

# Freedom of speech on campus: rights and responsibilities in UK universities



Universities UK

## Foreword

The issues covered in this report are relevant to every higher education institution in the UK, as well as to wider society.

Violent extremism is one of the greatest threats to the liberty and safety of citizens in modern times. To an extent unprecedented in history, individuals acting alone or in small groups have the ability to cause mass murder in pursuit of a political cause. Recruitment to the cause is through diverse routes and secretive processes.

The Director of MI5 confirmed in October last year that the country continues to face a real threat from Al Qaeda-related terrorism. He observed that the threat is diverse in both geography and levels of skill involved, but it is persistent and dangerous and trying to control it involves a continual invisible struggle. Counter-terrorist capabilities have improved in recent years but there remains a serious risk of a lethal attack taking place. He saw no reason to believe that the position will significantly improve in the immediate future.

Prime Minister David Cameron, in his speech to the Munich Security Conference on 5 February 2011, spoke of young men who find it hard to identify with traditional Islam practised at home by their parents, yet also find it hard to identify with Britain too, because of the weakening of collective identity. He maintained that, '[u]nder the doctrine of state multiculturalism, we have encouraged different cultures to live separate lives, apart from each other and apart from the mainstream.'

In the eyes of some commentators, universities are trouble spots. They have large assemblies of intelligent young adults; their students join clubs and societies, including Islamic and other faith societies; they are institutions accustomed to debate and to protest; and tensions can arise and sometimes erupt between different political, racial and religious groups on campus. Moreover, it transpires that a number of those involved in violent terrorism in recent years have been university graduates, and some of them former student leaders of Islamic student societies.

Indeed, the setting up of the Working Group behind this report was prompted by the events of Christmas Day 2009 when Umar Farouk Abdulmutallab was apprehended in attempting to blow up a flight from Amsterdam to Detroit. Eighteen months previously he had graduated from University College London, where he had also been president of the student Islamic Society. An independent inquiry chaired by Professor Dame Fiona Caldicott concluded unequivocally that there was no evidence to suggest that he had been radicalised during his time as a student, and MI5 see the hand of the Yemen-based preacher Anwar Al Awlaqi in his conversion to violent extremism.

Universities have wide-ranging responsibilities. They are open institutions where academic freedom and freedom of speech are fundamental to their functioning; where debate, challenge and dissent are not only permitted but expected, and where controversial and offensive ideas are likely to be advanced. Intellectual freedom is fundamental to their mission, their teaching and their research.

But all freedoms have limits imposed by law, in order to protect the rights and freedoms of others. The rules are neither simple nor easy always to apply; and they continue to change. The Equality Act 2010 requires universities to protect certain defined characteristics; and there is a new regulatory structure which separates students' unions constitutionally from their host universities in England and Wales and places them under the regulatory control of the Charity Commission.

Universities need to go beyond the minimum prescribed by law to ensure openness and transparency in their internal relations, that meetings of student societies are open to all and that views expressed at them are open to challenge. This is to engage, and not to marginalise, different cultures. Universities need also to ensure that potentially aberrant behaviour is challenged and communicated to the police where appropriate. But it is emphatically not their function to impede the exercise of fundamental freedoms, in particular freedom of speech, through additional censorship, surveillance or invasion of privacy.

Following the events of December 2009 it became clear that there was little guidance available to universities in this area, and that it would be helpful to provide greater clarity in relation to the legal framework within which universities must operate, and more information about how other universities had been addressing these challenges. Experience has actually been very different in different universities.

It was with a view to filling these gaps that Universities UK invited me to chair a Working Group to consider these issues and to report. I am grateful to all who have contributed to it.

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## 1. Introduction

This report considers the role of universities in promoting academic freedom and freedom of speech, and some of the constraints surrounding these freedoms. These issues are not straightforward and are often contested. The report does not offer easy solutions or absolute rules but seeks to map out the different considerations that might need to be taken into account in the reconciliation of sometimes competing interests. It also aims to illustrate how universities have addressed these issues in the past.

Universities play an important role in society as places of debate and discussion. This role is underpinned by legislation – the Education (No. 2) Act 1986 and the Education Reform Act 1988 – which give universities a legally defined role to secure freedom of speech and promote academic freedom. These legal principles reflect the fundamental belief in universities as places where open and uncensored debate can and must take place, not least as a way of encouraging students to learn to think for themselves and develop their own opinions. In this context, views expressed within universities – whether by staff, students or visitors – may sometimes appear to be extreme or even offensive. However, unless views can be expressed they cannot also be challenged.

It is precisely by being places where ideas and beliefs can be tested without fear of control, and where rationality underpins the pursuit of knowledge, that universities have come to represent one of our most important safeguards against views and ideologies that divide and undermine our open society.

However, alongside this commitment to open debate and free speech, universities are also subject to a range of other requirements and obligations, some enshrined in the law, such as in relation to equality, human rights, and security. These considerations are vital to ensure the safety and well-being of students, staff and the wider community. For instance, equality legislation requires universities to promote good relations within and between different groups, and outlaws harassment of members of staff or students in certain circumstances; and security legislation requires universities to disclose to the police information that may relate to terrorist offences. Generally these requirements coexist with the university's commitment to academic freedom and freedom of speech. In many cases it is precisely by promoting free speech that an individual's rights are best protected. However, there are circumstances when universities must map out a way forward between contradictory positions.

The report starts by examining the meaning of academic freedom and freedom of speech: concepts which are often invoked but rarely defined. It then explores the contemporary context in which universities are operating, both in terms of the diversity of current student populations, and the wider national environment. It summarises the relevant law, and describes the Government's security strategy and other security initiatives and structures. It then reviews the various ways in which universities from across the UK have addressed these challenges and sought to reconcile differing priorities, drawing on an on-line survey conducted by Universities UK of all its members in 2010. Despite media accusations of complacency by universities in relation to security matters, the survey findings confirm how unjustified such accusations are and how seriously universities take their responsibilities in relation to the safety and security of their staff and students, alongside their obligations to protect and promote free speech and academic freedom.

The report builds on previous work carried out by Universities UK, in particular with regard to promoting good campus relations. It is intended to be of assistance to universities who wish to find out more about these issues when responding to developments on their campuses. It is also hoped that it will be of interest to a wider readership seeking to understand why

freedom of speech and academic freedom are so important to universities, and the context in which universities engage with competing interests on campus.

Thanks are due to the Working Group that was established by Universities UK to provide strategic oversight of the project. Its members are Professor Mark Cleary (University of Bradford), Dr Felicity Cooke (equality consultant), Jim Dickinson (National Union of Students), Roger Gair (University of Leeds), Professor Simon Gaskell (Queen Mary, University of London), Dr Paul Greatrix (University of Nottingham), Dr Jim McGeorge (University of Dundee), Professor Geoffrey Petts (University of Westminster), Dr Teerenlall Ramgopal (Staffordshire University) Legal advice was provided by Pinsent Masons Solicitors.

Particular thanks are due to Professor Malcolm Grant, Provost of University College London, who chaired the Working Group and oversaw the project's development with commitment and insight.

## 2. Academic freedom and freedom of speech

Academic freedom and freedom of speech are concepts that are frequently invoked but whose meanings remain rather elusive. They have no uniformly agreed definitions, even though they are in many ways intrinsic to the particular nature of universities and the role of academics.

But it is important to note that these freedoms are both enforced – and restricted – by the law of the land. They are part of the framework of rights described by the prime minister in his Munich speech on 5 February 2011 where active promotion must be the hallmark of a genuinely liberal country: ‘freedom of speech, freedom of worship, democracy, the rule of law, equal rights regardless of race, sex or sexuality. It says to its citizens, “This is what defines us as a society; to belong here is to believe in these things.”’

### Academic freedom

The concept of academic freedom has evolved in different contexts, with US and UK characterisations intrinsic to the premise of university autonomy and the position of academics within autonomous institutions. German approaches, based on the Humboldtian model, focus on unity between teaching and research with both staff and students able to enjoy academic freedom.

In the UK, the concept of academic freedom tends to be associated with a number of values. These include:

- freedom from state and political interference
- institutional self-governance and autonomy
- individual freedom to undertake teaching and research
- institutional excellence
- security of academic tenure
- peer review and open and rigorous criticism of ideas

These values, at least to the extent that they reflect the rights and freedoms of academics, are reflected in the provisions of the Education Reform Act 1988, applicable to pre-1992 universities. Section 202 of the Act requires regard to be had 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.*

Some post-1992 universities have adopted similar provisions in their constitutions.

Significantly, these provisions apply to academic staff but not to staff who are not academics, nor to students or visitors to an institution, nor to the institution itself.

The principle of academic freedom operates as a constraint on action taken by universities in relation to academic staff – put simply, it prevents academic staff from being disciplined, dismissed or suffering other detriment on the grounds that they have exercised their academic freedom. This recognises and protects a vital aspect of academic life.

The right of academic freedom is qualified by the expression ‘within the law’. This means that there are boundaries to academic freedom, but those boundaries are as set by the criminal and civil law, with the effect that acts which are unlawful are not protected. It is therefore the law that constrains the requirement to protect academic freedom, not a university’s choices.

### Freedom of speech

Freedom of speech is a wider concept that goes beyond the rights of academics and applies to everyone. It is commonly defined by reference to the freedom to speak freely without censorship or limitation. In practice, the right to free speech is not absolute in any country and is commonly subject to limitations which recognise the potential conflict between free speech and other rights.

Freedom of speech has a special role in universities, specifically protected as a matter of law. The legislation, in the form of the Education (No. 2) Act 1986, emphasises the significance of free speech for universities by imposing a legal obligation on them to promote and protect it, and in particular states that the only constraints on the duty to secure freedom of speech are those imposed by the law. As with academic freedom, it is for the law, not for institutions, to set limitations.

Section 43 of the Act provides that:

*persons concerned in the government of any establishment... 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.*

This is a positive and proactive legal duty. The obligation is not merely to refrain from limiting or infringing freedom of speech, but rather to do all that is reasonably practicable to ensure that it is secured. The duty is directed at free speech for all participants in university life – members of staff, students, and visiting speakers.

Section 43 also imposes a number of more specific obligations:

- A duty on university governing bodies to issue, and keep updated, a code of practice setting out the procedures to be followed by members, students and employees of the establishment in connection with the organisation of meetings and other activities on the university’s premises; the conduct required of members, students and employees in connection with any such meeting or activity; and such other matters as the governing body considers appropriate.

These codes will typically cover rights to refuse permission to attend or close an event in lawful circumstances, and the responsibilities of event organisers and members of the university, including observing good order during an event.

- A duty on every individual and body of persons concerned in the government of the institution to take such steps as are reasonably practicable (including where appropriate the initiation of disciplinary measures) to ensure that the requirements of the code of practice are complied with.

- A duty to ensure that the use of any university premises is not denied to any individual or body of persons on the grounds of their beliefs, views, policies or objectives.

Set out at Annexe B are examples of such university codes of practice, by way of illustration, dealing with speaker meetings and values and behaviours.

### **The role of universities in promoting academic freedom and freedom of speech**

Notwithstanding these statements of law, freedom of speech in universities goes far beyond legal requirements. Universities define their role as being one where debate is positively encouraged, and where a safe space is provided for a range of ideas to be considered, examined and dissected both in academic programmes and in the wider life of the institution.

Indeed by being places of debate universities are one of our most important pillars of civil society, and represent a safeguard against forces that divide and undermine society. If universities are to be the innovative and dynamic organisations that push back the boundaries of knowledge in areas of science, social sciences and the humanities, they must also be places where differing and difficult views can be brought forward, listened to and challenged.

The Dearing Report provides a useful comment stating that one of the four main purposes of higher education is:

*to play a major role in shaping a democratic, civilised, inclusive society.*<sup>1</sup>

This role in promoting debate extends also to relations with students. Students have always been at the forefront of protest movements and campaigns and for a number of students their time at university is the period when their thinking is challenged and re-shaped whether in relation to politics, religion or other areas. This is a valuable part of university education as it is precisely through exposure to a wide variety of views that students have the opportunity to develop important skills in the analysis and refutation of accepted ideas, positions and modes of behaviour. As two universities commented in response to Universities UK's 2010 survey:

*Protest in many guises is a regular occurrence here; it is generally accepted as part of the determination to maintain freedom of speech.*

*We are content that there should be peaceful protests by students, or staff, outside public lectures or meetings of our Council and Court.*

<sup>1</sup> Report of the National Committee of Inquiry into Higher Education, 1997

### 3. The importance of context

#### Diversity of political challenges

The current debates around academic freedom and free speech will inevitably be influenced by national and local circumstances, and these will change over time. Geography will also be relevant, with different priorities emerging for large metropolitan universities and small rural ones.

In recent years, universities have been involved a variety of challenges relating to international political differences, or animal rights activism, or conflicts due to different religious beliefs, each influenced as much by external political or geopolitical events as anything inherent to the universities themselves.

Universities UK's 2010 survey of universities provides evidence of this diversity. Differences of views relating to animal rights emerged as the most commonly experienced issue: respondents indicated that protests, publicity campaigns and attempts to gain access to animal facilities continue, though the level of activity has reduced in recent years. Political and religious disagreements, many triggered by events in the Middle East, also figured prominently, as well as challenges linked to the activities of business and industry, competing equality rights, and the use of the Welsh language.

Further, not only does the substance of controversy change over time, but also the ways in which that controversy manifests itself on campus. The 2010 survey highlighted the impact of new methods of communication that are being used to organise sit-ins, 'flash-mobs' and other instant, no-notice demonstrations, meaning that university activities can be disrupted suddenly, more easily and for longer periods.

It is therefore important to recognise the diversity of challenges experienced by universities and the fairly constant nature of this diversity, though some challenges may wax and wane in their intensity.

This means that universities will develop generic policies and procedures that are flexible to adjust to a variety of challenges, rather than focus them on any particular type of conflict. Any work by external organisations with universities may need to recognise this approach.

This does not mean that in a particular set of circumstances, where the evidence suggests that specific action is required, there should not be a strategy specifically developed to manage it. For example if there were robust evidence of significant antisemitism or Islamophobia on campus, steps would need to be taken to address those specific developments. Nonetheless, even in these circumstances a university might decide that the most effective way forward in the circumstances would be a campaign to address the issue in the context of a broader and non-specific set of policies or actions.

#### Mass higher education

The context in which universities now operate is critical when assessing their responsibilities and obligations in relation to freedom of speech on campus. What might have been an appropriate and reasonable response when universities consisted of small residential communities of young British students (if indeed that were ever the case) is unlikely to be relevant in the current era of mass higher education.

Over the last few decades, the size of the UK higher education sector has increased significantly. Fifty years ago, there was the equivalent of 100,000 full-time students in UK universities; 10 years ago there were over two million, and in 2008/09 there were 2.4 million. Over the last decade alone, student enrolments have increased by 49 per cent on average across all subject areas. Higher education institutions are increasingly large organisations, with several institutions having more than 30,000 students and most institutions operating across several campuses.

The traditional view of a student as someone aged 18-21 undertaking a full-time undergraduate degree and living away from home is no longer the reality for the majority of UK students. There are over 850,000 part-time students, the majority of students are over 21 and many are combining study with existing work and other commitments in their local communities. Almost a third of full-time students travel no more than 12 miles to their place of study and may be regarded as local. More than two-thirds travel less than 62 miles to their place of study. Students are now more often than not more embedded in their communities than in their universities, and given the increasing focus on flexible, distance learning, this trend is set to continue.

