date a code of practice that sets out what procedures it expects from staff and students regarding freedom of expression. Furthermore, it further includes student union premises as being part of the “university establishment” even if not owned by the university, which is significant when considering the degree to which student groups might be able to argue they are not party to the requirements of the act as regards freedom of expression.

The statutory duty on universities to protect freedom of expression came in part as in response to a series of clashes at university unions in preceding decades (see box on “no-platforming”).

## No-platforming

Demonstrating against speakers, boycotting goods and banning or cancelling speeches (no platforming) has been present on UK campuses for many decades.

- “No-platforming” is a term used to mean the barring of certain speakers based on their political affiliations.
- It developed in the early 1970s as a reaction to attempts by the far-right National Front to recruit people on campus.
- The term “no-platform” was first used by the International Marxist Group, who argued: “The only way to deal with fascist type organisations like the National Front is to break up their activities before they grow to a size where they can begin to smash the activities of the working class.”
- At the 1974 National Union of Students conference, a “no-platform” policy was adopted. It stated: “[C]onference believes that in order to counter these [racist and fascist] groups, it is... necessary to prevent any member of these organisations or individuals known to espouse similar views from speaking in colleges by whatever means necessary (including disrupting of the meeting).”
- The no-platform policy was criticised by some at the time as a denial of free speech. The Guardian warned in an editorial: “Students should perhaps remember that frustration which leads to a denial of the right of one section of society is not something new. It is a classic pattern of fascism.”
- The current NUS policy, as set out in its articles of association, provides that no “individuals or members of organisations or groups identified by the Democratic Procedures Committee as holding racist or fascist views” may stand for election to any NUS position, or attend or speak at any NUS function or conference. Furthermore, officers, committee members, or trustees may not share a platform with any racist or fascist.<sup>[3]</sup> The six organisations currently on the no-platform list are:<sup>[4]</sup>
- Al-Muhajiroun;
- British National Party;
- English Defence League;
- Hizb-ut-Tahrir;
- Muslim Public Affairs Committee.
- National Action



# Legislation applicable to higher education institutions

The UK higher education system is quasi-public, essentially functioning as a system of “private institutions operating in the public interest”. There are around 162 HEIs – all publicly funded – and a handful of private universities in the UK. All UK institutions are legally independent, self-governing institutions.

Educational institutions in the UK are governed in a number of ways, depending on how they were established. UK HEIs are autonomous institutions and tend to be operated by internal articles of governance. Governance groups are usually councils and a board of faculties, supported by chairs of committees; some universities are set up as limited companies. In most cases the institution will have a body representing students as part of the governing group.

University policy, including staff and student behaviour, is governed by a range of legislation – from local laws in the UK to international treaties. The rights to freedom of expression and freedom from discrimination in the UK have evolved over time. The legal representations are therefore covered by common law, the UK’s domestic legislation and its international legal obligations.

From April 2018, a new regulator, the OfS became operational to begin regulating HEIs in England. Its responsibilities will include ensuring that HEIs promote the right to freedom of speech.

This section of Free Speech on Campus is intended to be an introduction to the legal obligations facing universities and HEIs. It is included as a summary and guide to help HEIs and stakeholders see at a glance the range of legislation, constitutions and codes that govern their operation and must be covered in their policies and codes of practice. For more information on the exact articles and their details – and specific legislation applicable to student unions – please see Appendix 2.

## UK legislation

Freedom of expression is enshrined and protected in UK law by the Human Rights Act, which incorporates the European Convention on Human Rights into UK law. The most important of the convention’s protections in this context is Article 10.

Article 10 states: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

It is worth noting that freedom of expression, as outlined in Article 10, is a qualified right, meaning the right must be balanced against other rights. Nevertheless, several judgments by the European Court of Human Rights have held that “Freedom of expression...is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population”.

The recommendations laid out in this report suggest how this might be done in such a way as to ensure freedom of expression is given due consideration in any such assessments.



### Section 43 of the Education (No. 2) Act 1986

As outlined above, section 43 of the Education (No. 2) Act 1986 contains a duty to secure freedom of speech in educational establishments. It requires those involved in the government of any university or higher education institution to take steps to ensure that freedom of speech within the law is secured for its members, students and employees and visiting speakers, and that the use of any premises of the establishment concerned is not denied to any persons on grounds connected to their beliefs, views, policies or objectives. The full text of this section can be found in the appendices.

### Public Order Act 1986

The Public Order Act makes it an offence for anyone to deliberately cause another person to fear [that] violence will be used against them or from someone to intentionally harass, alarm, or distress another.

### Education Reform Act 1988

The Education Reform Act protects academic freedom and requires university commissioners to: “ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions.”

### Education Act 1994

The Education Act requires HEIs to bring to the attention of students, at least once a year, the requirements of the act relating to freedom of speech in universities and colleges.

### Human Rights Act 1998

Since the Human Rights Act came into force, UK laws are required to be compliant with the rights guaranteed under the European Convention on Human Rights, including that of free speech and freedom of association and assembly. Under the act, HEIs are under a statutory duty to protect the free speech of staff and students, as well as protecting them from discrimination.

### Higher Education Act 2004

The Higher Education Act applies in its definition of the types of higher education governing bodies that are bound by the duties of the Counter-Terrorism and Security Act 2015 (See below).

### Racial and Religious Hatred Act 2006

This creates an offence in England and Wales of intentionally inciting hatred against a person on the grounds of their religion or race.

### Equality Act 2010

The Equality Act 2010 brings together more than 116 pieces of legislation covering anti-discrimination law in the UK. Chapter 2 of Part 6 of the Equality Act (the Higher Education Chapter)

applies, in conjunction with Part 2 of the Equality Act, to HEIs, and specifically protects students and prospective students from discrimination, harassment or victimisation from the institution's governing body. Chapter 2 of the Equality Act does not cover student unions (See Appendix 2 for more information).

### Public Sector Equality Duty

As public bodies, most HEIs are subject to the Public Sector Equality Duty under section 149 of the Equality Act 2010. The duty obliges public bodies to actively have regard to: eliminating discrimination, harassment, victimisation and other prohibited conduct; advancing equality of opportunity; and fostering good relations between people who have protected characteristics and those who do not.

### Counter-Terrorism and Security Act 2015

The Counter-Terrorism and Security Act 2015 imposes a legal obligation on UK HEIs to “take steps to prevent people from being drawn into terrorism.” This legislation forms part of the UK government's Prevent Duty (See below and Appendix 2 for more detail).

### Prevent Duty

There is a statutory duty on universities to tackle radicalisation through the Counter-Terrorism and Security Act 2015. Prevent, the counter-terrorism duty, applies across schools, further education colleges and universities (See case study below).

