

Prevent Duty

NUS Guidance for Students' Unions

This note is for general reference only and does not constitute legal advice

Background

The so-called “*Prevent duty*” was introduced by Section 26 of the Counter Terrorism and Security Act 2015 (the 2015 **Act**). It imposes a duty on specified public authorities to “...have due regard to the need to prevent people from being drawn into terrorism in exercising their functions”, putting the previously voluntary *Prevent* strategy onto a statutory footing.

The *Prevent* strategy was explicitly changed in 2011 to deal with all forms of terrorism and with non-violent extremism, which Government guidance suggests “*can create an atmosphere conducive to terrorism and can popularise views which terrorists then exploit.*”¹

The *Prevent* strategy defines “*extremism*” broadly and amorphously for these purposes, to include: “...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.”

The *Prevent* duty came into force on 1 July 2015 for many public authorities; but not yet for those subject to separate duties to ensure freedom of speech (described in section 31 of the 2015 Act), including higher education (**HE**) and further education (**FE**) institutions.

When these institutions do become subject to the *Prevent* duty, section 31 of the 2015 Act requires them to have particular regard to their applicable separate duties to ensure freedom of speech and academic freedom when complying with the *Prevent* duty. The Home Secretary is also required to do so when issuing statutory guidance and exercising powers of enforcement.

Universities and colleges which do become subject to the statutory *Prevent* duty will also be required to have regard to statutory guidance approved by Parliament about how the *Prevent* duty should be discharged. To date, general guidance on the *Prevent* duty for England and Wales has been approved by Parliament (in March 2015). However, revised general guidance and specific guidance for HE and FE institutions has been issued by government but not yet approved by Parliament.

Issues addressed in this guidance

This guidance addresses the following questions:

- How does the *Prevent* duty apply to universities and colleges? (page 2)

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417943/Prevent_Duty_Guidance_England_Wales.pdf at paragraph 8

- How does the *Prevent* duty apply to students' unions? (page 4)
- How does the *Prevent* duty relate to other applicable duties, such as under the Equality Act 2010? (page 5)
- To what extent does *Prevent* duty apply to trustees, officers and members of students' unions? What obligations are the different categories under? (page 8)
- What differences are there in the application of the *Prevent* duty as between HE and FE institutions? (page 8)
- What differences are there in the position in England, Wales and Scotland? (page 10)
- How can the requirement to "*fully mitigate*" risk arising from invitation of an external speaker be complied with? (page 10)
- What potential avenues of legal challenge to *Prevent* might be available? (page 12)
- Are students' unions able to campaign on this issue? (page 13)

How does the *Prevent* duty apply to universities and colleges?

The *Prevent* guidance for higher education institutions in England and Wales², as currently drafted (the **HE** Guidance), outlines extensive expectations in order for universities to comply with the *Prevent* duty:

- Universities are expected to carry out a risk assessment of where and how students might be at risk of being drawn into terrorism or non-violent extremism, and put in place an action plan to mitigate the risk.³
- Universities should 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, which should set out what is expected from students' unions and societies in relation to *Prevent*⁴.
- Universities should have a system for assessing risk associated with planned events and consider carefully whether the views likely to be expressed "*constitute extremist views that risk drawing people into terrorism or are shared by terrorist groups.*"⁵

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445916/Prevent_Duty_Guidance_For_Higher_Education_England_Wales_.pdf

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445916/Prevent_Duty_Guidance_For_Higher_Education_England_Wales_.pdf, at paragraph 19

⁴ *Ibid*, at paragraph 29.

⁵ *Ibid*, at paragraph 11.