Further, UK higher education institutions are also increasingly international. Since 2001/02, the number of institutions with more than 5,000 students enrolled from outside the UK has risen from three to 19. Campuses in the UK are some of the most internationalised amongst Organisation for Economic Co-operation and Development (OECD) countries, with international students (defined by domicile) accounting for 14.7 per cent of all higher education enrolments in 2008.

Despite these changes, institutions continue to offer many services to their students to support academic and personal well-being, including personal tutors, counsellors, doctors and nurses, disability support officers, careers advisors, and international student advisors. Indeed the increasingly diverse student community means support services are well used.

Nonetheless, discussions about how a university should respond to issues such as campus security, invitations to controversial external speakers, animal rights activism or homophobia have to be firmly sited in the reality of university life, and not in some fictitious world of a small residential community of scholars. In particular, the permeability of universities and their local communities will mean that the boundary between the university and the community will often be difficult to draw.

## 4. Issues of equality

Universities are, as a matter of law, required to prevent unlawful discrimination, and to promote equality of opportunity. In particular gender, race, disability, religion and belief, sexual orientation and age are all protected characteristics, which means that staff and students cannot be treated less favourably, directly or indirectly, by the university as an organisation or by its staff or others acting on its behalf. This also includes a right not to be unlawfully harassed.

Difficulties sometimes arise in defining the boundary between free speech and unlawful harassment. Harassment is defined in terms of conduct or speech relating to one of the protected equality characteristics, which has the purpose or effect of violating another's dignity or of creating a hostile, intimidating, offensive or humiliating environment. In the context of academic freedom and free speech in universities, an important element of this legal definition is that it is not just for the complainant to state that the speech or conduct in question has had the relevant effect on them: the complainant's perception is just one factor in an analysis which requires consideration of all the circumstances, and crucially, whether it is reasonable to conclude that the speech or conduct had the prohibited effect.

This definition therefore allows – indeed requires – the speech or conduct to be viewed in context. Speech or conduct which occurs in the specific context of research or teaching, academic debate, speaker events, demonstrations and protests must therefore be judged by what is reasonable in those specific contexts. When judging whether speech or conduct created a hostile, intimidating, offensive or humiliating environment, it is necessary to take into account the essential characteristic of universities as communities in which a central place must be given to critical thinking, vigorous debate, the free exploration and exchange of ideas and opinions (including those which are controversial), and the respect and tolerance of diverging or opposing values, thoughts and beliefs.

This approach is also relevant where there are 'clashes' of protected characteristics, such as conflict between opposing religious beliefs, or between faith-based and secular positions (for example regarding the value of religious belief, the role of women in society, sexual orientation and religious morality, and abortion). The views and opinions expressed on either side of these debates may be considered 'offensive' by those on the other side of the argument, but that does not of itself amount to unlawful harassment. The question is whether a hostile, intimidating, offensive or humiliating environment is created and, while the line between what is lawful and unlawful may not always be easy to predict, the basic yardstick is to assess whether, judged in context, the speech or conduct goes beyond what is reasonable in either its content or impact. It will often be the manner and form in which views are expressed, rather than the opinions themselves, which take the relevant speech or conduct into the area of unlawful harassment.

Under the new Equality Act 2010, equality rights extend to a generic duty which will require universities to have regard to the need to eliminate unlawful discrimination and harassment, advance equality of opportunity and foster good relations between different groups.

The relationship between the duty to promote good relations and the protection of freedom of speech is complex but the two are not necessarily in conflict. Particularly where competing 'protected characteristics' are involved – for example clashes between religious faith and sexual orientation – the duty to promote good relations should not be seen as automatically requiring either party to refrain from expressing their opinions. Tolerance and respect for opposing viewpoints, and the right to hold and express those opinions, are central to the preservation of the right to freedom of speech and entirely compatible with the fostering of good relations.

Equality legislation is complemented by criminal law in the Public Order Act 1986, which makes it a criminal offence to stir up racial and religious hatred. This includes the use of threatening, abusive or insulting words or behaviour, and may often be a factor in determining whether or not to allow a visiting speaker to attend a speaker meeting. There is a specific exemption in the legislation relating to religious hatred which acknowledges that the offences should not be applied 'in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief systems.'

## 5. Regulation of universities and students' unions as charities

Universities and students' unions are charities, and regulated as such by the Charity Commission for England and Wales, the Office of the Scottish Charity Regulator or the Charity Commission for Northern Ireland.

In England, the Charity Commission is required to consult the Higher Education Funding Council for England (as principal regulator) before it may use its regulatory powers in relation to those institutions that are exempt charities. This requirement does not apply to institutions that are registered charities or to students' unions, and does not arise in the other administrations. The summary below is based on guidance from the Charity Commission for England and Wales, but in principle applies also in Scotland and Northern Ireland.

In strict legal terms most students' unions are separate from their university, so that the university is not directly responsible for the actions of the students' union (except for those specific obligations imposed by the Education Act 1994). Further, as private associations, students' unions are not strictly subject to section 43 of the Education (No. 2) Act 1986, hence for instance their justification for denying a platform to the British National Party (BNP) in the interests of student welfare. In practice, the distinction between students' unions and their universities can be hard to maintain.

### Political activity

The Charity Commission has issued guidance in the context of political activity. The guidance covers political activity generally for charities, with supplemental guidance for the period in the lead-up to elections. There is also specific guidance for students' unions. The material published by the Charity Commission concentrates on political parties and campaigning activities, which makes it less helpful in dealing with those on the edge of, or outside of, mainstream politics.

In summary, the charity law requirement is that, as a charity, an organisation cannot support a political party. It therefore must be clear that the charity is politically neutral and independent. It is necessary to consider what the charity's funds are spent on, what its property is used for and how the time of its staff and trustees is spent.

Beyond the guidance stressing the need for neutrality and independence, the Charity Commission is mainly concerned with how a charity campaigns. The guidance, therefore, is helpful in explaining that while a charity cannot support a political party it can support a particular policy (if that policy forwards the objects of the charity). In the context of a university or a students' union, however, this guidance is rather limited, in that it covers only how to deal with campaigning to support their objects in the areas of higher education and student affairs – this is not instructive in the more complex area of political comment generally. The guidance does cover issues of engagement with politicians, but again this is aimed at mainstream politics and is mainly to stress that while a charity's objects may mean it can legitimately support one party over another *on a particular policy*, it must still seek to avoid any partisan support and maintain its independence.

The specific guidance on students' unions is more directly relevant as it recognises the importance of allowing students to develop their political awareness by exposure to a number of views and of the wish for students to actively campaign. It specifically states that a students' union may:

*[e]ncourage students to develop their political awareness and acquire knowledge of or debate political issues. To achieve this it may make grants to political clubs or societies on the campus. But these should be even handed and non-discriminatory and for the purposes of the clubs or societies.*

It is important to distinguish the position of the students' union (and, indeed, the university) from that of its students. A students' union may comment on political, social, environmental or economic issues which relate to it, its work and to students generally (for example student funding) but should not engage in wider campaigns (for example human rights in another country). However, this does not prevent students joining together outside of the union to express any views or to collect funds for a particular purpose or cause.

In conclusion, the key charity law requirements are that charity funds, premises and staff time should not be used in direct pursuit of a party political activity, though they may be used to support students' participation in these activities, in line with a students' union's or university's educational purpose and objects. A charity should be independent and politically neutral. However, it is recognised that it is part of the students' wider education to develop their political awareness, which therefore allows funds, premises and time to be used by various societies and student groups, providing they are politically neutral.

### **Charity regulation and freedom of speech**

Section 43 of the Education (No. 2) Act 1986 does not apply directly to students' unions, although it applies indirectly through the code of practice adopted by the university in relation to freedom of speech under the Act.

As well as considering the criminal and civil law implications of a particular event or speech, the students' union trustees must also consider their charity law duties. They must act prudently and in the best interests of the students' union and consider the risks involved. This will include the risk to the students' union's reputation, assets and students as well as the risk of breaching criminal and civil law. The students' union should have a system for reviewing speaking events and identifying events and speeches which require them to consider their legal obligations further. For those events and speeches, the relevant risks should be assessed by the trustees – this may mean reviewing copies of potentially problematic speeches in advance and ultimately preventing speeches from going ahead if they breach the trustees' obligations.

From a charity law perspective, the students' union trustees (and not the university) will be responsible for a breach of charity law such as harm to the students' union's reputation. The university should consider its own charity law obligations when deciding how to approach such events, whilst recognising that it is not always able to control the actions of the union.

While it is the students' union's trustees that are responsible in this context, the overlap with the responsibilities of the university in this area is complex. The university will be under an obligation to uphold its obligations under section 43 (and human rights obligations) in respect of the students' union as an occupier and user of its premises (as will often be the case) and its trustees (as, certainly in the case of the sabbatical officers and student trustees, members of the university).

Already, in the short time since 1 June 2010 when the Charity Commission became responsible for students' unions, the Commission has intervened on one occasion apparently without a full understanding of the complexity of the students' union/university relationship and the complexity of the difficult legal obligations which have to be balanced. These difficulties are exacerbated by the impact of the Charities Act 2006, which emphasises the independence of the students' union, as well as the involvement of two regulators, the Charity Commission for the students' union and the funding council for the university. Further discussions are likely to be needed involving the Charity Commission, the funding councils, students' unions and institutions to explore the interplay between students' unions and universities within the framework of charity law and regulation.

## 6. Security on campus

Political concerns have changed over the years, reflecting the shifting external environment. In the 1990s, challenges to academic, research and pharmaceutical activities posed by animal rights campaigning were particularly visible. The last decade has been marked by conflicts relating to religious faith and in particular violent extremism linked to Islam. In a small number of cases, Islamic extremism linked to terrorism has involved students and graduates of UK universities. The nature of this terrorism is different to previous manifestations in its capacity to cause mass fatalities with the perpetrators willing to die in the process. Other issues include threats posed by dissident Irish Republicans, political extremism, and industrial and cyber espionage.

Despite some media reports, the view of experts within government is that the higher education sector does not currently have a major problem with violent extremism, though of course that could change in the future. Meantime, due to the nature of universities as open communities where people, often young, come together and are exposed to a variety of views at a time when they may also be exploring their own identity, the Government recommends that the sector does need to be vigilant and aware of the challenges posed by violent extremism.

Both the Government and the police have characterised people at risk of becoming violent extremists as being vulnerable people whose movement into violent extremism may originate from a variety of factors in their background. One approach that has been encouraged by the police is for universities to think about vulnerable people within their student and staff community and how they can be identified and supported rather than focus on identifying radical or extreme groups or behaviours. But generally there is no easy way to identify those who may move into violent extremism compared to those who may hold extreme views. Indeed the process of radicalisation that may result in violent extremism is normally undertaken in a comparatively private and hidden way. Further, it has to be recognised that universities are only one part of the lives of staff and students and that there are other influences on their behaviour and actions.

Separately, there is also the important dimension of entirely legitimate research by academics into potentially sensitive areas – such as terrorism – involving a need for the possession of legitimate research materials that could get close to infringing the boundaries of terrorism legislation as well as requiring careful access controls. What is not in dispute is the crucial role of universities in undertaking teaching and research in areas related to security, terrorism and resilience, though clearly particular care needs to be taken in this area to avoid infringement of the law.

Set out at Annexe C is a summary of the main legal provisions relating to security issues on campus. In brief, the Public Order Act 1986 contains a range of criminal offences which can be committed by speech and conduct, characterised by violent conduct or by speech and actions which threaten violence or cause fear, alarm or distress. These provisions are often considerations for universities and students' unions in the context of invitations to controversial external speakers.

The Terrorism Acts 2000 and 2006 define certain criminal activities relating to terrorism in terms of inciting acts of terrorism, including through the glorification of terrorism, disseminating terrorist publications and belonging to or supporting proscribed organisations. They require disclosure to the police of any belief or suspicion that another person has committed an offence relating to terrorist money or property. Terrorism itself is defined as including the use or threat of serious violence against a person or serious damage to property, for the purpose of advancing a political, religious or ideological objective.

## Government strategy

The previous Government's response to security challenges was delivered through a strategy called CONTEST, with four elements:

- Pursue – to stop terrorist attacks
- Prevent – to stop people from becoming terrorists or supporting violent extremism
- Protect – to strengthen protection against terrorist attack
- Prepare – where an attack cannot be stopped, to mitigate its impact

Prevent is the element of the Government's counter-terrorism strategy that has been most visible to universities. The Prevent strand aimed to support community cohesion and thereby deter or divert people away from violent extremism. It provided funding to support various activities. Initially universities were not seen as relevant organisations for Prevent work, but Universities UK's 2010 survey and discussions with external organisations (held as part of the supporting work for this report) both indicated that over the last few years there has been increased engagement by and with universities as part of the Prevent agenda.

The Prevent approach has been criticised for its focus on one particular group within the community and for its use of community cohesion strategies to tackle counter-terrorism. The strategy is currently being reviewed by the Government and it is clear that its focus and approach will alter over the next few years. Early indications suggest that universities will be seen as important organisations within the new strategy and early engagement between the Government and institutions may be helpful in ensuring understanding of and, where appropriate, support for the new approach.

Universities UK's 2010 survey reported extensive engagement by universities with Prevent: two-thirds of universities indicated that their institution had engaged, and several expressed a wish to do more. Some reservations were also expressed.

*Director of Student Affairs is a member of the local PREVENT steering group. PREVENT team members regularly visit campus and develop working relationships with appropriate colleagues.*

*We had a meeting, at his initiative, recently with the Council's Prevent coordinator. We have agreed to keep in touch. The city is considered very low risk: if this were not the case or if this changes, we would engage further.*

*Extremism in this area could come from a number of areas, e.g. right-wing activities. We are using Prevent not only to check our intelligence information, but also to have a constructive dialogue by including a number of parties from our diverse institution, partly to reassure, but mainly to restate our values as an open and inclusive institution.*

*The Prevent agenda does not seem to us to be sufficiently focused, realistic or co-ordinated. For example, there seem to be too many cooks, with little joining up of initiatives taken by sector bodies, local authorities and the police.*

*We engaged indirectly with Prevent through our links with Counter Terrorism Command. However, amongst students, Prevent is not highly regarded and we are sensitive to this.*

## The police and security services

Each police force has a unique relationship with its local university, with varying degrees of contact and engagement, though sometimes relations can present problems simply due to the nature and size of universities. Some institutions lie across police, council and county boundaries which intensifies the difficulties of communication.

To address these issues the Association of Chief Police Officers (ACPO) has developed a document titled *The Application of Neighbourhood Policing to HEIs (2008)*. This guidance encourages forces to recognise that a university should be seen as a neighbourhood or series of neighbourhoods and consideration should be given to allocating a designated uniformed officer to provide a better service. Even if this approach is not possible, all universities fall within a neighbourhood police area and have contact with a range of police officers and police staff. The majority of police contact with universities focuses predominantly on investigating or offering support and advice in relation to incidents of general crime and disorder.

When appropriate, officers from specialist police units, such as counter-terrorism officers, major crime officers and drugs officers, will also work closely with university representatives. Police engagement with universities aims to reduce crime and anti-social behaviour as well as providing reassurance to students and staff and improving confidence in the police.

Only a small amount of police-university engagement is explicitly about preventing violent extremism. In relation to violent extremism, some good examples of engagement between police and universities include:

- awareness training in preventing violent extremism for staff and students
- the use of drama to encourage debate
- interfaith groups meeting to discuss and debate how to work peacefully together
- the use of 'ACT NOW' tabletop exercises where students take on the role of counter-terrorism police in a fictional incident
- participation in cultural awareness or religious celebration events
- regular police-students-staff liaison meetings
- conferences and seminars to discuss how universities and the police can work together
- close liaison in respect of 'hate crime' recording between police, universities and local authorities

The 2010 survey asked questions about engagement with the police, Counter Terrorism Unit (CTU), Special Branch and the security services. Nearly all respondents had regular contact with the police, just over half had regular contact with the CTU, and around half with Special Branch. Around a quarter had regular contact with the security services.

