**IN THE MATTER OF AN OPINION FOR THE NATIONAL UNION OF STUDENTS**

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**OPINION**

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## I. Introduction

1. We are asked to produce a written advice dealing with certain recurrent legal issues regarding the conduct of debates, motions and speaker events by students' unions and other aspects of the affairs of students' unions and the duties of their officers.

2. Facilitating discussion, motions and debates among student members regarding issues of general interest - including controversial political issues of the day - has long been and remains an integral role of most students' unions. However, in fulfilling this important role, those responsible for governing a students' union (and, in particular, its trustees) must be fully alive to the interlocking legal frameworks governing such activities, which it is their responsibility to ensure compliance with.

3. Our advice addresses general issues of charity law, public law (including the application of the new counter-terrorism 'Prevent duty' in s.26 of the Counter-terrorism and Security Act 2015), human rights law and equality law that students' unions are likely to confront. We do not address issues of defamation law, public procurement law, data protection law or election law, though we do seek to signpost some of the circumstances in which such issues may arise and in which legal advice may need to be sought. Our advice is also written from the perspective of the laws of England and Wales and does not specifically deal with the position in Scotland in so far as this differs.

4. It is important to emphasise at the outset that this advice necessarily provides only a general overview of some of the key recurrent legal issues and cannot and does not seek to provide a comprehensive discussion of all aspect of the areas of law we touch on. It is also important to emphasise that many of the issues addressed in our advice are

interlocking such that our advice must be read as a whole. Students' unions should seek specific legal advice where they remain unclear of their legal duties in a particular situation.

## II. Students' unions and their legal and practical relationship with their partner educational institution

5. Most higher education students' unions will be constitutionally independent from their partner institution, though we are aware that in some cases the constitution of the partner institution will require a union to be in existence and may require one or more of the officers of the union to sit on the partner institution's governing body. Even in the latter case we are of the view that the union will be an independent body in law. The legal form of unions will vary (e.g. incorporated company limited by guarantee, unincorporated association, or charitable incorporated organization ('CIO')). However, a higher education students' union will also almost invariably be a registered charity and therefore required to comply with charity law. Our advice considers the issues from the perspective of such students' unions that are legally independent charitable bodies.

6. Whilst typically being constitutionally independent, students' unions inevitably have a close legal and practical relationship with their partner educational institution. For example:

    a. The partner institution is required by s.22 of the Education Act 1994 to take reasonable practicable steps to ensure, among other things, that its students' union operates in a fair and democratic manner and is accountable for its finances, including by ensuring that it has a written constitution approved by the partner institution.

    b. We understand that, in practice, most students' unions receive the majority of their funding via an annual block grant from the partner institution, which will be subject to agreement to comply with policies, procedures and conditions specified by the partner

institution. Use of partner institution premises may also be subject to agreement to certain terms and conditions.

c. The union's membership will comprise primarily students of the partner institution who are directly subject to the regulations and disciplinary codes of the partner institution.

**III. Charity law**

The trustees' role

7. The trustees of the students' union (who may under the union's constitution variously be termed the trustee board, managing trustees, committee members, governors, directors or have some other title) have ultimate legal responsibility for ensuring that the students' union complies with the law, including the requirements of charity law. Where there is a Student or Guild Council as well as an inner core grouping of officers it seems to us likely that it will be that inner core that forms the trustee body, and not the Council, and if the Council directs the trustee body to do things which are inconsistent with the duties of the trustees they will be bound to disregard such a direction, just as they would if the direction had come by way of a resolution of the members.

8. Trustees are the guardians of the union's assets. Charity law requires that the union's assets[1] are applied only in furtherance of its objects as set out in its constitution. Trustees must ensure that assets are not used for extraneous purposes. It is also a requirement of charity law that the charity's activities are for the public benefit so trustees must ensure that the charity's activities are focused on carrying out the charity's purposes to this end rather than being seen as a vehicle for private benefit for the members.[2]

[1] Assets should be understood broadly in terms of not only direct expenditure of funds, but also for example use of charitable property or use of the time of employed sabbatical officers.
[2] See the Charity Commission's guidance on this requirement for further guidance, available at https://www.gov.uk/government/collections/charitable-purposes-and-public-benefit.

9. The Trustees are also under a legal duty to act in the best interests of the charity. This involves making balanced and informed decisions about what will best enable the charity to carry out its purposes.

10. Trustees also have a duty to maintain the good name of the students' union and to protect its funds from undue risk. This includes protecting its funds against legal claims by third parties, which could come from a wide range of quarters (e.g. accidents on union premises, failures to observe licensing laws, or use of union communications to make defamatory statements). Trustees must implement realistic and reasonable risk management strategies and processes to identify and mitigate risks to the charity's funds and assets.

11. Finally, trustees must act with reasonable skill and care, including seeking advice where necessary.

12. Further detail regarding the duties of trustees can be found in Charity Commission's guidance.[3]

Restrictions on political activity

13. As a matter of charity law, a charity's objects cannot include political objects, such as furthering the interests of a particular political party or securing or opposing any change in the law or in the policy or decisions of public bodies.

14. Moreover, like any other charity, a students' union cannot support a particular political party and can never give funds to a political party e.g. by way of support for an electoral campaign of a particular political party (though see below on the limited exception for students' unions to provide funds to political clubs established for the educational benefit of union members).

[3] e.g. 'The essential trustee: what you need to know, what you need to do' (10 July 2015), which is available at https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3/the-essential-trustee-what-you-need-to-know-what-you-need-to-do.

15. However, again like any charity - subject to any restrictions in its constitution and careful assessment by trustees of benefits and risks - a students' union can decide to apply its assets to reasonable campaigning and political activity as a means to further its objects, though not as an end in itself.[4]

16. In determining what political campaigning and activity is permissible, it is important for trustees to distinguish between:

    a. action by the union on issues that affect present and future student members in their capacity as students (for example, street lighting near the campus; more public transport to the educational institution at night; nursery places for the children of students; or the imposition of tuition fees or other national issues affecting students as students); and

    b. action on issues that do not affect students as students (such as industrial disputes in other sectors; general environmental matters; the treatment of political prisoners in a foreign country; or the Middle East peace process).

17. Reasonable expenditure on the former may be permissible under charity law where this is sufficiently closely connected to the students' union's objects and otherwise compliant with charity law. Expenditure on the latter will very likely not.

18. However, as considered in further detail below, it is also vital for trustees to understand that this does not mean that students' unions cannot expend funds to facilitate debates, motions or speaker events on controversial current political issues that do not affect students as students pursuant to their educational objects.

[4] The Charity Commission has published general guidance on campaigning and political activities entitled 'Speaking out: guidance on campaigning and political activity by charities' (March, 2008), which is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434427/CC9_LowInk.pdf.

Debating (controversial) issues not affecting students as students

19. Providing a forum for students to debate controversial political issues in order to facilitate the educational and personal development of students is at the heart of the traditional role of a students' union as a body designed to support the educational functions of the partner institution and assist in such development. Union constitutions accordingly frequently specify this as one of their specific objects.