### Higher Education and Research Act 2017

The Higher Education and Research Act aims to create a new regulatory framework for higher education, increase competition and student choice, ensure students receive value for money, and strengthen the research sector. The act established the Office for Students and sets out its role as the new regulator and funding council for the higher education sector. The role includes ensuring that students receive value for money. The OfS will also hold HEIs registered under the Higher Education and Research Act 2017 to account regarding the state of free speech on their campuses, with the powers to penalise institutions that do not comply with their own freedom of speech code.

### International standards applicable in the UK

Universal Declaration of Human Rights 1948 (Articles 2, 7 and 19)

Written at the United Nations in the aftermath of the Second World War, this declaration sets out fundamental human rights for universal protection. Articles 2, 7 and 19 deal with freedom of speech and protection against discrimination.

### European Convention on Human Rights (Articles 10 and 11)

Articles 10 and 11 in the European Convention on Human Rights help to protect free speech. Article 10 qualifies that right with responsibilities; and Article 11 covers public assembly for the purposes of exercising free speech, but also qualifies that with the right to reinforce public safety.

### Charter of Fundamental Rights of the EU

The Charter of Fundamental Rights brings together all the personal, civic, political, economic and social rights that were established at different times for different individual EU states. It also incorporates new developments in science and technology that may affect the protection of these rights – for example, data privacy. Articles 11 and 12 cover freedom of expression and assembling to express free speech.

### International Covenant on Civil and Political Rights 1966 (Articles 19, 20(2), 26 and 27)

This International Covenant is a multilateral treaty adopted by the United Nations General Assembly. It commits its parties to respect the civil and political rights of individuals, including the right to freedom of speech and freedom of assembly. It qualifies those rights with the need for prohibiting violence or public disorder.

### Protecting students and staff against discrimination

The following conventions protect citizens from harassment and discrimination. Universities and HEIs need to be aware of these laws. While they do not directly protect free speech, they can influence policies and decisions to allow certain events and speeches from happening on campus.

- International Convention on the Elimination of All Forms of Racial Discrimination 1966
- Convention on the Elimination of All Forms of Discrimination against Women 1981
- UN Convention on the Rights of Persons with Disabilities 2008

It is worth noting that it is often wrongly assumed that the duties to protect staff and students from discrimination or harassment are in conflict with, or trump, duties to protect freedom of expression. This is not the case. In fact, we believe that with the exception of Prevent, it is perfectly possible to protect freedom of expression while also meeting other statutory duties. Universities and the OfS should be clearer in asserting this when “harm” and “safety” are used as arguments to restrict legal speech on campus.



Arthur John Picton / flickr

# Current concerns on UK campuses

Between 2015 and 2017, the Spiked Free Speech University Rankings surveyed 115 universities in the UK and tracked 129 bans. The most recent Spiked report (2018) shows that 20 universities have banned some newspapers, 21 have banned speakers, 16 have suspended a number of student societies, 17 have banned adverts, 16 have banned a number of student societies, and nine have banned some types of fancy dress.<sup>3</sup>

This suggests a climate in which freedom of expression is increasingly limited. However, the Joint Committee on Human Rights<sup>4</sup> challenges this view in its recent report on freedom of expression in universities. It found: "The extent to which students restrict free speech at universities should not be exaggerated. Where it happens, it is a serious problem and it is wrong. But it is not a pervasive problem. The evidence we have taken shows that overall there is support for the principle of freedom of speech among the student population...much of the concern about free speech appears to have come from a small number of incidents which have been widely reported."

Censorship is of course, most difficult to spot when it involves self-censorship. Few of the recent studies or surveys into censorship on campus relate to instances in which individuals or groups no longer feel able to discuss certain topics – and therefore it is currently impossible to quantify the actual level of censorship – or limitations on freedom of expression – taking place in UK universities. Even evincing positive support for the principle of free speech is not necessarily indicative that individuals are willing to put such support into practice when it comes to allowing speakers who are controversial, even offensive, to speak on campus.

More research is needed to understand the areas in which free speech is limited on campus and the extent to which students and staff feel able to air views freely.

This report identifies four key barriers we see facing universities relating to their statutory duty to protect freedom of expression. These are:

1. Prevent
2. No-platform policies
3. Heckler's veto
4. Notions of speech as harm

## Prevent

HEIs are obliged to abide by current regulations, and comply with the requirements of the OfS, the new regulator, as outlined above. While this includes promoting free speech, recent government legislation is also influencing university policies and codes of practice, often resulting in a knock-on negative impact on free speech on campuses. For example, the government's anti-terrorism legislation requires institutions to comply with the Prevent duty as part of anti-terrorism legislation in a way that a number of people have argued is incompatible with its statutory duties to protect freedom of expression.

The Prevent duty guidance states: "[ ... ] when deciding whether or not to host a particular speaker, RHEBs [relevant higher education bodies] should consider carefully whether the views being expressed, or likely to be expressed, constitute extremist views that risk drawing people into terrorism or are shared by terrorist groups. In these circumstances the event should not be allowed to proceed except where RHEBs are entirely convinced that such risk can be fully mitigated without cancellation of the event [ ... ]. Where RHEBs are in any doubt that the risk cannot be fully mitigated they should exercise caution and not allow the event to proceed."<sup>5</sup>

Although the government points out that the Prevent guidance does not preclude speakers with extremist views from speaking on campus and does not require academics to 'report' students who discuss sensitive issues, it is clear that the way in which Prevent guidelines are being understood is encouraging a level of caution that is at odds with the positive duty to secure freedom of speech in universities.

Imran Awan, associate professor in criminology at Birmingham City University, argued in an article published on Aljazeera.com: "Today, thanks to the government's policies that aim to transform academic staff into counter-terrorism police, openness, tolerance and freedom of expression in UK universities are under threat. Academic staff are being encouraged to report their students for reasons like discussing certain 'sensitive' topics, asking certain questions or even reading 'suspicious' textbooks. Also, universities are being told not to give [a] platform to certain speakers because they have been classified - mostly without any substantial evidence - as extremists or radicals. All this is stifling academic debate, making university lecturers feel under pressure and forcing them to avoid 'risky' subjects and ideas rather than challenging, questioning and confronting them."<sup>6</sup>

3 <http://www.spiked-online.com/free-speech-university-rankings#.W9FSTRNKgdU>

4 <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/589/58902.htm>

5 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/445916/Prevent\\_Duty\\_Guidance\\_For\\_Higher\\_Education\\_England\\_Wales\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445916/Prevent_Duty_Guidance_For_Higher_Education_England_Wales_.pdf)

6 <https://www.aljazeera.com/indepth/opinion/uk-prevent-programme-doesn-work-1804111452226.html>

At its 2015 congress, the University and College Union passed a policy setting out objections to the Prevent duty, including the fact that “[it] seriously threatens academic freedom and freedom of speech”<sup>7</sup>. The National Union of Students has taken a stand against Prevent, arguing that it disproportionately targets Muslim students and poses a challenge to free speech. An NUS campaign, Students Not Suspects, has also challenged the legislation’s effect on students.