- Where it is deemed that a speaker's views are "*extremist*" or "*risk drawing people into terrorism or are shared by terrorist groups*", the event should not be allowed to proceed unless the university can be "*entirely convinced that such risk can be fully mitigated*".
- Senior managers of universities, including vice chancellors, are expected to actively engage with the police, BIS Prevent Coordinators and other "*partners*" in complying with the *Prevent* duty.⁶
- Universities must demonstrate a willingness to undertake *Prevent* awareness training and other training that could help the relevant staff prevent people from being drawn into terrorism and challenge extremist ideas.⁷
- Universities should have policies relating to the use of university IT equipment which contain specific reference to the *Prevent* duty and which enable the university to identify and address issues where online materials are accessed for non-research purposes.⁸
- Universities should have clear policies and procedures for students and staff working on sensitive or extremism-related research.⁹
- Universities should have robust procedures both internally and externally for sharing information about vulnerable individuals, including information sharing agreements where possible.¹⁰
- Universities should ensure sufficient chaplaincy and pastoral support is available for all students, and clear and widely available policies on use of prayer rooms and other faith-related facilities.¹¹

Specific *Prevent* guidance for the FE sector, as currently drafted¹² (the **FE Guidance**) is very similar to the HE Guidance. It omits the section on students' unions and societies but the same principles are generally likely to apply. One important difference which might explain this difference, however, is that many FE students' unions are legally a component part of the FE college, and have not been established as legally separate and autonomous entities. Where this is the case, the Prevent Duty would apply directly to a students' union as a component part of the FE college. Differences between the HE and FE sectors are discussed further below.

⁶ *Ibid*, at paragraph 16.

⁷ *Ibid*, at paragraph 22.

⁸ *Ibid*, at paragraph 27.

⁹ *Ibid*, at paragraph 28.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445916/Prevent_Duty_Guidance_For_Higher_Education_England_Wales_.pdf, at paragraph 23.

¹¹ *Ibid*, at paragraphs 25 and 26.

¹²

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445915/Prevent_Duty_Guidance_For_Further_Education_England_Wales_-_Interactive.pdf

The government is expected to specify bodies which will be tasked with monitoring compliance with the Prevent duty. It is possible that this body will be Ofsted in the case of FE institutions and the Higher Education Funding Council for England in the case of HE institutions.

The Home Secretary is also empowered by the 2015 Act to issue directions to public authorities which he or she believes have failed to discharge the Prevent duty. The Secretary of State is required to have particular regard to freedom of speech and academic freedom in making any such directions.

How does the *Prevent* duty apply to students' unions?

Students' unions are typically autonomous charitable bodies independent of their parent institutions. Students' unions are not currently public authorities for the purposes of the 2015 Act, meaning that the *Prevent* duty does not directly apply to them.

There are nonetheless a number of ways in which universities and colleges may require students' unions to assist them with discharging the *Prevent* duty.

Under HE Guidance, HE institutions are directed to have regard to the *Prevent* duty in the context of their students' union and societies. It requires clear policies on permissible campus activities and online activity directly related to university. It is suggested that the policy should state the expectations that institutions have of students' unions and societies in relation to the *Prevent* duty, including around challenging extremist ideas that risk drawing people into terrorist related activity.

Although the *Prevent* duty does not directly apply to them, the HE Guidance expresses an expectation of close cooperation between students' unions and societies and their parent institution and suggests that students' unions should consider whether staff and elected officers would benefit from *Prevent* awareness training. This is implied to be a matter of compliance with Charity Commission guidance relating to the prevention of terrorism, which requires charities to avoid involvement in promoting, supporting or giving a platform to inappropriate radical or extremist views (with extremism defined by reference to the *Prevent* strategy).¹³

The Charity Commission has significant powers to investigate and intervene in the way that charities are run. The counter-terrorism agenda is high on the list of the Charity Commission's regulatory priorities. It is, therefore, conceivable that the Charity Commission could take regulatory action if a college or university were to argue that a charitable students' union had failed to comply with the *Prevent* guidance. This may be viewed by the Commission as indicative of non-compliance with the Commission's guidance on extremism and demonstrative of unlawful activity (which would also comprise a breach of trust for charity law purposes). The interaction of charity law duties with the *Prevent* duty is discussed further below.

