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Joint Committee on Human Rights

Oral evidence: [Freedom of Speech in Universities](#),
HC 589

Wednesday 6 December 2017

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Members present: Ms Harriet Harman (Chair); Fiona Bruce; Ms Karen Buck; Baroness Hamwee; Baroness Lawrence of Clarendon; Jeremy Lefroy; Baroness O'Cathain; Baroness Prosser; Lord Trimble.

Questions 26–29

Witnesses

Mr Gary Attle, Mills and Reeve LLP; **Mr Paul Bowen QC**, Brick Court Chambers; **Ms Helen Mountfield QC**, Matrix Chambers; **Ms Aileen McColgan**, Matrix Chambers.

Q26 **Chair:** Thank you very much indeed for joining us, we really appreciate it. As you know, we are the Joint Committee on Human Rights, which means we are half Lords and half Commons. We are looking into free speech in universities. Obviously there is a lot of law in this area, so we could not be happier to have you here to explain and clarify for us the position in principle and what is actually happening in practice. We are very grateful to you for coming to give evidence to us.

I will kick off by asking whether you feel that the boundaries between speech that is protected by Article 10—the right to freedom of expression—and what is unlawful speech is clear. Do you think the boundaries are clear? If you think they are clear, can you tell us where they lie? If not, why are they not clear? Is it just that it is impossible to clarify and that each case needs to be assessed separately, or is it that it actually could be made clearer?

Paul Bowen QC: Thank you. I am a barrister specialising in human rights. Free speech is an area in which I have some experience, but to answer the question very quickly, it is always context-specific. It is not easy, in a lot of cases, to say exactly what the answer is. One can make certain clear propositions that there are certain forms of speech that are



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given greater protection under the Convention and under the common law right of free speech. Certain forms of political speech are given added protection. Forms of religious opinion and academic freedom are also given extra protection. There are also certain circumstances in which free speech will not be protected. It will not be protected if the form of speech is an incitement to commit some criminal offence or constitutes some form of hate speech. There are cases where free speech may be being used to influence vulnerable people in ways that are not to their benefit. That might be a situation in which free speech would not be protected.

There have been cases, which we will talk about at some point, that the Strasbourg court has had to consider around some forms of free speech in the context of Islamic so-called extremist opinion. I know that is one area you are concerned about and it is the area I have been concerned about, with the Prevent duty. In a nutshell, it is always context-specific: certain forms of speech are given added protection and certain forms of speech are not protected.

Chair: So you think that the law is as clear as it could be; it is just that in real life these things have to be balanced? You do not think any further clarity in the substantive law is necessary?

Paul Bowen QC: The grand chamber in the leading case on this, *Perinçek*, said that context is everything.

Chair: Yes, but what do you think? Leave aside the grand chamber. As a practitioner, do you think the law is as clear as it could be, or do you look at things and say that it would save a lot of time and trouble if they would be a little clearer here, legislatively?

Paul Bowen QC: I think it would be difficult to get greater clarity, even though 99 times out of 100 I think I will have a pretty good idea of what the answer is.

Gary Attle: I am a solicitor at Mills and Reeve and I head our higher education practice. I have advised universities for the past 25 years on a range of topics including the matters under discussion today. My view of the question is that the law is absolutely context-specific and there are some real complexities around the tension between some of the duties that are placed on universities. The free-speech duty has to be within the law, so we must always look at the other duties on universities, whether it is the Prevent duty under the counterterrorism legislation or the Public Order Act. There is quite a lot there to unpick. I personally do not think any more legislation would be helpful; indeed, it might create greater weight on those subject to these duties.



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I also think that some words and structures become conflated, and there is quite a lot of untangling to be done. What duties rest on the university as a corporate body, what duties rest on student unions and student societies, individual speakers and groups? So there is quite a lot of untangling to be done and we hope that we can help with that this afternoon.

Aileen McColgan: I am a barrister specialising in human rights and education law. I am also Professor of human rights law at King's College London. I agree with what has been said. There is a complexity in the question itself, when you asked whether the boundaries between free speech and unlawful speech are clear. Sometimes that is not a sufficient boundary; sometimes speech may be curtailed not because it is unlawful as such—hate speech and the like—but because the speaking of it will breach another right, or because allowing it to be said may breach the protection afforded to other individuals.

Chair: But that would make it unlawful, would it not?