20. Trustees can be confident that this is an entirely lawful activity for a students' union to engage in. In *Attorney General v Ross and anor* [1985] 2 All ER 334, Mr Justice Scott explained at 343:

> "The carrying on of political activities or the pursuit of political objectives cannot, in the ordinary way, be a charitable purpose. But I can see nothing the matter with an educational charity, in the furtherance of its educational purposes, encouraging students to develop their political awareness or to acquire knowledge of, and to debate, and to form views on, political issues. …~~But~~ the proposition that an educational charity, be it a school, polytechnic or university, cannot consistently with its charitable status promote and encourage the development of political ideas among its students has only to be stated to be seen to be untenable."

21. This is recognised by Charity Commission guidance, which states that it is permissible for students' unions to "*encourage students to develop their political awareness and acquire knowledge of, or debate, political issues*"[5] and that "*reasonable expenditure on debating matters of common concern is permissible*".[6]

22. Thus it is entirely lawful and proper for a students' union to facilitate debate by its members of political issues that do not affect students as students, such as, for example, a debate on the Middle East peace process or regarding a decision of the Government of the day to go to war.

[5] OG48 B3, para. 2.4.
[6] OG48 C3, para. 16.

23. This position is not altered by the fact that a particular political issue proposed for debate is especially controversial. Indeed, as a matter of principle, the constructive debating of such issues may be of greatest educational value to members.

24. However, the conduct of debates on controversial topics may give rise to other legal risks, which will need to be carefully considered by trustees pursuant to their duties as trustees. For example, certain controversial topics may be more likely to give rise to a particular risk of defamatory statements (an issue outside the scope of our advice); to give rise to a risk of harassment contrary to the Equality Act 2010 (on which see further below); or to give rise to public order issues which the union will need to consider pursuant to its (tortious) duty of care to its members and guests.

25. It is therefore essential that unions have robust risk management procedures in place to identify and manage the legal risks associated with controversial debates, motions and speaker events.

<u>The requirement of 'balance' in debates, motions and speaker events</u>

26. In our view, in order to ensure that debates and motions do effectively further a union's proper educational purpose, steps should be taken by the union to ensure that debates are conducted in a balanced and non-partisan manner i.e. so as to ensure a fair opportunity for different viewpoints to be expressed. For example:

    a. providing assistance to members in drafting counter-motions and amendments;

    b. ensuring that procedures are in place during a debate to draw out counter views by those attending the debate.

27. We are also firmly of the view that any internal rules for debates (such as rules to ensure the union is a "safe space" for its members) must not prevent a fair opportunity for different viewpoints to be expressed.

Moreover, if a criticism is voiced, particularly one of an individual present in the meeting concerned, we are in no doubt that a union must facilitate a reasonable right of reply.

28. However, provided that sufficient steps have been taken to attempt to secure a balanced debate, we do not consider that trustees are required by charity law to prevent a debate proceeding or bring a debate to a close simply because speakers for or against a particular view point cannot be found to put forward this point of view or because a preponderance of speakers support one or the other side of a debate on a particular issue.

29. Indeed, we consider that preventing a debate proceeding on the basis of members' beliefs or views may place it in conflict with the partner institution's duty to secure freedom of speech under s.43 of the Education No. 2 Act 1986 and thereby the requirements of the institution's free speech policies which, as considered below, are likely to apply in one form or another to the students' union and its members.

30. Trustees should also take steps to seek to ensure that there is balance in its overall programme of debates, motions and speaker events, in particular by ensuring that it offers financial and other support for debates, motions and speaker events to its members, clubs and societies on an even-handed basis.

31. However, again, we do not consider that there will be any necessary breach of charity law because the union's membership happens to favour particular issues or perspectives. Once again, were trustees to seek to control events proposed by its membership based on the beliefs or views of proposed speakers, this would potentially raise issues under s.43 of the Education No. 2 Act 1986.

Corporate expressions of members' opinion on issues not affecting students as students

32. A recurrent issue is whether it is permissible for a students' union to express a corporate position on an issue not affecting students as students.

33. To answer this question, in the case of issues not affecting students as students, we consider that it is necessary to draw a distinction between on the one hand, statements made by or capable of being imputed to trustees in their capacity as trustees (or by any other organ of the union with power to bind the union without the ability of trustees to override its decision) and on the other, corporate expressions of view by members through other union processes which do not constitutionally bind the union to a particular course of action and represent purely the views of the body of students as such (such as the outcome of a debate by the debating chamber or Student Council).

34. We consider that corporate expressions of view by the union's membership on issues not affecting students as students (i.e. expressions of view within the second category in para. 33 above) are permissible under charity law. Enabling such expressions of view are part and parcel of the unions' role of providing a forum for students to debate issues in order to facilitate their educational development. This was the view of Brightman J in *Baldry v Feintuck and ors* [1972] 1 WLR 552 at 558 who regarded this educational object as encompassing "…*discussion, debate, and reaching a corporate conclusion on social and economic problems*…" (emphasis added).

35. Publicising such a corporate conclusion to other members of the union can also be seen as part and parcel of the educational process, not least since this may stimulate further debate and discussion among members.

36. We also consider that the union could take steps to communicate the outcome of the motion to the partner institution where this furthers the

students' union's representative role *vis a vis* the partner institution. However, care must be taken to avoid action to communicate the motion in such cases straying into impermissible campaigning action (i.e. in order to persuade the partner institution to action the motion). Whether this line is crossed will be a matter of fact and degree. As considered earlier, there may be greater latitude for the union to engage in campaigning on issues that do affect students as students.

37. As *Baldry v Feintuck* also makes clear, trustees must not authorise the provision of funds to finance the taking of steps to implement such corporate conclusions where this would not further an educational purpose. This remains the case whether or not the membership resolved in the corporate motion that such action should be taken by the union (compare paragraph 7 above).

38. For this reason, even in the case of motions that do not strictly bind the union under its constitution, trustees may wish as a matter of best practice to seek to ensure, wherever possible, that proposed corporate motions put to its membership do not purport to require the union to take any act it is prohibited from taking by charity (or other) law (such as the provision of charitable funds to further a political cause that does not affect students as students).

39. This has at least two benefits. First, it avoids the unnecessary misperception by outside observers not familiar with the union's internal processes that the students' union (acting through its trustees or other organs) intends to act contrary to charity law. Secondly, it also avoids the trustees having to "veto" a democratically passed motion of the membership.

40. We also consider that it is best practice to ensure that such corporate motions are drafted so as to be clearly attributed to the student membership (i.e. the debating society, Student Council or other arm of the union that passed the motion) rather than generically attributed to the

union (which is capable of mistakenly giving the impression that it is also the view of the trustees).

41. Another technique that serves to avoid the misapprehension of an intention on the part of union trustees to take unlawful action is for any motion calling for implementing measures to be caveated by reference to the union's legal duties (for example, "*in so far as lawful to do so*").

42. In our view, trustees, in their capacity as trustees, should never adopt or endorse corporate expressions of view by members on issues not affecting students as students. This does not further the educational purpose behind such motions and is unlikely to further any other object of the union.

43. We recognise that the Charity Commission's operational guidance states generally that a union "…*should not comment publicly on issues which do not affect the welfare of students as students*…"[7], which might be read as taking a stricter view than that outlined by us above. However, in view of the dictum of Brightman J in *Baldry v Feintuck*, we interpret this guidance as intended to be solely directed to public comment by trustees or other organs of the union with the power to bind the union to action.