#### What the Prevent duty says about universities

The Prevent duty was brought into force by the Counter-Terrorism and Security Act 2015 which specifies certain authorities, including universities and higher education institutions, to have due regard to the need to prevent people from being drawn into terrorism. The government provides online training on the Prevent duty.

The Prevent guidance includes the catch-all phrase that universities must make sure their students or staff are not “drawn into terrorism, which includes not just violent extremism but also non-violent extremism, which can create an atmosphere conducive to terrorism and can popularise views which terrorists exploit. It is a condition of funding that all further education and independent training providers must comply with relevant legislation and any statutory responsibilities associated with the delivery of education and safeguarding of learners”.

#### Prevent on students

Noting that “young people continue to make up a disproportionately high number of those arrested [...] for terrorist-related offences”, the Prevent guidelines identify universities as a place that young people “risk radicalisation”, which can be facilitated through events held for extremist speakers, or through other radicalised students on social media.

#### Prevent on events

Where events are concerned, the guidance contains this statement: “Where institutions are in any doubt that the risk cannot be fully mitigated they should exercise caution and not allow the event to proceed.”

#### Privacy

In January 2017 King’s College, London, told students that their email could be retained and monitored as part of the college’s Prevent obligations<sup>8</sup>. It is believed other universities also monitor emails. Critics, including human rights lawyers, have said the policy is a catch-all for many types of political dissent and free speech, and that it encourages the demonisation of Muslims.

Most recently, the Joint Committee on Human Rights identified evidence given to the committee that showed Prevent was having a chilling effect on freedom of expression.

### Prevent duty

Prevent places a duty on educational institutions to deny a platform to those who might incite terrorism unless the risks cannot be mitigated. It also encourages universities to monitor students’ behaviour. The most controversial aspect of the legislation is that it is aimed at “extremist” speakers. “Extremism” as defined by the government is “vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs”. Critics, including Index on Censorship, argue this definition of “extremist” is too broad and does not simply include members of proscribed organisations but could potentially include anyone whose views do not currently chime with national views on particular issues (e.g. those who object to homosexuality on religious grounds). The government stresses that the policy only applies to extremist speakers who could draw others into terrorism but evidence suggests this is not how the policy has been understood, leaving universities struggling with two conflicting policies in which the cautious approach of Prevent is seen to trump the duty to protect free speech.

### Conclusion

Evidence provided by academics and students to the Joint Committee on Human Rights, as well as interviews conducted with students and other organisations by Index on Censorship suggests that the Prevent duty is having a chilling effect on freedom of expression in British universities.

We recommend:

The government undertake an immediate independent review of the Prevent policy – and in particular the way it is being trained, understood and implemented – that assesses the Prevent duty’s effectiveness in the context of higher education and its impact on freedom of speech and association, as recommended by the Joint Committee on Human Rights. This review should include a comprehensive survey – not simply small-scale sampling – of students and academics’ views and experiences. In particular, this should consider the degree to which these groups “self-censor”.

### No-platforming

The principles of free debate include the idea that speech must be countered with speech so that ideas are explored, viewpoints challenged, and arguments refined. No-platforming goes against

7 [https://www.ucu.org.uk/media/7370/The-prevent-duty-guidance-for-branches-Dec-15/pdf/ucu\\_preventdutyguidance\\_dec15.pdf](https://www.ucu.org.uk/media/7370/The-prevent-duty-guidance-for-branches-Dec-15/pdf/ucu_preventdutyguidance_dec15.pdf)

8 <https://www.theguardian.com/uk-news/2017/jan/20/university-warns-students-emails-may-be-monitored-kings-college-london-prevent>

this principle by seeking to stop certain people speaking on the grounds that they hold views that are offensive. Although the current NUS policies only specify six groups who should be no-platformed, the policy and term have been applied far more widely to ban certain speakers from union events.

This is because the NUS's position is that unions "have a right to refuse individuals and groups who threaten the safe environment students' unions provide for their members"<sup>9</sup>

This definition is extremely broad, not least because "safe" (and the accompanying notion of "harm") in this context are entirely subjective criteria, and risks a wide swathe of speakers being prevented from speaking on campus. We consider the question of harm in a later section.

At present, the NUS no-platform policy prevents representatives of the NUS from sharing a public platform with named individuals or groups, officially six "fascist and racist organisations": Al-Muhajiron; British National Party; English Defence League; Hizb-ut-Tahir; Muslim Public Affairs Committee; and National Action. Two of these organisations: Al-Muhajiron and National Action are proscribed terror

organisations under UK law and speakers from the others might well be unable to speak at universities under the government's counter-terrorism and anti-extremist legislation.

While individual university unions and student groups are not bound by this list, a 2016 ComRes survey of 1,000 university students found that 63% supported the NUS "no-platform policy" and 54% thought that the policy should be enforced against people who could be found intimidating. In reality, no-platforming has been extended to other speakers student unions find offensive. The case study below examines in more depth the case of Julie Bindel who was no-platformed by Manchester Students Union for her view on transgender men and women.

### Conclusion

Student unions should reaffirm a commitment to freedom of expression in their policies and remove all no-platforming policies that involve outlawing speakers who are not members of groups already proscribed by government.

While we welcome the focus on the OfS for ensuring that educational institutions promote free speech, we do not believe

<sup>9</sup> [https://nusdigital.s3-eu-west-1.amazonaws.com/document/documents/31475/NUS\\_No\\_Platform\\_Policy\\_information\\_.pdf?AWSAccessKeyId=AKIAJKEA56ZWKFU6MHNQ&Expires=1540455946&Signature=eliby5NhFpX5rb%2ByvhKbbJkUt88%3D](https://nusdigital.s3-eu-west-1.amazonaws.com/document/documents/31475/NUS_No_Platform_Policy_information_.pdf?AWSAccessKeyId=AKIAJKEA56ZWKFU6MHNQ&Expires=1540455946&Signature=eliby5NhFpX5rb%2ByvhKbbJkUt88%3D)



### Manchester University Students Union no-platforms Julie Bindel

Julie Bindel is a “political lesbian feminist” who has campaigned against sexual violence for more than three decades. In October 2015 the Free Speech and Secular Society at Manchester University invited Bindel to speak at an event called From Liberation to Censorship: Does Modern Feminism Have a Problem With Free Speech? However, the students union decided to prevent her from speaking, claiming that Bindel’s views on transgender women were “dangerous” and could “incite hatred towards and exclusion of our trans students”.

The charge relates to views such as those expressed in the 2004 article “Gender benders, beware”, in which Bindel stated that transgender women are not women and that rape counsellor Kimberley Nixon was “a man in a dress”.

Bindel told Index that, while people have the right to be offended by her speech, this does not in itself justify shutting

someone down. But the students were not invoking offence as the deciding issue. A third-year politics and history student at the university told Index in an interview that it was important for the students that the union was a place where students can be safe from “harm”. She noted students had a right to determine who or what the union allows or doesn’t allow on campus because they pay fees that partially fund the student union.

