IN THE MATTER OF THE PREVENT DUTY GUIDANCE CONSULTATION FOR THE UNIVERSITY AND COLLEGE UNION

ADVICE

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1. I am instructed in this matter to advise UCU in respect of its response to the consultation currently open in relation to the Prevent Duty and in order to prepare policy in this area.

2. The Prevent Duty is a duty under Clause 21(1) of the Counter-Terrorism and Security Bill 2015 to have "**due regard to the need to prevent people from being drawn into terrorism**".

3. In particular I am instructed that UCU has areas of concern which may be broken down into the following broad headings:

   3.1. How the Prevent Duty is squared with academic freedom enshrined in the Education (No 2) Act 1986 and in university Statutes.

   3.2. How the Prevent Duty interplays with academic staff vis a vis:

      3.2.1. The academic's contract of employment and their pastoral duty to students. In short, academic staff are very concerned that the duty which the Bill seeks to impose will seriously undermine the teacher/student relationship.

      3.2.2. The implications, if any, for academic staff for the Equality Act (in terms of being accused of discriminatory treatment if they are perceived as treating some of their students or fellow academics differently).

   3.3. The HEI's duty under the public sector equality duty.

   3.4. Any interplay in relation to the Human Rights Act 1998.

4. I am asked to advise on these matters and anything else that in my view arises in respect of the consultation.

5. In this advice I will:

   5.1. Set out a summary response to the four questions above.

   5.2. Set out a summary of the current law in areas that appear relevant for the purposes of this advice, namely: A. The Education (No 2) Act 1986; B. Human Rights Act 1998; C. Equality Act 2010; D. Public Sector Equality Duty; E. Breach of Privacy under the Common Law; F. Data Protection Act 1998.

   5.3. Go through the relevant parts of the Counter-Terrorism and Security Bill 2015 and Draft Guidance providing commentary.

6. It needs to be borne in mind that this is an extremely complex and controversial area, and I have been asked to advise with some haste. If there is any area in respect of which further advice is sought, or in respect of which there are any queries, I will be happy to advise further.

7. Further, the reality of the situation is that it is impossible to predict each and every factual scenario that may arise in respect of the duty to prevent people from being drawn into terrorism. That, it seems to me, is why the Draft Guidance is so vague. The reality is that decisions will need to me made taking into account all of the relevant factual circumstances that may give rise to a risk of people being drawn into terrorism. In many cases the answer as to whether the institution's decision is lawful may be obvious: in others it will not, and will depend on the specific circumstances. Challenging any policy or decisions which are taken pursuant under the duty, for example, under section 43 of the Education (No 2) Act 1986 or the Human Rights Act 1998, will need to be done on a case-by-case basis. In that respect therefore it needs to be borne in mind that a general advice on the nature of this advice will be limited in value.

PART 1. Summary Answer to Questions

8. However, in summary answer to the questions asked:

Question 1

8.1. It is difficult in my view to square the Prevent Duty with academic freedom enshrined in, for example, the Education (No 2) Act 1986. In particular, the Prevent Duty as set out in the Draft Guidance appears to envisage that decisions may be taken to exclude those with a particular "extremist" but lawful point of view, because of the potential risk that those hearing that view will be drawn into terrorism. This appears, on the face of it, potentially inconsistent with, for example:

8.1.1. the duty under section 43(1) of the Education (No 2) Act 1986 to take "*such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees … and for visiting speakers*";

8.1.2. the duty under section 43(2) of the Education (No 2) Act 1986 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*;

8.1.3. the duty upon University Commissioners, within s202 of the Education Reform Act 1988, to have due regard to the need "*to ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions*".

8.2. Whilst the above statutory duties do not permit totally free speech, in the sense that the duty on the institution is only to take such steps as "<u>are reasonably practicable</u>" to ensure freedom of speech "<u>within the law</u>", the Prevent Duty as set out in the Draft Guidance appears to envisage decisions being made which prevent lawful speech, even if it is reasonably practicable to ensure such freedom of speech, on the basis that there is a risk that exposure to extreme, but lawful, views may lead in individual to be drawn into terrorism. It appears to do so without any express reference to ensuring that the institution complies with its statutory duty under section 43 of the Education (No 2) Act 1986.

Question 2

8.3. There may be implications for academics in terms of their contracts of employment, relationship with students, and under the Equality Act 2010 because:

8.3.1. Insofar as the Draft Guidance requires institutions to "*ensure staff implement the duty effectively*", it seems to me that institutions will need to give instructions to staff in order to ensure compliance with the duty. Further, an instruction given in purported compliance with the duty to prevent people from being drawn into terrorism will be argued by an institution to be a lawful and reasonable instruction. This could lead an academic to come into conflict with their institution if they refuse to carry out what they say is not a reasonable or lawful instruction, and could lead to disciplinary action against them;

8.3.2. Insofar as the Draft Guidance appears to envisage a requirement to share information where doing so is considered necessary to prevent people from being drawn into terrorism, there is a risk that this will undermine the confidential nature of any relationship between academic and student;

8.3.3. If the manner in which an institution seeks to comply with the duty to prevent people from being drawn into terrorism is potentially discriminatory (in particular say against Muslims), then the individual academic responsible or who carries out such instructions, may also be liable for discrimination.

8.4. Now, the very important thing to highlight is that the above are only potential implications. The reality, as I have said, is that each and every decision taken by an institution in purported compliance with the duty will have to be considered on its own particular circumstances – that is, consideration will need to be given as to whether the decision is one which in fact and law contravenes the duty under s43 of the Education (No 2) Act 1986, the Human Rights Act 1988, the Data Protection Act 1988, the Equality Act 2010 etc. The difficulty is that given the very vague nature of the Draft Guidance it is very difficult to know how institutions will respond to it. It seems to me that there are two responses: 1 – seek further detail in the Guidance (in which case, if included, that will need to be taken into account by institutions);

and/or 2 – challenge a decision as and when it is made in purported compliance with the duty.

Question 3

8.5. I do not think there is any necessary conflict between an institution's public sector equality duty and the Prevent Duty. For example, whilst it might be said that, the prevent duty to have "*due regard to the need to prevent people from being drawn into terrorism*" may conflict with the public sector equality duty to have due regard to the need to "*foster good relations between persons who share a relevant protected characteristic and persons who do not share it*", because the prevent duty is primarily aimed at Islamic extremists (and therefore Muslims), it is clear that the Prevent Duty applies to all forms of terrorism. The reality it seems to me that if the Prevent Duty is applied in a non-discriminatory way (which means that those matters which draw people into terrorism are targeted rather than religion), then there should not be a conflict. Of course, to ensure that is done may not be straightforward – however there does not appear to me to be a necessary conflict. Further, and in any event, both the Prevent Duty and public sector equality duties are duties to have "due regard to" certain matters, and there is no reason why due regard cannot be had to both matters before a decision is made.

Question 4

8.6. Finally, policies or decisions taken by institutions in purported compliance with the Prevent Duty may very well call into question whether there has been a breach of the Human Rights Act 1998, in particular in respect of any infringement of free speech under Article 10 of the European Convention on Human Rights ("the Convention"), but also under Article 8 (right to private and family life); Article 9 (freedom of thought, conscience and religion) and Article 14 (prohibition of discrimination). As I hope I have already made clear however, whether there is a breach will depend on the particular circumstances of the particular decision.