Other organisations with which universities reported contact included the National Extremism Tactical Coordination Unit (which provides daily email digests on animal rights issues), the UK Border Agency, the military, local faith groups, local community groups, and local authority resilience and community cohesion groups. Relations with these groups are characterised by regular meetings, which generally appear to work well. Typically university security managers are the first point of contact in relation to crime prevention and community relations. A number of institutions also have dedicated campus police who contribute to relevant working groups and committees.

Extracts from the survey describing relations with the police include the following comments:

*Regular contact with campus police officers – they are members of our Security Monitoring Group.*

*Head of Security meets the police and special branch on at least a monthly basis and more as necessary. They get direct proactive briefings from them.*

*There are designated contacts within the University and regular meetings at all levels. The frequency ranges from fortnightly with the police at operational level to annual with senior officers. Information sharing protocols and use of designated contacts have been discussed at these meetings.*

*Our main strategy has always been to establish and maintain very good relationships with these groups.*

*Relationships with these agencies are reflected in the University's Business Continuity Plan, its Emergency Plan, and its Security Strategy.*

*Good relationships and open communications with local beat officer, dedicated Special Branch liaison officer and local area commanders.*

*The local community officer will shortly be provided with a room on campus so that better communication with staff and students can take place. Terrorism Prevention Officer is a member of a working group on the University that meets periodically to review risk of terrorist activities.*

*We have sought advice on specific potential speakers.*

*Police involved in safety campaigns, office to open on campus, welcome new students, Freshers Fayre, monthly exchange of information, police advise on conduct for Freshers week plus policing of major social events.*

*Operational orders for key events; generic data-sharing protocol; informal channels of communications; close relationship re VIP visits, which has led to University staff delivering training to new officers in protection team.*

*We have jointly organised an event at Police HQ on extremism. We have our own Community Monitoring Group which includes Police representation.*

The 2010 survey revealed that contact with specialist security police was understandably less frequent but a number of universities reported contact, some on a regular basis with key contacts, others more ad hoc when particular issues arose. Comments in the survey included the following:

*Again, we try to maintain a single point of contact for dealing with the CTU. We have informally articulated the circumstances in which we would not release information to the CTU.*

*Direct linkage between Special Branch and Registrar.*

*Generic data-sharing protocol; informal channels of communications.*

*A liaison role has been created within the University Security Office to work with the Police Counter Terrorist Security Adviser (CTSA) and University departments.*

*Full co-operation, where possible.*

Comments on the success of liaison with specialist police were more mixed, with some reports of a lack of understanding by the specialist police of aspects of university life.

*Regular contact with police and occasional contact with Terrorism Prevention Officer for advice and guidance in managing the (low) risk of terrorist activities. Very helpful relationships with Police Special Branch and new agreement for monthly informal updates.*

*Special branch have no idea how to communicate. They have all sorts of strange ideas about what and how people will report what they think of as suspicious, but which are far from abnormal in a university. We have occasional discussions with the police about using proper channels if they want information – coming through the university secretary's office rather than a junior course administrator.*

## 7. Reconciling competing interests: universities' experiences and strategies

Universities UK's 2010 survey of universities was distributed to all its members (vice-chancellors and principals), asking them to describe the nature of the challenges that they had faced in relation to the sometimes competing priorities of freedom of speech, security and how they managed the reconciliation of different interests on campus. The purpose of the exercise was to draw on the experiences of different universities, so as to provide a central pool of useful guidance for use by other universities in the future.

The survey was carried out by way of an on-line questionnaire. Responses were received from 40 universities across the UK.

Some overarching themes emerged:

- The circumstances which gave rise to most challenges experienced by respondents related to speaker meetings, protests, student societies, displays of notices, distribution of literature and the impact of electronic communications.
- A number of respondents reported having to manage competing interests and differing views in relation to lawful speech, individual/group behaviour and the banning of groups.
- The substantive issues were diverse and included activities related to animal rights, different political groups, different faith groups, gay rights, ethical campaigns and language rights. The most common type of challenge reported was in connection with animal rights. Situations relating to politics and extremism linked to religion were also common.
- Respondents indicated regular contact with a range of relevant organisations including police and specialist police (counter-terrorism and Special Branch) and a number reported regular contact with the security services. Most respondents indicated that these contacts worked well and useful dialogue resulted, but some areas for improvement were highlighted around communication by the police with senior university managers. A number of respondents reported on engagement with the Prevent agenda.
- A range of different senior managers have responsibility for promoting good campus relations within universities; these include pro-vice-chancellors, directors of student services, heads of equality and diversity, and directors of student operations.

The responses fell into different thematic categories, which have been reproduced below with extracts grouped together under structured headings. The summary below does not reproduce all the survey responses, and does not necessarily reflect the order in which the survey questions were asked. Inevitably not all the responses fell into easily definable categories.

### (i) Speaker meetings

Half of the institutions that responded indicated that they had experienced challenges in relation to speaker meetings, including issues relating to the invitation of controversial speakers who were perceived as being likely to breach the law, demonstrations outside lectures, and attempts by other groups to prevent meetings taking place.

The respondents outlined a number of approaches that their universities had taken to try to manage speaker meetings. Most sought to oversee speaker meetings through ensuring speakers, and the societies that invite them, adhere to relevant university codes on freedom of speech. Advance planning and the establishment of the appropriate agreed procedures emerged as an important element, some universities having set in place some quite

extensive plans and protocols for dealing with controversial speaker meetings. A number of respondents have developed specific policies and protocols to manage speaker requests, which may include risk evaluations, notice periods and facility bookings as well as liaison with the police.

### Establishing clear policies and procedures

*In accordance with Section 43 of the Education (No. 2) Act 1986 (referring to freedom of speech in universities), the University Council, the governing body, has issued and maintains a Code of Practice to be followed by members, students, and employees of the University for the organisation of meetings and public gatherings, etc. which are to be held on University premises, and for the conduct required of members, students, and employees of the University in connection with such meetings, etc. University departments and institutions that provide rooms or other facilities for speaker events and meetings (that is, those that fall outside their normal academic, teaching or research activities) report occasional difficulties in deciding whether a particular event/meeting may be held, either because of (i) the subject matter or purpose, (ii) the past history of the speaker(s), or (iii) the likelihood of demonstration or disorder.*

*Policy document covering the approval of Speakers. Intelligence from other stakeholders. Disciplinary action against societies which infringe university policies.*

*Speakers need to be invited by the University or by a student society; or to be taking part in a conference using University facilities. Due attention is paid to security in advance of any event where a protest is anticipated.*

*Code of Practice for meetings on University premises, including a requirement for a formal (10 day) notice period for an event and an understanding that informal SU channels would inform other interested societies (who may potentially take an opposing view to a speaker) of the nature of an event. Where a Student Society consistently breached the Code of Practice they were banned from inviting any external speakers to the University for a term. The SU also fines Societies for breaches of its procedures. We maintain a list of all external speakers invited to the University which demonstrates the University's commitment to free speech.*

*There are independent, university officers who have general responsibility under University regulations for the maintenance of good order and discipline within the University. They have particular responsibilities for upholding freedom of speech and for the orderly conduct of meetings and public gatherings on University premises, in accordance with the Code of Practice issued under Section 43 of the Education (no.2.) Act 1986. Good communication channels between these officers, the Security Office, the Department providing facilities and, where necessary, the police when such an event comes to notice has been developed; this helps ensure that risks are properly assessed and that appropriate action has been taken, including (rarely) refusing use of a facility on safety grounds.*

*The University has introduced revised arrangements for the booking of space by external organisations. These arrangements are supported by a lease agreement that has been drafted by the University's Legal Department. In addition, the University has established a single point of contact, through the Registrar's Office, for confirming what meetings, events, etc. can be publicised and/or endorsed through the official institutional channels of communication.*

*Close liaison with the Students' Association regarding the forward planning of the Association's events. Encouraging debates rather than events, so that both sides of a particular issue are presented – or at least ensuring that a subsequent event presents an alternate viewpoint. Emphasising the University's commitment to academic freedom within the law. The University passed on the charges associated with the planned event to the SU who withdrew the invitation to the speaker.*

## Managing the meeting

*Finding out who has been invited and ensuring that the audience is the 'correct' one – for example internal to the University, if that is appropriate.*

*We had to relocate one lecture a few years ago when students occupied the stage, but this has been the only occasion, and that was because of the speaker rather than the content of the lecture; most students respect the right of speaker to speak.*

## The role of the Chair

*There has been some heckling within lectures but it has been possible to control this by a strong chairman, who is issued with clear instructions for warning hecklers.*

*Good guidance to chairman. Assertion that the institution respects the rights of speakers to express their views. This is formalised in our Code of Practice on Free Speech. Tolerance of peaceful demonstrations outside public lectures. Making it clear to the audience that all speakers will take questions and that this includes challenging questions, so they can have their say.*

## (ii) The boundaries of free speech

A significant number of respondents reported having to adjudicate on what was and what was not legitimate and lawful free speech, be that in relation to external speakers, students or staff. Situations identified included objections to speakers on the grounds that their visit could be interpreted as an endorsement of their views by the university, and objections to certain people on the basis that they had promoted violence or racial hatred in the past. Issues also arose regarding the accurate reporting of events.

## Identification of what is lawful free speech

*We have experienced some difficulties in relation to a student who stood as a BNP candidate. Objectionable / racist posts were made by others on his My Space pages. The police were involved but it was not deemed actionable under the law. The local Race Equality Council wanted us to act. There was considerable frustration from those who were offended that the university did not just expel the student for his views. This situation needed careful management, especially in relation to the Race Equality Council. The strategy used was to meet with the student having identified that our university was mentioned on the My Space page and thus associated with the offending material. We used the University Equality Policies and the student disciplinary procedure. In this way we were able to get the offensive material removed and warn the student. The material was not clearly illegal so although we did not have support from the police it was important for local and internal relations to act but also important not to overreact because the student did not actually write the material.*

*We have taken a clear view that we encourage freedom of speech and recognise that not all speakers' views will meet with agreement from others. So far, all events have gone smoothly.*

*One of the challenges is to ensure that when lecturers cite racist views that they are very careful to be sure that these views are not misinterpreted as theirs. This happened in relation to a group of international students and the misunderstanding was exacerbated because their first language was not English. The strategy was to respond to the anonymous student complainant and to discuss the situation with the lecturer. The lecturer apologised to the group for misunderstanding and explained that the views were absolutely not their own. The Universities Scotland Race Equality toolkit for T&L was specifically circulated throughout the faculty.*

## Procedures and protocols

*Our Code of Practice on Free Speech was designed to allow speakers to speak freely, provided it is lawful. We updated it last year to strengthen and clarify this. If there is an objection to a speaker then this is referred to the Free Speech Group, set up according to the code, which includes a Pro Vice-Chancellor, an academic, a lay governor and the General Secretary of the Students' Union.*

*We seek to manage such challenges through a protocol on freedom of expression developed three years ago. Meeting with student groups to explain the framework for free speech is usually helpful, and where necessary we collaborate closely with the students' union.*

*A clear approach based on principles of freedom of speech not on emotion or fear of others' reactions. Where security costs may be high, informing the booker of the event that they must meet the costs: this has deterred some controversial speakers in the past. We have added a new institutional value of Tolerance.*

*There have been objections by some students and staff to speakers appearing at the institution when they have felt that this means an endorsement of their views by the institution. We have made it clear from the Senior Management that speakers express their own views and have never cancelled a lecture for this reason.*

## Accurate reporting of incidents

*Reporting of these episodes is often inaccurate, so we work hard to establish the facts of the matter, and complain if appropriate. The SU has taken a much firmer line in reminding organisers of events of the need to comply with our code of practice. We have also involved the SU fully in dealing with complaints and this has also been beneficial, as they have a much better awareness of the issues involved.*

*Where there is a challenge and it is thought appropriate speakers' comments have been monitored and action taken to reduce the risk of the prevention of free speech.*

## (iii) Protests

Just over half of respondents indicated that issues had emerged in relation to protests. The focus for protests was diverse, including protests related to religious facility provision, political developments in the Middle East, South Asia and Southeast Asia, the policies of a particular Christian denomination, language equality issues, the closure of academic programmes, animal research and ethical concerns about certain businesses.

## Dialogue and compromise

*Protests are handled well by our own security staff and in co-operation with the police if they are outside our premises. The Gaza occupation ended peacefully. The relations between the student occupiers and our security staff were good. We agreed to some of the reasonable student demands without committing ourselves to anything we thought was inappropriate. This was not exclusive to the University of course – the pattern of occupation, demands and resolution was common to several HEIs. We made it clear at the time that intimidating behaviour on campus towards any individual or group of students was not acceptable; a universal email was sent out signed by the Pro Vice-Chancellor and General Secretary of the SU.*

*The challenges we have experienced in regard to protests fall into two categories. First, we have had lots of complaints about events organised by a Palestinian solidarity group – for example, students 'playing dead' on the steps of the Union Building to represent Palestinians killed by Israeli troops in Gaza, and a theatrical wall (complete with anti-Israeli graffiti)*

*to represent the West Bank barrier. Secondly, we have had problems with conventional demonstrations when slogan-chanting has come close to, or crossed, the line of acceptability. We have sought to mediate between different groups, with a view to explaining and enforcing the protocol on freedom of expression. This can, for example, lead to a rewording of banners to render them less extreme. In the latter case, we have sought to use the protest organisers to ensure that slogans are acceptable, and if necessary have involved the police.*

*Proactive management of space and communications with the student body and, where relevant, externally.*

*Effective communication with student leaders. Willingness of the most senior staff in the University to meet with leaders of the protest to discuss their concerns/campaign and in the case of concerns about particular businesses to agree to take a paper on ethical investment to the University's Finance Committee.*

*The University works in close partnership with the University Students Union, which does (rightfully) engage in protest activities. However, these protests are managed peacefully and do not present any problems to the University.*

#### **(iv) Student societies**

A significant number of respondents said that they had had some difficulties with student societies. Most reported that the university generally had a good relationship with the students' union but that relations with some student societies were less consistent. Issues identified included difficulties with religious groups on equality issues, with political groups, and difficulties in ensuring that certain student groups engaged with other student groups and with the wider students' union and university.

#### **Policies and procedures**

*Ensuring that University student clubs and societies properly inform the University and other relevant authorities of events (in accordance with the Code of Practice for meetings or other public gatherings issued under Section 43 of the Education (no.2.) Act 1986) can be a challenge. Under the Code, the University issues Notices with which students are expected to comply, whether they act as individuals or collectively.*

#### **Relations with students' union and student societies**

*The Director of Student Operations and Support has responsibility for liaising with the SU, key Student Societies and the overall 'good campus relations' agenda. By making this senior manager available to the leaders of key Student Societies and holding regular meetings with SU officers, the University attempts to head off major problems. The SU also convenes a group for political societies to meet and discuss issues.*

*Close liaison between senior officers and the Students' Union.*

*Vigilance coupled with disciplinary action and close working with the Students Union.*

*The Student Union constitution has recently been reviewed and includes sections dealing with this matter.*

*The Students' Union introduced a better induction for Clubs and Societies on equality and diversity issues.*

*Student societies are managed through the Students' Union. The University has had no issues brought to its attention by the Students' Union. The University has a long-standing close and productive relationship with the Students' Union and is satisfied that any issues of this kind that might arise in the future would be brought to its attention.*

*We have monthly meetings involving the Student Union officers and senior members of the University's Corporate Management Team. We intend to resolve such matters before they grow and become issues or challenges.*

*We are fortunate to enjoy excellent relations with our SU and have done for some time. We have an early dinner with SU Sabbaticals and Executive to get to know them and break the ice before the start of the year. We listen and work with the SU.*

*Regular meetings with Director of Student Operations and Support and other senior staff have ensured an excellent relationship with the SU, characterised by open dialogue.*

### Dialogue and compromise

*The Christian Society objected to the removal of Gideon bibles from halls of residence rooms. The strategy used was to discuss the issues involved with the students and to agree to have a supply of bibles available via the multi-faith chaplaincy.*

*Some societies have tried to exclude others from joining. The legal position was explained and there has been no further problem in this regard.*

### (v) Incidents on campus

Around a third of respondents indicated that their institution had experienced challenges in relation to individual or group behaviour and incidents on campus. These incidents included police activity on campus, the behaviour of sports teams, media coverage of campus issues, ethical issues around links with certain businesses, and hostility to certain academic areas.

