

# **Universities' Legal Obligations in the Context of Trans Inclusion, Trans Equality, and 'Gender Critical' Activities on Campus**

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## EXECUTIVE SUMMARY

The purpose of this document is to explain to students, lecturers and other University staff, including but not limited to University management, Human Resources staff, and those involved in Equality, Diversity and Inclusion work, how the law treats disputes on the limits of freedom of expression in a University. This report in particular focuses on freedom of speech disputes relating to trans inclusion, trans equality and 'gender critical' speech. We explain how the law expects Universities to balance their obligations to protect expression and to safeguard their staff and students' other rights.

This document also outlines the likely impact of the government's proposed Higher Education (Freedom of Speech) Bill.

Section 2 sets out the relevant law, focusing on human rights law, discrimination law, and criminal law. Section 3 explains how this law applies in the specific context of trans-related speech. This Section summarises recent decisions of the UK courts, and sets out, using sample scenarios, how these would apply in the specific context of the University.

## RELEVANT LEGAL CONSIDERATIONS

The right to freedom of expression, established under the European Convention on Human Rights, ensures that individuals can access information in order to form their opinions and identity, and so that they can express their opinions and engage with others, for instance, to further develop their opinions, demand their rights, protest, or contribute to shaping the political landscape. Freedom of expression does not exclusively protect a monologue: it protects the exchange of ideas and opinions, including both speech and counter-speech. Public debates in the context of trans rights tend to focus on the (often 'gender critical')<sup>1</sup> speaker's right to freedom of expression. This focus neglects the fact that the speaker's right to freedom of expression is only one side of the coin, and that the freedom of expression of those seeking to protest against a speaker is equally relevant. Accordingly, any measure undertaken to protect freedom of expression must ensure that both the speaker's and the protestor's rights to freedom of expression are adequately considered.

In principle, University teaching and research staff are entitled to a heightened form of free speech: academic freedom. However, the legal protection of that freedom applies to statements made within an academic's area of expertise

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<sup>1</sup> See footnote 3, below.

(teaching and/or research) or professional competence and does not apply to statements or publications made outside of this context. This means, for example, that a Professor of Physics who has no expertise in feminism or gender studies cannot claim academic freedom when espousing 'gender critical' views. Equally, while a University is obliged to respect the academic freedom of its staff, and that principle might apply to invited academics from other institutions, it cannot be extended to visiting politicians, journalists, social media celebrities, etc.

Importantly, and as we outline in this report, the right to freedom of expression is limited by law in several scenarios. Each of these scenarios, we argue, may apply to limit 'gender critical' expression in certain instances.

One limitation to the right to freedom of expression, following the European Convention on Human Rights, is where the expression takes a discriminatory form vis-à-vis other rights protected by the Convention (Article 14) or where the expression is aimed at the destruction of other rights and freedoms (Article 17).

Freedom of expression is also restricted when the expression violates criminal law: for example, because the speech is an explicit or implicit threat or encouragement to kill or to use unlawful violence against a particular (type of) person or group. There are also heightened penalties for crimes motivated wholly or partly by hostility towards people because of their sexual orientation or because they are trans.

Freedom of expression is also limited where such expression is in breach of civil law (because the speech is libellous, discriminatory or constitutes harassment).

## **APPLYING THE LAW TO TRANS-RELATED ISSUES ON CAMPUS**

### ***Scenario A: Campaign to rescind an invitation***

In principle, once an invitation has been extended, it is unlikely that a University may cancel an event on the basis of a speaker's opinions. There are two important exceptions, however: (a) if those opposed to the event have reason to believe that anything that may be said or done by the speaker at the event will cross the line into criminal behaviour, or (b) the organising of the event would create a scenario where the University was effectively participating in the unlawful harassment of its staff or students. At either of these points the University's duty to uphold freedom of expression ceases to apply.

Section 3 of this report provides examples of both types of situations.

### *Scenario B: Calls for disciplinary action/dismissal*

In principle, any employer – including a University – must not take disciplinary action against, or indeed dismiss, a member of staff merely on the grounds of their beliefs. That protection applies to opinions (beliefs), however, it does not apply to the same extent to actions (manifestations of such beliefs), especially if those actions are violent, hurtful, etc. Again, Section 3 of this report provides practical examples in the University context to illustrate this point.

