

IN THE MATTER OF UNIVERSITIES UK

**AND IN THE MATTER OF THE GUIDANCE ON EXTERNAL SPEAKERS IN
HIGHER EDUCATION**

NOTE OF ADVICE

1. I am asked to advise Universities UK as to the lawfulness of its guidance, External Speakers in Higher Education, published November 2013 (the Guidance), particularly in relation to Case Study 2: Segregation.

2. The Foreword to the Guidance expressly provides:

Universities have to balance their obligation to secure free speech with their duties to ensure that the law is observed, which includes promoting good campus relations and maintaining the safety and security of staff, students and visitors. In practice, achieving this balance is not always easy.

Drawing on existing practice within the sector, this guidance seeks to map out the different factors that universities may wish to consider when drawing up policies and protocols for external speakers, reflecting both their legal obligations and their practical application. There is no one simple solution to the issues that emerge, and this guidance does not seek to prescribe a single model.

3. The following points are thus made, entirely properly, at the outset of the Guidance:
 - a. It is merely Guidance, and not prescriptive.
 - b. Decisions must be taken on a case-by-case basis, albeit that the Guidance may assist in identifying relevant factors to be taken into account.

- c. Universities are under a statutory obligation, imposed on them by Parliament, to take such steps as are reasonably practicable to secure free speech (see section 43 of the Education Act (No. 2) 1986 set out in more detail below).
 - d. In making their individual decisions about external speakers, universities may have to balance a range of different and competing interests.
- 4. It is clear that the Guidance document is designed to be read as a whole. Since the Guidance identifies a range of factors, it is not instructive to consider any one part of the Guidance in isolation. Any evaluation of the lawfulness of the Guidance should therefore be undertaken holistically. Thus the material contained in the Foreword and Introduction, in the main text, the case studies and the questions under the heading “practical considerations” is all relevant to such an assessment. Similarly, a decision-maker using the Guidance is expected to have regard to all of the material contained therein. Finally, the Guidance emphasises the importance of universities obtaining their own legal advice on specific decisions.
- 5. One of the purposes of the Guidance, which in my view it appropriately fulfils, is to inform decision-makers of the legal structures upon which their decisions must be based. These structures involve both domestic legislation, the European Convention on Human Rights (ECHR), introduced into domestic law by the Human Rights Act 1998 (HRA), and the case law that has developed from this. Crucially, the Guidance ensures that decision-makers have regard to:
 - a. The duty imposed on universities by section 43 of the Education (No. 2) Act 1986 to “take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for ... visiting speakers” including a duty to “ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with ... the beliefs or view of that individual”.

- b. Article 10 of the ECHR which provides that everyone has the right to freedom of expression including the freedom to impart ideas without interference by a public authority.
 - c. Article 9 of the ECHR which provides that everyone has the right to freedom of religion which includes freedom to manifest his religion.
 - d. Article 11 of the ECHR which provides that everyone has the right to freedom of peaceful assembly and association with others.
 - e. Article 14 of the ECHR which guarantees the enjoyment of the rights and freedoms under the ECHR without discrimination on any ground.
 - f. The duty imposed on universities by section 149 of the Equality Act 2010 to “have due regard to the need to eliminate discrimination ... advance equality of opportunity ... [and] tackle prejudice and ... promote understanding”.
 - g. The requirement that a university, when obliged to make a decision between competing rights and interests, must strike a fair balance between them, having regard to all the individual circumstances of the case.
 - h. The entire legal context including the obligations and powers of charities (which apply to many universities), the criminal law, the law concerning health and safety, and the law of contract and tort generally.
6. One of the features of the Guidance in relation to Case Study 2: Segregation under the heading “practical considerations” is the question “Can any steps be taken to ensure segregation is voluntary?” The Guidance also acknowledges that compulsory rather than voluntary segregation on the basis of sex is potentially capable of amounting to discrimination. The Guidance therefore assists decision-makers in identifying the relevant differences between events where there is voluntary segregation, for example within a particular group (when it might be discriminatory for the university to prohibit the segregation), and where an external speaker proposes compulsory segregation for a general audience when the university will be obliged particularly to

balance a number of competing rights and interests. Importantly, in this and other regards, the Guidance draws attention to the possibility of finding practical and mutually-acceptable solutions to situations of competing rights, for example, offering both segregated and non-segregated seating so that attendees may choose how they make arrangements to hear a particular external speaker.

7. When considering events which propose voluntary segregation, it is appropriate for universities to have regard to the right of self-determination of those who wish to meet while segregated. This is particularly the case where the voluntary segregation is the manifestation of a religious belief which is specifically protected by Article 9 of the ECHR. It would not be right for a university simply to treat a genuine wish for voluntary segregation as evidence of false consciousness on the part of members of the group that seek it, and then prohibit or otherwise inhibit it.
8. As set out above, universities that make decisions about the arrangements for external speakers, are required to strike a balance between competing rights and interests. In doing so, they will be obliged to have regard not only to the statutory duty imposed by Parliament in relation to freedom of speech, but also the great importance placed on freedom of speech both in the European jurisprudence and in the HRA. Further, whether the reason advanced for placing a stipulation of segregation of an audience for a particular speaker relies upon the fact that it is the manifestation of a religious belief, two rights – Articles 9 and 10 – will be invoked. These two important rights must be balanced against a right of freedom of association of those who do not wish to be segregated while hearing a particular speaker. Although it would be too simplistic to suggest that the two former rights will always outweigh the latter, it is likely that in many cases the significance of the two former rights will be greater than the latter in terms of where a person sits in order to be part of the audience for a particular speaker if not allowing segregation would prevent the speaker appearing.
9. The Guidance recognises that segregation is capable of amounting to discrimination. This is in line with the Technical Guidance on Further and Higher Education issued by the Equality & Human Rights Commission which states at paragraphs 4.8 and 4.9 as follows:

“4.8 When the protected characteristic is race, deliberately segregating a student or group of students from others of a different race automatically amounts to less favourable treatment...

4.9 Segregation linked to other protected characteristics *may* be direct discrimination. However, it is necessary to show that it amounts to less favourable treatment.”

It is unlikely that this will be the case where segregation is voluntary, or a non-segregated area is available. While segregation on the grounds of sex is not automatically discriminatory, a requirement to sit separately which is not accepted and is then enforced may be a detriment. The question in any case of indirect discrimination will be whether any disadvantage is justified and/or outweighed by the other considerations involved such as freedom of speech and the manifestation of religious belief.

10. Finally, Scottish universities will be aware that they are not subject to the requirements of section 43 set out above. It is my view that the absence of this specific statutory obligation does not fundamentally alter the analysis insofar as Scottish universities are still obliged to balance competing rights and interests, albeit there is not the additional emphasis on freedom of speech that arises under the English legislation.
11. Taking all these factors into account, it is my view that the Guidance is lawful and provides an appropriate foundation for lawful decision-making by universities.

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12 December 2013