Bindel argues that resolutions by the NUS to no-platform her at universities have caused some students and even academics to shy away from debate or research on contentious issues: “I have looked at loads of syllabuses on prostitution or sex work, as they call it, on feminism, or in other words, on transgenderism, on sexuality, and there is literally no voice of dissent.”

that penalties for non-compliance that include monetary fines or de-registration are likely to actively promote freedom of expression. Rather, we encourage a more active and vocal stance among university and student leadership that

demonstrates a commitment to freedom of expression, that includes the freedom to voice ideas that others find offensive. It is vital in this context that more is done to divorce notions of offensiveness from harm (See section 4 below).

## Heckler's veto

Threatening violence or disruption in response to a speaking event on campus can be used as a way to prevent that speaker being heard, and – given universities duty to ensure the safety of its students – this could lead educational institutions to cancel events as a result. In many of these, because of legal requirements on universities and unions, student societies are charged a security fee for organising potentially disruptive events; they are required to give notice for inviting “controversial” speakers; and they must pass a number of checks before an event can be approved. All of the above means controversial speakers risk being unable to speak on campus because a risk-averse institution would consider it unable to guarantee safety.

A “heckler's veto” is a term coined to describe a situation in which a speaker's right is curtailed by:

- government or other action to prevent another party from reacting negatively to the speaker's message
- a person who disagrees with a speaker's message triggering events to cause the speaker to be silenced – such as the threat of demonstration or violence.

In October 2016 Hen Mazzig, a former Israeli Defence Force intelligence officer and self-described pro-Israel activist, gave a talk at University College London (UCL). He was met with protests from students and outside groups who viewed Mazzig as “complicit in the colonisation of Palestinian territory, protection of illegal Israeli settlements, and Israel's illegal occupation”. UCL's Provost Professor Michael Arthur stated that the university is “clear in its support both of freedom of speech and of the right to protest”. However, a UCL investigation found that, while the majority of protesters and attendees were non-violent, Mazzig's freedom of speech was “intentionally disrupted”.

### Heckler's veto at Southampton University

At the University of Southampton in 2015, a proposed conference to examine the legality of the state of Israel called International Law and the State of Israel: Legitimacy, Responsibility and Exceptionalism sparked demonstrations on campus. In response, the university's chief operating officer conducted a risk assessment and obtained a police report. Following this, the university's vice-chancellor withdrew permission for the conference to be held on campus, citing a high risk of disorder. In this case, the court accorded the university a wide discretion in determining its “reasonably practicable” response to such a situation.

In response, two professors sought permission for judicial review to reverse the decision to ban the conference. The professors submitted that, in refusing permission, the university had breached its duties to uphold freedom of expression under section 43 of the Education Act (and Article 10 of the ECHR), by virtue of the refusal having been: (i) made on the grounds that the views to be expressed at the conference were controversial and had led to complaints; and (ii) based on exaggerated and unsubstantiated security and safety concerns.

However, the appeal found that the decision to withdraw permission had been taken for proper reasons, in good faith, and with regard to the duty to promote freedom of speech.<sup>10</sup>

The court found that:

- the decision was taken on the grounds of security (it was not possible to maintain good order or safeguard staff and students).
- the decision involved the “minimum derogation from the right of freedom of speech necessary to ensure safety and security”.
- the university had carried out an adequate risk assessment that concluded that the security of staff and students could not be secured in the face of the identified risk of 400 to 1,000 protestors. Such assessment had been based on the experience of the Head of Security, advice from police, information obtained by the university, and its own risk assessment.
- the conference had not been cancelled because of the nature of the speakers, and it was legitimate for regard to be had to the nature of the speakers when considering the risks imposed by an event.
- the decision was only to prevent the conference being held at the identified location and at the identified time. There was no prohibition on the conference being held elsewhere, publication of material to be presented at the conference.
- a commitment had been made to commission an independent report exploring how the conference could be held in the future.

<sup>10</sup> R (Ben-Dors) v University of Southampton [2016] EWHC 953 (Admin)



## Conclusion

We believe that the findings of the judge in the Southampton case form a useful basis for improved codes of practice in assessments used by universities and student bodies when considering the security risks involved. Institutions must conduct credible risk assessments – and provide where practicable measures to protect students – to ensure that controversial speakers are able to speak on campus despite threats of potential violence.

These should form part of revised, simplified codes of practice on freedom of expression in universities.

## Safety

It is the duty of universities to ensure the physical safety of students' and staff while on campus and that they do not face discrimination. Whereas in the past notions of safety and harm related almost exclusively to physical acts, institutions and student bodies have become increasingly occupied with the harm that can be caused by words. As an organisation that understands very well the power of words, we would not seek to argue that words can never cause harm. However, we would stress both that the harm caused by words is subjective and that censorship of such words is not the way to tackle "harmful" ideas.

Other than the speech already outlawed by the various acts outlined above, most forms of speech are permitted by law. However, we increasingly see in arguments for speech to be censored on campuses the argument that the speech in question causes harm and should therefore be outlawed because this puts a university in breach of its duty to care for students.

In the USA, which has foreshadowed the majority of developments now being seen on UK campuses, three terms have become increasingly prominent in the debate. Microaggressions are small actions or word choices that appear to have no malicious intent but that are thought of as a kind of violence nonetheless. US lawyer Greg Lukianoff and academic Jonathan Haidt, give the example of microaggressions cited by the Asian American student association at Brandeis University in the United States, which sought to raise awareness of microaggressions against Asians through an installation on the steps of an academic hall. The installation gave examples of microaggressions such as "Aren't you supposed to be good at math?" and "I'm colorblind! I don't see race."<sup>11</sup>

Trigger warnings are alerts that academics might issue if something in a course might cause a strong emotional response. Lukianoff and Haidt describe how some students

have called for warnings that Chinua Achebe's *Things Fall Apart* describes racial violence and that F. Scott Fitzgerald's *The Great Gatsby* portrays misogyny and physical abuse, "so that students who have been previously victimised by racism or domestic violence can choose to avoid these works, which they believe might 'trigger' a recurrence of past trauma".

Today, the term "safe space" has come to mean anything from a specific space on campus that students of a certain background feel comfortable in, to the banning of speakers, ideas, and publications from the university campus as a whole. Broadly speaking, safe space policies include guidelines that promote a safe environment for students to engage in discussions free from interrogation and judgement. This may result in individuals in breach of such guidelines being asked to leave the discussion or the space.

### Trigger warnings – for or against?

Many universities in the UK, including individual lecturers, have introduced the term "trigger warnings": a statement at the start of a piece of writing or video, for example, alerting the reader or viewer to the fact that it contains potentially distressing material. They apply mostly to subject matter dealing with violence against women, general violence and subject matter related to racism and colonialism. Supporters of this practice say that trigger warnings are not about shutting down debate, or letting students off doing work, but about signalling difficult subjects so that students do not relive trauma.