Seeking regulatory action by the Charity Commission is likely to be a last resort for a university or college and it is more likely that the policies and procedures put in place by a

¹³ <http://webarchive.nationalarchives.gov.uk/+http://www.charitycommission.gov.uk/detailed-guidance/protecting-your-charity/protecting-charities-from-harm-compliance-toolkit/chapter-5-protecting-charities-from-abuse-for-extremist-purposes-and-managing-the-risks-at-events-and-in-activities/chapter-5-protecting-charities-from-abuse-for-extremist-purposes#a>

university or college to discharge the Prevent duty could in practice be imposed on students' unions via the following means:

- The provisions in the students' unions constitution requiring the trustees of the union to comply with university ordinances and governance frameworks, including its freedom of speech code of practice.
- Any agreement between the parent institution and students' union, such as a Memorandum of Understanding, or conditions attaching to the unions block funding grant or conditions in any lease or licence agreement for the use of premises by the union.
- The employment contracts and related employment policies and procedures applying to any staff employed both by the parent institution and the students' union (or employed by the parent institution and seconded to the union).
- Indirectly, via regulations and ordinances governing the conduct of students, which may regulate the conduct of students' union members.

It is also possible that the government could, at some stage, include students' unions in the list of public authorities to which the *Prevent* duty applies. The Home Secretary is empowered to amend the list (contained in Schedule 6 to the 2015 Act) subject to approval by Parliament.

How does the Prevent duty relate to other applicable duties, such as under the Equality Act 2010?

HE and FE institutions are subject to a wide range of legal obligations and duties which cannot all be covered in this guidance. However, the following are some of the key legal obligations likely to interact with the *Prevent* duty in the case of universities and colleges. If students' unions, colleges or universities have specific questions about these areas of law, legal advice should be sought.

Duty to ensure freedom of speech

Under section 43(1) of the Education (No.2) Act 1984 (the **1984 Act**), HE and FE institutions in England and Wales are required to "*take such steps as are reasonably practical to ensure that freedom of expression within the law is secured for members, students, and employees of the establishment and for visiting speakers.*"

This includes a duty to "*ensure, so far as is reasonably practicable, that the use of premises of the establishment is not denied to any individual or body or persons on any ground connected with (a) the beliefs or views of that individual or any member of that body; or (b) the policy objectives of that body.*" This duty is expressly applied to students' unions under the 1984 Act. Universities and colleges are required to maintain a code of practice relating to the discharge of the freedom of speech duties and take reasonable steps to comply with it.

Section 31 of the 2015 Act makes clear that the Prevent duty is not intended to undermine these duties of freedom of expression, requiring institutions to have particular regard to such duties when discharging the Prevent duty.

In some cases (such as when deciding the circumstances in which external speakers will not be permitted to speak at an event) it is conceivable that the objective of preventing people being drawn into terrorism could conflict with a duty to ensure free speech within the law. In these circumstances, the duty to ensure freedom of speech is likely to take precedence over requirements of the *Prevent* guidance to restrict lawful speech in particular circumstances (for example speech defined as “*extremist*” speech).

This is because the *Prevent* duty is only a duty **to have regard to** the need to prevent people from being drawn into terrorism, alongside other considerations which may be relevant when taking decisions, i.e. it is not a duty to take a decision in a particular way. On the other hand, the duty to ensure freedom of speech is a qualified duty **to ensure a particular result**, i.e. that so far as reasonably practical access to premises is not denied on the grounds connected with beliefs or policy objectives.

However, this is a complex area and unions, colleges and universities are advised to take legal advice where appropriate.

Academic freedom

HE institutions have duties to protect academic freedom within the law under the Education Reform Act 1988 (the **1988 Act**), which contains a duty “*to ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial and popular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions.*” This duty is included in many HE institutions’ governing documents.

Section 31 of the 2015 Act recognises these duties and makes clear that they should not be undermined by the *Prevent* duty. This means that in taking any relevant decision universities will need to take account of the need to balance their duties to ensure academic freedom with their duty to have regard to the need to prevent people being drawn into terrorism. Again, the *Prevent* duty is not a duty to ensure particular results or to ensure that decisions are taken in a particular way; it is a duty **to have regard to** the need to prevent people from being drawn into terrorism, alongside other relevant considerations.