PART 2. The Existing Law

A. Education (No 2) Act 1986

9. Section 43(1) of the Education (No 2) Act 1986 provides that:

43.— Freedom of speech in universities, polytechnics and colleges.

(1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.

(2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with—
(a) the beliefs or views of that individual or of any member of that body; or
(b) the policy or objectives of that body.

(3) The governing body of every such establishment shall, with a view to facilitating the discharge of the duty imposed by subsection (1) above in relation to that establishment, issue and keep up to date a code of practice setting out—
(a) the procedures to be followed by members, students and employees of the establishment in connection with the organisation—
(i) of meetings which are to be held on premises of the establishment and which fall within any class of meeting specified in the code; and
(ii) of other activities which are to take place on those premises and which fall within any class of activity so specified; and
(b) the conduct required of such persons in connection with any such meeting or activity;
and dealing with such other matters as the governing body consider appropriate.

(4) Every individual and body of persons concerned in the government of any such establishment shall take such steps as are reasonably practicable (including where appropriate the initiation of disciplinary measures) to secure that the requirements of the code of practice for that establishment, issued under subsection (3) above, are complied with.

(5) The establishments to which this section applies are—
(a) any university;
(aa) any institution other than a university within the higher education sector
(b) any establishment of higher or further education which is maintained by a [local authority;
(ba) any institution within the further education sector

…

(8) Where a students' union occupies premises which are not premises of the establishment in connection with which the union is constituted, any reference in this section to the premises of the establishment shall be taken to include a reference to the premises occupied by the students' union.

10. Judicial authority on the above statute is limited.

11. However, in **R v University College London, ex p Riniker** [1995] ELR 213, the High Court (Sedley J) made it clear that section 43 is justiciable by judicial review. He set out the purpose of the enactment as follows:

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

12. The authority of **R v Liverpool University, ex p Caesar-Gordon** [1991] 1 QB 124, Ch D, makes it clear that where a university sought to ban a speaker (in that case a South African diplomat) on the basis of the threat of public disorder outside the university, such a ban was unlawful. The High Court (Watkins LJ) held:

> **".. in discharging its duty under section 43(1) the university is not enjoined or entitled to take into account threats of "public disorder" outside the confines of the university by persons not within its control. Were it otherwise, the purpose of the section to ensure freedom of speech could be defeated since the university might feel obliged to cancel a meeting in Liverpool on the threat of public violence as far away as, for example, London, which it could not possibly have any power to prevent" (132D-E)**

13. However, the reason for the High Court coming to its judgment in that case was that to require the university in the discharge of its duty under subsection (1) "*to take into consideration persons and places outside its control would be, in our view, to impose upon it an intolerable burden which Parliament cannot possibly have intended the university to bear*"

14. Hence, since a university has no ability to control the public, it was impermissible for it to take into account the potential for public disorder in order to withdraw permission for a meeting to take place. However, the Court held that had the university merely taken into account potential "*disorder on university premises and amongst university members*" then it may be that its decision could not have been objected to. "*Where, however, the threat was of public disorder without the university, then, unless the threat was posed by members of the university, the matter was, in our opinion, entirely for the police*." Indeed the

Court held that restrictions on publicity which were necessary to ensure free speech and good order, within the university, were not unlawful.

15. Hence, whilst **Caesar-Gordon** makes it plain that a university cannot take into account the potential for public disorder in coming to a decision to withdraw permission for a meeting, it does not exclude the possibility of the university taking into account the actions of its members, or actions within the university, in coming to a decision in respect of whether a meeting can go ahead and the terms on which it can do so.

16. A similar provision for securing academic freedom is set out in section 202 of the Education Reform Act 1988 which requires University Commissioners to have due regard to the need to, '*ensure that academic staff have freedom within the law to question and test received wisdom and to put forward new ideas and controversial or unpopular opinions without placing themselves in jeopardy of losing their jobs or privileges that they may have at their institutions*'. I am informed that this wording is also invariably included in the articles of government of newer universities and further education colleges.

17. It is of great importance, and it must not be forgotten, that both of the above provisions relating to academic freedom refer only to "freedom" or "freedom of speech" **within the law**.

18. There is no judicial authority, as far as I am aware, on what is meant by "within the law" within these statutes. However, it seems to me that "within the law" obviously means that a university is under any obligation to allow others to engage in criminal activity, such as for example, various offences under the Public Order Act 1986 (e.g. acts intended or likely to stir up racial hatred – section 18 of the Public Order Act 1986; Acts intended to stir up religious hatred or hatred on the grounds of sexual orientation – section 29B of the Public Order Act 1986)

19. Similarly, it seems to me likely to be the case that if the proposed activity is unlawful, but not illegal, then again, it seems to me that the university could properly say that it is under no obligation to take such steps as are practicable to allow that activity. That is because such purported "freedom of speech" or "freedom" would not be "**within the law**".

B. Human Rights Act 1998

20. Subsequent to the Education Act 1986 the European Convention on Human Rights ("the Convention") was incorporated into UK law by the Human Rights Act 1998.

21. Article 8, 9, 10 and 14 are of particular relevance and are as follows:

***Article 8 – Right to respect for private and family life*:**

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others.

Article 9: Freedom of thought, conscience and religion

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in a community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10: Freedom of expression

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

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

Article 14: Prohibition of discrimination

(1) The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

22. Of course, it is to be noted that, none of Articles 8, 9 and 10 are absolute rights: rather they may be departed from if necessary in a democratic society, in the interests of matters such as national security, the prevention of disorder or crime etc. Further, the prohibition in Article 14 is not a general prohibition but is a prohibition in respect of the enjoyment of other rights under the Convention.

23. A useful summary of the effect of the right to freedom of expression is contained with R **(Calver) v Adjudication Panel for Wales** [2012] EWHC 1172 (Admin); [2013] P.T.S.R. 378, Beatson J.

24. Beatson J set out various observations about the underlying principles relevant to freedom of expression (at paras 40-64) which include:

    24.1. Exceptions to freedom of expression must be construed strictly. Thus, clear words are required to restrict it. Hence, there is a narrower approach to the interpretation of legislation and instruments made under legislation restricting it.

    24.2. Once Article 10 is under consideration, whilst the court must "have due regard" to the judgment of the decision maker, the approach of the court involves scrutiny of greater intensity than in a judicial review not involving a Convention right, and the decision whether Article 10 is infringed is ultimately one for the court.