Dr Onni Gust, an assistant professor at the University of Nottingham, who teaches the history of the idea of monstrosity in the 18th century British Empire, defended their use in an article for *The Guardian*. Gust said trigger warnings did not mollify students: "A trigger warning does not give permission for students to skip class, avoid a topic or choose alternative readings. What it does do is signal to survivors of abuse or trauma that they need to keep breathing. It reminds them to be particularly aware of the skills and coping strategies that they have developed and to switch them on."

Izzy Gurbuz, wellbeing officer at the University of Manchester Students' Union told student magazine *The Mancunion* that: "Trigger warnings simply allow those whose mental health could be significantly affected by certain topics to make informed decisions about their health. For example, adequately preparing themselves so they're able to take part in particular discussion, or avoiding a situation which would cause them flashbacks or a panic attack."

<sup>11</sup> <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>

In setting out their policies and codes of practice on freedom of expression on campus, it is important that subjective notions of “harmful” speech are not used by HEIs as the benchmark for dictating what speech is permissible. As discussed in previous sections, it is the statutory duty of academic institutions to protect freedom of speech. This includes speech that might be offensive or shocking. We see the protection of such speech as in no way incompatible with academic institutions other duties to protect students from discrimination or harassment.

However, Greg Lukianoff and Jonathan Haidt have argued that, conversely, trigger warnings could contribute to trauma survivors seeing themselves as constantly at risk of being triggered and perpetually unable to tolerate reminders of trauma. They also suggest trigger warnings and other protective campus practices could prompt students who have not experienced trauma to perceive threat and harm where there is none, making them more emotionally vulnerable and less resilient.<sup>12</sup>

Statements of principle and codes of practice provide important frameworks by which HEIs can make clear their commitment to – and mechanisms for protecting – freedom of expression on campus.

We believe universities should use statements of principle and codes of practice to demonstrate that the duty of a university is to protect and promote freedom of expression so as to avoid confusion about what speech is and is not permissible on campus. All those who fall under the “governing body” – including student unions – must be made aware of their duty to comply with these commitments. In this context, we also welcome a commitment by the Charities Commission to review its guidelines as they concern student unions and free speech.

We are concerned by examples where codes appear to suggest that the duty to protect freedom of expression might have to be compromised in order to fulfil other duties or which outline types of speech that might be deemed unacceptable beyond illegal speech send confusing messages about the responsibility of the university in upholding freedom of expression. Complex procedures for inviting and approving speakers can also have a chilling effect on freedom of expression.

Examples of best practice are included in Appendix 1.

## Conclusion

The existence of trigger warnings and safe spaces are not, in and of themselves, indicative of a lack of freedom of expression

on campus although they certainly can be used to restrict expression. However, we are more concerned that universities have through deliberate messaging – or lack of messaging – allowed their statutory duty to protect freedom of expression be seen as in some way a lesser duty than that of protecting students. We would argue that it is possible for a university to fulfil both its duty to protect students and staff from discrimination and harassment while at the same time allowing freedom of expression, which includes the freedom to offend.

We recommend that universities simplify and revise their codes of practice on freedom of expression and state these explicitly to students and staff as part of their induction processes.

## Other factors

### Students as consumers

Education is now a big business in the UK. In late 2017, there were more than 500,000 new university students compared to only 68,000 people in 1980. Research shows that there are now twice as many people getting a degree as were gaining five O-levels in the early 1980s.

The introduction of market principles to British academic life has had a number of effects in the arena of free speech, impacting on students and staff. Today’s students demand a world-class education, but they also want value for money. The Higher Education and Research Act 2017 reinforces a consumerist approach to university by treating students like customers. The “customer” relationship that students have with their educational institute has recently been reinforced by the OfS requirements to ensure value for money for students as one of its duties under the new regulation regime.

As Joanna Williams, author and editor at Spiked, says: “In today’s marketed and consumer driven higher-education sector, many students have come to expect freedom from speech. They argue the university campus should be a ‘safe space’ free from emotional harm or potential offence.”<sup>13</sup>

In March 2017, academic Liz Morrish told the Times Higher Education that the “audit culture” in her university led to her resignation: “Last year saw the intensification of outcomes-based performance management in many universities ... In the UK, much of the rush to management by metrics is in response to shifting government incentives and policy changes, which, fed through the mechanism of the research excellence framework, affect institutional priorities, reputations and funding levels. Many of these metrics are quite outside the control of

<sup>12</sup> <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>

<sup>13</sup> <https://www.theguardian.com/world/2016/jan/24/safe-spaces-universities-no-platform-free-speech-rhodes>

academics. Nevertheless, they have been weaponised as tools of performance management, and the very nature of the scrutiny creates a hostile environment for academic freedom.”<sup>14</sup>

#### Safe from harm?

In November 2016, City University’s student union voted in favour of a motion targeting tabloid newspapers that it claimed published divisive narratives that were sexist, demonised minorities, and scapegoated the working class. Written by student Nick Owen, the motion stated that: “There is no place for the Sun, Daily Mail or Express (in their current form) on City, University of London, campuses or properties.”

Owen told Index: “It was around about the time where Jo Cox had been murdered and the Express were running things about judges, Brexit, things that mirrored Nazi propaganda. I wanted the university to do something, to make a stand.”

Students opposing the motion did not disagree with the idea that the UK media needs criticising, but they did not view banning newspapers as a constructive way to improve the quality of journalism in the UK.

Journalism student Vincent Wood, who wrote a motion that successfully overturned the ban in February 2017, told Index: “We should be supporting journalists working at these papers who feel they are representing a view that they shouldn’t be. We offered to approach issues through education as oppose to grandstanding and potential bans.”

#### ii) Misreporting of free speech controversies

We are concerned that some free speech controversies may have been misreported, undermining attempts to promote debates about free expression in university.

#### Ban white philopshers?

When protests at SOAS, University of London, called for the “decolonisation of the curriculum”, news reports were inaccurate in their coverage. Students were calling for a greater representation of diverse voices in the philosophy curriculum and for white philosophers and history to be taught in its colonial context. Dr Meera Sabarathnam, a lecturer in international relations at SOAS, explained in her blog that this meant three things: challenging assumptions about culture and

the way history is taught; putting philosophers and writers in their historical context; and thinking about “implications of a more diverse student body in terms of pedagogy and achievement”. The newspaper reports of this move inaccurately said that students wanted to “ban white philosophers”. The headline in the Daily Mail ran: “They Kant be serious! PC students demand white philosophers including Plato and Descartes be dropped from university syllabus.”