Political clubs and associations

44. It is well established that students' unions can make grants to political clubs or societies on campus in accordance with the union's educational objects.[8] In our view, the same applies to supporting other campaigning clubs or societies (such as an Amnesty International or Friends of the

[7] OG 48 B3, para. 2.2. Available at http://ogs.charitycommission.gov.uk/g048a001.aspx.
[8] *Attorney General v Ross and anor* [1985] 2 All ER 334 at 343 per Scott J "…*If the form of encouragement [of students to develop their political awareness or to acquire knowledge of, and to debate, and to form views on, political issues] includes provision of facilities for a students' Labour club or Conservative club, or any other political club, I can see nothing in that which is necessarily inconsistent with the furtherance of educational purposes*"; see also Charity Commission guidance OG48 C3, para. 13 "*Union funds can be used to support a …wide range of clubs and societies in the university or college. These can include political clubs and societies so long as these are dealt with in an even-handed way*."

Earth society) to the extent that doing so furthers the educational object of encouraging student members to develop their political awareness.

45. It is however necessary to ensure that funds are offered and provided on an even-handed basis to ensure that the relevant educational objects are in fact served and that such support does not constitute impermissible political activity or potentially unlawful discrimination contrary to the Equality Act 2010 (on which see further below).

46. Students' unions may not donate funds to a political party directly or indirectly. As such, political clubs and society must likewise be restricted from making such donations from funds provided to them by the students' union.

The legal relationship between a union and its clubs and societies

47. Whether the acts of clubs and societies are automatically acts of the students' union (so as to give rise to liability on the part of the union for acts and omissions of its clubs and societies) will depend on the particular constitutional arrangements between the students' union and its clubs/societies.

48. We are instructed that different models are followed within different institutions. Some treat the societies as components of the union and others treat them as independent entities, which are affiliated to the union (and are likely then to be properly characterised as unincorporated associations). If a union is unsure as to the position under its constitutional arrangements, it should seek specific legal advice.

49. Even in the case of union clubs and societies that are (constitutionally) independent entities, since the students' union gives funding to such clubs and societies, it must ensure that the club or society's objects further the educational objects of the students' union (including by being compliant with the law). This requires the union to take reasonable steps

to monitor whether activities do so in practice and ensure that it has the power to take effective measures (including measures to discipline members for breaches of union rules and to prevent the disbursement of further charitable funds to the club or society) where this ceases to be the case.

## IV. Free speech

50. We next consider the applicable laws protecting freedom of speech and how these impact on the conduct of debates, motions and speaker events by students' unions.

The Education No. 2 Act 1986

51. Section 43 of the Education No. 2 Act 1986 imposes a duty to secure free speech on any individual or body of persons "*concerned in the government*" of higher and further education institutions.[9]

52. In the typical case of a students' union with a distinct legal personality from its partner higher or further education institution, we consider that in many cases it is unlikely that the courts would treat the students' union as "*concerned in the government*" of the partner institution.[10] As such, the s.43 duty would not directly bind the students' union. However, it seems to us that the contrary view is not beyond argument in the case of a union whose origins lie in the constitution of the partner institution and whose officers are required to accept membership of the partner institution's controlling body. Such officers may indeed be individuals "*concerned in the government*" of the higher or further education institution in question.

53. In any event, with a view to facilitating the discharge of the s.43 duty, the partner educational institution is required to issue and keep updated a code of practice setting out procedures for meetings and other activities taking place on the institution's premises (and at its students' union, even if this is not on the partner institution's premises: ss.43(8)). This must

[9] The institutions to which s.43 applies are listed in ss.43(5).
[10] See *R v Thames Valley University Students' Union, ex parte Ogilvy* (unreported decision of the High Court (Sedley J) of 4 April 1997).

specify the conduct required of persons in connection with such meetings or activities. It must also take such steps as are reasonably practicable (including, where appropriate, disciplinary measures) to secure that the requirements of the code of practice are complied with.

54. The students' union may well be required to agree to comply with the code of practice pursuant to its Memorandum of Understanding (or other agreement) with its partner institution and/or as a condition of use of the partner institution's premises. In any event, student members will usually be directly required to comply with the code of practice by the institution's disciplinary code.

55. As such, the substance of the s.43 duty is likely in any event to apply to the activities of students' unions. We further note that charity law may well also impose similar duties as a matter of securing the public benefit object of the charity.

56. Section 43(1) imposes a positive and proactive duty 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.*"

57. Sub-section 43(2) goes on to provide that this duty includes, in particular, a "…*duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with— (a) the beliefs or views of that individual or of any member of that body; or (b) the policy or objectives of that body.*"

58. In *R v University College London, ex p Riniker* [1995] ELR 213, Sedley J explained the breadth of the duty (at 216):

> "…It is well known that the principal purpose of [s.43] was to prevent the banning from campuses of speakers whose views might be unacceptable to a majority, or even a vocal minority, of either the student body or the teaching body or both or, come to that, of the governing body. But its breadth is, in subs (1), somewhat larger and seeks the securing of freedom of speech in all respects."

59. Only speech "*within the law*" is within the scope of the s.43 duty. Thus speech that is contrary to the criminal law is not protected. This would include, for example:
    - speech inciting an audience to violence or to a breach of the peace.
    - speech stirring up racial or religious hatred or hatred on the grounds of sexual orientation contrary to the offences in s.18 and 29B of the Public Order Act 1986.
    - speech amounting to a terrorism offence (such as encouraging terrorism contrary to s.1 of the Terrorism Act 2006).
    - Speech intended to invite support for a proscribed terrorist organisation or by a person belonging to or professing to belong to a proscribed organisation (contrary to the offences in s.12 of the Terrorism Act 2000).

    It is beyond the scope of this advice to consider the detailed elements of these or other potentially applicable offences.

60. Unlawful speech also comprises speech that is contrary to the requirements of civil law, such as for example defamatory speech or speech amounting to harassment contrary to the Equality Act 2010 (on which see further below).

61. Lawful speech will fall within the scope of s.43, however irritating, contentious, eccentric, heretical, unwelcome or provocative it may be.[11]

62. The s.43 duty is not absolute and only requires persons concerned in the governance of the institution to take such steps as are "*reasonably practicable*".

63. The operation of other legal duties to which the partner educational institution is subject may mean that steps required to ensure freedom of speech are not reasonably practicable in a particular instance. For

[11] See e.g. the comments of Sedley J in *Redmond-Bate v DPP* (1999) 163 JP 789.

example, it may be lawful and necessary to prohibit a speaker event proceeding on the basis of an unacceptable risk of disorder on campus (which it is not possible to mitigate via reasonably practicable steps) such that allowing the event to proceed would unacceptably risk breaching the institution's duty of care to its students.[12]

64. A recent example of such a scenario that reached the courts is *R(Ben Dor) v University of Southampton* [2015] EWHC 2206 (Admin), [2015] ELR 590 where a decision to cancel a conference on the ground that it was not possible to put measures in place to ensure good order consistently with safeguarding staff and students was upheld as compatible with the University's s.43 duty (see e.g. at [30]).