    24.3. The relevant legal principles in this area do not provide the court with bright lines. For example, "in **R (Gaunt) v Office of Communications (Liberty intervening) [2011] 1 WLR 2355** , para 23 Lord Neuberger MR, considering restrictions on broadcasting "offensive and harmful material" in the Broadcasting Code made pursuant to the Communications Act 2003 , stated that "*like virtually all human rights, freedom of expression carries with it responsibilities which themselves reflect the power of words, whether spoken or written*". Although he also emphasised that "*any attempt to curtail freedom of expression must be approached with circumspection*", his recognition of the responsibilities that are carried by freedom of expression reflects an element of balancing. There, of course, has to be balancing when the exercise of the right to free expression in Article 10 right by one person will violate other Convention rights." (para 48)

24.4. "**Fourthly … notwithstanding the high importance of freedom of expression and its relative incommensurability with the interests that are invoked in justifying a restriction, the more egregious the conduct, the easier it is likely to be for the court, to undertake the balancing that is required and justifiably to conclude that what was said or done falls within one of the exceptions to freedom of expression under common law, statute or the Convention. If the conduct is less egregious, it is likely to be more difficult to do this. Justification requires, as was stated in Livingstone v Adjudication Panel for England [2006] LGR 799, para 39, "clear and satisfactory reasons within the terms of article 10.2** " (para 49)

24.5. "**Fifthly, it is clear, as a general proposition, that freedom of expression includes the right to say things which "right thinking people" consider dangerous or irresponsible or which shock or disturb …. The statements of Hoffmann LJ in the Central Independent Television case [1994] Fam 192 , 203 that "a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom" and that freedom of expression means "the right to publish things which government and judges, however well motivated, think should not be published" and of Sedley LJ in Redmond-Bate v Director of Public Prosecutions [2000] HRLR 249 , para 20 that "[f]reedom only to speak inoffensively is not worth having", are clearly relevant and have been relied on by courts considering restrictions in codes made pursuant to statutory authority"** (para 55)

25. Accordingly, where the right to free speech is engaged, it will be robustly protected by the courts, but, in the end, the question is one of the balancing of rights. The more egregious the conduct the easier it is likely to be for the court, to undertake the balancing that is required and justifiably to conclude that what was said or done falls within one of the exceptions to freedom of expression.

C. Equality Act 2010

26. Very briefly, it is unlawful for a person to "*treat [someone] less favourably than [they] treat or would treat others*" because of a protected characteristic, which includes because of race, religion or belief (section 13(1) and 14(2) of the Equality Act 2010 - Direct discrimination).

27. Further, it is also unlawful for a person to "*apply to [another] a provision, criterion or practice*" which puts that person, and those who share the protected characteristic (eg are of the same race, religion etc) at a *particular disadvantage* as compared to others. If so, the provision, criterion or practice is unlawful unless it can be shown that it is "*a proportionate means of achieving a legitimate aim*" (section 19 of the Equality Act 2010 - Indirect discrimination).

28. It is also discriminatory to engage "*in unwanted conduct related to a relevant protected characteristic*" which "*has the purpose or effect of (i) violating [another's] dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for [that other]*" (section 26 of the Equality Act 2010 – Harassment).

29. Further, where an employee does an act of discrimination within the course of their employment, that is treated as an act of the employer (section 109 of the Equality Act 2010). The employer is liable unless they can show they took all reasonable steps to prevent the employee from doing that act, or anything of that description. Further, someone who "*knowingly helps another … contravene*" the Act is also liable (s112 of the Equality Act 2010).

30. So, for example, if a university knows that an individual intends to engage in discriminatory behaviour, in the name of free speech, but enables the meeting to go ahead, they may be liable under the Equality Act 2010.

D. Public Sector Equality Duty

31. Section 149 of the 2010 Act provides, in so far as is material:

> (1) A public authority must, in the exercise of its functions, have due regard to the need to–
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to -
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

32. It is well established that the duty to have "due regard" involves a "conscious approach and state of mind": see **R (Brown) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)** [2009] PTSR 1506, para 91.

33. In **R (Brown)**, the court considered what a relevant body has to do to fulfil its obligation to have due regard to the aims set out in the general equality duty. The court set out that:
    - Decision makers must be made aware of their duty to have 'due regard' to the identified goals.
    - Secondly, the due regard duty must be fulfilled before and at the time that a particular policy is being considered by the public authority in question.
    - The duty must be exercised in substance, with rigour and with an open mind.
    - The duty imposed on public authorities … is a non–delegable duty.
    - The duty is a continuing one.

- It is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their … duties and pondered relevant questions.

34. In **R (Bailey) v Brent LBC** [2011] EWCA Civ 1586, Pill LJ said:

> **"The section 149 duty must be kept in mind by decision makers throughout the decision-making process. It should be embedded in the process but can have no fixed content, bearing in mind the range of potential factors and situations, as Miss Laing aptly submitted in submissions summarised at paragraphs 37 to 40 above. What observance of that duty requires of decision makers is fact-sensitive; it inevitably varies considerably from situation to situation, from time to time and from stage to stage."**

But added….

> **"The importance of complying with s.149 is not to be understated. Nevertheless, in a case where the council was fully apprised of its duty under s.149 and had the benefit of a most careful Report and EIA, I consider that an air of unreality has descended over this particular line of attack. Councils cannot be expected to speculate on or to investigate or to explore such matters ad infinitum; nor can they be expected to apply, indeed they are to be discouraged from applying, the degree of forensic analysis for the purpose of an EIA and of consideration of their duties under s.149 which a QC might deploy in court. The outcome of cases such as this is ultimately, of course, fact specific (see Harris). All the same, in situations where hard choices have to be made it does seem to me that to accede to the approach urged by Miss Rose in this case would, with respect, be to make effective decision making on the part of Local Authorities and other public bodies unduly and unreasonably onerous.**

35. In **Greenwich Community Legal Centre v Greenwich London Borough Council** [2012] EWCA Civ 496, CA**,** the Court of Appeal adding (para 30):

> **I would emphasise the need for the court to ask whether as a matter of substance there has been compliance; it is not a tick box exercise. At the same time the courts must ensure that they do not micro-manage the exercise. Furthermore, as Pill LJ observed in *R (Bailey) v Brent London Borough Council [2011] EWCA Civ 1586* para 83, it is only if a characteristic or combination of characteristics is likely to arise in the exercise of the public function that they need be taken into consideration. I would only add the qualification that there may be cases where that possibility exists in which case there may be a need for further investigation before that characteristic can be ignored: see the observations of Elias LJ in Hurley and Moore para 96. (Perhaps more accurately it may be said that whilst the Council has to have due regard to all aspects of the duty, some of them may immediately be rejected as plainly irrelevant to the exercise of the function under consideration — no doubt often subliminally and without being consciously addressed**

E. Breach of Privacy/Confidence

36. I have set out Article 8 of the Convention above. In tandem with the development of jurisprudence under Article 8, the common law has developed a common law action for breach of privacy.

37. In **Campbell v MGN Ltd** [2004] 2 A.C. 457, Lord Hoffmann noted that "*English law has adapted the action for breach of confidence to provide a remedy for the unauthorised disclosure of personal information … this development has been mediated by the analogy of the right to privacy conferred by article 8 of the European Convention on Human Rights*".

38. If Article 8 is engaged (i.e. there is a reasonable expectation of privacy) the court must decide whether the interference with that right is justified. Eady J. in **Mosley v News Group Newspapers Ltd** [2008] EWHC 1777 (QB) noted "the judge will often have to ask whether the intrusion, or perhaps the degree of intrusion, into the claimant's privacy was proportionate to the public interest supposedly being served by it".

F. Data Protection Act 1998

39. I will not set out, in any detail, the provisions of the Data Protection Act 1998. However, they are relevant for this advice, because reference is made to the Data Protection Act in the Draft Guidance, and therefore I will summarise some key elements.

40. In order for personal data to be processed (which includes shared) lawfully under the Data Protection Act 1998 at least one of the conditions in Schedule 2 of the Act. For sensitive personal data to be processed lawfully, one of the conditions in Schedule 3 of the Act must apply (see section 4(3) DPA).