In another incident, media widely reported that a student at the University of Edinburgh had been reported to university authorities by a fellow student for Islamaphobia for “mocking Islamic State on Facebook” – a story that was untrue but which succeeded in successfully smearing the reputation of the black female student who had reported the individual.<sup>15</sup>

These incidents reflect debates within British universities, not only among students but also among academics, about how to deal with the more diverse student population and a changing attitude to colonialism, race and the history of the UK.

Misreporting of freedom of expression issues in the UK risks diminishing support for the principle of freedom of expression more widely.

<sup>14</sup> <http://world.edu/audit-culture-made-quit/>

<sup>15</sup> <https://www.theguardian.com/commentisfree/2017/sep/25/smear-student-robbie-travers-racial-politics>

# Conclusion and recommendations

## 1. University codes of practice

Under section 43 of the 1986 Education Act, universities are annually obliged to share their guidelines on freedom of expression. We recommend HEIs revise regularly and publicise more effectively their codes of practice on freedom of expression to make clear their responsibilities and their commitment to protecting free speech on campus. This could include making clear policies on trigger warnings and safe spaces to make clear students should expect to encounter uncomfortable and offensive ideas. Codes of practice should include “highest standards tests” to ensure that opponents of a particular speaker or idea cannot use “heckler’s veto” to threaten violence in order to force a university or student group to cancel a debate.

Universities should, as a matter of course:

- a. Have a clear statement of principles on university’s commitment to freedom of expression. See Appendix 1 for examples of good practice examples. These should make clear that the university has an explicit duty to protect freedom of expression.
- b. Update and simplify policies on handling potentially controversial events to ensure speakers and protestors can both exercise their lawful rights to speak without risk of physical harm.

## 2. Student unions’ policies

We urge student unions to reaffirm a commitment to freedom of expression in their policies and remove “no-platforming” policies that involve outlawing speakers who are not members of groups already proscribed by government.

## 3. Prevent review

The government should undertake an immediate independent review of the Prevent policy that assesses the Prevent duty’s effectiveness in the context of higher education and its impact on freedom of speech and association, as recommended by the Joint Committee on Human Rights and others. This review should include a comprehensive survey – not simply small-scale sampling – of students and academics’ views and experiences. In particular, this should consider the degree to which these groups “self-censor”.

## 4. Reject fines system to punish non-compliance

We do not believe that fines are the mechanism to promote freedom of expression on campus. Rather, a clearer commitment to freedom of expression from governing bodies and student unions would encourage this.

## 5. Undertake a full survey of student and staff attitudes to free speech

It is clear that there is a lack of research into attitudes towards freedom of expression in universities. A comprehensive survey of staff and students’ attitudes and experiences would help to better identify strategies for promoting the value of freedom of expression on campus. Since free speech has been identified by successive British prime ministers and members of the cabinet in recent years as a central British value, developing strategies for its better promotion – including developing educational training material for young people in secondary education – is a key component in ensuring its protection.

# Appendix 1: Examples of best practice, statements of principle and codes of practice

## A. Statement of Principles: University of Chicago

The University of Chicago made this statement in 2012:

The University of Chicago is an institution fully committed to the creation of knowledge across the spectrum of disciplines and professions, firm in its belief that a culture of intense inquiry and informed argument generates lasting ideas, and that the members of its community have a responsibility both to challenge and to listen.

Geoffrey R. Stone, Edward H. Levi Distinguished Service professor of law and former provost of the university, captures this ethos in this July 2012 statement of the aspirations of the University of Chicago: "Eighty years ago, a student organisation at the University of Chicago invited William Z. Foster, the Communist Party's candidate for President, to lecture on campus. This triggered a storm of protest from critics both on and off campus. To those who condemned the University for allowing the event, University President Robert M. Hutchins responded that "our students . . . should have freedom to discuss any problem that presents itself." He insisted that the "cure" for ideas we oppose "lies through open discussion rather than through inhibition." On a later occasion, Hutchins added that "free inquiry is indispensable to the good life, that universities exist for the sake of such inquiry, [and] that without it they cease to be universities."

This incident captures both the spirit and the promise of the University of Chicago. Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge and learn. Except insofar as limitations on that freedom are necessary to the functioning of the University, the University of Chicago fully respects and supports the freedom of all students, faculty and staff "to discuss any problem that presents itself," free of interference.

This is not to say that this freedom is absolute. In narrowly-defined circumstances, the University may properly restrict expression, for example, that violates the law, is threatening, harassing, or defamatory, or invades substantial privacy or confidentiality interests. Moreover, the University may reasonably regulate the time, place and manner of expression to ensure that it does not disrupt the ordinary activities of the University.

Fundamentally, however, the University is committed to the principle that it may not restrict debate or deliberation because the ideas put forth are thought to be offensive, unwise, immoral, or wrong-headed. It is for the members of the University community to make those judgments for themselves.

As a corollary to this commitment, members of the University community must also act in conformity with this principle. Although faculty, students and staff are free to criticize, contest and condemn the views expressed on campus, they may not obstruct, disrupt, or otherwise interfere with the freedom of others to express views they reject or even loathe.

For members of the University community, as for the University itself, the proper response to ideas they find offensive, unwarranted and dangerous is not interference, obstruction, or suppression. It is, instead, to engage in robust counter-speech that challenges the merits of those ideas and exposes them for what they are. To this end, the University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it.

As Robert M. Hutchins observed, without a vibrant commitment to free and open inquiry, a university ceases to be a university. The University of Chicago's long-standing commitment to this principle lies at the very core of the University's greatness.

## B. Code of Practice: Canterbury Christ Church University

Canterbury Christ Church University ('the University') introduces its Code of Practice with the following statement:

"Canterbury Christ Church University ('the University') is an academic community of staff and students. Central to this concept, and the University's values as a Church of England Foundation, is the ability of all its members to challenge freely prevailing orthodoxies, to query the positions and views of others and to put forward ideas that may sometimes be radical in their formulation. The University recognises all forms of expression within the law."

It also has a clear policy on external speakers:

"Some external speakers are known to hold contentious, even inflammatory or offensive, views. In some cases, their very presence on campus may be considered to be divisive and may lead to attempts by other groups to prevent the event taking place. Such speakers might include those subject to adverse media attention; and/or associated with a campaign or political pressure group; and/or a member of a group whose views may be deemed as being discriminatory or inflammatory to others. For the purposes of this Code, such speakers are regarded as controversial speakers, but their freedom of speech within the law is recognised."

# Appendix 2: The legal landscape in the UK

The rights to freedom of expression in the UK must be viewed in the context of the piecemeal constitutional framework that has evolved over time. The legal origins of these rights are found among: common law, domestic legislation, and international legal obligations of the UK. These rights are closely intertwined with law protecting us from discrimination and so some of the legislation overlaps and interrelates.

The UK higher education system is quasi-public, essentially functioning as a system of “private institutions operating in the public interest”. UK HEIs are autonomous institutions that tend to be operated by internal articles of governance.