### Reducing the risk

*To reduce risk in this area, the University has developed a robust and effective culture of communication and liaison between the Vice Chancellor's Office, the University Security Office, University Departments, the police and relevant community representatives. Joint briefings and de-briefs are carried out, especially for larger, major events.*

*The University created a website in order to communicate information and policy concerning biomedical research and specifically work with animals.*

*We deal with these challenges both by personal contact with these groups from the Senior Management level and through the Good Campus Relations Group. Senior managers meet the Islamic Society on several occasions to hear their concerns, discuss School policy and clarify the policy of the Society. We established very good and open relations with the Society and a mechanism for dealing with such things in the future. But membership of student societies changes each year and we cannot be complacent about this. We also have an excellent inter-faith adviser whose help is invaluable on these occasions. We set up a Good Campus Relations Group in 2007, in the first instance to respond to Universities UK guidelines and to check our procedures. It includes senior office holders and representatives of the SU. This has become the main forum for discussing particular issues which have arisen and how to deal with them as well as proposing ways to foster good relations on campus.*

### Responding to incidents

*We are one of the only universities in the UK to have had people arrested on campus under the Terrorism Act. This proved to be a challenging time for the institution, as was the aftermath. We provided clear statements to the University community and beyond, explaining the action taken.*

*A very small number of incidences of low-level antisemitic graffiti. Good relations between Security and Jewish student community; clear contact points between Jsoc and Security*

*for reporting incidents; where incidents have been reported they have been taken seriously, investigated thoroughly, in consultation with Jsoc, and the Police involved; we have used incidents as a means of promoting awareness among staff; the local University Police Beat Officer has also taken a positive interest in the area and we provide him with a regular contact with Jsoc to discuss issues.*

*We had a problem with a motion passed by the students' union (via a referendum) which was – wrongly – portrayed as gagging the Jewish Society. This occasioned a good deal of press coverage. The only strategy available to us was clear communication – firstly to explain that the union is independent of the University and secondly to make the point that the motion in question was not in any event capable of bearing the construction put upon it by some press reporting – the Jewish Society was not in fact being prevented from representing the interests of Jewish students on campus. Our communications involved meetings with representatives of the British Board of Deputies and the UJS.*

*A student tore down posters of Darwin in the library which caused £200 of damage as he did not agree with evolutionary theory. We dealt with this through the code of student discipline. We've had other issues, again dealt with through the Code, of students trying to impose views on others. We explained the expectations of a university environment.*

*A senior member of the SU consistently challenging the University's commitment to diversity and attempted to undermine it by convincing other students to accept his belief. We heard his concern. Wherever appropriate the University explored and investigated his grievance.*

#### **(vi) Display of notices and other communications**

Around a third of respondents indicated that their institution had experienced difficulties in relation to the display of notices, distribution of literature and electronic communications. These include misleading notices, inappropriate email usage, the distribution of inappropriate literature, displays of artwork, notices commenting on particular countries, the use of university websites by external commentators, and complaints about content in university magazines.

*The University operates a set policy regarding the display of notices. Unauthorised notices are removed by security.*

*We have an IT Conditions of Use which students have to agree to abide by when they arrive at the institution. We have tracked down inappropriate use of email and blogs and taken disciplinary action. The campus is small and inappropriate notices can be removed. We have provided more official spaces for appropriate notices and posters to be displayed.*

*We have agreed procedures for distributing material on campus and Security staff are proactive in identifying and removing inappropriate material.*

*The University's Policy on Acceptable Use of Information Systems Facilities provides a framework for managing electronic communications. This is reinforced by the procedure for confirming through the Registrar's Office what meetings, events, etc. can be publicised and/or endorsed through the official institutional channels of communication.*

*Close liaison with the Students' Association and a willingness on their part to allow senior management in the University to take a final view on the acceptability or otherwise of particular material.*

*We have a rule that notices have to have an English translation if they are in another language. The need to do this encourages individuals to reflect on their notices.*

### **(vii) Relations with the local community**

Just over a third of respondents indicated that their institution had experienced issues in relation to the local community, mainly relating to practical issues around noise, parking and rubbish rather than concerns about the activities of particular community groups or student groups.

A few institutions did highlight some specific cases where local communities and their representatives had expressed concern about specific activities on campus, with one reporting that a local politician had questioned the invitation of a particular speaker to the university, and another that the local Jewish community had raised concerns about the impact of certain activities on the Jewish student community.

*There was a recent demonstration by the English Defence League and counter demonstration in which some students were involved. We didn't intervene as it was a matter of public order so the police were present. In relation to students in the counter demonstration, we took the view that it was their right to participate.*

*Use of the University's prayer room facilities by members of the local community. Use of the University's main prayer room is monitored on a day-to-day basis by security staff. The University intends to establish a liaison group to oversee the broader aspects of the operation of the prayer room.*

*Regular attendance at local community group meetings with colleagues from the Students Union. Joint response protocol with the Students Union, Police, Anti-Social Behaviour team – as agreed with local residents groups.*

*A Student Community Partnership is in place, involving both universities in the city, a liaison officer and a protocol. It works well. The SU also issues appropriate messages to students asking them not to join in certain activities that will be a serious nuisance to other residents of the city.*

*Some of our LGB students picketed the mobile blood donor facility as it was not accepting blood from the LGB community. We had discussions with both parties, which allowed both the discriminatory point to be made and the blood donor process to take place without the picketing.*

### (viii) Reconciling competing interests

Examples of how universities have addressed competing interests emerged from the 2010 survey, many raising issues arising from invitations to British National Party (BNP) speakers.

*The only substantial challenge we have faced was when a student wished to invite Nick Griffin to speak on campus. We allowed this on certain conditions, but when it became clear (largely through UCU mobilising people) that very large numbers of people would be descending on the University to protest, on public order grounds it was necessary to withdraw permission. During the fortnight while all this was happening, it prompted a generally constructive and worthwhile discussion amongst staff and students on the limits of freedom of speech.*

*Unbeknown to the University, some media students invited two BNP members to be interviewed on campus. Some staff found out that this was happening and objected. When the University was alerted to it the BNP members were escorted off campus on the grounds of safety. This did cause an internal debate on the nuances of freedom of speech vis a vis opinions that are outwith our values. We came to the conclusion that a balanced debate or passive membership is one thing, but using our institution as a vehicle is quite another.*

*A clear approach based on principles of freedom of speech not on emotion or fear of others' reactions.*

The 2010 survey also revealed the extensive and generally productive engagement that exists between universities, their students and external organisations to allow debate and discussion on campus, whilst at the same time being aware of the boundaries to this debate and the need for vigilance in safeguarding their student, staff and wider community. This often involves difficult and independent decisions, based on evidence and consultation with staff, students and, when appropriate, external bodies.

*We have always taken a very firm line about academic freedom being paramount – so we do not cancel events unless we cannot guarantee the safety of our students and staff. This firm line is very important. Gauging the likely nature of the protest is key – the police are likely to be involved in some instances (e.g. a particular Ambassador speaking on campus) whereas for other events we would just increase internal security.*

*The University always starts from the point of wishing to allow peaceful protest. We try to engage with organisers and agree the format of a protest to avoid confrontation. We liaise with the local police area commanders, as necessary, and plan to provide low key security for the event – particularly in relation to key University buildings and offices.*

## 8. Recommendations

The work of the Working Group and the results of the survey revealed considerable commitment by universities to their different responsibilities and to the appropriate and responsible adjudication between competing interests. Issues of free speech, campus security, equality rights, charity law and the rights of students and staff raise issues to which there are rarely simple answers, and which are situation specific. As the survey revealed, different universities have addressed these issues in different ways. Indeed, in these matters different people may reach different but equally legitimate conclusions about the same matters. These are contested issues.

Nonetheless, universities can never be complacent about their work in this area. Accordingly, drawing on the results of the survey certain recommendations have been identified. These will form the basis of further work to be taken forward by Universities UK in the future.

### Universities

- Identify an appropriate senior person to lead on issues of campus security supported by clear identification of responsibilities within the institution in areas such as student services, security and IT.
- Ensure that all involved in making decisions in relation to campus security, academic freedom, free speech and equality rights are familiar with the legal requirements operating in this area and indeed this report.
- Review current protocols/policies on speaker meetings to ensure they are up to date and relevant, and are aligned with the students' union's protocols and policies.
- Consider developing a protocol on data-sharing with external organisations.
- Work with the students' union to provide clear information to students and student societies about the rights and responsibilities of the institution, the students' union, student societies and students in relation to academic freedom, free speech and equality rights.
- Develop, if not already in existence, and maintain a mechanism for regular dialogue with relevant external organisations such as the police, local authorities and community groups.
- Take an appropriate role in relevant national, regional and local strategies, to include regular links with local colleges and other relevant local institutions to share practice and information. This might include the identification of regional contacts to facilitate local and regional networks.

### Government

- Engage at a senior level with universities to ensure that universities are involved in the development of relevant policies and associated strategies.
- Ensure that universities receive timely policy and strategy information.
- Offer universities appropriate opportunities to engage with the implementation and operation of relevant policies and associated strategies.
- Acknowledge and reflect the legal requirements imposed on universities in relation to academic freedom and free speech when engaging with them.

### **Charity regulators**

- Seek to engage and work with Universities UK, the National Union of Students and other parties to understand the broader higher education context in order to promote compliance with charity law.

### **Higher Education Funding Council for England and the Charity Commission for England and Wales**

- Review and consider clarifying how the two bodies will work together in response to issues relating to freedom of speech in institutions that are exempt charities.

## Annexe A: National and sector resources

### National resources

Barendt E (2010) *Academic Freedom and the Law: A Comparative Study* Oxford: Hart Publishing

Home Office (2004) *Counter-terrorism powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper*

<http://tna.europarchive.org/20100419081706/http://security.homeoffice.gov.uk/news-publications/publication-search/691045/ct-discussion?view=Standard&pubID=689833>

Rammell B (2007) *Academic Freedom in the 21st century* Speech at Fabian Society event

[http://webarchive.nationalarchives.gov.uk/+http://www.dius.gov.uk/speeches/rammell\\_fabiansociety\\_271107.html](http://webarchive.nationalarchives.gov.uk/+http://www.dius.gov.uk/speeches/rammell_fabiansociety_271107.html)

DIUS (2007) *Promoting good campus relations, fostering shared values and preventing violent extremism in universities and higher education colleges*

<http://webarchive.nationalarchives.gov.uk/tna/+http://www.dius.gov.uk/publications/extremismhe.pdf/>

Neumann P and Stevens T (2009) *Countering Online Radicalisation: A Strategy for Action* London: International Centre for the Study of Radicalisation

<http://www.icsr.info/news/attachments/1236768445ICSROnlineRadicalisationReport.pdf>

National Counter Terrorism and Security Office (NaCTSO) (2009) *Crowded places: Counter-Terrorism Protective Security Advice for Higher and Further Education*

<https://vsat.nactso.gov.uk/SiteCollectionDocuments/AreasOfRisk/Education%202009.pdf>

Office for Counter Terrorism and Security (OSCT) (2009) *Safeguarding online - Explaining the risk posed by violent extremism*

<http://tna.europarchive.org/20100419081706/http://security.homeoffice.gov.uk/news-publications/publication-search/prevent/Officers-esafety-leaflet-v5.pdf?view=Binary>

Association of Chief Police Officers of England, Wales and Northern Ireland (2008) *The Application of Neighbourhood Policing to HEIs*

<http://www.acpo.police.uk/documents/crime/2008/200804CRIHEI01.pdf>

### Sector resources

Committee of Vice-Chancellors and Principals (1998) *Extremism and intolerance on campus* London: CVCP

Universities UK, GuildHE and the Equality Challenge Unit (2005) *Promoting Good Campus Relations: dealing with hate crime and intolerance* London: UUK, GuildHE, ECU

<http://www.universitiesuk.ac.uk/Publications/Pages/Publication-227.aspx>

Equality Challenge Unit (2007) *Promoting Good Campus Relations: update* London: ECU

<http://www.ecu.ac.uk/publications/promoting-good-campus-relations-update>

Equality Challenge Unit (2009) *Religious observance in higher education: institutional timetabling and work patterns* London: ECU

<http://www.ecu.ac.uk/publications/files/Religious-obs-timetabling.pdf/view?searchterm=religious%20observance>

Equality Challenge Unit (2009) *Religious observance in higher education: facilities and services* London: ECU

<http://www.ecu.ac.uk/publications/files/Religious-obs-facilities-and-services-briefing.pdf/view?searchterm=facilities%20and%20services>

Association of University Chief Security Officers and HEFCE (2008) *Planning for and managing emergencies: a good practice guide for higher education institutions* London: AUCSU; Bristol: HEFCE  
[http://interim.cabinetoffice.gov.uk/media/132802/hei\\_emergencyplan\\_aucso\\_guide.pdf](http://interim.cabinetoffice.gov.uk/media/132802/hei_emergencyplan_aucso_guide.pdf)

### Ongoing resources

Religious Literacy Leadership in Higher Education – <http://religiousliteracyhe.org/>

Religion and Belief in Higher Education – <http://www.derby.ac.uk/ehs/research/religion-and-belief-in-HE/about-the-project>

### Student resources

NUS Student Inter-faith Project – <http://nussl.ukmsl.net/news/article/faith/78/>

NUS resources on dealing with tension and conflict on campus – <http://nussl.ukmsl.net/news/article/faith/386/>

Federation of Student Islamic Societies freedom of expression resources – <http://fosis.org.uk/student-affairs/projects/650-freedom-of-expression>

Union of Jewish Students *A Student's Guide to Antisemitism on Campus* – <http://www.thecst.org.uk/docs/Students%20Book%2001-for%20website.pdf>

### External organisations

Office for Security and Counter-Terrorism – <http://www.homeoffice.gov.uk/counter-terrorism/>

National Counter Terrorism and Security Office – <http://www.nactso.gov.uk/default.aspx>

The Police Association of Higher Education Liaison Officers (PAHELO) – [www.pahelo.org.uk](http://www.pahelo.org.uk)

## Annexe B: Examples of university codes of practice

### University A

#### Meetings or Other Activities on University Premises:

##### Code of Practice

###### Preamble

In pursuance of its duties as laid down in Section 43 of the Education (No.2) Act 1986, the Council of the University hereby enacts the following Code with a view to taking the steps which are reasonably practicable to ensure that freedom of speech within the law is secured from members, students and employees of the University and for visiting speakers.

###### I. Principles

1. So far as is reasonably practicable, no premises of the University shall be denied to any individual or body of persons on any grounds connected with:

- (a) the beliefs or views of that individual or of that body; or
- (b) the policy or objectives of that body.