41. It is sufficient for present purposes to set out that, the conditions within Schedule 2 of the Data Protection Act 1998 which make the process of personal information lawful include the following:

> 1. The data subject has given his consent to the processing
> …
> 3. The processing is necessary for compliance with any legal obligation which is subject, other than an obligation imposed by contract
> …
> 5. The processing is necessary -
> (a) for the administration of justice
> …
> (b) for the exercise of any functions conferred on any person by or under any enactment
> …
> (d) for the exercise of any other functions of a public nature in the public interest by any person.
> 6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

42. The conditions within Schedule 3 of the Data Protection Act 1998 which make the process of sensitive personal information lawful include the following:

> 1. The data subject has given his explicit consent to the processing of the personal data
> 2. (1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment …
> 3. (1) The processing is necessary –

a. In order to protect the vital interests of the data subject or another person, in a case where (i) consent cannot be given by or on behalf of the data subject, or (ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or
b. In order to protect the vital interests of another person, in a case where consent by or on behalf of another person has been unreasonably withheld

…

7. The processing is necessary -

(a) for the administration of justice

…

(c) for the exercise of any functions conferred on any person by or under any enactment

43. Further section 4(4) of the Data Protection Act 1998 requires a data controller to comply with the data protection provisions set out in Schedule 1.

44. Finally, section 35(1) of the Data Protection Act 1998 provides that "Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of the court". There are also certain exemptions within section 29 in respect of data processed for the purposes of the prevention and detection of crime etc, and in section 28 if an exemption is required in the interests of national security.

PART 3. Counter-Terrorism and Security Bill 2015

45. It is in the context of the above legal landscape that the Counter Terrorism and Security Bill is being enacted.

46. The key provision for our purposes is Clause 21(1) of the Bill, which provides that:

> **(1) A specified authority must, in the exercise of its functions, have due regard to the need to prevent people from being drawn into terrorism.**

47. Schedule 3 sets out the specified authorities which include higher and further education institutes. Clauses 22 and 23 makes provision to enable the Secretary of State to amend Schedule 3 by regulation.

48. Clause 24(1)-(2) provides:

> **(1) The Secretary of State may issue guidance to specified authorities about the exercise of their duty under section 21(1).**
> **(2) A specified authority must have regard to any such guidance in carrying out that duty.**

49. The remainder of the Clause makes provision for consultation in respect of, revision and publication of such guidance.

50. Clause 25 provides for the enforcement of the duty as follows:

> (1) Where the Secretary of State is satisfied that the authority has failed to discharge the duty imposed on it by section 21(1), the Secretary of State may give directions to the authority for the purpose of enforcing the performance of that duty.
>
> (2) A direction given under this section may be enforced, on an application made on behalf of the Secretary of State, by a mandatory order.

51. Clause 26 provides that a "a failure in respect of a performance of a duty imposed by or under this Chapter does not impose a cause of action at private law"

52. Clause 27 includes the definition of Terrorism for the purpose of the above provisions, being the definition in s(1)-(4) of the Terrorism Act 2000.

> (1) In this Act *"terrorism"* means the use or threat of action where–
> (a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

(2) Action falls within this subsection if it–
(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person's life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

53. It is to be noted that *"the government"* is defined in section 1(4) as meaning the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom.

The Duty to have "Due Regard": Clause 21(1) of the Bill

54. The context of the duty to have due regard is set out in some detail above (page 13-14) in respect of the similar public equality duty. Whilst remembering, of course, that the extent of the duty will not necessarily be the same, it is likely in my view that the courts will find that similar basic propositions apply: such as that decision makers must be aware of their duty to have 'due regard' to the identified goals, the due regard duty must be fulfilled before and at the time that a particular policy and individual decision is being considered by the institution in question; the duty must be exercised in substance, with rigour and with an open mind; and the duty is a continuing one. Further that it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their duties and considered relevant questions.

55. Clause 24(2) of the Bill requires regard also to be had to the Secretary of State's Guidance, the Draft of which is addressed below

56. It is important to point out that, whilst regard must be had to that Guidance, the duty to have regard to it does not, in my view, require that it must be followed: guidance, is just that, guidance – it is not a direction. However, where Guidance is not followed the decision maker must at the very least show that it was aware of the Guidance, that it

considered it, and have cogent reasons for not following it, if that is the course decided upon: see eg **R v Islington LBC** [1996] ELR 66, in which Sedley J stated that:

> **'…In my judgment Parliament in enacting section 7(1) [of the Local Authority Social Services Act 1970] did not intend local authorities to whom ministerial guidance was given to be free, having considered it, to take it or leave it. Such a construction would put this kind of statutory guidance on a par with the many forms of non-statutory guidance issued by departments of state. While guidance and direction are semantically and legally different things, and while 'guidance does not compel any particular decision' (Laker Airways Ltd v Department of Trade [1967] QB 643 , 714 per Roskill LJ), especially when prefaced by the word 'general', in my view Parliament by s.7(1) has required local authorities to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course. Parliament by section 7(1) has required authorities to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course.'**
>
> **…**
>
> **if this statutory guidance is to be departed from it must be with good reason, articulated in the course of some identifiable decision–making process"**

57. It is with that in mind that I turn to the Draft Guidance.

The Draft Prevent Duty Guidance

58. I do not purport to set out the whole of the Draft Guidance which is being consulted upon, but set out some of the key points as they appear to me below. In particular, I do not concentrate on matters within the Guidance which may be seen as procedural – such as risk assessments, training, access to information, and record keeping – all of which should be fairly straightforward for an institution to take steps to comply with – but I do concentrate on what appear to be concrete steps which institutions may be required to take.

Section B of the Draft Guidance: Introduction

Aim of the Duty and Challenging Extremism

59. The Guidance (para 3) makes it clear that the purpose of the "Prevent" Strategy is to "*reduce the threat to the UK from terrorism by stopping people becoming terrorists or supporting terrorism*". This, says the Guidance, is what is expressed in the Act simply as "*prevent[ing] people from being drawn into terrorism*".

60. The Guidance goes on to state that "*some people who join terrorist groups have previously been members of extremist organisations and have been radicalised by them*", and says the Government has "*defined extremism in the Prevent strategy as: "vocal or active opposition to fundamental British values including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs. We also include in our definition of extremism calls for the death of members of our armed forces*" (para 5)

61. The Guidance then makes it clear that the Prevent strategy "*was explicitly changed in 2011 to deal with all forms of terrorism and target not just violent extremism but also non-violent extremism, which can create an atmosphere conducive to terrorism and can popularise views which terrorists can exploit*" (para 6).

62. The Guidance then states that "*preventing people becoming terrorists or supporting terrorism requires challenge to extremist ideas where they are used to legitimise terrorism and are shared by terrorist groups. And the strategy also means intervening to stop people moving from extremist (albeit legal) groups into terrorist-related activity*" (para 6)

Comment

63. One can see immediately see that, under the Guidance, the concept of "preventing people being drawn into terrorism" is on the face of it, clarified, or extended (depending on one's view point) to include the concept of requiring challenge to extremist ideas where they are used to legitimise terrorism and are shared by terrorist groups.

64. On the one hand, this may be apt to create difficulties, in that it might be argued that the definition of extremism is vague and capable of subjective interpretation. For example, if it suffices, in order to be said to have an extremist viewpoint, to have a vocal opposition to, for example, "individual liberty" (that being a "British value") then a viewpoint which seeks to restrict individual liberty sufficiently might itself be said to be "extremist". Also, a vocal opposition to respect for those who have a different belief, may also be said to be "extremist". Also, for example, given the definition that extremism amounts to "vocal or active opposition to British values" the obvious question is what is a British value?