Human Rights Act 1998

Most colleges and universities which are subject to the *Prevent* duty will also be public authorities for the purposes of the Human Rights Act 1998 (the **HRA**). As such they will be bound to act in a way that is compatible with the right to freedom of expression under Article 10 of the European Convention on Human Rights (**ECHR**).

Article 10 protects the rights of staff, students and visiting speakers to receive and impart information and ideas without interference. Article 10 extends to views that may shock, disturb or offend the views of others, but would not generally protect statements that

unlawfully discriminate or harass or incite violence or hatred against others. Whether a non-violent extremist's speech falls on one or other side of this line may be a difficult question of fact.

The Article 10 right is not absolute and can be limited where there is a legal basis for doing so and it is proportionate to do so in furtherance of public interest.

The *Prevent* duty does not authorise universities and colleges to act in a way which is incompatible with Article 10, meaning that universities and colleges will also need to take account of their Article 10 obligations in their decision-making alongside the *Prevent* duty.

Equality Act 2010

The Equality Act 2010 prohibits a range of public and private bodies from engaging in discrimination on the grounds of certain "*protected characteristics*", including race and religion or belief. Under the Act, colleges, universities and (in some cases) student unions may be prohibited from unlawfully discriminating in the provision of services.

Colleges and universities will also be subject to a "*public sector equality duty*" under the Act, requiring them to have due regard to the need to have good relationships between people who share a protected characteristic and those who do not have that protected characteristic. If action were to be taken in the name of implementing the *Prevent* duty in a way which is disproportionately targeted at those holding particular beliefs, this could be seen to contravene the public sector equality duty. So, institutions will need to balance this duty with the *Prevent* duty in their decision-making.

If institutions put in place provisions or practices which place people with a protected characteristic (such as religion or faith) at a disadvantage compared to those who do not share that characteristic, this would need to be justified as a proportionate means of achieving a legitimate aim in order to ensure that there is not a breach of the Equality Act. Colleges and universities will, therefore, need to be careful to ensure that the policies and procedures that are put in place to comply with the *Prevent* duty are proportionate in order to avoid potential breach of the Equality Act.

Charity law

English and Welsh universities, colleges and students' unions will often be charities registered with the Charity Commission. As such, their trustees will need to take account of their duties under charity law when taking any decisions.

The Charity Commission has specific guidance on "*protecting charities from abuse for extremist purposes*".¹⁴ The definitions of "*extremism*" and "*radicalisation*" in this guidance are the same as under the *Prevent* guidance, meaning that the Charity Commission may

¹⁴ <http://webarchive.nationalarchives.gov.uk/+/http://www.charitycommission.gov.uk/detailed-guidance/protecting-your-charity/protecting-charities-from-harm-compliance-toolkit/chapter-5-protecting-charities-from-abuse-for-extremist-purposes-and-managing-the-risks-at-events-and-in-activities/chapter-5-protecting-charities-from-abuse-for-extremist-purposes#a>

take the view that complying with the *Prevent* duty will be indicative of whether its own guidance is being complied with.

The Charity Commission guidance suggests that it should be of “*particular interest*” to students’ unions and requires students’ unions and HE institutions to “*take an interest in the activities and views being expressed within affiliated societies, along with literature and other materials that are made available and promoted in bookshops/bookstalls, in prayer rings, through electronic media, websites and using social media spaces.*”

As noted above, it is conceivable that the Charity Commission could take regulatory action if a charity failed to comply with the *Prevent* guidance. Whilst it is our view that students’ unions can debate and implement (subject to compliance with other aspects of charity law) a well-crafted and carefully drafted resolution calling for a campaign to repeal the *Prevent* guidance (as explained below), charities are not able to break the law and a failure to comply with *Prevent* guidance as required by the parent institution (as opposed to campaigning or lobbying for its repeal), could conceivably lead the Charity Commission to investigate the students’ union, institute a statutory inquiry or suspend or remove trustees, with the threat of personal liability to students’ union trustees.