Aileen McColgan: It would not necessarily make it unlawful as such, because it may be very context-specific. What is perfectly appropriate in one context might render an institution vulnerable to accusations of, for example, allowing harassment on grounds of sex or race to take place, not because the words are unlawful but because of the context in which they are spoken. It would not necessarily be that the words themselves were unlawful, but the articulation of them in a particular context might create difficulties for the institution in other ways.

Helen Mountfield QC: I specialise in human rights law and equality law. There are some forms of speech that are not protected by free speech guarantees. Something that is a deliberate lie is not protected at all. That was decided in a case involving a Member of Parliament, the Woolas case. Nor is speech that is intended to destroy the rights of other people. That means that if you set out to destroy the rights of other people to speak or to exist, then the speech is not protected at all. But those are quite broad limits, because the right to freedom of expression includes the right to say things that may be very unpopular. There was a decision of the European Court of Human Rights in a case called *Gündüz*, where someone was advocating a state based on sharia law. It was said that you can advocate that if you want to, provided you are not suggesting that violence should be used to achieve that state.

What worries me is not so much the law, because the law is quite clear that universities must take appropriate steps to protect lawful speech. What concerns me is that the guidance on that law fuzzes the edges in a way that makes universities unduly anxious and ends up, perversely, in them avoiding having people speaking and saying lawful things for fear of breaching the Prevent duty, for example.



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Q27 Fiona Bruce: Thank you for coming today. You have given us a lot to unpack. It is a complex issue. Can I go back to Mr Bowen's comment that some forms of hate speech may be unlawful, but some may be lawful, depending on context? As I understand it, there is no accepted definition of hate speech. It falls somewhere between expressions that merely shock, offend or disturb and, say, a threat of violence or to kill. We need help to understand what might and might not be lawful, given a certain context. Can you assist us any further, beyond saying that it depends on the context? Can you give us some examples, particularly relating to university environments? What do you consider hate speech?

Paul Bowen QC: I do not think that I said that hate speech is ever permitted. I do not think that something properly called hate speech will ever be protected.

Fiona Bruce: Sorry, I misheard you. You said some forms of hate speech.

Paul Bowen QC: Certainly some forms of speech which would be considered extremist within the definition of the Prevent policy will not be considered hate speech and will be protected under Article 10. Helen gave the very good example of the case of Gündüz. An Islamic speaker spoke out on television in favour of sharia law, opposing democracy, and calling children of a secular marriage an offensive word in Turkish. It was held to be language that was sufficiently protected that his prosecution for inciting hatred was considered a breach of Article 10. The point is that Article 10 and our own common law protect statements that can be highly offensive. In my view, they should. Free speech that protects only what you want to hear is not worth anything at all.

Lord Trimble: You said that because the person was advocating sharia law, that was not hate speech. But you went on to say that the person used abusive language. My command of Turkish is such that I cannot understand the degree. Can you give some indication of what the abusive terms were, and at what point and in what way do abusive terms become hate speech?

Paul Bowen QC: I can tell you what the abusive term was. I could not give you a direct translation of it. The term that was used is "pic". I do know exactly how you would translate that but it involved both religious offence and offence in and of itself.

Lord Trimble: The term was "bastard".

Paul Bowen QC: It was not far off that.

Lord Trimble: If it is just using the term "bastard", would that be hate speech?



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Paul Bowen QC: It can depend. One factor that is taken into account when deciding whether or not a form of speech is to be protected is the context in which it is set. For example, if something is said in the context of a pluralistic debate where more than one opinion is being given, something that is deeply offensive and possibly even hate speech may well be protected because it is said in the context of a number of people speaking and giving differing views. If it is just one person speaking, it might not be. That is what I meant by the context being very important.

Chair: By “context”, I thought you meant who the students are. I thought you were implying that if there was a large number of Muslim students you would not be able to say certain things that might be regarded as in breach of the Prevent duty, whereas if they were non-Muslim students you could say what you liked because the context is different. You were not talking about the context being who is in the study body. It is the context of what other arguments are being brought forward.

Fiona Bruce: I understood that.

Chair: You thought the same as me, did you?

Paul Bowen QC: What I mean by context is all the various factors that go into the judgment.

Chair: Does that include who is in the student population?

Paul Bowen QC: It could well do. It would also include the audiences.

Chair: The audience is the student population as far as we are concerned. So, basically, what you can say in relation to Islam depends on who the students are, in terms of whether or not it can be in breach of Prevent.

Paul Bowen QC: It is a relevant factor. That is what I mean.

Chair: So you can say more about Islam and be more controversial about Islam with hardly any or no Muslim students on a campus but on another campus you could say less? Does that sound like what the law should be?