65. Steps may also not be reasonably practicable if they are prohibitively costly.

66. Finally, it would not in our view be reasonably practicable for the university to seek to compel its students' union to take a step to secure free speech that it would be unlawful for the union to take. For example, if the students' union's trustees were reasonably to conclude that inviting a speaker who is likely to engage in hate speech (albeit falling short of a criminal offence) would not further the union's educational objects or would not comply with the public interest requirement,[13] it is difficult to see how the partner institution could reasonably conclude that it would be proper to attempt to compel the union to act in breach of its duties under charity law.

[12] However, it would seem that it would be unlawful to take account of risk of disorder by non-students off campus as a result of a speaker event since s.43 is local in its focus: see e.g. *R v University of Liverpool, ex p Caesar-Gordon* [1991] 1 QB 124, [1990] 3 All ER 821. But in that case the Court did not address the evident tension between that interpretation of s.43 and the public benefit requirements of charity law (and indeed the need to preserve the good name of any charity) which could well be thought to require charities always to be alive to the possibility of deleterious consequences to the community at large arising out of their actions. It may well be right that officers of unions should err on the side of caution in this regard not least because disorder off-campus could easily spill over into on-campus harm.

[13] For examples when the Charity Commission considers that a charity may reach such a conclusion see 'Compliance Toolkit', Chapter 5: Protecting Charities from abuse for extremist purposes and managing the risk at events and in activities – guidance for trustees', which is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/351342/CT-5.pdf.

‘No Platform’ policies

67. The question arises whether a students’ union may adopt a ‘no platform’ policy compatibly with its partner institution’s duty under s.43 of the Education No. 2 Act 1986.[14]

68. We understand such policies to operate to prevent identified speakers or bodies speaking at any union event on a blanket basis, even if invited by a member, club or society in accordance with the usually processes for inviting an external speaker.[15]

69. Since s.43 only protects lawful speech, where a no platform policy is directed solely to preventing unlawful speech, this is likely to be unproblematic, provided that the policy is carefully tailored to achieve this goal.

70. An example of such a policy would be a no platform policy in respect of proscribed terrorist organisations or members of such organisations. [16] In view of the criminal prohibitions in s.12 of the Terrorism Act 2000[17], this will be unobjectionable. Indeed, the ‘Prevent duty’ sector-specific guidance issued by the Secretary of State to higher and further education

[14] As considered in the above section, s.43 in many cases would not directly bind the students’ union, but an enforceable code of practice implementing the duty is likely to apply to student members and potentially the students’ union so as to give it some form of indirect effect. The partner educational institution may seek to enforce the code of practice, or be forced to do so by a claim for judicial review by an affected individual: *R v University College London, ex p Riniker* [1995] ELR 213 at 216.

[15] We would distinguish a no platform policy from case by case decisions by event organisers about which speakers to chose to invite for a particular event in order to most effectively further the educational objectives of that event. Such a decision may include consideration of whether a particular speaker’s views are likely to be unhelpfully divisive so as, for example, to undermine effective discussion at the event or so as to deter attendance by a section of the union’s membership. We do not consider that this type of decision generally raises an issue under s.43 since the duty is not to provide an invitation to speak to any particular speaker.

[16] A current list of proscribed terrorist organisations can be found at the below link: https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2

[17] criminalizing arranging, managing or assisting in arranging or managing a meeting to support or further the activities of a proscribed organization or at which a member of a proscribed organization will address the meeting.

institutions, considered further below, explicitly provides that institutions should not provide a platform for such offences to be committed.[18]

71. We consider that no platform policies extending to lawful speech are more difficult to reconcile with s.43. Such policies are in obvious tension with the central purpose behind the enactment of s.43 (as described by Sedley J in *ex p Riniker*) since they will very likely be the direct product of the majority of the union's membership finding the beliefs, views, policies or objectives of the individual or body that has been 'no-platformed' to be unacceptable.

72. However, we consider that it may be possible to operate a no platform policy extending to organisations or individuals who have demonstrated through their track record a clear propensity for engaging in extreme, though lawful, speech (for example, racist views falling short of relevant criminal offences) of a type that means that trustees could reasonably conclude that inviting such an organisation or individual to speak would under all circumstances place the union in breach of its charity law duties because, for example, this could not reasonably be expected to further the union's educational objects, because this would not further the public interest or would bring the union into disrepute, or because in an extreme case it might reasonably be regarded as likely to put the union's property in jeopardy. [19]

73. If operating a no platform policy on such a basis, unions would need to be very careful that the policy reflects a genuine and reasonable assessment of their obligations under charity law, and is not overly inclusive in its scope. Importantly, the policy thus remains a product of the students'

[18] e.g. Prevent duty guidance for higher education institutions in England and Wales (16 July 2015), para. 10. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445916/Prevent_Duty_Guidance_For_Higher_Education__England__Wales_.pdf.

[19] See again the Charity Commission guidance 'Compliance Toolkit', Chapter 5: Protecting Charities from abuse for extremist purposes and managing the risk at events and in activities – guidance for trustees', which at p.7 contemplates the invitation of certain speakers being contrary to the public benefit requirement despite the fact that their speech falls short of the criminal threshold. This is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/351342/CT-5.pdf.

union's duties under charity law, and not some more amorphous and subjective rationale (such as, for example, ensuring that the union is a "safe space"), which would not be reconcilable with the s.43 duty.

74. Careful consideration would also need to be given to ensuring compliance with the requirements of the Data Protection Act 1998 ('DPA') in so far as records regarding an individual's political views (which would constitute sensitive personal data for the purposes of the DPA) are processed by the union in furtherance of such a policy. Detailed consideration of the requirements of data protection law is beyond the scope of this advice.

75. Finally, we also note that the s.43 duty (as applied via the partner institution's code of practice) is unlikely to prevent a union from taking steps to ensure that their members are enabled to choose not to attend speakers or events that they may find offensive or upsetting. This could include measures regulating where, when, and subject to what conditions (such as advertising) controversial speaker events take place. Such measures are less likely to conflict with the s.43 duty than a full-blown no platform policy.

<u>Human Rights Act 1998: freedom of expression, freedom of thought conscience and religion, and freedom of assembly and association</u>

76. Certain human rights enshrined in the European Convention on Human Rights ('ECHR') have been incorporated into domestic law by the Human Rights Act 1998 ('HRA'). These include:

    a. Freedom of expression, which encompasses the freedom to hold opinions and to receive and impart information and ideas without interference (Article 10).

    b. Freedom of thought, conscience and religion, including freedom to manifest religion or belief, in worship, teaching, practice and observance (Article 9).

c. Freedom of assembly and association (Article 11).

77. Pursuant to s.6 of the HRA, public authorities are bound to act compatibly with incorporated ECHR rights (unless prevented from doing so by a provision of primary legislation or secondary legislation made under primary legislation that cannot be interpreted consistently with ECHR rights). Many higher and further education partner institutions will be public authorities for the purposes of s.6 of the HRA at least in respect of some of their functions.

78. However, applying the factors identified in the case law,[20] where it is a constitutionally distinct body to its partner institution, we do not consider it likely that the courts would treat a students' union's functions as being functions of a public nature for the purpose of s.6 HRA in most cases. One exception to this may be where the students' union has a direct governance role in the partner institution.

79. As such, as with s.43 of the Education No. 2 Act 1986, the significance of the HRA will likely be in the main indirect i.e. via the influence that the partner institution's duty to comply with ECHR rights will have on its policies, procedures and decision-making in relation to the students' union and its students. The requirement under charity law to secure the public benefit may also require the union to observe the underlying principles of enshrined ECHR rights.