The University must also take account of other legal obligations which may require it to have regard to what is said on its premises. A speaker, for example, who incites an audience to violence or to breach of the peace or to racial hatred transgresses the bounds of lawful speech. Equally, assemblies of persons, even if directed to lawful purposes, cease to be lawful if they cause serious public disorder or breaches of the peace.

###### II. Procedures

2. (a) By the authority of the Council of the University the following procedures must in future be followed by members, students and employees of the University in respect of:

(i) meetings or other activities which are to be held on premises of the University falling within the class of meetings specified in paragraph 3 below; and

(ii) the conduct required of all persons in connection with any such defined meetings or activities; and

(iii) any other related or ancillary matters which the Council of the University from time to time declares to fall within this Code. (See paragraphs 4(v) and 5 below).

(b) Infringements of, or departures from, these procedures in whatever respect will render those responsible subject to disciplinary proceedings as laid down by the University.

(c) Additionally, if any such actions involve breaches of the law the University

authorities will be ready to assist the prosecuting authorities to implement the processes of law and, if charges are preferred, will stay disciplinary proceedings pending the outcome of any such proceedings.

(d) The Council of the University, in laying down the following, appoints the Registrar to act on its behalf to ensure as far as is reasonably practicable that all members, students and employees of the University, and visiting speakers, comply with the provisions of this Code.

Meetings or other activities to which this Code applies

Any meetings or other activities where there is a real likelihood that the speaker may not be able to enter or leave the premises safely and/or deliver his or her speech will be deemed to fall within the requirements of this Code.

#### *4. Preparation for and conduct of meetings, etc. on University premises*

(i) This section applies to any meetings or activities falling within the meaning of paragraph 3 above.

(ii) The organisers of any such event shall ensure that a single person is appointed as principal organiser of the event.

(iii) The principal organiser of such an event shall secure that at least two weeks before the date proposed for the event notice of the proposal is given to the Registrar. Such notice shall contain a written statement of the name of the speaker, the subject of the address and the precise timing of arrival and departure of the speaker.

(iv) Within five days of receiving such notice the Registrar shall issue a statement which shall either grant or withhold permission for the use of University premises as proposed for the conduct of the event.

(See paragraph 6 below.)

(v) Permission so granted may be granted subject to such conditions as the Registrar considers reasonably necessary to secure fulfilment of the University's statutory responsibilities concerning the protection of free speech within the law. (See paragraph 5 below.)

(vi) The principal organiser and every other person concerned with the organisation of an event for which permission has been granted shall be required to comply with any and every condition laid down by the Registrar under the provisions of this Code. Such conditions may include a requirement that tickets must be issued for public meetings and that an adequate number of stewards should be available, as to whose suitability the Registrar must be satisfied, in addition to any security staff that the

Registrar may feel should be present to maintain order. (See paragraph 5 below.)

(vii) The University will normally supply and pay the cost of a public address system if there is reasonable cause to consider this necessary to enable a meeting to take place within adequate hearing for the speaker.

(viii) Organisers have a duty to see that nothing in the preparations for or conduct of a meeting or activity infringes the law, eg. by conduct likely to cause a breach of the peace or incitement to illegal acts.

(ix) The Chair of the meeting has a duty so far as possible to secure that both the audience and the speaker act in accordance with the law during the meeting. In case of unlawful conduct the Chair is required to give appropriate warnings and, in case of continuing unlawfulness, to require the withdrawal or removal of persons concerned by the stewards or security staff.

(x) No article or objects may be taken inside the building where the meeting is taking place, or taken or used elsewhere on University premises in circumstances likely to lead to injury or damage.

Premises used for meetings or activities must be left in clean and tidy conditions in default of which the organisers may be charged for any additional cleaning and repairs that are subsequently required. Payment in advance or evidence of ability to pay towards these costs may be required.

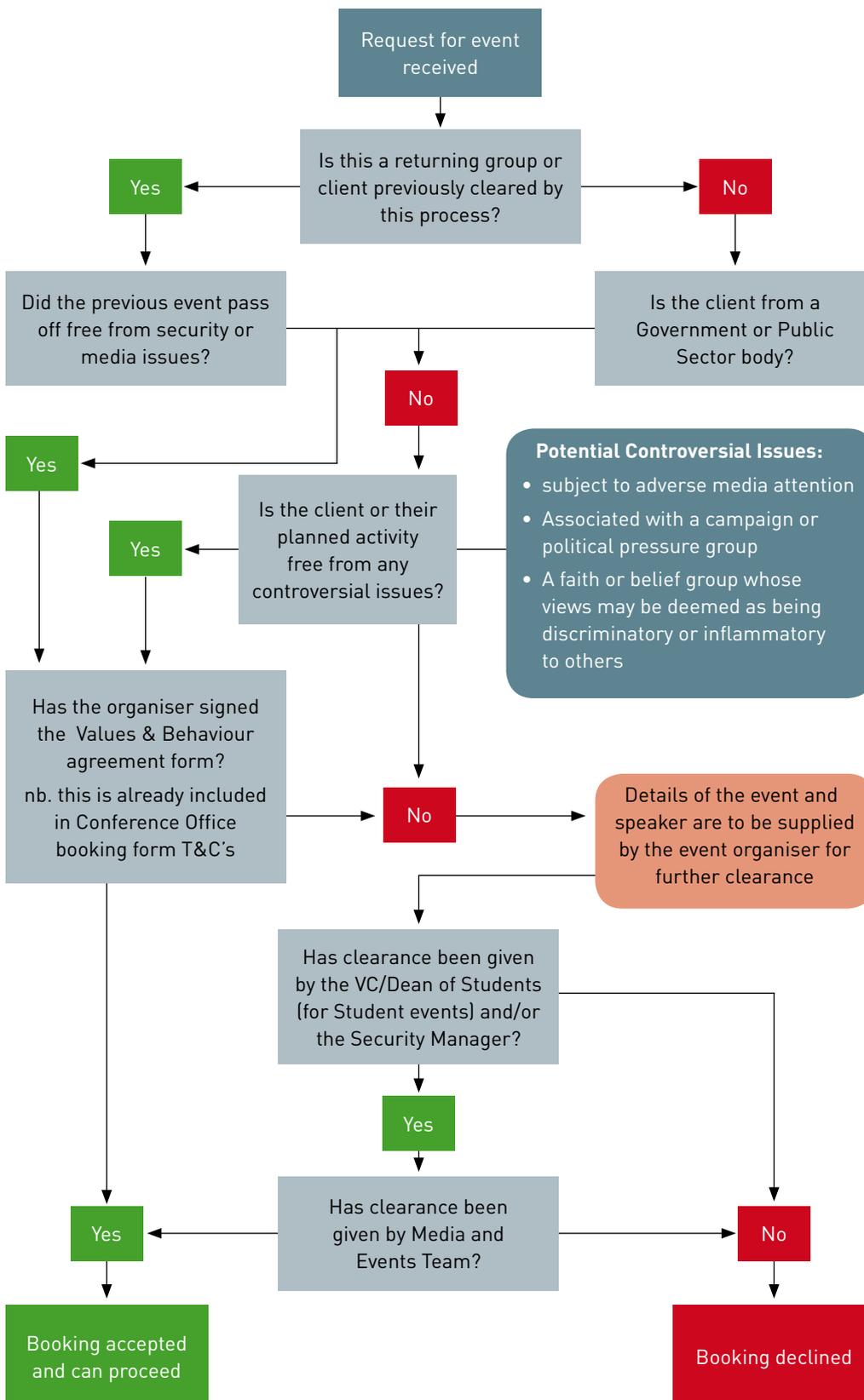
(xii) The conditions prescribed by the Registrar under subsection (v) above and paragraph 5 below may include conditions concerning admission or exclusion of press, television or broadcasting personnel.

5. In addition to the conditions set out in paragraph 4 above the Registrar has discretion to lay down further conditions, if appropriate, after consultation with the police. Thus he may, for example, require the designated meeting or activity to be declared public (which would permit a police presence); he may arrange for University staff to be responsible for all security arrangements connected with the meeting or activity and appoint a member of staff as “controlling officer” for the occasion. If not satisfied that adequate arrangements can be made to maintain good order he may refuse or withdraw permission for the meeting or activity. Such a step would normally only be taken on the advice of the police.

6. Appeals against the rulings of the Registrar may be made to the Vice-Chancellor whose decision shall be final but must be reported to the next meeting of the Council of the University.

## University B

### Due diligence process for accepting event bookings



## Events and speakers form

### Preconditions –

All events held at the University, whether for internal groups (staff, students or Students Union Societies) or for external clients, must comply with the University's statement on our community values and behaviours - see copy below.

All event organisers are required to sign this form indicating that they agree with the statement and confirm that they will ensure that all their event speakers will adhere to the values statement. All event speakers must agree to take questions from any member of the event audience.

Where an organiser refuses to sign the form, the University will seek independent clarification on the suitability of the event to be held on the premises, or the suitability of any of the event speakers. This will require a notice period of 4 weeks prior to the event.

Should any group or individual fail to agree to or fail to conform to the principles laid down in the values statement, the University reserves the right to refuse the booking or give access to its premises. The University reserves the right to monitor any event on its premises and if necessary, close an event and request all persons to leave its premises.

**Event organiser to complete:**

Event title:	
Date:	
Organisers full name:	
Organisers contact details: (organisation/address/email/tel contact number)	
<b>n.b. if more than one speaker, please complete a separate form for each speaker.</b>	
Speaker's full name:	
Speaker's organisation: (Title and website url)	
Speakers contact details: (address/email/tel contact number)	
Title of talk:	
Subject matter:	
Has the speaker spoken at the University before? If so please provide date:	
Has the speaker been refused to speak publicly or at any other educational establishment before? If yes, please provide details:	
Are there any other details about the event that should be noted i.e. if the event is approved, is there a likelihood of Media interest? Does the event have any controversial subjects? If so please provide details:	
<b>ORGANISER TO READ AND SIGN:</b> I have read the University Values and Behaviours statement and confirm that this event and its speakers will adhere to the principles of the statement.	
<b>SIGNED:</b>	<b>DATE:</b>

## University B: our values and behaviours

### The values that are core to our business

#### Our community

The University is a community of enquiry which includes all those – students, academic and professional staff – engaged in the learning activities we offer. Our community is characterised by honesty, openness, respect and a pride in diversity. We rejoice in being a diverse community, drawn from over 160 countries.

We believe that all ideas, theories and beliefs are proper subjects for rigorous and systematic challenge. We expect to generate and consider ideas and analyses that either support or challenge accepted wisdom. Indeed such enquiry is one of the ways that we best fulfil the University's motto "to serve mankind". This freedom to enquire should, however, be tempered by an understanding of the impact of enquiry on others.

In free societies there is a constant and unavoidable tension between rights and responsibilities, between the rights of one individual and those of another. We accept that there are professional judgements to be made in the balancing of the conflict within these various behaviours.

As a community, the 'public spaces' of the University are important for the exchange of ideas. These include physical 'public space' in the University's estate and virtual 'public space' on the University's web sites. All members of the community should have equal and open access to these spaces within the constraints required to ensure health and safety, security, and the proper conduct of the University's business.

#### Responsibilities

As members of our community, individuals have obligations to that community. If the conduct of any member of the University's community is detrimental to other members of the community, we will initially endeavour to support the individual so that s/he can become a constructive member of the community. However, if a serious violation of responsibility occurs infringing the University's policies and/or rules, the University has the right - and will exercise it - by due process to dismiss and exclude the individual from the community. If the University considers that illegal acts are being perpetrated, appropriate disciplinary action will be taken, and if necessary the relevant authorities will be informed. (Student Disciplinary Code, Various Staff Disciplinary Codes).

We all have a shared responsibility for the well-being of the individual members of the community and of the community itself. Further, we recognise that in serving mankind we have a degree of responsibility for the well-being of the wider community of the UK and of the world in which the University is located.

#### Behaviours

Our community is defined by certain behaviours and the following provides links to the relevant policies underpinning these behaviours:

- We will not condone or support any actions which are against the law of the land or contradict University regulations (Security/Health and Safety Policies)
- We will seek to provide a safe and secure environment (Security/Health and Safety Policies)
- We will not accept discrimination against individuals on any basis (Equality & Diversity Policy)

- We will not tolerate or condone behaviour that may cause harm to: individuals or groups within the University community, the university community itself, or the wider community within which the University is located (Harassment & Dignity at Work Policy)
- We will respect the right of individuals to conduct their lives privately and without undue interference from the University (Privacy Statement and related management policies)
- We will guarantee by policy and action the right of free speech within the University community unless the exercise of such a right can be shown to lead to or increase significantly the probability of the discrimination of individuals or groups, harm to individuals or groups within the University, or the University or the community within which the University is located (Code of Practice on Freedom of Speech).

### General Principles

The University expects its students and staff to make a personal commitment to the following principles:

1. assume responsibility for their behaviours and the effects of them on other persons
2. promote and preserve the welfare of other persons within the community and the welfare of the community as a whole
3. accept that they are part of a community with a strong tradition of enquiry and questioning and respect that tradition whilst exercising the freedom to challenge its implications
4. be free to consider the broad range of human opinion and ideas
5. seek to develop as people who contribute positively to the wider society
6. pursue excellence in their work and study
7. operate in accordance within the range of behaviours set out above

## Annexe C: The law: a summary of the legal framework

The legal framework governing academic freedom, freedom of speech and freedom of expression in the higher education sector has two main elements. First, as Section A explains, there are specific legal obligations on universities to promote, protect and respect these key freedoms. However, the rights to academic freedom and freedom of speech and expression are not absolute – they are freedoms ‘within the law’. Consequently, the criminal and civil law also sets limits on the lawful exercise of these rights, as summarised below in Section B.

One fundamental point in this analysis is that it is the law alone which can set restrictions on freedom of speech and expression and on academic freedom – it is for the law, and not for institutions or individuals within institutions, to set the boundaries on the legitimate exercise of those rights.

Section C considers other relevant legal considerations, namely:

- the public sector equality duty including the duty to promote good relations. As we explain, these duties do not set additional restrictions on freedom of speech or academic freedom within the law, but may require universities to take a more active stance in maintaining the distinction between lawful and unlawful activity. The duty to promote good relations does not, however, require universities to stifle the expression of controversial or unpopular views or expressions, where these are otherwise lawful
- the position of students’ unions under charity law
- the law relating to disclosure of information between universities or students’ unions and the police or other law enforcement agencies, in the context of concerns about, or investigations into, unlawful activity

### Section A: Freedom of speech and academic freedom

#### (i) The Education (No. 2) Act 1986

Section 43 of the Education Act (No. 2) 1986 is the most specific and direct legislative obligation on universities to promote and protect freedom of speech. It provides that

persons concerned in the government of any establishment... **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. (our emphasis)

Section 43 is of fundamental importance in the context of this report. It imposes a positive and proactive legal duty. The obligation is not merely to refrain from limiting or infringing freedom of speech, but rather to do all that is reasonably practicable to ensure that freedom of speech is secured. The duty is directed at freedom of speech for all participants in university life – members, students, staff and visiting speakers.

Without detracting from, or limiting in any way, that broad duty, section 43 also imposes a number of specific further obligations:

- A duty on governing bodies to issue, and keep updated, a code of practice regarding the organisation of meetings and other activities on the university’s premises. The code must set out the conduct required of members, students and employees in connection with any such meeting or activity and the procedures they must follow. The code may also deal with

such other matters as the governing body considers appropriate. These codes will typically include the right to refuse permission for, or to close, an event in lawful circumstances, and will detail the responsibilities of event organisers and members of the university, including the requirement to observe good order during an event. These elements reflect the fact that freedom of speech is to be enjoyed (and secured) within the law.