Paul Bowen QC: I am not sure that that is what I am saying. I did say that the audience can be a relevant factor. For example, if you are speaking to a group of schoolchildren—

Chair: We are concerned just with universities.

Paul Bowen QC: I understand that, but I am trying to give an example of where it might be relevant who your audience is. If you are speaking to



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children, who are likely to be more vulnerable and more impressionable, what you can say may well be less—

Chair: Would the guy that you were talking about in this case be protected against the Prevent duty if he went on to a campus? Would Gary advise the university that because of this case he could go along to a campus and say that?

Helen Mountfield QC: In that case, what mattered was that he was talking in the context of a spirited political debate. I am not sure that you can limit the speech that people can receive depending on the characteristics of the audience, and I would be a bit worried if you could, in the university context. As I understand it, the university has a duty to take reasonable steps to protect all lawful speech. Then the question is: what are the limits of the lawful speech? It is not lawful to incite violence. It is not lawful to encourage terrorism or support for a proscribed organisation. It is not lawful to speak in a way that is intended to or is likely to have the effect of stirring up racial or religious hatred or hatred against a group on the basis of their sexual orientation. But when that legislation went through, there was real and proper concern about what that would do for freedom of expression about religious views or religious people expressing sincerely held religious views about what was moral. The law was very clearly framed to say that a criminal offence does not take place if the way that somebody is speaking is just an expression of antipathy, dislike or ridicule. It is a criminal offence that can be prosecuted only with the consent of the Director of Public Prosecutions. There are quite close limits around that—people cannot use the law to say, “This is something you should not be allowed to say because of the profundity of my disagreement with it”. That is an appropriate barrier. I think the Prevent guidance encourages universities to have an overanxious approach to stopping speech for fear that it might be an indicator of a view that is not unlawful speech. However, universities are taking a precautionary approach, and I think that has a particular adverse effect on members of black minority-ethnic groups and Muslim students’ organisations.

Chair: Just so that we can be completely clear about this, the characteristics of the student population, in terms of a high level of Muslim students or no Muslim students, is not a factor which can be taken into account when deciding whether or not the Prevent duty is engaged?

Gary Attle: We are discussing two issues at the moment. There are the criminal offences of incitement to hatred on the grounds of race, religion or sexual orientation under the Public Order Act, as amended over the years, and, separately, there is the Prevent duty, the statutory duty on specified authorities, including universities, to take appropriate steps to



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prevent people going into terrorism. Helen is right that it requires the Attorney-General or the Director of Public Prosecution to bring a criminal charge under those Public Order Act offences. There is very good guidance. I checked earlier today on the Crown Prosecution Service website: it talks about those offences and gives examples, including the language used, where prosecutions have been successful.

The CPS is very clear that it takes freedom of speech into account when considering those incitement offences and they recognise that these are highly sensitive matters. Special prosecutors look at every one of these cases and it is inciting hatred, which goes beyond mere dislike of somebody, that triggers those offences. It does say that the context is relevant. To answer your question, Chair, the audience is one of the matters that the CPS would take into account in determining, after the events, whether to bring a criminal charge. Whether a university or a student union would think about these things when deciding whether to allow someone a platform to speak is a different question.

Chair: Can we have an answer to that different question, then? I am just trying to be clear whether the duties are different for different universities depending on whether they have a large body of Jewish students and have to have a different view about the degree to which something might be regarded as anti-Semitism. It is probably more of an issue with the Prevent duty, because the Prevent duty is a separate thing: there is a statutory duty on universities. I want to be clear. Leave aside the issue of prosecutions, will there be a difference in how this is implemented? Should there be a difference, legally, in how this is implemented depending on who the student body is? Do we have more ability to speak freely about the different views of Islam in a university with fewer Muslim students?

Gary Attle: My view is that the free speech duty applies right across the land equally, but it would be appropriate for a decision-maker to think about their local community. There may be issues under the Equality Act which would make them do that, and think about fostering good relationships. My view is that it should be about mitigation of any issues that come up: what would be the appropriate steps to manage an event appropriately to prevent any fisticuffs or anything happening during the meeting, rather than preventing the event happening at all.

Chair: I am getting at the radicalisation potential. I am sorry to detain everybody on this but it is about the potential for radicalisation within your student body, leave aside the point about violence. The idea of Prevent is that you do not allow views that could cause radicalisation. Who the students are is part of the context of whether radicalisation is likely to be the result.