80. Accordingly, we only provide below a brief overview of the scope of the rights under ECHR Articles 10, 9 and 11.

81. Article 10 protects communications of virtually any kind (e.g. spoken, written, film, images, dress, and even graffiti).[21] It also includes conduct,

[20] See in particular *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546; *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95; and *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2009] 4 All ER 865.
[21] See the examples in Blackstone's Guide to the Human Rights Act 1998 (OUP, 7th Ed.) at 7.399.

such as acts of protest.[22] Importantly, it protects not only information and ideas that are favourably received, but also information and ideas that offend, shock or disturb.[23]

82. The European Court of Human Rights ('ECtHR') has, in a limited number of extreme cases, held that hate speech aimed at the destruction of the rights and freedoms of others falls outside the scope of Article 10 all together (by virtue of the effect of ECHR Article 17[24]), including statements of ethnic hate[25], religious hate[26], anti-Semitism and holocaust denial[27], and totalitarian ideas that threaten democracy.[28]

83. In all other cases, restrictions on expression by public authorities must be *"convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved"*.[29] The legitimate ends for which freedom of expression can be restricted are outlined in Article 10(2), namely the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary. We note that the strict requirements of proportionality mean that an unspecified, general appeal to the desirability of securing a "*safe space*" on campus is unlikely to suffice to justify an interference with free expression rights.

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[22] e.g. *Steel v United Kingdom* (1998) 28 EHRR 603.
[23] *Sunday Times v United Kingdom* (1979) 2 EHRR 245, at para. 65.
[24] Which provides "*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention*."
[25] e.g. *Ivanov v Russia*, application no 35222/04 (admissibility decision of 20 February 2007).
[26] *Norwood v United Kingdom,* application no. 23131/03 (admissibility decision of 16 November 2004).
[27] *Garaudy v France,* application no. 65831/01 (admissibility decision of 7 July 2003) and M'Baia M'Baia v France, application no. 25239/13 (admissibility decision of 20 October 2015).
[28] e.g. *Communist Party of Germany v the Federal Republic of Germany* (decision of Commission of 20 July 1957).
[29]*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 200 per Lord Nicholls.

84. Any restriction on free expression must also be "*prescribed by law*". This means, in essence, that it must have a sufficiently clear, precise and publicly accessible legal basis in domestic law.[30] This could be pursuant to regulations or procedures within the partner educational institution's published internal laws.

85. In some circumstances, Article 10 will impose a duty on a public authority to take positive action to protect the freedom of expression of private individuals. In determining whether such an obligation exists and its scope, the courts will ensure a fair balance is struck between the general interest of the community and the interests of the individual and that such a duty does not impose an impossible or disproportionate burden on the authorities.[31] Such positive duties will parallel and operate to reinforce the positive duty under s.43 of the Education No. 2 Act 1986, considered above.

86. Article 9 protects the right to hold (and change) religious or non-religious beliefs, as well as to manifest such beliefs in worship, teaching, practice and observance. In order to engage the protection of Article 9, a belief must attain a certain level of cogency, seriousness, cohesion and importance. Manifestations of a religion or belief will be protected if they are intimately linked to the religion or belief.[32] The right to manifest religion or belief is (like Article 10) a qualified right: interferences with this freedom must be "*prescribed by law*" and demonstrated to be proportionate to one of the legitimate aims outlined in Article 9(2). These aims include the protection of the rights and freedoms of others. Thus, for example, in the context of gender segregation[33], the right to manifest one's religion is circumscribed by the requirement not to discriminate against others on grounds of sex.[34]

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[30] *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at para. 49.
[31] e.g. *Appleby v United Kingdom*, application no. 44306/98 (decision of 6 May 2003) at paras. 39-40.
[32] *Eweida and ors v United Kingdom* (2013) 34 BHRC 519 at para. 82.
[33] On which see further paras. 97- 100 below.
[34] See e.g. Equality and Human Rights Commission publication 'Gender Segregation at Events and Meetings: guidance for Universities and Students' Unions' (30 June 2014), at p.12. Available at http://www.equalityhumanrights.com/publication/gender-segregation-events-and-meetings-guidance-universities-and-students-unions.

87. Article 11 protects freedom of peaceful assembly and freedom of association. It is again a qualified right and can be restricted on a basis prescribed by law and where demonstrated to be proportionate to one of the legitimate aims outlined in in Article 11(2).

88. Freedom of peaceful assembly encompasses public and private meetings, marches and processions, press conferences, static protests, 'sit-ins', occupations of buildings or land and counter-demonstration,[35] but only if the gathering is intended to be peaceful.[36] Requirements for the authorisation of assemblies will not necessarily amount to an interference with Article 11.[37] Restrictions on protest on private property will also not necessarily breach Article 11, though if a bar on accessing private property prevents any effective exercise of Article 11 rights, the state may come under a positive obligation to regulate private property rights.[38] A public authority may also be subject to a positive obligation to protect peaceful protests from disruption by violent counter-demonstrations.[39]

89. Freedom of association protects the right to form and join associations, including political parties and trade unions. However, it does not provide a right to join any particular association, which is a matter for the private association to regulate through its rules.[40] The right to freedom of association can also give rise to positive obligations on the part of the state.[41]

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[35] See examples in Blackstone's Guide to the Human Rights Act 1998 (OUP, 7th Ed.) at 7.464.
[36] *G v Germany* (1989) 60 DR 256,
[37] e.g. *Aldemir v Turkey*, application no 32124/02 (decision of 18 December 2007) at para. 43.
[38] *Appleby v United Kingdom*, application no. 44306/98 (decision of 6 May 2003) at para. 47-49 and 52.
[39] e.g. *Platform 'Artze fur das Leben' v Austria* (1988) 13 EHRR 204 at para. 32.
[40] e.g. *Cheall v United Kingdom* (1985) 42 DR 178.
[41] For example, in *Redfearn v United Kingdom* (2012) 33 BHRC 713, the ECtHR held that the State is subject to a positive obligation to ensure that persons are not dismissed from employment solely based on their membership of a political party. It found (by a bare majority) a violation of Article 11 in circumstances where a bus driver had been dismissed from employment with a private company without legal recourse under domestic law for being elected as a councillor of the British National Party.

## V. Equality law

90. The provisions of domestic equality law are largely now to be found in the Equality Act 2010 ('EA 2010'). This prohibits various species of discrimination on the grounds of or related to certain protected characteristics by persons engaged in particular defined areas of activity. The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, and sexual orientation: ss.4-11 EA 2010.

91. The areas of activities in respect of which a prohibition on discrimination applies that are most relevant to students' unions are the following:

    a. The provision of services (including provision of goods and facilities) to the public or a section of the public whether for payment or not (s.29 EA 2010).[42] Whilst the point is not free from doubt, members of a students' union - who in most cases are likely to be predominantly comprised of current students at the partner educational institution who have not chosen to opt out of membership – may well be considered to be a "*section of the public"* since this term has been interpreted in the case law as excluding members of clubs with a real element of personal selection, which is absent in the case of membership of a students' union.[43]

    b. If members of students' unions are not a "*section of the public*", the students' union will likely instead be prohibited from discriminating against members, associates and guests pursuant to the provisions applicable to membership associations in ss.101 and

[42] This applies to all protected characteristics, except age discrimination against those under the age of 18 and discrimination on grounds of marriage and civil partnership: s.28. However, see below on the exclusion of religion and belief and sexual orientation as relevant protected characteristics from the prohibition on harassment in s.29(8) EA 2010.
[43] *Charter v Race Relations Board* [1973] AC 868, [1973] 1 All ER 512; *Dockers' Labour Club and Institute Ltd v Race Relations Board* [1976] AC 285, [1974] 3 All ER 592; *Bateson v YMCA* [1980] NI 135.