Ultimately, the law expects Universities to behave in a careful and considered way, based on the specific merits of each case. Universities cannot pre-empt this analysis, for example by categorically treating one of their legal duties (such as the duty to protect free speech) as having a priori greater weight than their other obligations (such as those under the criminal law, or the Equality and Human Rights Acts).

With rights come responsibilities, and it is clear that in a democratic society the recognition of the importance of freedom of speech is coupled with the acknowledgement that there are legitimate and essential limitations to that right.

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# 1. INTRODUCTION

1. The purpose of this document is to explain to students, academics and other University staff at institutions in England and Wales how the law treats disputes between people as to the limits of freedom of expression in a University, focusing in particular on issues relating to trans inclusion,<sup>2</sup> trans equality and ‘gender critical’<sup>3</sup> speech. It is divided into two parts.
2. Section 2 sets out the legal context, i.e. the principles of law that apply to all freedom of expression cases in a University. We set out obligations under the European Convention on Human Rights, criminal law, and discrimination law. We explain how a University is expected to balance its competing obligations to protect expression and to safeguard its staff and students.
3. Section 3 explains the relevant law in the specific context of trans-related speech, summarising recent decisions of UK courts and tribunals and how we believe the courts will expect Universities to apply them. In particular, it addresses when and where anti-trans speech crosses the line, requiring Universities to take steps to restrict it; i.e. when the speech in question constitutes impermissible speech under the European Convention on Human Rights, amounts to harassment, or is criminal. We use two practical scenarios to illustrate the legal issues arising: (a) attempts to restrict public events organised by a group or individual and (b) campaigns for warnings or sanction against an employee of the University who has been expressing (typically) anti-trans opinions.
4. What we explain is that, if faced with a highly polarised debate on campus, the law expects Universities to behave in a careful and considered way, based on the specific merits of each case. Universities cannot pre-empt this analysis, for example by treating one of their legal duties (such as the obligation to protect free speech) as having greater weight than their others (such as obligations under the criminal law, or the Equality Act). Decision-makers must look carefully to see if there is any risk that behaviour will cross the line into criminal behaviour or discrimination. The duty to protect freedom of expression cannot be an excuse for the harassment of vulnerable staff or students, including trans staff or students.

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<sup>2</sup> The use of the term ‘trans’ in this document is intended to refer to all forms of trans experience, and everyone who identifies under the trans umbrella. For an example of the Employment Tribunal treating non-binary persons as being protected under the Equality Act: *Taylor v Jaguar*, ET Case No. 1304471/2018.

<sup>3</sup> The Oxford English Dictionary defines ‘gender critical’ to mean ‘(a) critical of traditional beliefs about gender, esp. based on the perspective of gender feminism (gender feminism n.); (b) critical of the concept of gender identity, or the belief that gender identity outweighs or is more significant than biological sex.’ In practice, this has become the preferred term used by people who campaign against the extension of legal rights for trans people, or for the rolling back of existing legal rights.

## 2. FREEDOM OF EXPRESSION: RESOLVING COMPETING INTERESTS

5. The right to freedom of expression is at the centre of the ‘trans debate’ within UK Universities. In this document, we deliberately refer to that discussion in quotation marks, for the reasons given by Shon Faye in *The Transgender Issue*,<sup>4</sup> where it is argued that the ‘debate’ itself is a recurring, closed-loop discussion in which trans people are expected to justify their own experience and their entitlement to rights which were accepted years ago, and which constitutes a part of trans people’s oppression.
6. In this Section we set out the relevant legal principles. The first sections discuss the overarching freedom of expression obligations, as established under international human rights law. Section 2.1 sets out the content of the right to freedom of expression, Section 2.2 discusses the principle of academic freedom, while Section 2.3 addresses permissible limitations on the right to freedom of expression.
7. These overarching obligations are then applied in light of the specific legal context in England and Wales. Section 2.4 discusses how Universities are expected to apply their freedom of expression obligations. Section 2.5 discusses relevant criminal law principles. Section 2.6 discusses relevant obligations under equality law.