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Aileen McColgan: I do not think there is a correct answer to that: it is one of the difficulties with the Prevent duty, which is a duty to have due regard to the need to prevent people from being drawn into terrorism. I would have thought that universities find themselves in a very difficult position if, for example, they have a very high level of Muslim students. People outside who are challenging whether they have complied with the Prevent duty may well move from the fact that there is a high level of Muslim students in the university to assuming that speech which would not be particularly problematic in another context will, in that context, have a particular risk of drawing people into terrorism.

The legal answer should be that it should not matter, but I do not think that universities can easily comfort themselves that those who are judging them on their compliance with Prevent—

Chair: You mean the Office for Students, effectively?

Aileen McColgan: In due course, yes. It is important that those who are judging them on their compliance with Prevent will not fall into the trap of making assumptions about the likelihood of being drawn into terrorism from the demographic of the student body.

Helen Mountfield QC: I agree, but I think that, in principle, it is wrong. It should be the character of the speech that matters, not the characteristics of the audience. My perception is that because of this concern about the characteristics of the audience, universities are being far more assiduous in their risk assessments when they look at minority ethnic societies or Muslim-based societies.

There was an interesting article by an Oxford academic, a woman called Karma Nabulsi, in the *London Review of Books* in May of this year giving examples of that. She gave the example of a well-known and well-established society for minority ethnic students from a particular group which was told it could not have its welcome drinks because it could not give the university a list of who was going to come to the welcome drinks 48 hours in advance. It was told, "This is non-negotiable, sorry. This is what we have to do because of the Prevent guidance". That seems counterproductive to me, because by dint of thinking how big the risk is and a precautionary approach being taken, universities are shutting down speech and association, which is contrary to the statutory objective in the 1986 Act, which is to take all reasonable steps to allow speech unless it is unlawful.

Q28 **Fiona Bruce:** We have heard some of your views. The Committee would like to know whether there is Strasbourg case law that could help us understand where it might be proportionate for prevention of free speech to occur in contravention of the freedoms in Article 10 on freedom of expression and Article 9 on the freedom to



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express one's religious beliefs. Do you have any cases from the ECHR that would help the Committee?

Aileen McColgan: The difficulty is that the cases will all be specific to the facts. One thing it is worth bearing in mind on the Article 10 case law is that, for example in that Turkish case that we spoke about, the interference with the applicant's freedom of expression there was criminal conviction and imprisonment. The level of justification for that kind of interference has to be much higher than the level of justification that would require being told you cannot speak here, but you can speak over there. It is very difficult. One cannot just take Strasbourg case law and translate it into answers that will always be right, regardless of the context.

Chair: Is it about the freedom of speech of the person making the speech or the freedom of expression of the students to listen to it?

Paul Bowen QC: It is both.

Aileen McColgan: The first is more developed, but the second—

Helen Mountfield QC: But the second, I agree—

Chair: The duty in the Education Act is to protect the rights of students to hear things; it is not to allow people to inflict themselves on students, is it? That is not the direction it is coming from. It is protecting the students' ability to hear things.

Gary Attle: And indeed the academic staff and visiting speakers. The Section 43 duty is broader than students; it is the whole academic community. While it is not a European Court of Human Rights case, there is an interesting domestic case on freedom of speech involving the University of Southampton. I have checked with the Clerks about the sub judice rule and my understanding is that there is no outstanding appeal in that case. It is quite interesting because the decision-making process of the judge in that case took a European Convention mindset to the Section 43 domestic duty, looking at freedom of speech, the legitimate aim being pursued and whether a proportionate approach was being taken. This was all to do with a risk to safety on campus.

Chair: Who was coming to speak there? What was the event?

Gary Attle: Two academics from the University of Southampton itself wanted to put on a conference to do with the State of Israel. I understand from the judgment that it was quite a controversial conference on the university campus. The university decided to withdraw permission for the conference to go ahead. It did a risk assessment, it involved the police and its own security people and was concerned that in the time available



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before the conference, not enough safety could be assured for those coming to the conference.

Judicial review proceedings were brought and ultimately failed because the judge was satisfied that the university had a proper regard to the risk to the safety of people coming on to the campus and that the free speech under Section 43, and indeed under Articles 10 and 11, was not infringed. The judge at the end of the case said she was assured that freedom of speech on campus had been maintained and that simply because there was a risk to safety there was no infringement of those academics' right to speak on a controversial topic.