102 EA 2010.[44] These provisions only apply to associations with a membership greater than 25, where membership is regulated by the association's rules, and where membership involves "*a process of selection*": s.107(2) EA 2010.

c. In any event, whenever the union opens its doors to non-members for events or to allow use of its facilities by non-members, it will be prohibited from discriminating against such members of the public in the provision of its services pursuant to s.29 EA 2010.

d. In respect of its employees or job applicants: s. 39 EA 2010.

92. The partner educational institution will itself be bound not to discriminate in its educational arrangements by s.91 EA 2010.[45] In most cases, it will also be subject to the public sector equality duty in s.149 EA 2010, which requires that in its decision-making it has due regard to the need to (a) eliminate discrimination prohibited by the EA 2010; (b) to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and (c) to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

93. The following are the key species of discrimination prohibited by the EA 2010 relevant to the activities of students' unions under consideration in this advice:

Direct discrimination

94. Direct discrimination arises when a person is treated less favourably "*because of*" a protected characteristic: s.13 EA 2010. The characteristic needs to be a cause of the less favourable treatment, but does not need to

[44] This applies to all protected characteristics, except marriage and civil partnership: s.100 EA 2010. However, see below (footnote 53) on the exclusion of religion and belief and sexual orientation as relevant protected characteristics from the prohibition on harassment in s.103(2) EA 2010 (also footnote 53).
[45] This applies to all protected characteristics, except marriage and civil partnership: s.84 EA 2010.

be the only or even the main cause.[46] A conscious discriminatory motivation is not required.[47] With the exception of direct discrimination because of age, such discrimination cannot be justified.

95. Thus a students' union that prohibits all speakers or students of a particular nationality from participating in its events would directly discriminate on grounds of race.

96. A students' union that provided less generous funding to a particular religious society than it provided to other religious societies would directly discriminate on grounds of religion or belief if the decision to provide less generous funding was "*because of*" the religion of the society's membership rather than, for example, some reason unrelated to this protected characteristic such as the size of membership of the society.

97. Segregation on racial grounds is always direct discrimination (ss.13(5) EA 2010). Segregation on the basis of other protected characteristics, such as gender, will constitute direct discrimination if it results in less favourable treatment because of the protected characteristic. If a woman was not permitted to occupy a particular area of a lecture hall or seating area because it was reserved for men this would likely amount to less favourable treatment and therefore direct discrimination.

98. Genuinely voluntary segregation would not entail less favourable treatment. But where a person feels pressured to conform to a policy of segregation this would be unlikely to be treated as voluntary. Demonstrating that segregation is voluntary is also likely to be difficult in practice. If pressure was put on a woman to sit separately from men (or vice versa) this could also amount to unlawful harassment, on which see further below.[48]

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[46] EHRC Employment Statutory Code of Practice (2011), para 3.11. Available at http://www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/employercode.pdf.

[47] *R (E) v Governing Body of JFS (Secretary of State for Children, School and Families, interested parties) (United Synagogue intervening)* [2009] UKSC 15, [2010] 2 AC 728.

[48] See e.g. the Equality and Human Rights Commission publication 'Gender Segregation at Events and Meetings: guidance for Universities and Students' Unions' (30 June 2014), at p.5.

99. For further guidance on the compatibility of segregation with equality law see the Equality and Human Rights Commission ('EHRC') guidance on 'Gender segregation at Events and Meetings: guidance for Universities and Students' Unions'.[49] This also contains recommendations for good practice, including a recommendation that students' unions maintain a system for monitoring planned speaker events with a view to identifying arrangements that may breach equality law.

100. The EHRC guidance also addresses[50] the limited circumstances in which gender segregation may be permitted under statutory exceptions in the EA 2010. These include an exception for associations whose membership is restricted to a single protected characteristic[51] and an exception for certain activities of religious organisations (in particular, religious worship).[52] It is beyond the scope of this advice to consider these exceptions in detail.

Indirect discrimination

101. Indirect discrimination arises when a provision, criterion or practice puts, or would put, a person with a protected characteristic at a particular disadvantage when compared with persons who do not have that protected characteristic, and this cannot be shown to be a proportionate means of achieving a legitimate aim: s.19 EA 2010.

102. Thus if a students' union were to impose a rigid dress code for an event which prohibited the wearing of any form of head dress this would put Sikh students at a particular disadvantage since the Sikh faith requires the wearing of a turban. The union is highly unlikely to be able to justify the application of this policy to Sikh students as a proportionate means of achieving a legitimate aim. As such, the policy would very likely

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Available at http://www.equalityhumanrights.com/publication/gender-segregation-events-and-meetings-guidance-universities-and-students-unions.

[49] ibid.

[50] pp. 7-8.

[51] EA 2010, sch. 16, para. 1. The exception does not apply in the case of the protected characteristic of race, to colour.

[52] See in particular, EA 2010, sch. 3, para. 29 and sch 23, para. 2.

constitute unlawful indirect discrimination on grounds of religion or belief and race.

Harassment

103. Harassment occurs when a person engages in unwanted conduct related to a relevant protected characteristic (for the protected characteristics under the EA 2010 see paragraph 90 above[53]) and the conduct has the purpose or effect of violating the affected person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person: s.26 EA 2010.

104. There are thus two alternative bases for liability: (i) unwanted conduct with the purpose of violating the affected person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person, and (ii) unwanted conduct with such an effect. In deciding whether conduct has the relevant effect, account must be taken of (a) the perception of the affected person; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect i.e. both subjective and objective factors.[54]

105. Unwanted conduct can cover a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.[55]

106. "*Related to*" has a broad meaning and does not require that the unwanted conduct is "*because of*" the protected characteristic.[56]

[53]Religion and belief and sexual orientation are not relevant protected characteristics for the purposes of the harassment provisions in those parts of the EA 2010 concerned with the provision of services to the public or a section of the public (on which see para. 91(a) above) and members, associates and guests of membership associations (on which see para. 91(b) above): s.29(8) and s.103(2) EA 2010.
[54] See discussion in *Dhaliwal v Richmond Pharmacology* [2009] ICR 724, [2009] IRLR 336 at para. 15 on the materially similar predecessor provision.
[55] EHRC Employment Statutory Code of Practice (2011), para. 7.7.
[56] EHRC Employment Statutory Code of Practice (2011), para. 7.9.

107. The relevant threshold of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment will not be met by things said or done that are "*trivial or transitory, particularly if it should have been clear that any offence was unintended*", and the courts have emphasized the importance of not encouraging "*a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*".[57]

108. This threshold has been applied by the First Tier Tribunal in *Fraser v University College Union*[58] to robustly reject a claim of harassment[59] relating to race and religion/belief against the UCU by an Orthodox Jewish member based on *inter alia* on-going debate within the union over a number of years about the Israel/Palestine situation (including discussion of motions for a boycott of Israeli academic institutions, which were not ultimately implemented on the basis of legal advice).