There are four common forms of legal status for HEIs, namely establishment by:

- royal charter through the Privy Council (particularly the pre-1992 universities)
- a specific act of Parliament
- the Companies Act as companies under guarantee
- charitable trusts

However, a majority of HEIs are funded by public bodies, such as the Higher Education Funding Council for England, and are required to operate within the relevant regulatory framework.

The HEFCE is also responsible for monitoring compliance with the Prevent policy (see below), although this task shifts to the new Office for Students from April 2018.

## Key relevant laws in detail

### Public Order Act 1986

Section 4 of the Public Order Act 1986 creates the offences of using threatening, abusive or insulting words or behaviour that cause or are likely to cause another person harassment, alarm or distress. Section 5 creates the similar offence of displaying any writing, sign or other visible representation that is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby, whether in a public or a private place.

The Public Order Act 1986 makes it a criminal offence to stir up racial and religious hatred. Section 18 specifies that the crime of incitement to racial hatred is committed if a person uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, intending to stir up racial hatred, or where having regard to all the circumstances racial hatred is likely to be stirred up. Part 3A of the act sets out the crime of incitement to hatred on the grounds of religion or sexual orientation, which is committed if a person uses threatening words or behaviour, or displays any

written material which is threatening, with the intention to stir up religious hatred or hatred on the grounds of sexual orientation.

### Education (No.2) Act 1986

Section 43(1) states that: “Every individual and body of persons concerned in the government of any establishment to which this section applies [which includes universities] shall 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 above duty particularly includes a duty to ensure that “the use of any premises” of the university is not denied to any person. It has been recognised that the duty only applies to the extent allowed within the bounds of the law, namely: “It does not in any way require universities to allow or facilitate speakers to break the law through inciting violence, inciting racial hatred, or glorifying acts of terrorism.”

HEIs are required to have a code of practice setting out the means by which they aim to achieve this duty.

### Education Reform Act 1988

The Education Reform Act protects academic freedom and requires university commissioners to: ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions.

### Education Act 1994

The Education Act requires HEIs to bring to the attention of students, at least once a year, the requirements of the act around freedom of speech in universities and colleges.

### Human Rights Act 1998

Since the Human Rights Act came into force, UK laws are required to be compliant with the rights guaranteed under the European Convention on Human Rights, including that of free speech and freedom of association and assembly. Under the act, HEIs are under a statutory duty to protect the free speech of staff and students, as well as protecting them from discrimination.

### Equality Act 2010

The UK domestic law relating to free speech and freedom from discrimination has mostly been codified into the Equality Act 2010. The act brings together more than 116 pieces of legislation covering anti-discrimination law in the UK. Chapter 2 of Part 6 of the Equality Act (the Higher Education Chapter) applies, in conjunction with Part 2 of the Equality Act, to HEIs, and specifically protects students (and prospective students) from discrimination, harassment or victimisation from the institution’s governing body. The Equality Act sets out a public

sector equality duty under section 149. This duty applies to all public bodies and requires that they take into account the need to “eliminate discrimination” and “advance equality of opportunity” when carrying out their public functions. The Equality and Human Rights Commission, established under section 6 of the Equality Act 2006 and subject to the provisions therein, is the UK’s national equality regulator. However, Chapter 2 of the Equality Act does not cover student unions.

#### Counter-Terrorism and Security Act 2015

Educational establishments have a duty to “have due regard to the need to prevent people from being drawn into terrorism”, as set out in s 26(1) of the Counter-Terrorism and Security Act 2015 (CTSA). Section 31 of the CTSA adds that when carrying out their duty under section 26 of the CTSA, the HEI should also consider its duty to ensure freedom of speech, and the importance of academic freedom.

The Home Office has provided guidance for HEIs in exercising the duty under s 26 of the CTSA and balancing it with the right to freedom of speech. According to the guidance, in order to properly exercise the duty, HEIs should have policies in place for external speakers and events, and have mechanisms to assess the risks posed, and how to mitigate those risks.

The CTSA imposes a legal obligation on UK HEIs to “take steps to prevent people from being drawn into terrorism”. This legislation forms part of the UK government’s Prevent duty, aimed at curbing home-grown terrorism. The most controversial

aspect of legislation is that aimed at potential extremist speakers, “extremism” being defined as “vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs”. The guidance issued in tandem with the act makes clear that it applies to both violent and non-violent extremism, which “can create an atmosphere conducive to terrorism and can popularise views which terrorists exploit”.

#### Higher Education and Research Act 2017

The Higher Education and Research Act aims to create a new regulatory framework for higher education, increase competition and student choice, ensure students receive value for money, and strengthen the research sector. The act established the OfS and sets out its role as the new regulator and funding council for the higher education sector. The role includes ensuring that students receive value for money. The OfS will also hold HEIs registered under the Higher Education and Research Act 2017 to account regarding the state of free speech on their campuses, with the powers to penalise institutions that do not comply with their own freedom of speech code.

#### Public Sector Equality Duty

As public bodies, most HEIs are subject to the Public Sector Equality Duty under section 149 of the Equality Act 2010. The duty obliges public bodies to actively have regard to: eliminating discrimination, harassment, victimisation and other prohibited conduct; advancing equality of opportunity; and fostering good



Matt Buck / flickr

relations between people who have protected characteristics and those who do not.

The Equality Act specifies the following bodies as owing the PSED:

- (i) the governing body of an educational establishment maintained by an English local authority (within the meaning of section 162 of the Education and Inspections Act 2006);
- (ii) the governing body of an institution in England within the further education sector (within the meaning of section 91(3) of the Further and Higher Education Act 1992); and
- (iii) the governing body of an institution in England within the higher education sector (within the meaning of section 91(5) of that Act).

The PSED has the effect of obliging public bodies, when exercising their powers and functions, to actively have regard to the following:

- (i) eliminating discrimination, harassment, victimisation and other prohibited conduct;
- (ii) advancing equality of opportunity; and

(iii) fostering good relations between people who have protected characteristics and those who do not.

The PSED is aimed at engraining equality into the exercise of all public functions such as policy and decision making and service delivery. The ultimate aim is to improve a HEI's performance on equality, by for example preventing discrimination before it arises and creating the appropriate "culture".

#### Prevent duty

There is a statutory duty on universities to tackle radicalisation through the Counter-Terrorism and Security Act 2015. Prevent is a counter-terrorism duty that applies across schools, further education colleges and universities. It requires educational institutions to deny a platform to those who might encourage terrorism.

Duties under the Counter-Terrorism and Security Act 2015 (CTSA) are imposed on "specified authorities". "Specified authorities" are defined in Schedule 6 of the CTSA, and include in particular both the following types of higher education bodies (together, relevant higher education bodies RHEBs):





- Governing bodies of qualifying institutions within the meaning given by section 11 of the Higher Education Act 2004 (which includes most universities and higher education institutions); and
- Private higher education institutions that are not in receipt of public funding from the Higher Education Funding Council for England (HEFCE) or the Higher Education Funding Council Wales (HEFCW) but have similar characteristics to those that are, which have at least 250 students (excluding those on distance-learning courses) undertaking courses of a description mentioned in Schedule 6 to the Education Reform Act 1988 (higher education courses).