Data Protection Act 1998

Universities, colleges and students’ unions will be data controllers under the Data Protection Act 1998 (the **DPA**). This means that they will be bound to comply with the DPA in processing students’ personal and sensitive personal data.

The *Prevent* guidance suggests that institutions should have “*robust procedures*” in place internally and externally for sharing information about individuals vulnerable to being drawn into terrorism. Assuming such information includes information about the political opinions, religious beliefs or other beliefs of a similar nature of students or others, their physical or mental health or condition, or the commission or alleged commission of an offence, this information will comprise sensitive personal data for the purposes of the DPA. This means that the data would need to be processed in accordance with strict conditions under the DPA, including that the data is only processed with the subject’s explicit consent or in other narrowly defined circumstances (such as where the processing is necessary “*in order to protect the vital interests of the data subject or another person*”, where the data controller cannot reasonably be expected to obtain consent or where consent has been unreasonably withheld).

Non-sensitive personal data can be processed where the data subject has given consent or if the data is necessary for compliance with any legal obligations to which the data controller is subject (except under contract).

The *Prevent* guidance makes clear that the *Prevent* programme must not involve any covert activity against people or communities but suggests that personal information may need to be shared (for example, to enable support to be obtained for a person via the government’s Channel Programme). The guidance recognises that information sharing requires the existence of a power to do so and suggests that consent for information sharing should be

obtained “*wherever possible*”; and so suggests that information sharing agreements should be put in place as required.

To what extent does *Prevent* duty apply to trustees, officers and members of students’ unions? What obligations are the different categories under?

As noted above, the *Prevent* duty does not directly bind students’ unions (where they are autonomous bodies), meaning that the duty does not directly impose obligation onto trustees, officers, members or staff of the union, except in any office that they hold in respect of the college or university itself. However, the HE Guidance suggests that students’ unions should consider whether staff and elected officers would benefit from *Prevent* awareness training.

Where students’ union staff are employed both by the parent institution and the students’ union (or employed by the parent institution and seconded to the union) they may be required under the terms of their employment contract to assist the institution in implementing the *Prevent* duty.

It remains to be seen what other obligations parent institutions may seek to impose (following discussion and consultation with students’ unions) on different officers and staff within a students’ unions. It may be that policies and procedures will allow some latitude as to who particular obligations are assigned to.

Where duties are imposed on the students’ union as an organisation the ultimate responsibility for discharging these will rest with the trustees where the students’ union is a charity.

What differences are there in the application of the *Prevent* duty as between HE and FE institutions?

The *Prevent* duty under the 2015 Act applies equally to HE and FE institutions. Similarly, the provisions of section 31 of the 2015 Act, which requires particular regard to duties to ensure freedom of speech when complying with the *Prevent* duty, applies to both HE and FE institutions.

However, there are more substantive differences in the extent to which HE and FE institutions are able to have regard to the importance of academic freedom alongside the *Prevent* duty in their decision-making.

There are also relevant differences in the statutory guidance. In some cases these may relate to fundamental differences in the structure of FE and HE students’ unions. Whereas HE students’ unions tend to be autonomous entities independent of their parent institution (and so not directly subject to the *Prevent* duty) FE students’ unions are in some cases a constituent part of their parent institution, meaning that the *Prevent* duty may apply to them directly.

Freedom of speech

There is no material difference in the scope of the freedom of speech duties that apply to HE and FE institutions, though what is “*reasonably practicable*” in the FE sector may sometimes be different to that in the HE sector. The FE Guidance recognises that an FE institution, like an HE institution, will need to balance its legal duties of freedom of speech with its Prevent duty.¹⁵

Academic freedom

The duties to maintain academic freedom referred to in section 31 of the 2015 Act typically have been directed towards HE, and not FE, institutions.¹⁶ This is likely to be reflected in FE institutions’ constitutional and governance documents, which accordingly are unlikely to place the same emphasis on protecting the academic freedom of staff.