109. The Tribunal found that the relevant debates had been well-ordered and balanced, carefully controlled from the Chair, and managed in an even-handed fashion with speakers selected in turn to speak for and against the motions. On the very rare occasions when it was necessary to call the meeting to order, the Chair did so and those present responded appropriately.[60] In these circumstances, the claim of harassment based on the conduct of the debates could not succeed.

110. The Tribunal also made more general observations about the likelihood of a properly conducted political debate giving rise to a claim of harassment:

> "…a political activist accepts the risk of being offended or hurt on occasions by things said or done by his opponents (who themselves take on a corresponding risk). These activities are not for everyone. Given his election to engage in, and persist with, a political debate which by its nature is bound to excite strong emotions, it would, we think, require special circumstances to justify a finding that such

[57] *Dhaliwal v Richmond Pharmacology* [2009] ICR 724, [2009] IRLR 336 at para. 22. See also *Land Registry-v-Grant* [2011] ICR 1390.
[58] Case no. 2203290/2011 (decision promulgated on 22 March 2013).
[59] contrary to s.57 EA 2010, which prohibits harassment by trade unions of their members.
[60] At [132].

involvement had resulted in harassment. … Secondly, the human rights implications of the claim must not be overlooked. As we have noted, Article 10(2) of the Convention countenances limitations on freedom of expression only to the extent that they are *necessary in a democratic society*. The numerous authorities under domestic and Community jurisprudence (some cited above) emphasise repeatedly that freedom of expression must be understood to extend to information and ideas generally, including those which offend, shock or disturb society at large or specific sections of it…."[61]

111. In our view, had the UCU permitted the debates to descend into a generalized attack on Jews under the guise of holding a political debate, its actions in organizing the debates may have been capable of satisfying the elements of the prohibition on harassment. Similarly, if as part of its programme of activities on the Israel/Palestine situation, the UCU had knowingly invited anti-Semitic speakers to address its members, this might also have given rise to circumstances amounting to harassment for which it was responsible.[62]

112. Finally, we note that the relevant threshold for harassment could be established by the cumulative effect of numerous unwanted acts, which collectively have the effect of violating the affected person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

Instructing, causing or inducing contraventions of the EA 2010

113. A person ('A') must not (or attempt to) instruct another person ('B') to do, cause B to do, or induce B to do, in relation to a third person ('C'), anything that amounts to a breach of the EA 2010: s.111 EA 2010.

114. Section 111 does not apply unless the relationship between A and B is such that A is in a position to commit a breach of the EA 2010 in relation to

[61] At [156].
[62] Indeed, the invitation of a speaker who had been convicted of anti-Semitic hate speech in South Africa was the single part of the claim in *Fraser v UCU* that the Tribunal considered had potential merit: see e.g. at [162].

B: ss.111(7) EA 2010. The relationship between a students' union and its partner institution would not appear to be one of the protected relationships covered by the EA 2010 (while the union *may* be regarded as providing services to its partner institution, this would not appear to be the provision of services to a "*section of the public*" within the meaning of s.29 EA 2010). As such, it appears to us that s.111 would not apply to attempts by the students' union to influence the conduct of its partner institution.

Claims by corporate victims of discrimination

115. Recently, in *EAD solicitors v Abrams* [2015] IRLR 978, the Employment Appeal Tribunal (per Langstaff J) ruled that a legal person (e.g. a company or limited liability partnership) can complain of discrimination contrary to the EA 2010.

Positive action under the EA 2010

116. Students' unions should also be aware of the effect of s.158 of the EA 2010, which permits positive action in favour of persons with a protected characteristic when it is reasonably thought that people who share the protected characteristic: (a) experience a disadvantage connected to that characteristic, (b) have needs that are different from the needs of those who do not share that characteristic, or (c) have disproportionately low participation in an activity compared to those who do not share that protected characteristic.

117. In such circumstances, action may be taken which is proportionate to meeting the aims of: (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage; (b) meeting those needs, or (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.[63]

[63] Further guidance and good practice in the educational context can be found in the EHRC's publication 'Equality Act 2010 Technical Guidance on Further and Higher Education' (Ch. 13), which is available at http://www.equalityhumanrights.com/sites/default/files/publication_pdf/EqualityAct2010-TechnicalGuidance-FEandHE-2015.pdf.

## VI. The 'Prevent' duty

118. Section 26 of the Counter-Terrorism and Security Act 2015 ('CTSA 2015') imposes a duty on a number of public bodies, including most higher and further educational institutions, to "…*have due regard to the need to prevent people from being drawn into terrorism*" (commonly known as the 'Prevent duty'). Terrorism is broadly defined in s.1 of the Terrorism Act 2000: s.35(3) CTSA 2015.[64]

119. The duty does not directly bind students' unions, which are not included in the list of authorities bound by the duty in schedule 6 CTSA 2015. However, partner institutions are likely to require their students' union (and students) to comply with aspects of the policies and procedures put in place to give effect to the duty and it is in our view strongly arguable that charity law would require a students' union to conform to the general policy of the CTSA as part of its public benefit commitment.

120. At the time of writing this advice, higher and further educational institutions may still be in the process of developing or finalising their approach to implementing the Prevent duty. We note that the applicable statutory guidance [65] provides for educational institutions to consult students regarding implementation.

121. Like the public sector equality duty in s.149 EA 2010,[66] the Prevent duty does not provide the listed authorities with new powers or functions and also does not impose a duty to achieve a particular result in a particular case. Rather it requires appropriate ("*due*") regard, in the institution's

[64] This comprises three elements: first, the "*use or threat of action*" inside or outside the UK, where that action consists of "*serious violence*", "*serious damage to property*", or creating a serious risk to public safety or health; secondly, that the use or threat must be "*designed to influence the government of the UK or any other country or an intergovernmental organization or to intimidate the public*"; and thirdly, that the use or threat is "*made for the purpose of advancing a political, religious, racial or ideological cause*": see *R v Gul* [2013] UKSC 64, [2014] AC 1260 at [27].

[65] e.g. Prevent Duty guidance for higher education institutions in England and Wales (16 July 2015, into effect on 18 September 2015), para. 16 and Prevent Duty guidance for further education institutions in England and Wales (16 July 2015, into effect on 18 September 2015), para. 12. All Prevent statutory guidance can be found here: https://www.gov.uk/government/publications/prevent-duty-guidance.

[66] See para. 92 above.

decision-making, to the objective of preventing persons being drawn into terrorism.[67]

122. Section 31 CTSA 2015 (requiring "*particular regard*" to *inter alia* the duties to ensure freedom of speech when discharging the Prevent duty) also makes clear that Parliament intended to preserve in full force pre-existing duties relating to freedom of expression, including as provided for under s.43 of the Education No. 2 Act 1986 discussed above.