### 2.1. THE RIGHT TO FREEDOM OF EXPRESSION UNDER INTERNATIONAL HUMAN RIGHTS LAW

8. The right to freedom of expression is protected in UK law by the European Convention on Human Rights (‘ECHR’), and by section 3 of the Human Rights Act which requires that all domestic legislation, including all legislation relevant to Universities, must be read and given effect in a way which is compatible with the rights contained in the Convention.<sup>5</sup>
9. Article 10 ECHR provides that:

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<sup>4</sup> Shon Faye, *The Transgender Issue* (London: Penguin, 2022).

<sup>5</sup> The government is presently consulting on reforms to the Human Rights Act 1998, including the amendment of section 2 HRA 1996, to give additional weight to the domestic interpretation of the Convention, i.e. to say that UK courts should prioritise previous decisions of other UK courts over the European Courts of Human Rights. These changes, if made and if they endure, are not likely to come into effect before 2023. In practice, the authors of the document do not believe that those changes or any proposed in that consultation will materially alter the guidance set out in this document, not least because when we cite the decisions of the ECHR, these are ones which have already informed decisions of the UK courts and in that way have been brought into domestic jurisprudence.



1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
  2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>6</sup>
10. The right to freedom of expression ensures that individuals can (a) access information in order to form their opinions and identity, and (b) that they can express their opinions and engage with others, for instance, to further develop their opinions, demand their rights, protest, or contribute to shaping the political landscape. The European Court of Human Rights has recognised the central role that freedom of expression plays in a democratic society. The Court has highlighted that ‘Democracy thrives on freedom of expression’<sup>7</sup> and that ‘freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.’<sup>8</sup> As such, ‘there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of matters of public interest.’<sup>9</sup> (Permissible limitations are discussed further in section 2.3, below).
11. The role of freedom of expression in political debate has been repeatedly acknowledged. In *Erdogan and Others v Turkey* the European Court of Human Rights stated:

The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that

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<sup>6</sup> Article 11 ECHR also protects everyone’s right to freedom of association.

<sup>7</sup> *Centro Europa 7 S.R.L. and Di Stefano v Italy*, Grand Chamber, ECtHR, App. No. 38433/09, 7 June 2012, para. 129.

<sup>8</sup> *Lingens v Austria*, Judgment, ECtHR, App. No. 9815/82, 8 July 1986, para. 42.

<sup>9</sup> *Wingrove v United Kingdom*, Judgment, ECtHR, App. No. 17419/90, para. 58.

offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.<sup>10</sup>

12. The right to freedom of expression facilitates the exchange of ideas and vigorous debate. Two key elements of the right should be highlighted. First, as evident in the text of Article 10, freedom of expression protects both the right 'to receive *and* to impart information'.<sup>11</sup> This indicates that freedom of expression does not exclusively protect a monologue. Rather it seeks to protect the exchange of ideas and opinions; e.g. speech and counter-speech. This is in marked contrast to most press discussion of 'free speech' in the UK, in which it is wrongly assumed that the only rights which require protection are those of the speaker, that their audience is expected to be passive and silent, and that members of an audience have no legal rights. Cases in which freedom of expression has been found to protect expression against another person have included *Steel and Ors v United Kingdom*,<sup>12</sup> which concerned the rights of protesters leafleting against a multinational business, and *Handzhiyski v Bulgaria*,<sup>13</sup> where Article 10 protected a protest that took the form of defacing a monument in order to embarrass a political rival.
13. Second, freedom of expression does not only protect ideas that are received favourably, or which may be regarded as part of a 'reasonable' or 'civilized' debate. It also protects ideas and opinions which are not favourably received, and which shock or offend. This recognises the fact that the process by which ideas are developed or accepted is not always straightforward. Sometimes, expression considered extreme is required in order to shift the status quo. As Lord Justice Sedley explained, in *Redmond-Bate v Director of Public Prosecutions*, 'Freedom only to speak inoffensively is not worth having'.<sup>14</sup> In this regard it is important to emphasise that 'protests can constitute expression of opinion'<sup>15</sup> protected by the right to freedom of expression.
14. There is no single authoritative definition of protest. Importantly, however, the European Court has confirmed that the right to freedom of expression protects not only ideas, but the manner in which they are expressed: 'Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.'<sup>16</sup>