FE institutions also are not qualifying institutions for the purposes of s.31(2)(b), s.31(3)(b) and s.31(4)(b) of the 2015 Act, which means that they are not subject to the duty to have particular regard to the importance of academic freedom in discharging the Prevent duty as HE institutions, and neither is the Home Secretary in issuing statutory guidance to them or enforcing the Prevent duty by way of directions.

The statutory guidance

In most respects the HE Guidance and FE Guidance is materially identical, subject to the following points:

¹⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445915/Prevent_Duty_Guidance_For_Further_Education_England_Wales_-_Interactive.pdf at paragraph 6.

¹⁶ e.g. s.202(2)(a) of the Education Reform Act 1988 and s.32(2) of the Higher Education Act 2004

- The HE guidance contains an express statement confirming that the guidance “*does not prescribe what appropriate decisions would be - this will be up to institutions to determine, having considered all the factors of the case*” (including having “*due regard to the need to prevent people from being drawn into terrorism*” – the *Prevent* duty).¹⁷ The FE Guidance does not contain the same affirmation that the institution retains discretion to make appropriate decisions. In our view the nature of the *Prevent* duty is such that FE institutions do also have such discretion (as explained above, the duty is not to achieve particular results, but to have regard to particular considerations, alongside other relevant considerations). However, differences in other applicable legal duties (such as in relation to academic freedom) and other differences in context *may* mean that this discretion is narrower in scope in the case of FE institutions.
- An important difference (perhaps reflecting the non-application of duties of academic freedom, explained above) is that the FE Guidance is more onerous in respect of staff training, seeking to impose *Prevent*-related requirements in respect of teaching methods and curriculum, as follows:

“We would expect institutions to demonstrate that it undertakes appropriate training and development for principals, governors, leaders and staff. This will enable teachers and others supporting delivery of the curriculum to use opportunities in learning to educate and challenge. It will also allow leaders and teachers to exemplify British values in their management, teaching and through general behaviours in institutions, including through opportunities in the further education curriculum” (para. 20)¹⁸

- The FE Guidance does not include the sections of the HE Guidance on students’ unions and societies. As noted above, it may be that is because many students’ unions in FE colleges are not separate legal entities and are considered to be under the direct control of the FE college. In this case, the *Prevent* duty may directly bind the students’ union, because it is a division of the FE college.

What differences are there in the position in England, Wales and Scotland?

This commentary is written from the perspective of the laws of England and Wales. Any detailed treatment of Scottish law would require input from a Scottish lawyer. However, much of the applicable law is the same in Scotland and the parallel Scottish *Prevent* guidance is similar in effect to the guidance applicable to England and Wales.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445916/Prevent_Duty_Guidance_For_Higher_Education_England_Wales_.pdf at paragraph 5.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445915/Prevent_Duty_Guidance_For_Further_Education_England_Wales_-_Interactive.pdf at paragraph 20.

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One obvious and important difference between the position in England and Wales and that in Scotland is that the freedom of expression duty in s.43 of the Education Act No. 2 1986 does not apply to Scottish institutions.¹⁹ Scottish institutions that are public authorities for the purposes of section 6 of the HRA will, however, need to give effect to the right to freedom of expression under Article 10 of the ECHR. Section 31 of the 2015 Act also provides that Scottish post-16 education bodies must have particular regard to the need to ensure freedom of speech in discharging the *Prevent* duty.

On the other hand, the duty of academic freedom in s.202 of the Education Reform Act 1988 is stated to extend to qualifying institutions in Scotland²⁰, meaning that such institutions will be required to have particular regard to this in applying the *Prevent* duty, under section 31 of the 2015 Act. There is also additional provision for post-16 education bodies to have regard to the desirability of ensuring academic freedom in section 26 of the Further and Higher Education (Scotland) Act 2005.

How can the requirement to “fully mitigate” risk arising from invitation of an external speaker be complied with?

The HE Guidance and FE Guidance on external speakers and events establishes a stringent threshold for events to proceed where it is assessed that there is some risk of people being drawn into terrorism by the presence of an external speaker likely to express extremist views. Under the guidance, an institution should only allow an event to proceed where it is “*entirely convinced*” that the risk can be “*fully mitigated*” and should not allow it to go ahead if there is “*any doubt*” as to whether this is the case.