123. Pursuant to s.29 CTSA 2015, the Secretary of State has issued general statutory guidance[68] and also sector-specific guidance applicable to higher education ('HE')[69] and further education ('FE')[70] institutions. HE and FE educational institutions are required to have regard to such guidance in discharging the Prevent duty (s.26(2) CTSA 2015), though they will be permitted to depart from the requirements of the guidance where they have good reason to do so.[71][72]

124. The general Prevent guidance places the Prevent duty within the context of the Government's broader counter-terrorism 'Prevent' strategy, which extends to addressing non-violent extremism as a cause of terrorism.[73] To this end, the guidance adopts the Government's broad definition of "extremism":

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[67] E.g. *R(Baker) v Secretary of State for Communities and Local Government* [2008] EWCA civ 141, [2008] LGR 239 at para. 31.
[68] Revised Prevent duty for England and Wales (16 July 2015) and Revised Prevent duty guidance for Scotland (16 July 2015).
[69] Prevent Duty guidance for higher education institutions in England and Wales (16 July 2015, into effect on 18 September 2015), and Prevent Duty guidance for higher education institutions in Scotland (16 July 2015, into effect on 18 September 2015).
[70] Prevent Duty guidance for further education institutions in England and Wales (16 July 2015, into effect on 18 September 2015), and Prevent Duty guidance for further education institutions in Scotland (16 July 2015, into effect on 18 September 2015).
[71] cf. e.g. *R v Islington LBC ex p Rixon* (1996) 32 BMLR 136 at 140 (a case concerned with an arguably more onerous duty to comply with the Secretary of State's guidance, namely "*to act under the general guidance of the Secretary of State*").
[72] The Secretary of State can also issue directions to institutions who she considers are not complying with the Prevent duty, and apply to enforce such directions by way of a mandatory order from the High Court: s.30 CTSA. The Higher Education Funding Council for England and the Office for Standards in Education, Children's Services and Skills ('Ofsted') respectively monitor compliance with the Prevent duty by higher and further educational institutions in the first instance.
[73] Paras. 7-8.

> "… 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. We also include in our definition of extremism calls for the death of members of our armed forces".[74]

125. Of particular relevance to this advice is that part of the HE and FE sector specific guidance directed to the management of external speakers and events. This provides that institutions should have in place "*policies and procedures … for the management of events on campus and use of all … premises…[which] apply to all staff, students and visitors and clearly set out what is required for any event to proceed*."[75] These policies and procedures will therefore apply to speaker events run by the students' union on the partner institution's premises, which is likely in many cases to include the students' union.

126. The HE and FE guidance states that institutions should operate a system for assessing and rating risks associated with any planned events, which provides evidence to suggest whether an event should proceed, be cancelled or whether action is required to mitigate any risk.[76] It also lays down a strict threshold for events to be permitted to proceed where there is an identified risk of "*extremist*" views being expressed that "*risk drawing people into terrorism or are shared by terrorist groups*":

> "…when deciding whether or not to host a particular speaker, [institutions] 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 [relevant HE or FE institution] are entirely convinced that such risk can be fully mitigated without cancellation of the event. This includes ensuring that, where any event is being allowed to proceed, speakers with extremist views that could draw people into terrorism are challenged with opposing views as part of that same event, rather than in a separate forum. Where [relevant HE or FE institutions] are in any doubt that the risk cannot be fully mitigated they should exercise caution and not allow the event to proceed." (emphasis added)[77]

[74] Para. 7.
[75] e.g. HE guidance for England and Wales, para. 7.
[76] HE guidance for England and Wales, para. 12; FE guidance for England and Wales, para. 9.
[77] HE guidance for England and Wales, para. 11; FE guidance for England and Wales, para. 8.

127. This strict threshold (requiring "*full mitigation*" of all risk to a high degree of certainty, even where the risk arises from lawful speech), is in our view in potential conflict with the duty to take reasonable practicable steps to secure freedom of speech within the law in s.43 of the Education No. 2 Act 1986. It may also result in decisions that disproportionately interfere with the right to freedom of expression under ECHR Article 10 by requiring cancellation of events where risk is assessed as low but cannot be fully mitigated to the required degree of certainty specified in the guidance. As such, partner institutions may take the view that they will need to depart from a literal application of the strict approach outlined in the statutory guidance in order to ensure full compliance with their other binding legal duties.

128. The HE (but not the FE) guidance specifically addresses the position of students' unions and societies. It requires that institutions have "*clear policies setting out the activities that are or are not allowed to take place on campus and any online activity directly related to the university*…[and setting out] *… what is expected from the student unions and societies in relation to Prevent including making clear the need to challenge extremist ideas which risk drawing people into terrorism.*"[78]

129. We note that the requirements imposed by a partner institution in respect of external speaker events in order to give effect to the Prevent duty (and statutory guidance) may to some extent parallel obligations arising under charity law (see paragraph 119 above). Charity Commission guidance already provides that charities need to consider whether providing a platform for the expression or promotion of views that may be considered to be "*extreme*" (albeit falling short of the threshold of the criminal law) furthers their objects, satisfies the public benefit requirement, or otherwise gives rise to unacceptable risks to the charity.[79] In order to demonstrate

[78] para. 29.

[79] See again Charity Commission 'Compliance Toolkit', Chapter 5: Protecting Charities from abuse for extremist purposes and managing the risk at events and in activities – guidance for trustees' at p.7 (available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/351342/CT-5.pdf).

compliance with the requirements of charity law, union trustees would be well advised to ensure that the union has processes in place for assessing risks posed by external speakers quite apart from any requirement to give effect to the Prevent duty.

130. The HE guidance also suggests that students' unions should consider whether their staff and elected officers would benefit from Prevent awareness training or other relevant training provided by the Charity Commission, regional Prevent co-ordinators, or others (para. 30). Demonstrating completion of relevant training (which of course need not be the official Government Prevent training programme) may assist trustees in demonstrating compliance with the requirements of charity law and enable confident decision-making in this difficult area.

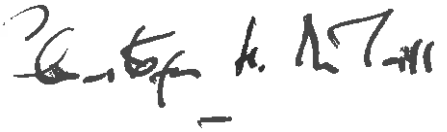
131. Finally, we note that the partner institution may seek to implement an information sharing agreement with the students' union regarding vulnerable individuals at risk of being drawn into terrorism.[80] Whether such an arrangement is implemented, and in what form, will be a matter for discussion and negotiation between the union and its partner institution, including in light of the understandable concern that such information sharing about members' activities may have an unfortunate chilling effect on participation in union activities.

132. If such arrangements are put in place, students' unions will need to ensure that they are fully compliant with the requirements of the Data Protection Act 1998 in so far as this entails sharing of personal or sensitive personal data (such as information about members' political opinions). A full treatment of these requirements of data protection law is beyond the scope of this advice.

[80] For example, pursuant to para. 23 of the HE guidance for England and Wales, which states an expectation that institutions would have "…*have robust procedures both internally and externally for sharing information about vulnerable individuals (where appropriate to do so). This should include appropriate internal mechanisms and external information sharing agreements where possible.*"

## VII. Overall

133. We reiterate that this advice is necessarily not comprehensive and can only sketch out some of the key legal issues in the conduct of debates, motions and speaker events by students' unions. Our advice must also be read as a whole given the interlocking nature of many of the issues considered. Students' unions should seek specific legal advice where they remain unclear of their legal duties in a particular situation.



**CHRISTOPHER McCALL**
**Maitland Chambers**

**RAJ DESAI**
**Matrix Chambers**

**12 April 2016**