Helen Mountfield QC: But it is not that if there is a risk to safety at all, that is the end of it, because that would mean you could threaten a counterdemonstration and silence people in that way. The Strasbourg case law on freedom of association and freedom of expression has a number of cases about demonstrators and counterdemonstrators and the duty—in those cases, on the police—to make sure that people's right to demonstrate in a lawful way is reasonably protected. I think there was a timing issue in that Southampton case. Aileen is right that the European Court of Human Rights cases are all quite fact-specific. But one thing it is really interested in is whether there is a sufficiently clear legal framework to protect the values that it thinks are important.

There was quite an unusual case last week called *Antović and Mirković v Montenegro*. It was about a university that videoed everything in all spaces in the university. The complainants are actually maths lecturers so it was not terribly politically controversial but they objected. They said that they were entitled to a degree of privacy even in a professional context and that this would inhibit them. They won their case because the state did not even accept that the privacy interest was engaged. It did not say, "There are reasonable safeguards around this and we are entitled to check you are a good enough maths lecturer", or whatever it might be. It just said that none of these interests were engaged. That is when the court is concerned, when it cannot see a framework or a balancing exercise. Inevitably, in the individual cases—"Can I express my sincere religious views on homosexuality? Is that going to harass somebody who says that is a fundamental part of their identity?"—those are all going to be questions of balance and individual circumstances. But there must be a framework to enable that balance to be undertaken.

Fiona Bruce: What does the panel think the duty under Section 43 adds to this picture? As the Committee understands it, this is a proactive duty on the governing body to uphold freedom of speech. What does it add over and above the Article 10 right?

Paul Bowen QC: Obviously, Section 43 came into force before the Human Rights Act, so between 1986 and 2000 it was very useful. It



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employs the language that “particular regard” must be given to duty to protect free speech. That is a form of words that we lawyers recognise as having greater weight given to it than, for example, “due regard”. It is useful in that respect. Even in the light of the Human Rights Act, for Parliament to have legislated specifically to protect a right in a particular context, a judge will give that particular weight, because it comes with the added legitimacy of Parliament’s imprimatur, not just from the Human Rights Act but from a specific piece of legislation. So it can be very useful. I say that, but then you look at Section 13 of the Human Rights Act, which refers to the duty to give particular regard to the right to religion, and it has been very little litigated. Questions have been raised in the past in case law about what it adds to the convention. It is difficult to say but generally if Parliament has given something a particular importance, judges tend to give greater importance to it.

Gary Attle: I think it is a very practical piece of legislation. It applies, as you say, to the governing body of a university, and it will be extended under the Higher Education and Research Act to all registered providers under the new regime coming in. It also applies to the premises of a university, and indeed to the premises occupied by a students’ union. It is a positive duty. One of the manifestations of that positive duty is to have a code of practice setting out the good order in which events might be put on. It is both positive and very practical.

There is another piece of legislation, which I do not think the Committee has discussed so far, and that is the Education Act 1994. In Part 2, Sections 20 to 22 provide the link, I believe, between the university’s obligation to secure freedom of speech and the students’ union. The 1994 Act puts another statutory duty on the governing body of the university to have some degree of oversight of the students’ union, including oversight of the finances of the students’ union and the constitution of the students’ union; indeed, the constitution must be approved by the governing body. For our purposes today there is a duty for the university to communicate in writing, at least once a year, to every student of the university the duties under Section 43—the free speech duty and, indeed, the restrictions imposed by charity law. So it is a positive duty on the university to communicate these duties to students. That, to my mind, is the missing link between the university’s duties and how you get duties fixed on students’ unions, which are not public authorities and are essentially private members’ organisations.

Fiona Bruce: A final question: are universities observing their obligations in the respects that you referred to?

Gary Attle: That is really difficult for me to say. We read a lot in the press and we advise on some things. I know that universities passionately believe in freedom of speech. I listened to the evidence hearing last week



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of a number of brilliant students talking about their different societies. It really came across that there was an anxiety and a fear about putting on an event that was troublesome in some way. Even if it is a perception, that matters, and my view is that we need not more legislation but more leadership and more communication to explain these things and to have more dialogue.

Baroness O'Cathain: The last couple of comments have rung bells for me. The questionnaire that is sent out to all the students, how would people who feel a little bit insecure and not very capable of making their views heard or respected get over that? Sometimes I have seen on university campuses really good, intelligent people who just cannot get their message across and then are treated pretty badly by those who, like the people we had last week, are so good and so articulate. But not all students are like that. Is it all as rosy as you say?

Gary Attle: You probably need university management and leaders here to answer that from a practical point of view. In fact, it is not a questionnaire, it is a statement of duties. But I know from my own experience on other topics—for example, sexual harassment on campus is a big issue and university leaders are doing a lot to tackle that—I have seen university leaders talk about that and get it into the public discourse within the university. It may be that the free speech-type issues need to be talked about more. Some of these duties go back to the 1986 Act and the 1994 Act and maybe there needs to be more public discourse about these things.