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<sup>10</sup> *Erdogan and Others v Turkey*, Judgment, ECtHR, App. Nos. 346/04, 39779/04, 27 May 2014, para. 33; also *Handyside v the United Kingdom*, Judgment, ECtHR, App. No. 5493/72, 7 December 1976, para. 49.

<sup>11</sup> Emphasis added.

<sup>12</sup> *Steel and Morris v the United Kingdom*, Judgment, ECtHR, App. No. 68416/01, 15 February 2005.

<sup>13</sup> *Handzhiyski v Bulgaria*, Judgment, ECtHR, App. No. 10783/04, 6 April 2021.

<sup>14</sup> *Redmond-Bate v Director of Public Prosecutions* (1999) 7 BHRC 375, para 20.

<sup>15</sup> *Taranenko v Russia*, Judgment, ECtHR, App. No. 19554/05, 15 May 2014, para. 70.

<sup>16</sup> *Jersild v Denmark*, Judgment, ECtHR, App. No. 15890/89, 23 September 1994, para. 31.

15. Evidently, the purpose of protest is to draw attention to the protestors' opinions or ideas, as a means of informing the public and contributing to the overall debate.<sup>17</sup> The manner in which expression is conveyed can – in and of itself – play a key role in capturing attention or making a point. Accordingly, it is likely that the right to freedom of expression will protect a wide variety of protests, both in terms of what is said in them and how that speech is expressed. In this regard the ECHR's decision in *Alekhina and Others v. Russia* (a case concerning a sacrilegious musical performance carried out in an Orthodox church by members of the dissident and feminist punk band Pussy Riot) is relevant:

The Court has also held that opinions, apart from being capable of being expressed through the media of artistic work, can also be expressed through conduct.<sup>18</sup>

16. Public debates in the context of trans rights tend to focus on the speaker's right to freedom of expression. This focus risks neglecting the fact that the speaker's right to freedom of expression is only one side of the coin, and that the freedom of expression of those seeking to protest the speaker is equally relevant. Accordingly, any measure undertaken to protect freedom of expression must ensure that both the speaker's and the protestor's rights to freedom of expression are adequately considered: protesters have rights too.

## **2.2.ACADEMIC FREEDOM AND INTERNATIONAL HUMAN RIGHTS LAW**

17. The principle of academic freedom is widely accepted, and succinctly encapsulated in Recommendation 1762(2006) of the Parliamentary Assembly of the Council of Europe:

4. In accordance with the Magna Charta Universitatum, the Assembly reaffirms the right to academic freedom and University autonomy which comprises the following principles:

4.1. academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction

[...]

4.3. history has proven that violations of academic freedom and University autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation<sup>19</sup>

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<sup>17</sup> *Taranenko v Russia*, Judgment, ECtHR, App. No. 19554/05, 15 May 2014, para. 77.

<sup>18</sup> *Alekhina and Others v Russia*, Judgment, ECtHR, App. No. 38004/12, 17 July 2018, para. 204.

<sup>19</sup> 'Academic Freedom and Autonomy', Recommendation 1762(2006), Parliamentary Assembly of the Council of Europe, 30 June 2006.

18. Similarly, the UN Committee on Economic, Social and Cultural Rights has stated that:

Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creating or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction.<sup>20</sup>

19. The Court has repeatedly stated that ‘academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction.’<sup>21</sup>

20. However, the precise contours of the principle of academic freedom are not resolved by these instruments: ‘The meaning, rationale and scope of academic freedom are not obvious, as the legal concept is not settled.’<sup>22</sup>

21. In *Erdogan and Others v Turkey*, for example, three ECHR judges held that there was a difference between the protection offered to academic speaking on subjects within the sphere of their research, and other speech, even if located within a University:

We submit that in determining whether ‘speech’ has an ‘academic element’ it is necessary to establish: (a) whether the person making the speech can be considered an academic; (b) whether that person's public comments or utterances fall within the sphere of his or her research; and (c) whether that person's statements amount to conclusions or opinions based on his or her

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<sup>20</sup> General Comment No. 13, The Right to Education, Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/1999/10, 8 December 1999, para. 39.