The HE and FE guidance cross-refers with apparent approval to the guidance issued by Universities UK in 2013 on external speaker events²¹, which outlines a number of safeguards to mitigate the risk of the commission of criminal offences based on existing practice within the HE sector. The *Prevent* guidance itself identifies only one potential mitigation measure, namely ensuring that extremist views are challenged with opposing views as part of the same event, rather than in a separate forum.

Other methods for mitigating risk of commission of criminal offences identified in the Universities UK guidance, which may also be relevant to the *Prevent* duty include:

- approving a request on the condition that a particular individual chairs the event;
- making the event ticketed only or specifying that attendees must show valid ID;
- opening the event up to the general public;

¹⁹ See s.67(7) of the Education Act No. 2 1986 Act

²⁰ See s.238(3) of the Act

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<http://www.universitiesuk.ac.uk/highereducation/Documents/2013/ExternalSpeakersInHigherEducationInstitutions.pdf>

- placing restrictions on the numbers able to attend or restricting the event to university staff and students only;
- imposing conditions on how the event is advertised (e.g. promotional material to contain translations if in a language not understood by university staff);
- making a translator available to university staff attending the event;
- restricting the display of banners or placards at the event and its immediate surrounds;
- imposing special arrangements on how the event or meeting is chaired;
- requesting a script or précis from the speaker outlining what they intend to say and requiring them to sign an undertaking acknowledging that their speech will be terminated if they deviate from it;
- briefing the chair in advance of the event (this briefing could highlight the circumstances under which they must stop the event);
- issuing warnings to participants on their conduct;
- requiring invited speakers to confirm that they will abide by the university's values or good campus relations policy or providing speakers with a copy of such documents;
- restricting what materials are available at the event (e.g. CDs, DVDs, leaflets, memory sticks).

However, mitigating the amorphous and subjective risk of persons being drawn into “*terrorism*” as a result of non-violent “*extremist*” speech (as defined respectively by the broad definition of “*terrorism*” in s.1 of the Terrorism Act 2000 and the broad, subjective and amorphous definition of “*extremism*” in the *Prevent* guidance) is clearly a much more uncertain exercise than mitigating the risk of speech amounting to a criminal offence.

Indeed, in our view, having concluded that there is some risk of persons being drawn into terrorism on the basis of a likelihood of expression of extremist views (as defined by the *Prevent* guidance) it will in practice be very difficult in many cases for an institution to conclude with the required degree of certainty that this risk has been “*fully mitigated*”, due to the combination of the uncertain nature of the risk and the generally unpredictable nature of live speaker events. So, if this aspect of the *Prevent* guidance is fully given effect to it could lead to many such events being cancelled or subjected to stringent conditions.

Institutions may reach the view that the only way in which it is possible to conclude that a risk has been fully mitigated to the required degree of certainty identified in the guidance is by requesting a script of what the speaker will say in advance, approving this, and requiring

the speaker not to deviate materially from this under threat of termination of the speech. This would, of course, significantly limit the formats of events that can be hosted and the possibility for a dynamic exchange of views and ideas. Such a process of prior censorship may also be wholly unacceptable to many speakers. It might also be argued, for example, that attempting to stop a speech in progress could result in there being a more extreme reaction from the audience, which may in and of itself create an atmosphere conducive to extremism or at least be counter-productive.

In our view, such prior censorship of the content of lawful speech also sits very uneasily with the duty to ensure freedom of speech under s.43 of the Education No.2 Act 1986, and may also constitute a disproportionate and therefore unjustified interference with the Article 10 ECHR rights of speakers and students to receive and impart information and ideas.

For these reasons, it is in our view possible that the *Prevent* guidance as currently drafted could have a chilling and disproportionate impact on freedom of expression, which could conceivably be counter productive for institutional compliance with the statutory *Prevent* duty, by supporting those who question commitment to fundamental British values such as lawful freedom of expression.

What potential avenues of legal challenge to *Prevent* might be available?