65. It is also of importance to note that the concept of "challenging" such ideas is difficult and may be said to require positive action in response to such ideas being aired (either

actually or potentially). Hence, it might be said that the cancellation of an event arranged by a speaker (to prevent students hearing the views, and therefore seeking to prevent people being drawn into terrorism in that way) cannot be consistent with the "challenging" of those ideas (to prevent students adopting the views that they have heard). The latter is more consistent with freedom of speech.

66. One can immediately see the difficulties that will be faced by institutions attempting to formulate a policy, or make a specific decision, on the basis of what might be said to be a vague definition of what the duty requires.

67. However, one does needs to bear in mind that the Guidance only extends the duty to challenging extremist ideas "where they are used to legitimise terror and are shared by terrorist groups" (para 6). Hence, it seems to me that the Guidance is unlikely to be permitted to be used to allow steps taken, for example, to censor an "extremist" viewpoint, in respect of which no realistic connection can be made to the legitimisation of terror or which is not shared by terrorist groups. It seems to me accordingly the connection with being drawn into terrorism must be fundamental to any action taken under this duty by an institution: this would also be consistent with the statutory duty under the Act.

Target of the Prevent Duty (paras 7-9)

68. The Guidance makes it clear that the duty is intended to deal with all kinds of terrorist threat to the UK. That is, it is not limited to Islamic extremists, but also extends to terrorists associated with the extreme right, saying, for example, that "*The white supremacist ideology of extreme right-wing groups has also provided both the inspiration and justification for people who have committed extreme right-wing groups*"

Comment

69. The point being made here is that having due regard to the duty to prevent people being drawn into terrorism must not be limited to Islamic terrorism, and must be operated in a non-discriminatory way.

70. For example, if a Muslim is treated differently to a non-Muslim, because of their race, then that is direct discrimination (see above) which cannot be justified, and for which an individual and the employer will be liable.

71. Hence, great care will need to be taken to ensure that institutions do not adopt policies or practices, or make decisions, which are directly or indirectly discriminatory on grounds of race or religion.

72. It should be noted, in this respect, that if an individual academic, for example, refuses to do something which is discriminatory, and is thereby disciplined, then they will be able to claim that such disciplining is itself discriminatory because the disciplining is "because of" a protected characteristic: see eg **Showboat Entertainment Centre v Owens** [1984] 1 All ER 836.

73. Hence, for example, if an institution adopts some policy for Muslim faith-related facilities, but does not do so for other religions or beliefs, then an academic might say that that amounts to direct discrimination on grounds of religion or belief and refuse to take part in it. Of course, the institution may argue that the reasons for its policy is not "because of" the fact that the individuals are Muslim, but is because of the duty to prevent people being drawn into terrorism. However, in order to get such an argument off the ground the institution, it seems to me, would need to show a clear basis for its belief in the link to terrorism of the particular Muslim or Muslim Group.

74. Of course, this may create very difficult legal issues, which would leave the academic in a difficult legal position: on the one hand there may be arguments that a policy or act was discriminatory, and he/she would not want to risk being part of that policy both as a matter of conscience and because he/she may therefore being liable for discrimination, but on the other hand if they refuse to carry out the policy there is a risk they may be disciplined. The difficulty however, for present purposes, is that it is not until a policy is determined or decision made by an institution, that any assessment can begin to be made as to whether it is discriminatory.

Status of the Guidance (paras 10-11)

75. Paragraphs 10-11 of the Guidance make it plain that "*we expect all specified authorities to participate fully in work to prevent people being drawn into terrorism. How they do this, and the extent to which they do this, will depend on many factors, for example, the age of the individual, how much interaction they have with them etc. The specified authorities in Schedule 3 to the Act are those judged to have a role in protecting vulnerable people and/or our national security*"

76. It states "*This guidance identified best practice for each of the main sectors and describes ways in which they can comply with the duty. It includes sources of further advice and provides information on how compliance with the duty will be monitored*" (para 11)

Comment

77. These paragraphs, whilst setting out the expectation that institutions will "participate fully in work to prevent people being drawn into terrorism", at the same time make it clear, in my view, as set out above, that the decision as to how to comply with that duty is primarily that of the institution, taking into account the many factors that will be relevant to it and the particular decision or policy being adopted. The duty is to have due regard to the duty to prevent people being drawn into terrorism and to have regard to the Secretary of States guidance. Therefore the institution will need to be able to cogently and rationally explain its decision and how it complies with these duties: however in the end the decision is that of the institution.

78. It is of note that the guidance expressly is said to identify "best practice". That may be suggested to mean, it seems to me, that a failure to follow the guidance will not, of itself, mean that an institution has adopted a practice which is unlawful. That is, it may be said that "best practice" identifies a "gold standard" but not the only "lawful standard". That would however seem surprising, and I would not expect a university to be able to successfully argue that the reference to this being "best practice" would mean that they did not need to take the guidance seriously. As set out above, it seems to be that the Guidance must be followed unless there is a cogent reason not to, and the institution does not have the authority to take a substantially different course.

79. I also note, whilst we are here, the use in the Guidance of the word "we" in setting out what "we" expect throughout the Draft Guidance. I assume the "we" is reference to the Secretary of State whose duty it is to issue the guidance under section 24 of the Act.

Section C: A Risk-Based Approach to the Prevent Duty:

80. In this section, the Guidance then sets out general themes including "Leadership"; "Working in Partnership"; "Capabilities" and "Sharing Information"

Leadership (Para 14)

81. Under "Leadership" the Guidance states that:

> *For all specified authorities, we expect that those in leadership positions:*
>
> - *Establish or use existing mechanisms for understanding the risk of radicalisation;*
> - *Ensure staff understand the risk and build capabilities to deal with it;*
> - *Communicate and promote the importance of the duty;*
> - *Ensure staff implement the duty effectively*

Comment

82. These expectations, it appears to me, are essentially procedural – i.e. the establishment of mechanisms for understanding the risk of radicalisation, training and communication in respect of the risk and duty, and implementation of the duty.

83. The Guidance here gives no obvious guidance as to what concrete measures institutions are expected to take.

84. However, the expectation to "ensure staff implement the duty effectively" suggests, clearly to me, that an institution will have to be able to have some form of sanction in the event that staff do not implement the duty. That is, if a staff member refuses to do what the institution believes it is required to do in pursuance of its duty, then the institution cannot be said to have ensured that the duty is implemented effectively if it allows staff to refuse to do so. Of course, it may that the institution can ensure the duty is implemented by requiring someone else to implement it, other than the objector, but that may not always be possible. It seems to me that the requirement that institutions ensure

staff implement the duty effectively may therefore lead to dispute between institution and individual, and potential disciplinary action. Obviously it will then be necessary to consider whether the instruction is one which is lawful and reasonable, is, for example, in breach of The Education (No 2) Act 1986, the Human Rights Act 1998, Data Protection Act 1998, is a breach of privacy under the Common Law, or the Equality Act 2010.

Working in Partnership (para 15)

85. Under "Working in partnership", the Guidance states that: "*To demonstrate effective compliance with the duty, specified authorities must demonstrate evidence of productive co-operation, in particular with local Prevent co-ordinators, the police and local authorities, and co-ordination through existing multi-agency forums, for example, Community Safety Partnerships.*"

Comment

86. Again this is largely procedural requirement. However, it seems to me that working in partnership may require effective information sharing, which I will address further below.