- A duty on every individual and body of persons concerned in the government of the institution to 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 are observed.
- A duty to ensure that the use of any university premises is not denied to any individual or body of persons on the grounds of their beliefs, views, policies or objectives.

The section 43 duty is directed at the governing body and senior management. While it does not directly apply to staff or to students or students' unions, the duty is indirectly applied to them through the required code of practice and rules and practices adopted to support and implement the section 43 duties.

### **(ii) The Education Reform Act 1988 – academic freedom**

The term 'academic freedom' is well recognised but does not itself appear in any UK legislation. It is a convenient 'shorthand' reference to the provisions of section 202 of the Education Reform Act 1988, which in relation to pre-1992 universities required university commissioners to have regard, inter alia, 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.'

This legal obligation is imposed not directly on institutions but on the university commissioners, whose role was created by the 1988 Act but whose functions were ended in 1996. However, through the role of the commissioners in regulating the constitutions of universities, the principle of academic freedom became enshrined in the statutes and articles of government, for example as a guiding principle for the interpretation of the 'Model Statute' provisions regarding dismissal for good cause and redundancy, and academic staff grievances, in Chartered Universities.

Equivalent provisions protecting academic freedom are sometimes included in the articles of association of post-1992 universities.

The principle of academic freedom may therefore operate as a constraint on action taken by universities in relation to academic staff. Put simply, it prevents academic staff being disciplined, dismissed or suffering other detriment on the grounds that they have exercised academic freedom. This recognises and protects a vital aspect of academic life, and complements the duty on institutions under section 43 of the Education (No. 2) Act 1986 to secure freedom of speech within the law.

It should, however, be noted that the protection conferred by section 202 of the Education Reform Act 1988 is limited to academic staff only, rather than staff generally. Students and visiting speakers are not covered and cannot invoke a right of 'academic freedom'.

The right to academic freedom is qualified by the phrase 'within the law'; as with the duties to ensure free speech under section 43 of the Education (No. 2) Act 1986, the boundaries on academic freedom are set by the criminal and civil law, with the effect that acts which are unlawful are not protected.

Recent detailed analysis of the scope of academic freedom and the law is described in the National and sector resources section of this report at Annexe A.

### **(iii) The Human Rights Act 1998**

The Human Rights Act incorporates the European Convention on Human Rights into UK law.

A number of Convention rights are relevant to freedom of speech and expression:

- freedom of thought, conscience and religion (Article 9) – including the freedom, either alone or in community with others, and in public or private, to manifest one’s religion or belief, through worship, teaching, practice and observance
- freedom of expression (Article 10) – including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority
- freedom of assembly and association (Article 11)

In addition, under Article 14, the enjoyment of the rights and freedoms set out in the Convention must 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.’ Article 14 does not therefore establish any free-standing right not to suffer discrimination – its effect is that the state must ensure that the other Convention rights are not regulated in a discriminatory fashion.

The non-discrimination provisions of Article 14 are wider than the scope of UK discrimination law, most specifically in this context because they extend to ‘political or other opinions’. As is explained below, the UK law on religion and belief discrimination is capable of covering philosophical beliefs but does not protect pure opinions (political or otherwise).

These Convention rights under Articles 9 to 11 are not absolute, but qualified. The Convention states that, ‘the exercise of these freedoms, since they carry with them duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society’ for the following purposes:

- 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 the prevention of the disclosure of information received in confidence

These Convention rights may therefore be constrained by the state. Once again they are ‘freedoms within the law’.

The inter-relationship between UK law and these Convention rights is complex. The position can be summarised as follows:

- It is unlawful for public authorities to act in a manner incompatible with the Convention rights. The acts of universities – at least in relation to their public functions – must therefore respect the rights and freedoms set out above.
- In any event, in relation to ‘private’ bodies or ‘private’ acts, UK law must be interpreted and applied, as far as possible, consistently with these Convention rights. As a result, even where the Human Rights Act is not directly relied on as the basis of a claim, tribunals and courts have to take its provisions into account when determining legal

disputes. For example, the right to freedom of expression could be taken into account by an employment tribunal when determining a case of unfair dismissal. Where freedoms and rights in the Convention are qualified, the courts can regulate legal limitations on them by considering whether these restrictions are necessary in a democratic society for one of the purposes set out above.

#### (iv) Discrimination law

Although discrimination law can operate as a limiting factor on freedom of speech and expression (by making speech and conduct unlawful), it also has a role to play in protecting these freedoms.

In particular, the Equality Act 2010 prohibits discrimination – including detrimental treatment and harassment – relating to one of the equality areas including gender, race, sexual orientation, disability, age, and religion and belief.

The term 'religion and belief' is broad in scope. It is not confined to religious or faith-based beliefs – non-religious philosophical beliefs are also protected. Further, the absence of a specific belief is also protected. As a result, for every religious or other belief which is protected, equal protection is given to differing or dissenting beliefs (religious or otherwise) and to the rejection or denial of that belief.

Case law has also demonstrated that the support of a political party does not qualify as a protected belief (although underlying political philosophies may qualify). Violent or extremist views will not qualify on the grounds that they are incompatible with human dignity, conflict with the fundamental rights of others, and are not worthy of respect in a democratic society. Accordingly, a belief in the racial supremacy of a particular racial group will not qualify for protection under the Equality Act.

The protection in relation to qualifying beliefs includes protection against detrimental treatment or harassment relating to the holding of, or expression of, these beliefs. These concepts are discussed further in section B(ii).

## Section B: Legal constraints

The rights to freedom of speech and expression and academic freedom are not absolute – they are freedoms within the law. This section identifies the key relevant criminal and civil law provisions which restrict or limit these rights.

### Criminal law restrictions

#### (i) Public Order Act 1986 – violent, threatening or abusive conduct and speech

The Public Order Act 1986 contains a range of criminal offences which can be committed by speech and conduct and therefore limit the exercise of the rights to freedom of speech and expression and academic freedom. These offences are characterised by violent conduct or by speech or actions which threaten violence or cause fear, alarm or distress.

The use or threat of unlawful violence to another, where that conduct would cause a person of reasonable firmness present at the scene to fear for his personal safety, constitutes the criminal offence of **affray**. The relevant threat cannot be made by the use of words alone.

Where groups engage in unlawful violence or the threat of unlawful violence (including violence to property) the offences of **violent disorder** (three or more persons present together) or **riot** (12 or more persons present together) are committed.

The criminal offence of **fear or provocation of violence** is committed where a person:

- uses threatening, abusive or insulting words or behaviour
- distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting

**with the intention** to cause another to believe that immediate unlawful violence will be used against him or another; or to provoke the immediate use of unlawful violence by another; or to cause another to believe that such violence will be used or is likely to be provoked.

The offence of **causing harassment, alarm or distress** may be committed by:

- the use of threatening, abusive or insulting words or behaviour or disorderly behaviour
- the display of any writing, sign or visible representation which is threatening, abusive or insulting

within the hearing or sight of a person likely to be caused harassment, alarm or distress.

It will be noted that this offence can be committed without an intention to cause harassment, alarm or distress (where that intention is present, an aggravated form of the offence is committed). Indeed, the offence is focused on the likelihood of that effect rather than whether or not it is actually caused. However, where there is no intent, it is a defence for the person concerned to show that he had no reason to believe that there was any person within hearing or sight likely to be caused harassment, alarm or distress, or that the conduct was reasonable.

### **(ii) Protection from Harassment Act 1997**

This legislation (which does not apply in Northern Ireland) creates both criminal offences and gives rise to civil rights and remedies.

Although there are slight textual differences between the provisions of the Act which apply in Scotland and those for England and Wales, the essential element of the offence of harassment is the same in both jurisdictions – a course of conduct which amounts to harassment and which the offender knows to amount to harassment, or which a reasonable person in possession of the same information would think amounted to harassment of the other.

The Scottish law provisions expressly state that 'harassment' of a person includes causing the person alarm or distress. Otherwise, beyond the provision that a course of conduct must consist of at least two separate acts, there is no definition of harassment. However, case law indicates that the conduct in question must be 'oppressive and unacceptable' and in the context of civil claims be serious enough to be at a level that would sustain criminal liability.

The provision applicable in England and Wales also creates a separate offence of 'putting people in fear of violence'. This offence is committed by a person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against them. A person is guilty of an offence if they know that their course of conduct will cause the other so to fear on each of those occasions or if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on each occasion.

The Act also allows individuals to enforce the act through civil claims for damages or for injunctions to restrain harassing behaviour.

### (iii) Racial and religious hatred

The Public Order Act 1986 also contains specific offences relating to the **stirring up of racial and religious hatred**. The religious hatred offences differ significantly more than those relating to racial hatred, and are much more narrowly focused.

#### Racial hatred

The following acts are criminal offences if they are committed with the intention of stirring up racial hatred or if, in all the circumstances, they are likely to stir up racial hatred:

- the use of threatening, abusive or insulting words or behaviour
- the display of any written material which is threatening, abusive or insulting
- the publication or distribution of written material which is threatening, abusive or insulting
- the public performance of a play which involves the use of threatening, abusive or insulting words or behaviour
- the distribution, showing or playing of a recording of visual images or sounds which are threatening, abusive or insulting
- the possession of written material or a recording of visual images or sounds which is/are threatening, abusive or insulting, with a view to their display, distribution, publication or playing

As one key aspect of the offences is the use of threatening, abusive or insulting words or behaviour, these acts may also be unlawful under the more general Public Order Act offences described above.

Where there is no intention to stir up racial hatred, it is a defence to show that there was no intention or awareness that the words or behaviour concerned might be threatening, abusive or insulting. In the case of written material or recordings, it is a defence for the person concerned to show that they were not aware of their content and did not suspect, or have good reason to suspect, that they were threatening, abusive or insulting.

In respect of performances, there is an additional defence of not knowing or having reason to suspect that the performance would use the offending words or behaviour or that the circumstances of the performance were such that racial hatred would be likely to be stirred up.

#### Religious hatred

Religious hatred offences (introduced into the Public Order Act 1986 by the Racial and Religious Hatred Act 2006) occur where the following actions are committed with the intention to stir up religious hatred:

- the use of threatening words or behaviour
- the display of threatening written material
- the publication or distribution of written material which is threatening
- the public performance of a play involving threatening words or behaviour
- the distribution, showing or playing of a recording of visual images or sounds which are threatening
- the broadcasting of a programme which includes threatening visual images or sounds
- the possession of written material or the recording of visual images or sounds which are threatening, with a view to their display, distribution, publication, playing or broadcasting

It will be noted that the focus of these offences is on **threatening** words or behaviour but not insulting or abusive words or behaviour. Further, as the offences all involve the **intent** to stir up religious hatred, the defences available in relation to racial hatred do not apply. Intent is a necessary ingredient of the offences – it is not sufficient to show that religious hatred was likely to be stirred up.

A specific provision in the religious hatred legislation reinforces the right to freedom of expression. This provides that the religious hatred offences should not be applied 'in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.'

It is therefore not a criminal offence under the racial hatred legislation to insult or abuse a religion or religious belief. Such actions may, however, breach the civil law if they constitute direct discrimination or harassment against individuals.

#### **(iv) Terrorism offences**

In the context of this report, the principal offences under the Terrorism Acts 2000 and 2006 are as follows:

- directly or indirectly inciting or encouraging others to commit acts of terrorism, including through the glorification of terrorism
- belonging to or professing to belong to a proscribed organisation or to support a proscribed organisation
- disseminating terrorist publications, including those publications that encourage terrorism, and those that provide assistance to terrorists
- possessing a document or record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism
- offences associated with terrorist property (including, but not limited to, money)
- giving or receiving training in terrorist techniques and attendance at a place of terrorist training

A number of these offences directly restrict freedoms of speech and expression, and academic freedom, by making the relevant speech or conduct unlawful. Some offences are relevant in other ways to the issues examined in this report – for example, raising questions about the lawfulness of academic activity relating to terrorism which involves the possession or study of terrorist training materials. The offences relating to proscribed organisations also include restrictions on meetings and events on university premises and potential liabilities for the organisers of such events.

A proscribed organisation is an organisation considered to be a terrorist organisation and is prohibited by law from operating in the UK. A list of organisations that are currently proscribed can be found on the Home Office website<sup>2</sup>.

2 <http://www.homeoffice.gov.uk/publications/counter-terrorism/proscribed-terror-groups/>

## Definition of terrorism

The first element in the definition of terrorism under the Terrorism Acts is the use or threat of one of the following prohibited actions:

- serious violence against a person
- serious damage to property
- endangering another's life
- creating a serious risk to the health and safety of the public or any section of the public
- serious interference or disruption to an electronic system

All of the prohibited acts would amount to criminal offences in their own right and so would fall outside the scope of legitimate freedom of expression and speech, and academic freedom in any event. They are converted into terrorist acts if they are committed

- for the purpose of advancing a political or religious or ideological objective (so, for example, animal rights extremism would be an ideological objective)
- with the design of influencing the Government or any international government organisation or of intimidating the public or any section of the public (this element is not required where the prohibited action or threat involves use of firearms or explosives)

## Acts of terrorism - 'failure to disclose' offences

Under the Terrorism Act 2000, it is an offence for a person 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
- 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

For these purposes, an act of terrorism means the offences referred to in the above definition of terrorism.

As noted below, it is also an offence to fail to disclose, without reasonable excuse, a belief or suspicion that another person has committed an offence relating to terrorist money or property.

These offences are exceptions to the general rule under UK criminal law that there is no legal duty to prevent criminal acts, to report suspicions or beliefs that criminal acts may be committed, or to proactively disclose information about actual or potential criminal offences.

It should also be noted that there is no equivalent offence of failing to disclose information or suspicions about the other categories of terrorism offences described below relating to 'speech and conduct', terrorist publications, meetings involving members of prescribed organisations, terrorist training, and the collection or possession of information useful for acts of terrorism.

It is only to this limited and specific extent that institutions, staff and students have obligations under the criminal law to disclose information to the police about terrorism offences or activities. The Terrorism Act does not create any general legal obligation to monitor and report the activities of members of a university's community.

## 'Speech and conduct' terrorism offences

The restrictions on speech and expression, and related conduct, under the Terrorism Acts are as follows:

- belonging or professing to belong to an organisation proscribed by the secretary of state
- inviting support (other than money or other property) for a proscribed organisation
- addressing a meeting (of three or more persons) with the purpose of encouraging support for a proscribed organisation or to further its activities
- wearing an item of clothing or wearing, carrying or displaying any article in such a way or in such circumstances as to arouse reasonable suspicion that you are a member or supporter of a proscribed organisation

In addition, it is an offence under the Terrorism Act 2006 to:

- publish, or cause another to publish, a statement likely to be understood as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism with the intent that members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism, or being reckless as to whether that effect will be caused.

Where there is no proof of the relevant intent, it is a defence for a person to prove that the statement did not express his or her views, nor have his or her endorsement and that the circumstances of the publication made this clear

Without limiting the scope of statements which encourage or induce terrorism, the Act expressly provides that such statements include:

*every statement which glorifies (including any form of praise or celebration) the commission or preparation of terrorist acts (whether in the past, in the future or generally) if it is a statement from which members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.*

That test is applied by reference to the content of the statement as a whole and the circumstances and manner of its publication.