<sup>21</sup> *Erdogan and Others v Turkey*, Judgment, ECtHR, App. Nos. 346/04, 39779/04, 27 May 2014, para. 40. See, similarly, *Sorguc v Turkey*, Judgment, ECtHR, App. No. 17089/03, 23 June 2009, para. 35; *Aksu v Turkey*, Judgment, ECtHR, App. Nos. 4149/04 & 41029/04, 15 March 2012, para. 71.

<sup>22</sup> *Erdogan and Others v Turkey*, Judgment, ECtHR, App. Nos. 346/04, 39779/04, 27 May 2014, para. 40.

professional expertise and competence. These conditions being satisfied, an impugned statement must enjoy the utmost protection under Article 10.<sup>23</sup>

22. Those dicta imply that other forms of speech located in a University context would be denied the heightened protection of academic freedom – for example, events hosted by outside bodies, or expression by academics outside the sphere of their research.
23. ‘No platforming’, as discussed in more detail below, occurs when a decision is made to withdraw an individual’s invitation to speak (say on a University campus) as a result of their association with particular opinions or organisations.
24. It is sometimes argued that withdrawing an invitation gives rise to an interference with the proposed speaker’s freedom of expression and academic freedom. In certain cases, this may be true, particularly when an invitation relates to an academic’s area of expertise and competence. This, and associated exceptions, are discussed in greater detail below (see Section 3.1).
25. Importantly, academic freedom does not extend to non-academics such as representatives of private companies, or political parties, or TV or Internet celebrities, nor, indeed to academics speaking outside their area of expertise and competence. Moreover, academic freedom and freedom of speech do not confer on anyone a ‘right to a platform’ at a University.<sup>24</sup> To hold otherwise would lead to the absurd result whereby a ‘free speech’ claim would require Universities – on receiving a request from an external actor – to provide, a venue, a potential audience, and the prestige associated with their name. Universities’ primary duties are to their students, and their staff, not to external parties, so it is only to be expected that Universities will be selective in who they invite to speak at an event.
26. In *Alekhina and Others v. Russia*, the Court held that there was no generalised right of access to public buildings such as government ministries.

the Court reiterates that notwithstanding the acknowledged importance of freedom of expression, Article 10 does not bestow any freedom of forum for the exercise of that right. In particular, the provision does not require the automatic creation of rights of entry to private property, or even, necessarily,

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<sup>23</sup> *Erdogan and Others v Turkey*, Judgment, ECtHR, App. Nos. 346/04, 39779/04, 27 May 2014, Joint Concurring Opinion of Judges Sajó, Vučinič and Kūris, para. 8. The authors note that the precise scope of an academic’s ‘expertise and competence’ is unclear, and often the subject of public debate.

<sup>24</sup> Even Speakers’ Corner in London’s Hyde Park freedom of speech is not absolute, speakers there must stay within the law in the same ways as are described here.

to all publicly owned property, such as for instance, government offices and ministries.<sup>25</sup>

27. It is likely that the ECHR would look with similar disfavour on any attempt to make Article 10 into a generalised right of access to a public platform in a University.

### **2.3.LIMITATIONS ON THE RIGHT TO FREEDOM OF EXPRESSION**

28. As noted above, Article 10 creates a general presumption in favour of freedom of expression. All other things being equal, government and public authorities must work to protect free expression, including for people on both sides of a controversial debate.
29. The presumption in favour of free expression is, however, qualified. 'Restrictions' may be made on speech, as are prescribed by law, pursue a legitimate aim, and are necessary in a democratic society.
30. Under the Convention, freedom of expression ceases to apply if the speech concerned is contrary to the law, whether because it is criminal (for example because the words used are threats of violence) or it is in breach of civil law (for example, because the speech is libellous or discriminatory or harassment, etc.).
31. The principle of non-discrimination is set out in Article 14 ECHR. As we will see from the discussion of domestic anti-discrimination legislation below, the prohibition on discrimination serves to limit expression which takes a discriminatory form:

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

32. Article 17 ECHR provides a further limit, excluding the rights set out in the Convention, where their misuse would lead to the destruction of other people's rights:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any

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<sup>25</sup> *Alekshina and Others v Russia*, Judgment, ECtHR, App. No. 38004/12, 17 July 2018, para. 213. See also *Taranenko v Russia*, Judgment, ECtHR, App. No. 19554/05, 15 May 2014, para. 78.

act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

33. Only rarely will speech be so offensive for it to engage Article 17 and lose the protection of Article 10. To come within Article 17, a mere willingness to destroy the rights of others is not sufficient. That desire to negate other people's rights must take the form of an 'activity' or 'act' which deprives the group or person of their own right to speak. There are, however, examples of expression which was found to have crossed that line:

ACTIVITY WHICH WAS FOUND TO INFRINGE ARTICLE 17
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<p>In <i>Beizars and Levickas v Lithuania</i>,<sup>26</sup> the complainants were gay men who had been the victims of homophobic speech on social media. They suffered threats on Facebook, to 'burn in hell', be castrated, burned or 'cure[d]', which the state had failed to investigate or restrict. The victims complained that the state had failed to protect their rights under Article 14, and held that the speech of their abusers came within article 17 and was not protected speech. The ECHR agreed with them.<sup>27</sup> The prospect of physical violence was limited (the posters did not know where the complaints lived) but the language was 'performing' violence against them. The Lithuanian state had acted unlawfully in ignoring their complaints and the court required Lithuania to compensate the complainants.</p>
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ACTIVITY WHICH WAS FOUND TO INFRINGE ARTICLE 17
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<p>In <i>Norwood v United Kingdom</i>,<sup>28</sup> a member of the BNP in 2002 displayed insulting images from the window of his home, a poster representing the Twin Towers in flames and carrying the words 'Islam out of Britain – Protect the British People'. Mr Norwood was prosecuted in the UK and convicted of displaying a sign with hostility towards a racial or religious group and received a fine. The ECHR held that Article 17 applied to his case. The decision to prosecute him had infringed his right to free speech, but that infringement had been lawful. The ECHR found that the message of the poster was that the presence of Muslims in Britain must endanger the rights of other people and therefore that Islam and therefore Muslims, as a group, need to be removed from Britain. In addition, the Court also concluded that the poster linked Muslims as a group to grave acts of terrorism, finding this to be an attack on a religious group: 'linking the group <i>as a whole</i> with a grave act of terrorism, is incompatible with the values proclaimed</p>
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<sup>26</sup> *Beizars and Levickas v Lithuania*, Judgment, ECtHR, App. No. 41288/15, 14 January 2020.

<sup>27</sup> Also see *Sabalić v Croatia*, Judgment, ECtHR, App. No. 50231/13, 14 January 2021, which reached a similar conclusion, with the Croatian government criticised for its failure to provide sufficient sanctions for homophobic and transphobic crimes.

<sup>28</sup> *Norwood v the United Kingdom*, Admissibility Decision, ECtHR, App. No. 23131/03, 16 November 2004.

and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.’<sup>29</sup> [Emphasis added]

34. In broad terms, the case-law distinguishes three bands of activity.

- Band (i): The ‘gravest’ category of language which clearly stirs up hatred or violence or performs acts aimed at the destruction of the rights and freedom of others, and which clearly engages Article 17.
- Band (ii): A ‘less grave’ category of speech which arguably engages Article 17, and requires ‘an assessment of content of the expression and the manner of its delivery’. This category will include some language which slanders or is prejudicial or offensive to groups protected by Article 14.
- Band (iii): The majority of language, which does not engage Article 17, since it does not come close to calling for, or symbolically enacting, the destruction of others’ rights.<sup>30</sup>