Capabilities (paras 16-19)

87. Under "Capabilities" the Guidance states, in essence, that staff must understand what radicalisation means, and why people may be vulnerable to it. It states that staff should be aware of what "we" mean by the term "extremism" and the relationship between extremism and terrorism. It goes on to state that:

> "*17 Staff need to know what measures are available to prevent people from becoming drawn into terrorism and how to challenge the extremist ideology that can be associated with it. They need to understand how to obtain support for people who may be being exploited by radicalising influences.*
> *18. All specified authorities subject to the duty will need to ensure that they provide appropriate training for staff involved in the implementation of this duty. Such training is now widely available*"

Comment

88. Again this is largely procedural requirement. However, whilst staff need know what measures are available to prevent people being drawn into terrorism and how to challenge the extremist ideology associated with it, there is no Guidance within this section as to what those measures are.

Sharing Information (paras 19-20)

89. Under "Sharing Information", the Guidance (para 19) provides that: "*The Prevent programme must not involve any covert activity against people or communities. But specified authorities may need to share personal information to ensure, for example, that a person at risk of radicalisation is given appropriate support (for example on the Channel programme). Information sharing must be assessed on a case-by-case basis and is governed by legislation. To ensure the rights of individuals are fully protected, it is important that information sharing agreements are in place at a local level. When considering sharing personal information, the specified authority should take account of the following…*". The Guidance then goes on to set out the factors that should be taken into account – namely Necessity and Proportionality, Consent, Power to Share, the Data Protection Act and the Common Law Duty of Confidentiality.

90. The Guidance then goes on to state that where the specified authorities suspect that someone is involved in illegal terrorist-related activity they should be referred to the police (para 20)

Comment

91. This Guidance in para 19 is in my view extremely vague, and it is very difficult to see how an institution will know what it is actually expected to do to comply in terms of information sharing, other than to ensure it complies with existing legislation.

92. The first point to note in this respect is that the Guidance expressly states that the Prevent programme "must not involve any covert activity against people or communities".

93. However, it may be said that it is hard to see how the disseminating of information about an individual, without the express consent of that individual does not amount to a "covert activity".

94. Yet the Guidance plainly does envisage that personal information may be shared without the consent of the individual, as it is only one of the considerations to be taken into account in the decision as to whether to share that information (within paragraph 19 of the Guidance and the Data Protection Act 1998 as set out above).

95. If all information sharing must be "overt", then it seems to me that the institution will need to inform its student body, for example, that it will share information given to it in order to comply with its duty to prevent people being drawn into terrorism. I can see how academics would be concerned that would seriously undermine any trust or confidence that a student may have in an academic, and indeed act to suppress a student raising matters relevant to them which they believe may then be shared.

96. Equally however, if the Guidance does intend there to be covert information sharing, then equally that would may seriously undermine the trust or confidence that a student may have in an academic.

97. Further, whilst setting out the considerations that need to be considered in respect of sharing information (ie necessity, proportionality, consent, and power to share – that is the provisions of the Data Protection Act 1988, Human Rights Act 1998 and the Common Law Duty of Confidentiality[1]), there is absolutely no guidance as to what that actually means.

98. That is, nowhere does the Guidance suggest what information is actually envisaged may be shared. There are no examples at all.

99. The upshot, it seems to me, is legal uncertainty. On the one hand institutions will know that a decision as to the sharing of information should be assessed on a case-by-case basis in line with legal duties under the Data Protection Act 1988, Human Rights Act 1998 and the Common Law Duty of Confidentiality, and on the other hand know that the duty to have due regard to the need to prevent terrorism encompasses some element of information sharing, albeit not covert activity, without any guidance as to what that may entail.

100. Obviously, the problem is that it would not be possible for anyone to give examples of all the situations that may arise, but it seems to me that, without more than there is in the current guidance, it is very difficult to see how an institution will go about complying with the duty.

[1] In this respect, it seems to me that, in law, the considerations of necessity, proportionality, consent are aspects/considerations which will render the sharing of information lawful or not under the Data Protection Act 1988, Human Rights Act 1998 and the Common Law Duty of Confidentiality, rather than being distinct considerations.

101. I should note that, whilst there is reference in the Guidance to the Data Protection Act 1988, it seems to me that, once the duty have due regard to the need to prevent people from being drawn into terrorism becomes a statutory duty, then it will certainly be arguable on the part of institutions (depending on the exact circumstances of the case) that the sharing/processing of data is "necessary for compliance with any legal obligation" (within Schedule 2 for Personal Data) and, again depending on the exact circumstances of the case, and the identity of the institution, that the sharing of sensitive data is "necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment" or "necessary for the exercise of any functions conferred on any person by or under any enactment" (within Schedule 3 for Sensitive Personal Data).

102. In reality, there may well be some obvious cases in which the sharing of information will plainly be justified. For example, it is an offence, under s38A of the Terrorism Act 200, to fail, without 'reasonable excuse' to disclose to the police, as soon as is reasonably practicable information which he knows or believes might be of material assistance in: *'preventing the commission by another person of an act of terrorism; or securing the apprehension, prosecution or conviction of another person, in the UK, for an offence involving the commission, preparation or instigation of an act of terrorism'*[2]

103. However, the expectation to share information appears to go well beyond that, yet no guidance is given as to how far beyond that it goes.

Section D: Monitoring and Enforcement

104. Section D of the Guidance provides that all specified authorities will be expected to maintain appropriate records to show compliance with their responsibilities and provide reports when requested (para 21), and paragraph 24 provides that where a specified body is not complying with the duty, the Prevent Oversight Board (of the Home Office) "*may recommend that the Secretary of State use the power of direction under section 23 of the Act. The power would only be used when other options for engagement and*

[2] See also s19A Terrorism Act – Offence of Failing to without 'reasonable excuse' to disclose to the police, as soon as is reasonably practicable a belief or suspicion that another person has committed a 'terrorist property offence'

improvement had been exhausted. The power would be used only to ensure the implementation and delivery of the Prevent duty."

105. As such matters are essentially procedural I will not address them further.

Sector-Specific Guidance

106. The remainder of the Guidance then provides Sector-specific Guidance. Of relevance for the UCU is Guidance in respect of Higher Education (paragraphs 50-74) and Further Education (paragraphs 75-103).

Higher Education

Introduction (paras 50-53)

107. The Sector-Specific Guidance for Higher Education, begins, as follows (para 50):

"*Universities' commitment to freedom of speech and the rationality underpinning the advancement of knowledge means that they represent one of our most important arenas for challenging extremist views and ideologies. However, there is also a risk that some people may use higher education institutions as a platform for drawing people into terrorism. Universities must take seriously their responsibility to exclude those promoting extremist views that support or are conducive to terrorism*"

108. The Guidance also states, at para 52 that "*We do not envisage the new duty creating large new burdens on institutions and intend it to be implemented in a proportionate and risk-based way.*"

Comment

109. It is worth noting here that the Guidance on the one hand recognises that universities are one of the most important arenas for challenging extremist views, but on the other hand sets out that they must take seriously their responsibility to exclude those promoting extremist views that support or are conducive to terrorism. For reasons explained above (page 21-22), there may be said to be a potential conflict here: the Guidance recognises universities must challenge such views but also says they should take their responsibility to exclude those promoting such views seriously.