## Terrorist publications

A range of offences also exist in relation to terrorist publications, defined as those containing matter likely:

- to be understood, by some or all of the persons to whom it is or may become available as a consequence of that conduct, as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism (again including the glorification of terrorism as described above)
- to be useful in the commission or preparation of such acts and to be understood, by some or all of those persons, as contained in the publication, or made available to them, wholly or mainly for the purpose of being so useful to them

These tests are applied by reference to the contents of the publication as a whole and to the circumstances in which the relevant conduct occurs.

The relevant offences make it illegal to:

- distribute or circulate a terrorist publication
- give, sell or lend such a publication
- offer such a publication for sale or loan
- provide a service to others that enables them to obtain, read, listen to or look at such a publication, or to acquire it by means of a gift, sale or loan
- transmit the contents of such a publication electronically
- possess such a publication with a view to it being used as described above

with the intention that an effect of this conduct will be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism; or will provide assistance in the commission or preparation of such acts; or being reckless as to whether these effects will arise.

Where there is no proof of the relevant intent, it is a defence to prove that the publication did not express the views of the defendant nor have their endorsement and that the circumstances of the publication made this clear.

In relation to electronic statements and publications which are 'unlawfully terrorism-related' as described above, the police have powers to serve notices requiring the statement, article or record to be secured, withheld from the public or modified so that it is not terrorism related. It is an offence to fail, without reasonable excuse, to comply with such notice.

#### Offences relating to terrorist property including failures to disclose

The Terrorism Acts also establish a range of offences in relation to 'terrorist property' – defined as money or other property likely to be used for the purposes of terrorism (including the resources of any proscribed organisation), the proceeds of the commission of acts of terrorism, or the proceeds of acts carried out for the purposes of terrorism.

These offences include inviting another to provide money or other property, or receiving or providing money or other property with the intention that it should be used, or with reasonable cause to suspect it will be used, for the purposes of terrorism.

It is also an offence to fail to disclose to the police, without reasonable excuse, a belief or suspicion, gained in the course of employment, that another person has committed an offence relating to terrorist money or property. Such disclosures also secure exemptions from data protection obligations (as they are expressly permitted by law) and a defence to any criminal liability relating to involvement in the transactions in question.

#### Restrictions on meetings

It is also an offence to arrange, manage, or assist in arranging or managing, a meeting of three or more persons in the knowledge that the meeting is:

- to support a proscribed organisation
- to further the activities of a proscribed organisation
- to be addressed by a person who belongs or professes to belong to a proscribed organisation.

In the case of a private meeting (to which the public are not admitted) it is a defence to prove that you had no reasonable cause to believe that the address would support a proscribed organisation or further its activities.

### Terrorist training and training materials

#### *Training in relation to firearms or weapon use*

It is an offence to provide or receive instruction or training in the making or use of firearms, radioactive material, or weapons, explosives or chemical, biological or nuclear weapons, or to invite another to receive such training (with or outside the UK). No offence is committed if the person concerned can show that any action or involvement in relation to the training was wholly for a purpose other than assisting, preparing or participating in terrorism.

#### *Training for terrorism*

It is an offence:

- to provide instruction or training in terrorism skills, in the knowledge that a person receiving it intends to use the skills in which he is being instructed or trained in connection with the commission or preparation of acts of terrorism; or assisting the commission or preparation by others of such acts or offences
- to receive training or instruction in terrorism skills with the intention to use those skills for or in connection with the commission or preparation of acts of terrorism or for assisting the commission or preparation by others of such acts or offences
- to attend at any place (anywhere in the world) while instruction or training of the type mentioned above is provided, in the knowledge or belief, or where a person could not reasonably have failed to understand, that such training is being provided there for purposes connected with the commission or preparation of acts of terrorism

Terrorism skills are:

- the making, handling or use of a noxious substance
- the use of any method or technique for doing anything else that is capable of being done for the purposes of terrorism, in connection with the commission or preparation of an act of terrorism or in connection with assisting the commission or preparation by another of such an act or offence
- the design or adaptation for the purposes of terrorism, or in connection with the commission or preparation of an act of terrorism, of any method or technique for doing anything

The offences described above should not, in practice, restrict legitimate and genuine academic teaching and research activity. While the definition of 'terrorism skills' is extensive, the key element of the offence for the 'trainer' is the knowledge of an intention to use those skills for acts of terrorism.

### Collecting or possessing information useful for acts of terrorism

It is also illegal to collect or make a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism or to possess a document or record containing information of that kind. It is a defence for a person to prove that he had a reasonable excuse for his actions or the possession of the information or record.

This offence is of relevance to the study and research of terrorism within universities. The language of the offence is deliberately wide and unspecific about the type of information it is

aimed at. The study of terrorism may involve the academic use and access to a wide range of information that could fall within the potential scope of this offence – for example terrorist ‘handbooks’ or ‘manuals’, terrorist tactics, terrorist propaganda, and the study of methods and techniques of radicalisation and incitement to terrorism.

The key point is that the defence of ‘reasonable excuse’ would be available for legitimate research or academic activity. However, it is the defendant who has the burden of proving that defence. It is recommended that research or other academic activity relating to issues relevant to this offence should be notified to a nominated university officer or committee so that there is an audit trail regarding the scope and purpose of the research/activity which will assist in establishing the relevant defence.

### **(v) Civil law constraints**

The rights to freedom of speech and expression and academic freedom within the law are also subject to a number of civil law constraints. These include civil law torts relating to defamation and malicious falsehood and the civil law rights under the Protection from Harassment Act 1997. The law of trespass is also relevant in the context of protest activity, especially occupations and sit-ins, and allows universities to seek injunctions to remove trespassers.

Defamation involves the making or publishing to a third party of a statement which has a tendency to lower or adversely affect a person’s reputation in the estimation of right thinking people generally, or to expose a person to hatred, contempt or ridicule. The defences to an action of defamation include that the statement or imputation is true or constitutes fair comment.

The defence of qualified privilege acknowledges the public interest in freedom of speech, allowing statements to be made by a person who has a moral, legal or social duty to make them to a person who has a corresponding interest in receiving the statement or are made by a person who is acting to further or protect an interest and to a person who has a common or corresponding duty or interest to receive it. Under the Human Rights Act, the law of defamation requires a balance to be struck between Article 8 (respect for private life) and Article 10 (freedom of expression).

### **(vi) Equality and discrimination legislation – Equality Act 2010**

Equality and discrimination legislation is a significant civil law constraint on the freedoms of speech and expression and on academic freedom. If speech or conduct amounts to unlawful discrimination, it falls outside the scope of those freedoms on the grounds that it is no longer ‘within the law’, the rationale being that the fundamental rights of others are infringed.

UK discrimination law is now contained in the Equality Act 2010, and covers a wide range of equality strands or protected characteristics – sex, race, disability, age, sexual orientation, religion or belief, marital or civil partnership status and gender reassignment. The Equality Act does not apply in Northern Ireland, where section 75 of the Northern Ireland Act remains in force.

In the context of higher education, the law on discrimination confers rights on employees and workers not to suffer discrimination by their university employer in relation to their employment, or in applications for employment, and on students not to suffer discrimination by a university in relation to admission to courses, the provision of education, facilities services or benefits or through any other detriment.

Unlawful discrimination can take a number of forms:

- direct discrimination – less favourable treatment because of a protected characteristic
- indirect discrimination – the application of a provision, criterion or practice which,

although apparently 'equality neutral', tends to disadvantage those who share a particular protected characteristic

- harassment
- victimisation – detrimental treatment on the grounds, for example, of making a complaint of discrimination

Of these, direct discrimination and harassment are the most relevant in the context of this report.

The Equality Act significantly extends the scope of unlawful discrimination in these areas. For example, unlawful direct discrimination can now occur on the basis of:

- a perception that a person has a protected characteristic (for example a perception regarding religious or other protected belief, even if that perception is wrong)
- a person's association with another who has the relevant protected characteristic. A claimant need not actually have the relevant protected characteristic him/herself in order to bring a claim

Unlawful harassment has been extended under the Equality Act to cover the harassment of staff (employees and workers) by third parties, including students, contractors and visitors. Further, the unwelcome conduct or speech which constitutes the harassment now needs 'to relate to a protected characteristic'; previously the actions constituting harassment had to be committed on the grounds of the victim's protected characteristic. This represents a significant shift of focus away from the reason for the treatment – the law now focuses on the content and effect of the speech or behaviour concerned. The result of this change includes widening the scope of harassment law. For example, offensive remarks relating to race or ethnicity are now actionable regardless of the claimant's own race or ethnicity.

Universities will be vicariously liable for harassment committed by their employees or agents – including the harassment of staff and of students. As discussed above, universities will also be liable for acts of harassment by students and other third parties toward their employees and workers, in certain circumstances.

Unlawful harassment occurs where there is unwanted conduct (speech or action) which relates to a protected characteristic which has the purpose or effect of violating another's dignity or of creating a hostile, intimidating, offensive or humiliating environment.

Where speech or conduct relating to a protected characteristic is intended to have the effect of violating another's dignity or creating a 'hostile, intimidating' (and so on) environment, it will amount to unlawful harassment and take the words or conduct outside the scope of legitimate freedom of speech or expression.

Where that effect – often, in practice, the causing of offence – is not intended, it is not sufficient merely for the complainant to state that the speech or conduct has had the relevant effect. The test applied is not purely subjective. The complainant's perception is one factor in an analysis which requires consideration of all the circumstances of the case and, crucially, whether or not it is reasonable to conclude that the speech or conduct had the prohibited effect.

## Section C: Other relevant legal issues

### (i) Public sector equality duties

The Equality Act 2010 replaces the existing public sector equality duties in relation to race, gender and disability equality, with a new single public sector equality duty which will also cover age, sexual orientation, religion or belief, pregnancy and maternity, and gender reassignment. This duty applies directly to universities, not to students' unions or student societies.

The new duty (expected to come into force in April 2011) will require universities, in the exercise of their functions, to have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation
- advance equality of opportunity between different groups
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it

These duties are proactive and positive obligations – for example, universities must not simply refrain from discrimination but must consider the need to take positive steps to eliminate it.

These duties do not, however, represent additional constraints on freedom of speech and expression or academic freedom. They do not extend the boundaries of what is already unlawful discrimination and therefore outside the exercise of these rights 'within the law'. So, for example, the impact of the duty to eliminate unlawful discrimination and harassment includes the creation of a proactive duty to take action (such as disciplinary action) when incidents of actual or potential harassment arise. However, that is not an obligation to challenge or restrict freedom of speech or academic freedom, as unlawful acts fall outside the scope of those freedoms. At most, the positive duties create additional focus on the distinction between legitimate freedom of speech within the law and unlawful discrimination, and the need for institutions to actively monitor that boundary.

The duty to foster good relations is expressly stated in the Act as requiring due regard, in particular, to the need to tackle prejudice, and promote understanding. The relationship between this duty and the protection of freedom of expression is complex, but the two are not necessarily in conflict. Particularly where competing 'protected characteristics' are involved – for example clashes between religious faith/morality and sexual orientation – the duty to promote good relations should in no way be seen as automatically requiring either party to refrain from expressing their opinions or beliefs. Tolerance and respect for opposing viewpoints, and the right to hold and express those opinions, are as central to fostering good relations as they are to preserving the right of freedom of speech.

### (ii) Data disclosure

#### Introduction

In the case of investigations into possible breaches of the criminal law, or where there are concerns about unlawful activity, universities and/or students' unions may be asked (or may wish) to disclose information to the police or other law enforcement agencies. Issues around information disclosure and data sharing may also arise in the context of the sharing of information between a university and its students' union or student societies, or between institutions.

The legal regulation of data sharing applies to the ad hoc disclosure of information between organisations (including in response to an emergency situation or one-off disclosure) as well as the more systematic sharing of data between organisations under agreed standing arrangements.

The legal framework governing the systematic or one-off disclosure of information to third parties consists of the following elements:

- the legal powers (express, implied or incidental) of the organisation to share the information
- legislative or other legal provisions which protect the rights of individuals, by imposing restrictions, restraints or prohibitions on the freedom of the organisation to share information or make the relevant disclosure. These include the Human Rights Act 1998, the Data Protection Act 1998 and the common law rules on confidentiality

As explained below, disclosures to the police or other law enforcement agencies for the purposes of reporting, or assisting investigations into, crimes or potential criminal activities are lawful in principle. However, care must be taken to ensure that the information disclosed is no wider than necessary to meet the purpose of the disclosure.

Guidance on data sharing produced by the Department for Constitutional Affairs in November 2003 and updated in 2007 remains a useful reference point. It contains a detailed exposition of the fundamental legal issues which must be considered in respect of any information-sharing initiative and a checklist of relevant legal considerations which focus on the lawful basis for activity and possible restrictions imposed by the law of confidence and data protection.

In October 2010, the information commissioner issued a draft code of practice giving practical guidance on 'data sharing': the disclosure of data by transmission, dissemination or otherwise making it available. The draft code covers not only the sharing and pooling of personal data sets but also 'one-off' disclosures of personal data and is relevant to all disclosures of personal data. The draft code was subject to a consultation which closed in January 2011. Once approved by the secretary of state, the code must be taken into account by the commissioner in carrying out his functions and will be admissible in evidence in any legal proceedings. Further, the Information Rights Tribunal or a court conducting any proceedings under the Data Protection Act, or any court or tribunal conducting any other legal proceedings (even outside the strict remit of the DPA), must also take account of the code.

### The legal power to make the disclosure

The issue to be considered here is whether the organisation has an express, implied or incidental power to make the disclosure.

The express powers of universities are set out in either in their constitutions or in legislation. These are unlikely to contain an express power to make disclosures of information to third parties. The absence of an express power is not, however, a complete bar to disclosure. An implied power to disclose may exist where the disclosure is ancillary to an express power or function. In other words, if the disclosure would support the exercise or discharge of an express function or power, then the power of disclosure can be implied.

In the case of disclosures to the police or other law enforcement agencies, it will be possible to rely on an implied power to disclose personal information to prevent or detect crime or to assist the administration of justice. That, however, is only a starting point, as the further elements of the legal framework set out below still need to be satisfied, especially in relation to the scope (that is, the proportionality) of the information to be disclosed.

Disclosures between universities and between universities and their (separately constituted) students' unions may also be permitted under implied or incidental powers, for example to enable the regulation of student discipline. The legal obligations on universities to ensure freedom of speech within the law, eliminate discrimination and foster good relations may also form a basis for implying powers on universities to disclose information to third parties. It is more difficult to use these to imply powers on students' unions to disclose information to universities as the students' unions themselves are not the subject of these legal obligations. For that reason, it may be prudent to add relevant express powers of disclosure into the constitutions of students' unions.

### The Human Rights Act 1998 (HRA)

The HRA implements the European Convention on Human Rights and Fundamental Freedoms into UK law. Article 8 of the Convention states that *'Everyone has the right to respect for his private and family life, his home and his correspondence.'*

This is a qualified right – interference by public authorities with the exercise of this right is permitted where it is *'in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'*

Disclosures to the police relating to concerns regarding national security, public safety, disorder or criminal activity would clearly fall within the scope of the permitted interference with this right, but two further conditions need to be satisfied.

The first is that any disclosure be made 'in accordance with the law' – the fact that the disclosure relates to criminal activity, for example, does not of itself make the disclosure a lawful interference with the Article 8 right. Where the law imposes a duty to disclose – for example in relation to terrorist property offences under the Terrorism Acts – the disclosure will be lawful. In the absence of a legal duty to disclose, lawfulness is determined by reference to the powers of the organisation to make the disclosure (see above) and the other relevant legal provisions discussed below.

The second requirement is for the interference to be 'necessary in a democratic society'. The word 'necessary' does not mean 'strict necessity' but rather that the interference must be proportionate in all the circumstances of the case. The greater the interference with Article 8, the greater the justification required (although the test applied is the range of reasonable responses). Again, the legal framework set out below is relevant in ensuring that these qualifications to the Article 8 right are satisfied.