Helen Mountfield QC: The other thing is that, as Gary said, the duty under the 1986 Act is a practical requirement to take reasonable steps in relation to freedom of expression. The other duties we have talked about—the Prevent duty, the public sector equality duty and the duty to give due regard to the need to avoid harassment and to foster good relations—are duties to think about the relevant things, not duties to take particular steps. That informs what reasonable steps are to promote freedom of expression. But universities can set a tone when they send out the information to students about what is expected in terms of courtesy of discourse, in terms of everyone's right to speak, and in terms of speaking and expressing different views in ways that enable people to learn from one another and to challenge one another's views. People get confused between what they have to do—the steps they have to take—and the ways in which they have to think. There is a lot that a university can and arguably should do to set a tone for the way a debate takes place.

Baroness O'Cathain: So that people are not threatened.

Helen Mountfield QC: Yes, you cannot threaten. We do not expect you to threaten; speakers cannot, for example, segregate audiences in



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meetings that are not about religious observance, by gender or things like that. We set an environment within which you can say anything you want, you can debate and say anything that is lawful, because this is what we are for, but you cannot incite violence or hatred and you ought to be aware of the needs of other people. We want you to have relationships that enable you to differ without silencing other people who perhaps have less power than you, one way or another.

Baroness O'Cathain: You have helped me with that, because people can be so wounded by words and it can have a very long-term effect on people, which is almost hate. I am happy, thank you.

Q29 **Baroness Prosser:** You have dealt with some of the things I wanted to raise. Not only context, but balance must always be taken into account. For example, as well as all the pieces of legislation that have been mentioned thus far, we have the Equality Act 2010, which requires the university to foster good relations between different groups and gives it a duty to protect free speech. Then there is the public sector equality duty and all that that entails. The main question is, do you think there is a need for further legal clarity? Do we need another piece of legislation, or maybe some of this stuff needs to be brought together? How do you think such clarity should be provided?

Paul Bowen QC: To answer in the context of the Prevent duty, there are certain aspects of the guidance that are positively confusing and misleading and certainly need tidying up. I say that because the judge in the Butt case accepted that.

Baroness Prosser: Would such tidying up give universities and those who feel offended, et cetera, some clarity about the differences between the requirements of the different pieces of legislation?

Paul Bowen QC: One piece of guidance dealing with all the pieces of legislation might be very helpful. In relation to the Prevent duty guidance itself, there are certain parts of it which are positively misleading, and they certainly need to be made less misleading—or not at all misleading.

Baroness Prosser: Do you want to give us an example of that?

Paul Bowen QC: The main part—I think it was read out to you in evidence last week—is paragraph 11 of the higher education guidance:

“Furthermore, when deciding whether or not to host a particular speaker, RHEBs 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



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the event should not be allowed to proceed except where RHEBs are entirely convinced that such risk can be fully mitigated without cancellation of the event ... Where RHEBs are in any doubt that the risk cannot be fully mitigated they should exercise caution and not allow the event to proceed”.

That essentially means that if there is the slightest possibility of any risk, you have to cancel the event. That is wrong.

Helen Mountfield QC: It is contrary to the 1986 Act. When I was looking up some materials for this, I found the views of David Anderson QC, who was the independent reviewer of terrorism legislation until very recently. He said in relation to that cautionary approach to anything that might be extremist that, if it becomes the function of the state to identify individuals who are engaged in or exposed to non-violent extremist activity, it will become legitimate for the state to scrutinise and for the citizen to inform upon the exercise of core democratic freedoms by large numbers of law-abiding people. That is where the problem is. We can understand the objectives of the Prevent guidance—let us not allow a democratic society to be undermined—but the way it is phrased perversely has that effect, in my view. It is dangerous because one of the potential chilling things for freedom of expression is state interference with it.

Chair: You think this Prevent guidance, which has the force of the Prevent duty on universities, cuts across their obligation to promote free speech in the Education Act?

Gary Attle: Yes.

Helen Mountfield QC: Yes.

Chair: Do you all think that?

Paul Bowen QC: Yes.

Gary Attle: I think we are free to speak about the decision. It is a High Court decision, it may be going to appeal, but I understand that under the rules of Westminster we can talk about it, because it is about the exercise of the Secretary of State’s power to issue that guidance.