Challenge to the Prevent duty itself

In our view, there is no clear basis to challenge the *Prevent* duty itself. This has been enacted in primary legislation, and therefore can only be challenged on the grounds of incompatibility with ECHR rights (seeking a declaration of incompatibility under s.4 of the HRA) or on the grounds of incompatibility with EU law. We do not consider that there is a sufficient EU law dimension. Nor do we consider that the *Prevent* duty (which as explained above is not a duty of result) cannot be given effect in a way that is compatible with ECHR rights.

Challenge to the Prevent guidance

In our view, there is a potential ground of challenge to that part of the HE Guidance and FE Guidance which applies the *Prevent* duty to external speakers and events, in so far as it seeks to restrict lawful speech deemed to be extremist in nature and to give rise to a risk of people being drawn into terrorism unless the institution can be “*entirely convinced*” that the risk can be “*fully mitigated*” (as discussed above).

We consider that this approach conflicts with institutions’ duties to ensure freedom of speech within the law in s.43 of the Education No.2 Act 1986, and in particular the duty in ss.43(2) 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.*”

In our view, there is no legal basis under the 2015 Act to cut across the duty under s.43(2) of the 1986 Act in this manner, particularly given that section of the 2015 Act explicitly preserves (and bolsters by requiring particular regard to) that duty.

Implementation of this guidance would also raise significant questions as to the legal basis on which HE and FE institutions are empowered to restrict lawful speech in these circumstances (since the *Prevent* duty does not provide any additional powers or functions that specified authorities do not already have) and therefore compliance with:

- the “*in accordance with law requirement*” under ECHR Article 10(2); and
- the proportionality of interference with the right to receive and impart ideas under ECHR Article 10 as a result of this approach.

In these circumstances, we consider that a number of arguable grounds of challenge to this aspect of the guidance could be formulated by way of an application for judicial review in the High Court. These include challenging this part of the guidance on the basis that:

- it misstates or is misleading as to the law;
- it gives rise to an unacceptable risk that it will lead to unlawful acts by HE or FE institutions (including of breaches of ECHR Article 10); and/or
- it is ultra vires in failing to comply with, or give effect to the legislative purpose underlying, s.31 of the 2015 Act, namely to preserve the freedom of expression duties.

We consider that NUS would be likely to have standing in bringing such a judicial review.

There may also be a basis for individual students’ unions or students to bring judicial review claims against their educational establishment (where it is amenable to judicial review) in respect of particular decisions in implementing the *Prevent* duty (e.g. the information sharing obligations).

Are students’ unions able to campaign on this issue?

The HE Guidance and FE Guidance are yet to be considered and approved by Parliament, meaning that there is still an opportunity for lobbying on aspects of the guidance which are considered to be unsatisfactory or undesirable, with a view to them not being affirmed by Parliament.

There will also be opportunity for students’ unions to engage with their parent institution (including through the consultation required by the *Prevent* guidance) on the local implementation of the *Prevent* duty. Institutions subject to the *Prevent* duty are required by the *Prevent* Guidance to engage and consult with students’ unions on their approach to implementation.

A students' union will be able to campaign on issues flowing from the 2015 Act to the extent that such a campaign falls within its charitable objects and impacts on the education and welfare of students as students. In our view, it is likely that there will be many aspects of the *Prevent* guidance and implementation of that guidance which will clearly and inherently affect students in this capacity.

Any students' union seeking to campaign on the issue should carefully and objectively consider the potential impact of the implementation of the *Prevent* duty on student members of that union. It seems clear that there will be a case for students' unions to campaign on the implementation of the *Prevent* duty by the parent body.

In our view, if the motion is put together carefully, it will also be lawful for a students' union to adopt a broader approach, that seeks to campaign against the relevant provisions of the 2015 Act per se, if there is a fundamental issue with the law that impacts on the education or welfare of students as students, including students of that particular students' union.

A model resolution has been prepared by NUS for to assist students' unions wishing to campaign against the 2015 Act, the *Prevent* duty or the applicable guidance.

Bates Wells and Braithwaite London LLP

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