RHEBs are subject to the duty contained in section 26 CTSA, which provides: "A specified authority must, in the exercise of its functions, have due regard to the need to prevent people from being drawn into terrorism."

Under section 31 CTSA, in carrying out the duty imposed by section 26 CTSA, RHEBs are also required to have particular regard to:

- ensuring freedom of speech (section 31(2)(a) CTSA), defined as the duty under section 43(1) of the Education (No. 2) Act 1986 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"; and
- the importance of academic freedom (section 31(2)(b) CTSA), defined as the freedom referred to in section 202(2)(a) of the Education Reform Act 1988 to "ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions".

## Guidance

The section 26 duty is supplemented by both general and sector-specific guidance, issued by the Secretary of State under section 29 CTSA. Relevant published guidance (in relation to RHEBs in England and Wales) includes:

- The general Revised Prevent duty guidance: for England and Wales, issued 12 March 2015 and revised 16 July 2015; and
- The sector-specific "Prevent duty guidance: for higher education institutions in England and Wales".

(each available at: <https://www.gov.uk/government/publications/prevent-duty-guidance>)

Other guidance has also been published on a non-statutory basis by a number of organisations which also sets out particular guidelines for RHEBs, including:

- Universities UK, External Speakers in Higher Education Institutions, issued 22 November 2013, <http://www.universitiesuk.ac.uk/policy-and-analysis/reports/Pages/external-speakers-in-higher-education-institutions.aspx>
- Universities UK, Oversight of Security-Sensitive Research Material in UK Universities, issued 26 October 2012, <http://www.universitiesuk.ac.uk/policy-and-analysis/reports/Pages/oversight-of-security-sensitive-research-material-in-uk-universities.aspx>
- Equality and Human Rights Commission, Delivering the Prevent Duty in a Proportionate and Fair Way, issued 9 February 2017, <https://www.equalityhumanrights.com/en/publication-download/delivering-prevent-duty-proportionate-and-fair-way>

## Revised Prevent Duty Guidance: for England and Wales

This guidance provides specified authorities (including RHEBs) with a number of principles to be followed when balancing their section 26 and section 31 duties:

- The starting point for complying with section 26 CTSA is to demonstrate an awareness and understanding of the risk of radicalisation, as it applies in the specified authority's area or institution.
- Three themes guide specified authorities (including RHEBs) in complying with the section 26 duty: effective leadership; working in partnership; and appropriate capabilities:
  - Effective Leadership: Individuals in leadership positions should establish mechanisms, or use existing mechanisms, to understand the risk of radicalisation, communicate the importance of the section 26 duty and ensure that staff understand this risk and implement the duty;
  - Working in Partnership: Specified authorities need to provide evidence of co-operation with local Prevent co-ordinators, the police, local authorities and multi-agency forums (e.g. Community Safety Partnerships), among others; and
  - Appropriate Capabilities: Staff who engage with the public need to understand the meaning of radicalisation and how to obtain support for people under the risk of radicalising influences. Appropriate training needs to be provided to such staff.
- Whilst the Prevent programme must not involve covert activities against people, specified authorities may need to share personal information to ensure e.g. that a person at risk of radicalisation is given appropriate support. To protect the rights of individuals, information sharing agreements must be in place.
- Specified authorities will be expected to maintain appropriate records to show compliance with their responsibilities and provide reports when requested.

## Prevent Duty Guidance: for higher education institutions in England and Wales

This sector-specific guidance provides RHEBs with a number of principles and guidelines in the context of specific issues which are particular to higher education institutions:

### i. External Speakers and Events

- RHEBs should have policies and procedures in place for the management of events on campus or other RHEB premises, setting out clear requirements for events to proceed.
- RHEBs must be particularly mindful to balance their section 26 duty against their section 31 duties to protect freedom of speech and academic freedom.
- When deciding whether or not to host a speaker, RHEBs should consider whether the views expressed, or likely to be expressed, constitute extremist views that risk drawing people into terrorism or are shared by terrorist groups. If this is the case, the event should not be allowed to proceed unless the RHEB is fully convinced that such a risk can be fully mitigated, e.g. by ensuring that speakers with extremist views can be challenged as part of the same event. If there is any doubt as to whether the risk can be fully mitigated, the event should not be allowed to proceed.
- RHEBs are expected to put in place a system for assessing and rating risks associated with planned events. This should provide evidence as to whether an event should proceed or be cancelled and whether any risk mitigation action is required. An equivalent mechanism should be put in place in respect of events that are RHEB affiliated, funded or branded, but which take place off-campus.
- RHEBs should demonstrate that staff members involved in the physical security of its premises have an awareness of the section 26 duty. This could often be achieved through engagement with the Association of University Chief Security Officers (AUCSO).

### ii. Partnership

- The senior management of the RHEB is expected to engage actively with partners such as police, BIS regional higher and further education Prevent coordinators as well as students.
- With respect to larger or more complex RHEBs, there is an expectation that they should make use of internal mechanisms to share information about Prevent across faculties and establish a single point of contact for the operational delivery of Prevent.
- RHEBs should have regular contact with their relevant Prevent co-ordinator.

### iii. Risk assessment

- RHEBs are expected to carry out a risk assessment as to where and how their students might be at risk of being drawn into terrorism, defined as including both violent and non-violent extremism.

### iv. Action plan

- Any institution that identifies a risk should develop a Prevent action plan, setting out the actions it will take to mitigate this risk.

### v. Staff training

- RHEBs will be required to demonstrate a willingness to undertake Prevent awareness training to help staff prevent people from being drawn into terrorism, enabling them to recognise vulnerability to this risk and understand what actions are available.
- RHEBs should have robust internal and external procedures for sharing information about vulnerable individuals.

### vi. Welfare and pastoral care/chaplaincy support

- RHEBs should offer sufficient chaplaincy and pastoral support to all students and have clear and widely available policies for the use of faith related facilities such as prayer rooms.

### vii. IT policies

- RHEBs should have policies regarding the use of their IT equipment, with a specific reference to the section 26 duty. In particular, RHEBs should consider the use of filters as part of their overall Prevent strategy. In relation to accessing extremist-related materials for non-research purposes, reference is made to the guidance published by Universities UK.

### viii. Student unions and societies

- RHEBs should have clear policies setting out the activities allowed (and not allowed) to take place on campus, as well as any online activity directly related to the RHEB. This should set out expectations from student unions, in particular the need to challenge extremist ideas. Student unions should consider whether their staff would benefit from Prevent awareness training, provided by the Charity Commission.



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