Chair: The position is, do not worry about this, you can say anything you like about cases—because there are no juries involved, we are not worried about that abuse of process thing. What we do not want to do in discussions in this Committee is to second-guess the judges in the decision they are about to make and set ourselves up as an alternative judicial authority. Aside from that, just fire away, do not worry. If you are about to be in contempt of anything, do not worry because you are totally



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privileged here.

Gary Attle: Thank you. The judgment in the case of Dr Butt, brought by Mr Bowen, is really important and should be read by everybody who is involved in decision-making in this area. It is a huge judgment, 200-odd paragraphs, but the nub of the judgment is that the Prevent duty guidance on higher education is just that: it is guidance. Even though there are awkward words about fully mitigating the risk and the decision-maker being entirely convinced that there is no risk, the judge has said that at the end of the day it is still guidance and if the university, in consideration of its Section 43 duty, decides that it is still going ahead, the free-speech duty is more important. We have some judicial clarity, subject to anything else that may go on, and that is a way of reconciling things.

The difficulty I have with the Prevent duty and how it works, and maybe the effect on universities, is more about enforcement power. It falls to the Secretary of State to make a direction if it is considered that any university or any other specified authority is failing in its Prevent duties and ultimately to seek a mandatory court order for the enforcement of that duty. That is quite an onerous power, I think; it vexed universities at the time it was going through but when the Counter-Terrorism and Security Bill was going through, provision was made for having particular regard to freedom of speech. So it is possible to reconcile it, the judge has reconciled it, but nonetheless the wording of the guidance may be misinterpreted by decision-makers.

Chair: But this is guidance made under statute. Your idea is that universities can say, "It is only guidance", to the Office of Students, which has the power to deregulate them. Those who are drawing up the guidance under statute would not take the view that the word is "guidance" and it is not mandatory. In reality, it is a problem if guidance is pulling in a different direction from another thing, is it not? Your argument is that we do not need to worry if it is pulling in a different direction because it is only guidance, but is that right?

Gary Attle: That is the law as it stands. The question about the Office of Students and any monitoring of free speech is a different question. There are issues that we can talk about on that, but I am deeply concerned about all the duties that universities have. We must remember that, as difficult as the Prevent duty is, it is in the context of counterterrorism, violence and terrorist acts. Parliament has ordained that legislation and approved that guidance. I defer to the wisdom of Parliament in that, and the judiciary has looked at that guidance and said that there is a way of reconciling it. Were the wording to be clearer for decision-makers, it would be welcome.



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Paul Bowen QC: However—this much I can say—Parliament has introduced the Prevent duty, which requires public authorities, including universities and other higher education bodies, to have due regard for the need to prevent people being drawn into terrorism. Of course, what we have is a non-statutory policy underlying that which now informs the Prevent guidance. I shall read from the Prevent duty guidance and how it refers to “terrorism”. An authority must, for example, “carry out a risk assessment for their institution which assesses where and how their students might be at risk of being drawn into terrorism”. That is fine, but it goes on: “This includes not just violent extremism but also non-violent extremism, which can create an atmosphere conducive to terrorism and can popularise views which terrorists exploit”.

The difficulty is matching up the concept of extremism, particularly non-violent extremism, defined nowhere in any statute but in the policy as, “vocal or active opposition to fundamental British values”. That has been introduced and has opened up the range of views or opinions which might be proscribed to a much greater extent than if it was limited to views which might encourage people to be drawn into terrorism per se. That is a real tension, I put it no stronger than that.

Baroness Prosser: Do you agree that this responsibility that has been placed upon the universities, because this is guidance and they have to determine and interpret it, seems to be quite onerous for them? Does it include, say, if the university decides, “Yes, okay, we can go ahead; the guidance is such, I have looked at it and we should go ahead”, that they must then provide some kind of security arrangements to protect people? What does it say, if anything, about the duty of the university to protect the mental health of students, for example? It all seems to me to be so multilayered that one question leads to another.

Aileen McColgan: It is extremely difficult for universities. When the guidance is incorrect, as a matter of law, it is all very well to say, “You don’t need to follow it, it is only guidance”—and it is absolutely the case that statute trumps guidance, so that the freedom of expression statutory obligation will trump the guidance—but a university administrator sitting in his or her office trying to work out how to keep all these balls in the air is not well served by the guidance. Having a single piece of guidance which would pull together freedom of expression implications, the public sector equality duty, the Prevent duty and give some practical guidance would be massively helpful.