110. It is also to be noted that the Guidance refers to excluding "those promoting extremist views that support or are conducive to terrorism". For reasons set out above (page 22), it seems to me the connection with being drawn into terrorism must

be fundamental to any action taken under this duty by an institution: this would also be consistent with the statutory duty under the Act.

111. The reference to the new duty not being intended to create large new burdens on institutions and intending it to be implemented in a proportionate and risk-based way, is clearly an indication that the duty is not intended to have the draconian effect, that some may fear, of preventing free speech or requiring spying on students. What is necessary is a "proportionate and risk-based response". Of course what is proportionate to the risks will depend on the facts of any one particular case.

Partnership (Paras 54-57)

112. The Guidance then goes on to set out what the Secretary of State would expect universities to be delivering in particular areas. The first is Partnership

113. The Guidance sets out that "*active engagement from Vice Chancellors and senior management of the university with other partners including police and local authority Prevent co-ordinators*" is expected (para 54); as is "*an internal cross-department group that shares information across the relevant faculties of the institution, with a single point of contact for operational delivery of Prevent-related activity*" (para 55); and "*regular contact with their regional higher education Prevent co-ordinators … [who] will help universities comply with the duty and can provide advice and guidance on risk and the appropriate response*" (para 56)

Comment

114. Again this is largely procedural requirement in respect of identifying risks. There is no guidance as to what should be done once any risk is identified

Risk Assessment (paras 57-58)

115. A risk assessment which makes an assessment of where and how their students might be at risk of being drawn into terrorism is expected. The Guidance states "*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 Guidance continues that "*We would expect the risk assessment to look at institutional policies regarding the campus and student welfare, including equality and diversity and the safety and welfare of*

students and staff. We would also expect the risk assessment to assess the physical management of the university estate including policies and procedures for events held by staff, students or visitors"

Comment

116. Again this is largely procedural requirement in respect of identifying risks. There is no guidance as to what should be done once any risk is identified

Action Plan (para 59):

117. The Guidance states that, with the support of co-ordinators and others as necessary, any institution that identifies a risk should develop a Prevent action plan. "*This will enable the institution to comply with the duty and address those risks*"

Comment

118. Again this is largely procedural requirement in respect of creating an action plan to respond to the risks. There is no guidance as to what should be done once any risk is identified

Staff Training (paras 60-61).

119. The Guidance sets out that compliance with the duty will require the institution to demonstrate its willingness "*to undertake Prevent awareness training and other training that could help staff prevent people from being drawn into terrorism and challenge extremist ideas which can be used to legitimise terrorism and are shared by terrorist groups*". All staff are expected to have sufficient training to enable them to understand factors that make people support terrorist ideologies or engage in terrorist-related activity, and recognise vulnerability to being drawn into terrorism and what action to take in response.

120. The Guidance goes on to state that: "*We would expect the institution to have robust procedures both internally and externally for sharing information about vulnerable individuals (where appropriate to do so). This should include information sharing agreements where possible*". The Guidance goes on to state that BIS offers free training which covers safeguarding and identifying vulnerability to being drawn into terrorism.

Comment

121. Again this is largely procedural requirement in respect of training. Insofar as the Guidance then returns to the question of sharing information, it does not add anything to the general guidance set out above, which I have already said is somewhat lacking in clarity (page 27-29 above). Again here, the Guidance merely states that the institution should have procedures in place for sharing information (where appropriate to do so). It does not begin to give any guidance as to where it may be appropriate to do so.

Welfare and Pastoral Care/Chaplaincy Support (para 63):

122. The Guidance states that: "*Universities have a responsibility to care for their students and we would expect, as part of the pastoral care and support available, there be sufficient chaplaincy and pastoral support for all students according to the needs of the particular institution. This is seen as a key element of compliance with the duty. Support is available from the regional higher and further education Prevent co-ordinator*"

Comment

123. It is to be noted that the Guidance recognises Universities' responsibility to care for their students, and that that obviously involves making sure there is sufficient pastoral support in place to prevent those at risk being drawn into terrorism. It seems to me that a function of ensuring such pastoral support is in place is to ensure that students are able to speak confidentially, without feeling there is a risk that information that they have disclosed will be shared. For reasons I have explained, I am not convinced the guidance makes that clear (page 27-29 above).

Speakers and Events (paras 64-69).

124. This, it seems to me, is a key aspect of the Guidance for higher education, aimed at students being protected from radicalising influences in university.

125. The Guidance states that "*In order to comply with the duty all universities should have policies and procedures in place for the management of events on campus and use of all university premises. The policies should apply to all staff, students and visitors and clearly set out what is required for any event to proceed*" (para 64).

126. It goes on to state that: "*The university clearly needs to balance its legal duties in terms of both ensuring freedom of speech and also protecting student and staff welfare. Guidance is available from Universities UK and the National Union of Students to support institutions to make decisions about hosting events and have the proper safeguards in place*." (para 65)

127. It continues: "*Universities must take seriously their responsibility to exclude those promoting extremist views that support or are conducive to terrorism. We would expect the policies and procedures on speakers and events to include at least the following:*

> *- Sufficient notice of booking (generally at least 14 days) to allow for checks to be made and cancellation to take place if necessary;*
> *- Advance notice of the content of the event, including an outline of the topics to be discussed and sight of any presentations, footage to be broadcast etc;*
> *- A system for assessing and rating risks associated with any planned events, providing evidence to suggest whether an event should proceed, be cancelled or whether mitigating action is required (for example a guarantee of an opposing viewpoint in the discussion, or someone in the audience to monitor the event); and*
> *- A mechanism for managing incidents or instances where off-campus events of concern are promoted on campus"*

128. The Guidance continues that "*where appropriate and legal to do so, a university should have protocols in place for the sharing of information about speakers with other institutions and partners*" (para 67)

Comment

129. Whereas, once more, a great deal of the Guidance relates to the process that institutions are expected to follow in assessing risk, it is plainly envisaged that there will be circumstances in which a planned event should be cancelled or mitigation action required such as the guarantee of an opposing viewpoint or monitoring.

130. The difficulty is that whereas as set above (page 6-8), section 43(1) of the Education (No 2) Act 1986 does not require an institution to take such steps as are practicable to ensure freedom of speech where that freedom of speech is not "within the law", the Education (No 2) Act 1986 does require, it seems to me, the institution to take such steps as are practicable to ensure free speech where the speech is not, of itself, unlawful.

131. It seems to me that the duty to have due regard to the need to prevent people from being drawn into terrorism, if and insofar as it is envisaged that institutions should

exclude those promoting extremist views that are not, of themselves, unlawful, may be said to inconsistent with that duty.

132. In particular it does not sit comfortably with section 43(2) of the Education (No 2) Act 1986 which makes it clear that the duty to ensure free speech within the law is secured includes that, so far as reasonably practicable, the use of premises should not be denied to any individual etc **on any ground** connected with the views of beliefs of that individual or any member of that body or the policy or objectives of that body.

133. Despite this apparent inconsistency, the Guidance does not expressly refer to the statutory duty within s43 of the Education (No 2) Act 1986 (although may be said to do so by reference to the reference to the University's "legal duties" and the Universities UK guidance which does include it). Nor does the Guidance make it clear that institutions must make decisions which accord with that statutory duty, nor does it give examples of situations in which an institution may be said to be acting in accordance with both statutory duties. It does appear therefore that the Draft Guidance appears to seek to avoid addressing this issue head on.