### Data Protection Act 1998

Personal privacy is protected by the Data Protection Act 1998 (DPA) which implements the European Directive on Data Protection.

#### Key terms

Key terms in the analysis below include:

- personal data – data relating to an identified or identifiable living individual
- sensitive personal data – including personal data which relates to racial or ethnic origin, political opinions, religious beliefs, trade union membership, physical or mental health, sexual life, the commission or alleged commission of any offence or criminal proceedings

- processing of personal data – the obtaining, holding, using, disclosure or destruction of personal data
- data controller – meaning any legal person who determines the purposes for which and the manner in which personal data is processed. Universities will be data controllers, as will students' unions, with a legal identity separate to that of the university

### Rules on disclosure and other processing

The DPA requires (subject to certain exemptions discussed below) that any person processing personal data should do so in accordance with eight Data Protection Principles. Particularly relevant are the requirements that:

- data must be processed 'lawfully' and 'fairly' (First Principle)
- personal data shall be obtained only for one or more specified and lawful purpose, and shall not be further processed in any manner incompatible with that purpose (Second Principle)
- personal data shall be adequate, relevant and not excessive in relation to the purpose for which they are processed (Third Principle). In relation to processing by disclosure, this again emphasises that the disclosure must be proportionate to its purpose

The requirement under the First Principle for data to be processed fairly requires consideration of how the data was obtained, and whether the person from whom the data was obtained was misled or deceived as to the purposes for which the data would be processed. Fair processing also interrelates with the right to notice of processing, the right to object to processing and other obligations under data protection principles.

The requirement for 'lawful' processing under the First Principle means that legal obligations under statute and common law must be observed. The DPA itself does not confer a legal right to disclose or otherwise process the data. In addition, Schedules 2 and 3 to the DPA contain conditions for the processing of personal data and sensitive personal data respectively and at least one of these conditions must be satisfied for the processing to be 'lawful' under the First Principle.

One of the Schedule 2 and 3 conditions is that the data subject has consented to the processing. However, in the context of disclosure relating to criminal activities, such consent is unlikely to have been given.

Other relevant Schedule 2 conditions (for non-sensitive personal data) are:

- that the processing is necessary to comply with any legal obligation to which the data controller is subject, other than a contractual obligation (The 'legal obligation condition')
- that the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party to whom the data is disclosed, except where processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (the 'legitimate interest condition')

The Schedule 3 conditions (expanded by the Data Protection (Processing of Sensitive Personal Data) Order 2000) include that:

- the processing is necessary in order to protect the vital interests of the data subject or another person in a case where the data controller cannot reasonably be expected to obtain the consent of the data subject (the 'vital interest condition')
- the processing is in the substantial public interest; is necessary for the purposes of the prevention or detection of any unlawful act; and must necessarily be carried out

without the explicit consent of the data subject being sought so as not to prejudice those interests (the 'public interest condition')

Exemptions under the DPA allow the disclosure of data to the police and other law enforcement agencies without the consent of the data subject. For example, section 28 of the DPA exempts the processing of personal data for the purpose of safeguarding national security. Section 29 provides a qualified exemption from the restrictions on disclosure under the data protection principles (including the First and Second Principles) where the disclosure is for the purposes of the prevention or detection of crime, or the apprehension or prosecution of offenders, and those purposes would be prejudiced if the non-disclosure principles were applied. However, one or more of the conditions in Schedule 2 (or Schedule 3 in the context of sensitive personal data) must still be satisfied under this exemption. The legal obligation condition will be satisfied if there is a legal obligation to disclose the information. Otherwise, the legitimate interest, vital interest or public interest conditions are likely to apply.

In terms of disclosures between universities or between universities and (legally separate) students' unions, the legitimate interest, vital interest or public interest conditions may also provide a basis for disclosure, for example in relation to regulating student discipline and investigating offences, monitoring the exercise of freedom of speech within the law and in the context of relevant codes of practice under s43 Education (No. 2) Act 1986, and the legal duty to eliminate discrimination and foster good relations. If data is intended to be shared in this way, it would be good practice to refer to this in relevant policies or protocols and data processing notices.

#### Disclosures to the police – additional points

The police and other law enforcement agencies have standard forms which are used when requesting disclosures of data under s28 and 29 DPA. These forms will certify the purposes for which the information is required and that the failure to disclose the information would prejudice the investigation. Where these forms are not used to make requests, it is prudent for the body from which disclosure is requested to ensure, wherever possible, that the request is made in writing, to verify that the identity of the person and body making the request is genuine (for example, is on official or headed paper and signed by an officer of the requesting organisation), that the nature of the information requested is clear, and that the request clearly states that the request is for one of the purposes referred to above and failure to disclose will prejudice that objective.

Where information is requested urgently in the context of emergency situations, there may not be time for the request to be put in writing. Anyone disclosing the information should be satisfied that the request is genuine and of the identity of the person making the request and should ask for the request to be subsequently confirmed in writing.

This exemption allows the data controller to make the requested disclosure but does not itself make the disclosure compulsory. In the absence of a court order requiring the production of the information, the data controller has discretion to disclose. The principle of 'proportionality' runs throughout the legal framework around disclosure and data sharing – including the DPA provisions. Data controllers need to establish the purpose for which the information is requested and to be reasonably satisfied that the disclosure goes no further than is reasonable to achieve the relevant purpose. They are entitled to question the person making the request, where they have concerns about proportionality. The data controller should also ensure that the information disclosed goes no further than that which is actually requested, that the information being provided is up to date and accurate, and be alert to the risk that the disclosure may also involve disclosure of data relating to individuals not within the scope of the request. Where feasible, they should take steps to remove this third party data before making the disclosure.

Where a university and a students' union are separate legal entities, each will have its own obligations as data controllers. A request by the police to a students' union for disclosure of data should not be treated as a request to the university – the police should make a separate request to the university.

It is also prudent for organisations to have clear written policies and procedures for dealing with police requests, to provide a clear framework of responsibility and accountability to nominated officers and to ensure that requests are responded to in a structured and consistent manner.

Once information is disclosed to the police or another law enforcement agency, that body will also have obligations under the DDA as a data controller, and under the wider legal framework regarding data sharing. The purposes of criminal law enforcement and the protection of national security will typically allow the sharing of data with other law enforcement agencies. Universities will not be legally responsible for any misuse or wrongful disclosure by the third party, but it is suggested that universities should be alert, when responding to disclosure requests by the police, to the risk of further data sharing, particularly in the context of the proportionality of the disclosure.

### Common law obligations of confidentiality

An obligation of confidence will arise:

- in respect of personal information where the information has the necessary quality of confidence – that is where the information is not in the public domain, is not readily available from other sources and has a degree of sensitivity and value
- where the information was communicated in circumstances where there was an express or implied obligation of confidence
- where the body holding it knows or should know that disclosure would be a breach

An obligation of confidence may be overridden where a greater public interest is served by disclosure of the information. The test of public interest is a high one and applies on a case-by-case basis. However, disclosures to the police relating to potential criminal activities would fall within the scope of this public interest defence. Once again, this is subject to requirements of proportionality as a result of other aspects of the overall legal framework.

## Annexe D: Applying the law in practice: three case studies

### Case study 1: Academic freedom; freedom of speech; racial harassment; possible breach of duty to promote good race relations

In an interview with the university's student newspaper, a lecturer attacks multiculturalism and states that he is a proponent of a theory that there is a persistent gap in the average IQ of black and white people. The remarks cause substantial controversy and criticism.

In a subsequent article in the student newspaper, the lecturer repeats and expands on the comments in his earlier interview. He cites academic research papers on average IQ in sub-Saharan Africa as indicative of a level that would be regarded in the West as 'within the range of mental retardation'. He asserts that the populations of such countries are incapable of developing technologically sophisticated civilisations or of building or sustaining states that conform to basic standards of good governance and administrative competence. He claims that these regions are characterised by ignorance, stupidity, superstition and savagery.

The university which employs the lecturer considers the case for disciplinary action, including whether the article falls within the scope of academic freedom, or freedom of speech, within the law.

The first issue considered is whether the remarks constitute unlawful racial harassment. It is concluded that the article in the student newspaper does, prima facie, contain material which has the effect of violating another's dignity or of creating a hostile, offensive or humiliating environment. The content and the tone of the article are contemptuous of the races or national groups referred to, including many from which the university's student population are drawn.

There is clear evidence from complaints and protests about the article that it has caused widespread offence, both to those from racial or national groups to which the article referred and to others outside those groups.

As well as considering those subjective responses, the university considers whether it is reasonable in all the circumstances for the article to be regarded as having the effect of violating another's dignity or of creating a hostile, offensive, or humiliating environment. It is acknowledged that the article cites academic research, but the views expressed in the article go well beyond a mere reference to or reporting of those studies. The substantive parts of the text do not constitute or result from any genuine academic research or scholarship, but essentially use the research referred to as a launching point for a series of offensive and insulting generalisations and racial slurs. The article itself is in no way a genuine academic output. It is considered that there is nothing in the overall circumstances of the case which provides any legitimate context or justification for making the remarks in question. It is also possible that the comments are likely to stir up racial hatred.

In reaching its conclusion that there is a disciplinary case to answer, the university is conscious of the lecturer's rights to academic freedom and freedom of speech within the law, and its own duty to protect those rights. However, the university's view that the article appears to constitute unlawful harassment means that it considers that the comments fall outside the true scope of these freedoms. The lecturer would be able to raise the issue of academic freedom in any disciplinary hearing.

The university is also conscious of its duties to eliminate unlawful discrimination and harassment and to promote good race relations. It determines that these obligations require it to bring disciplinary action against the lecturer and to actively monitor the boundaries of academic freedom within the law.

## Case study 2: Students' union; freedom of speech; unlawful race and religious discrimination; code of practice

A dispute develops within a students' union as a result of tensions relating to the scope of legitimate protest and political expression. The Palestinian Solidarity Group (PSG) complains that the students' union has prevented it from carrying out certain protest activities following complaints by Jewish students and that this is an interference with its right of freedom of speech and expression.

A motion presented by the PSG is passed by the students' union following a referendum. The motion resolves that all political parties of the union should be able to exercise freedom of speech without being silenced to satisfy those with opposing political views. It goes on to resolve that the Jewish Society should be advised that 'promoting and defending Israel in its activities indicate that the Jewish Society is taking and advocating a certain political stand on behalf of Jewish students on campus and is expected to accept that other parties will declare and promote opposing stands in the university, as long as Judaism as a faith is not offended.'

The Jewish community inside and outside the university expresses concern about the motion, complaining that it creates an environment hostile to Jewish students and conducive to antisemitism. A particular concern is expressed that the effect of the motion is that the students' union seems to be determining for itself what constitutes Judaism, adopting a narrow definition based around faith.

The university is concerned to ensure that the motion, and the controversy caused by it and by (in some cases) misleading comments and blogs about the motion, should not undermine its commitment to, and legal duty to ensure, freedom of speech within the law. Neither the PSG nor the Jewish Society, or indeed any other group, should be prevented from exercising freedom of expression, as long as their actions are lawful. To that extent the first part of the motion is not controversial or inappropriate, nor is the reference to the PSG or other groups being able to put forward political views which oppose or conflict with those put forward by the Jewish group. However, the university considers that the caveat 'as long as Judaism as a faith is not offended' does not correctly define the boundaries of lawful freedom of speech and expression.

The university is also concerned that the controversy surrounding the motion (including external comment) has created an environment in which the principles relating to freedom of speech and expression within the law have become confused or blurred, and that an environment may have been created which is hostile to Jewish students or conducive to antisemitism.

The university decides that it would be appropriate and beneficial to take action to affirm and restate the principles of freedom of speech in the Education (No 2.) Act 1986 and their universal and non-partisan application throughout the university community.

The university decides to revise and republish its Code of Practice under the Act, which has until now been merely procedural. The university redrafts its Code to include an introductory section containing a policy statement which emphasises the university's commitment to promoting and protecting freedom of speech and encouraging free debate, enquiry and protest. This expressly states that the university tolerates a wide range of views, political as well as academic, even when they are unpopular, controversial or provocative, but that the right to freedom of speech and expression is not unfettered. The relevant legal framework is summarised. The policy statement states that freedom of expression has to be set within the context of the university's values and those of a civil, democratic and inclusive society. As a result, speakers and those taking part in protest activities are expected to respect these values, to be sensitive to the diversity of the university's community, and to show respect to all sections of that community. The Code emphasises that it is typically the manner and form

of speech or protest activity which will take that activity outside the scope of what is lawful, rather than the mere statement or expression of beliefs or opinions.

The Code gives examples of the approach which the university would take, making clear that it would not prevent spoken or written criticism of the State of Israel but would not permit such criticisms to be expressed in a form which was or might reasonably be interpreted as antisemitic, just as it would not allow the expression of views intended to stir up religious hatred against Muslims.

### **Case study 3: External speaker; freedom of speech; code of practice; safety on campus**

An undergraduate politics student seeks permission from a university to invite a speaker from the BNP to address a meeting on campus. The meeting is a private meeting primarily for students in the politics department, which has a specialism in the study of far-right politics. The purpose of the meeting is to allow the students to hear at first-hand about, and question, BNP policies.

Under the university's Code of Practice on Meetings on University Premises and Freedom of Speech, the university secretary has responsibility for considering requests and ensuring compliance with the Code on behalf of the university's council.

To support decision making under its Code of Practice, the supporting materials to the Code include a due diligence template for taking decisions about speaker events. A flowchart includes consideration of whether the speaker or group have previously spoken on campus, and if so whether the speakers and events were previously cleared under the due diligence framework and whether the events passed off without problems. The flowchart also includes the identification of circumstances which might mean that an event is sensitive or controversial, including the fact that it may involve participation by a speaker or group whose views could be deemed inflammatory or discriminatory to others.

The supporting materials also contain a checklist which requires in any event that the organiser signs the university's Values and Behaviour Agreement form, which includes requirements not to breach the civil or criminal law, not to discriminate or harass and not to breach the terms of the university's Code of Practice.

The university secretary meets with the student to discuss the proposed BNP speaker event, and consults with the university's head of security. The secretary agrees to the event proceeding, providing that the conditions in the Code of Practice and Values and Behaviour Agreement are complied with, and on the condition that the event will be cancelled or terminated if there is any unlawful speech, such as the incitement of racial or religious hatred, or if there are public order concerns.

In taking this decision, the secretary is conscious of the university's duty to ensure freedom of speech within the law. The BNP are not a banned or proscribed organisation or political party. There is no evidence that the speaker's presence at other meetings has involved the commission of any criminal offence or public order issue, or that this event would do so. The purpose of the event appears consistent with freedom of speech within the law, even if it may involve the expression of controversial or unpopular opinions.

The university secretary briefs relevant heads of department, the university's students' union, and the campus trade unions about the event, and issues external and internal statements to explain the decision to grant permission for the event and to place this in the context of the legal duty to ensure freedom of speech within the law.

Opposition to the event builds. The campus trade unions and NUS organise significant protests, arranging to bring staff and students from other institutions to the university to protest. The university acknowledges that this protest activity is also within the scope of freedom of speech and expression. However, the scale of the planned protests make it clear that there is a substantial risk of disorder if the event proceeds and that the original purpose of the event, and the conditions attached to the permission granted, can no longer be fulfilled.

On that basis, and after consultation with security and the police, the university withdraws permission for the event. This is consistent with the university's Code which provides that permission may be withdrawn if adequate arrangements cannot be made to ensure that good order is maintained.