Helen Mountfield QC: There has been some quite contradictory guidance. We have all talked about the Prevent guidance. The Charity Commission has guidance for student unions that says that offices of student unions should not comment publicly on issues that do not affect



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the welfare of students. Again, I do not think that is right. There was, briefly, guidance from Universities UK about three or four years ago that said that if an observant religious speaker wanted men and women to be separated in the audience, that was okay. That was withdrawn, I think because the general legal view was that that was not right, and there is now guidance from the Equality and Human Rights Commission on this, which I think is right. But a university administrator, as Aileen said, cannot keep all these different sources of guidance in their head.

It seems a good idea to me to have this thrashed out, if possible, with one set of guidance on this issue, because the effect of the Prevent guidance, in particular, has been to suppress democratic dissent; or at least the perception is that it has done that. That is counterproductive: it is not what it is for. If you give people a legitimate sense of grievance—if my strongly held views on what is wrong with drone warfare are being characterised as a perceived grievance that makes me a potential extremist, and therefore all sorts of monitoring of what I might say or who I can invite is happening—you are setting people up with a legitimate sense of grievance and alienating all sorts of people.

Chair: Are you saying that the charities restriction, because student unions are charities, prevents them talking or doing things that are not of direct benefit to students? There is an issue about whether “direct benefit to students” is anything that expands their minds and helps them engage in freedom of speech. Would you say, *prima facie*, that that charity law restriction as applied to student unions cuts across the other public policy imperative?

Helen Mountfield QC: I think it goes a bit too far. The main charitable object of most student unions is to promote education and the interests of students. It depends on the precise deeds setting them up, but most would also say that they promote or provide a platform for education and debate of controversial ideas. If, say, the student union debating society says we all agree that something should happen, are the officers not allowed to say that, because it is not about education? Surely not. It is different, for example, if the student union calls on the university to do something unlawful; such as, perhaps, to never provide references for Israeli universities. That might be calling on the University to do something unlawful under equality law, but that, on the whole, is not is being done.

Chair: That is not to do with charity law.

Helen Mountfield QC: No, that is not to do with charity law. The Charity Commission’s view is that that expression of opinion goes beyond the student union’s charitable objects and I think that rather depends on the way in which the opinion is presented. I think it goes too far and may



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suppress speech that is actually lawful and within the student union's charitable objects.

Paul Bowen QC: Can I draw out something else from the Butt judgment which cuts across the Prevent guidance? It was one of the issues that was considered there and it feeds into this narrative about certain groups, particularly Muslim groups, feeling under siege, to a certain extent, and spied upon. Dr Butt, had been named, you may recall, in a press release when the Prevent duty guidance came out: he was one of six speakers who were named as extremists. He had been identified by the Extremism Analysis Unit as an extremist and an example of the kind of speaker who would not be permitted in future to come and speak on campuses. It turned out that his information had been obtained by the Extremism Analysis Unit from mostly open source material and this material is shared by the Extremism Analysis Unit with Prevent co-ordinators in each of the different police areas.

Prevent co-ordinators will speak with university administrators, either on a specific request made of them by an administrator or they may even raise a concern about a particular speaker who might be coming. There is a mechanism whereby information is obtained primarily from open sources—Twitter feeds, other social media accounts, websites, published speeches—and these are harvested to form profiles and make assessments about people, that they are extremists. That information is used to prevent them, potentially, speaking to particular groups. It feeds into this narrative that these groups feel that they are spied upon. The concern about it is that the activity of collecting that material, gathering it together, making assessments and sharing it, is not required to be regulated beyond by the Data Protection Act, which does not give you much assistance because you will not be told that the material is being collected. You will not be given an opportunity to challenge an assessment that is made that you are an extremist.

Chair: This is all very interesting but it is slightly straying away from what David was likely to ask a question about next. There is a vote in the Commons. There may be three votes, so what are we going to do? Shall we ask the witnesses to wait, or have we asked enough?

Ms Karen Buck: I was told that there might be three Divisions, but I do not know.

Chair: Is that what you think, Fiona? We are going to start running shortly. We will let you go at this point, thanking you very much for giving your evidence to us. If we need to get back to you on specific points, we can do so in writing or on the phone. If it really comes to it, we could have you back again. Rather than make you wait 45 minutes while we vote, we will pause the session.



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Fiona Bruce: May I just suggest—I am sure the panel is aware of it—if there is anything they would like to have said this afternoon, they can write to the Committee.

Chair: Could they not stay here in a non-quorate session for the benefit of our Peer members and with our team? We could ask questions but not in an evidence session. Is that a halfway house? We are going now and we are going to have to run.