134. I should say, of course, that there is a risk that a court may say that s43 of the Education (No 2) Act 1986 does not actually operate to require a university to take all such reasonable steps to ensure that lawful free speech is secured.

135. For example, a court may say that taking "such steps as are reasonably practicable to ensure that freedom of speech within the law is secured" is to be read as meaning that the steps the institution must take to ensure freedom of speech must be within the law. Insofar as the institution is required also to have due regard to the need to prevent people from being drawn into terrorism, then it may be argued that the steps it is required by the law to take include giving due regard to the need to prevent people being drawn into terrorism, and that therefore it is entitled, if the speech gives rise to a real risk of such, to exclude the speaker even though there is nothing unlawful about what the speaker proposes to say.

136. Put another way, it may be said that it is not reasonably practicable for the university to ensure freedom of speech when it is under a duty to prevent people from being drawn into terrorism.

137. However, it has to be said that such arguments do not appear at all attractive – if the proposed free speech is lawful, it is difficult to see how it can be prevented under section 43 unless to allow it is impracticable: but that of course may depend on the exact factual situation.

138. Obviously, and in any event, regardless of the impact of s43 of the Education (No 2) Act 1986, any infringement with free speech must be consistent with Article 10, which as set out above, the courts will seek to protect unless there is a good reason not to.

139. In the end, however, the decision as to what to do is that of the University, having due regard to the need to prevent people from being drawn into terrorism, in addition to its duty under s43 and under Article 10 of the Convention, taking into account the exact circumstances of proposed events, views that will be expressed, and those to whom they will be expressed, together with other mitigating factors which may be taken into account which will allow the freedom of speech.

140. It will necessarily be a case-by-case decision for each University.

Safety Online (paras 68-69)

141. The Guidance states that universities would be expected to have in place policies regarding the use of IT on campus, which includes specific reference to the statutory duty. The Guidance states that educational institutions "*should consider the use of filters as part of their overall strategy to prevent people from being drawn into terrorism*" (para 68)

142. It goes on that "*to enable the university to identify and address issues where online materials are accessed for non-research purposes, we would expect to see clear policies and procedures for students and staff working on sensitive or extremism-related research*" (para 69)

Comment

143. Again, it seems to me that duty to have due regard to the need to prevent people from being drawn into terrorism, if and insofar as it is envisaged that institutions should filter extremist views that are not, of themselves, unlawful, is potentially inconsistent with the duty under section 43 of the Education (No 2) Act 1986.

144. The Guidance does not make it clear whether that is indeed intended to be the case.

Students Unions and Societies (paras 70-71):

145. The Guidance sets out the following: "*Institutions should have regard to the duty in the context of their relationship and interactions with student unions and societies. They will need to have clear policies setting out the activities that are or are not allowed to take place on campus and any online activity directly to the university. The policies should set out what is expected from the student unions and societies in relation to Prevent including making clear the need to challenge extremist ideas which are used to legitimise terrorism and are shared by terrorist groups. We would expect student unions and societies to work closely with their institution and co-operate with the institutions' policies*."

146. It continues: "*Student unions should also consider whether their staff and elected officers would benefit from Prevent awareness training or the chairing and facilitation training offered by the regional higher and further education Prevent co-ordinators. Many student unions have already undertake Prevent awareness training and higher education co-ordinators can give advice on the most appropriate training packages*" (para 71)

Comment

147. On the face of it this is largely procedural requirement in respect of having clear policies setting out what student activities are or are not allowed. However, such policies will need to include what events and speakers are permitted, and therefore the same issue as set out above apply: namely to what extent can the policy seek to prevent free speech that is not, of itself, an unlawful act given the duty under section 43?

Prayer and faith facilities (para 72).

148. The Guidance provides that the institution should have clear and widely available policies for the use of prayer rooms and other faith-related activities. "*These policies should outline arrangements for managing prayer and faith facilities (for example an oversight committee) and for dealing with any issues arising from the use of the facilities*"

Comment

149. As I have already noted, insofar as any policies for the use of prayer-rooms and faith activity are produced, it is imperative that they apply to all faith so as to prevent any suggestion of direct discrimination.

150. The sector-specific guidance ends with provisions setting out a proposed monitoring regime by regional higher and further education Prevent co-ordinators and other local providers to determine how the duty is being implemented and complied with.

Further Education

151. The sector-specific guidance for Further Education is similar, aside from the fact that there is no reference to any commitment to freedom of speech. Aside from that, the Guidance in respect of Partnership, Action Plans, Welfare, Speakers and Events, and Prayer and Faith facilities appear materially the same or substantially similar.

152. The Risk Assessment Guidance (paras 82-86) is substantially more detailed and includes that "*As independent organisations, each institution is required to have clear and visible policies in place covering staff, learners, learning and infrastructure (use of premises), capable of identifying where students or staff may be at risk of being drawn into terrorism. These policies and procedures will help an institution satisfy itself and government that it is able to identify and support these individuals*"

153. It continues that: "*This duty will complement the institution's responsibility under the Equality Act 2010 and cover student welfare, including equality and diversity, the safety of students and staff, and ensure there is awareness of the risks of being drawn into terrorism through Prevent awareness training*" (para 83).

154. The guidance goes on to state that the risk assessment should include policies and procedures for events held by staff, students or visitors, and relationships with external bodies and community groups who may use premises, and/or work in partnership with the institution (para 84). It states that they are expected to have clear and visible whistle-blowing and complaints policies and robust procedures in place to ensure that the sub-contracting of the delivery of course does not lead to inadvertently funding extremist organisations

155. The Staff Training provisions are also more detailed, and includes that "*we expect institutions to encourage students to respect other people with particular regard to the protected characteristics set out in the Equality Act 2010 (including with that being used for schools)*" (para 89)

Comment

156. Most obviously it is entirely unclear to me why there is no reference at all to freedom of speech within the Further Education provisions. As set out above (page 9), section 43 of the Education (No 2) Act 1986 applies to "any institution within the further education sector" (section 43(5)(ba)). Accordingly, I cannot see why there is no reference within this Guidance to the importance of ensuring, so far as practicable, free speech within the law.

157. Aside from the above, it is not clear to me why the Guidance is different in the other minor respects, because those differences do not appear to add a great deal to the Guidance for Higher Education.

Conclusion

158. I have commented on each part of the Draft Guidance that appears relevant to me. In summary however a key issue here appears to me to be the lack of actual concrete guidance, in particular as to what steps it is envisaged will be taken in respect of information sharing and whether it is envisaged the duty will extend to excluding lawful free speech, contrary to the apparent wording of the Education (No 2) Act 1986 in particular. It seems to me that the Guidance seeks to avoid such issues. The impact of that is that it will be down to individual institutions to make such decisions without any such Guidance. From the individual academic's perspective that means that there is little clarity as to what to expect from their institutions, and can only wait until policy is implemented or decisions made to challenge them under provisions such as the Education (No 2) Act 1986 or Human Rights Act 1998.

159. I hope that I have addressed the matters which I am instructed to address, but given the complexity of the issue, I am conscious that I may not have. If there are any queries

or any matters in respect of which I can be of further assistance, I hope that my instructing solicitors will not hesitate to contact me.

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20 January 2015

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