35. When speech comes within band (ii), the court has held, its legality or otherwise will depend on the context. So, for example, Mr Norwood was a member of the British National Party and although his poster may have been considered political speech, its nature meant that it was not protected by the European Convention on Human Rights. Other cases which are superficially similar have resulted in different outcomes. So, there are examples of cases upholding the human rights of political activists, even where their views are offensive, for example, *Redfearn v the United Kingdom*,<sup>31</sup> where a BNP candidate was dismissed from his post as a bus driver. A crucial difference between *Norwood* and *Redfearn*, was that the latter had been silent at work and done nothing to offend his colleagues. He was dismissed not for anything he had said or done (the expression or manifestation of his opinion) but what he believed (the opinion itself). Despite the obvious racism of the party of which he was a member, this was a step too far.

36. In general, human rights caselaw has sought to afford significant protection to academic expression. But to receive this heightened protection, the academic concerned must be speaking within the bounds of their professional expertise. So, in *Erdogan v Turkey*,<sup>32</sup> a Professor had published a piece in an academic law journal criticising senior judges for dissolving a political party, and portraying them as

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<sup>29</sup> Arguably, those ‘gender critical’ statements which refer to the negative behaviour of individual trans people, and use it to lobby for a restriction of the rights of trans people as an entire group suffer from the same flaw.

<sup>30</sup> *Lilliendahl v Iceland*, Admissibility Decision, ECtHR, App. No. 29297/18, 12 May 2020, paras 25-36.

<sup>31</sup> *Redfearn v the United Kingdom*, Judgment, ECtHR, App. No. 47335/06, 6 November 2012.

<sup>32</sup> *Erdogan and Others v Turkey*, Judgment, ECtHR, App. Nos. 346/04, 39779/04, 27 May 2014.



incompetent. Professor Erdoğan was writing for an audience of academics and in his specialist area.<sup>33</sup>

37. By contrast, in 2004, Bruno Gollnisch a Professor of Japanese and candidate for the French far-right party, the Front National, was suspended from teaching in his college after saying at a press conference that there had been no gas chambers in Hitler's concentration camps. Gollnisch was speaking outside his area of academic knowledge. The Court held that his contribution to the spreading of disorder within his University was incompatible with his duties as a teacher. Accordingly, it found that his suspension had been lawful.<sup>34</sup>

## 2.4. UNIVERSITIES AND FREEDOM OF EXPRESSION

38. Some Universities are also bound by charity law. Those Universities that are charities must only act in ways which further their objects. These objects must be for the public benefit (Part 1, Charities Act 2011). A University's trustees must comply with the Universities' obligations to protect freedom of expression and to protect students, employees and workers from harassment, discrimination, etc.

39. Universities are subject to section 43 of the Education (No.2) Act 1986 ('Freedom of speech in Universities, polytechnics and colleges.') which provides that:

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

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

(a) the beliefs or views of that individual or of any member of that body;  
or

(b) the policy or objectives of that body.

40. Subsections 43(3) and (4) require Universities to issue, keep up to date and apply codes of practice setting out procedures to give effect to this duty.

41. While section 43 was intended to make no platforming very difficult in the UK, or even unlawful; in practice this has not been its effect. Those whose platforms have

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<sup>33</sup> See also *Sorguc v Turkey*, Judgment, ECtHR, App. No. 17089/03, 23 June 2009.

<sup>34</sup> *Gollnisch v France*, Admissibility Decision, ECtHR, App. No. 48135/08, 7 June 2011.

been removed have struggled to enforce section 43. And that effort has been made ever more difficult by the expanding use of the Equality Act, which limits the ability of Universities to insist on events going ahead, especially where those events can plausibly be said to result in discrimination against protected groups of staff or students (see below).

42. As of the drafting of this report in autumn 2022, this duty ('the freedom of speech duty') was expected to be augmented by a proposed Higher Education (Freedom of Speech) Bill. Among the changes that law would make would be to create a further duty on institutions, not merely to protect freedom of expression but in particular to safeguard the 'academic freedom' of staff. However, that protection is unlikely to be read as extending beyond the narrowly-defined protection of academic freedom that already exists in the caselaw of the European Convention, which we have discussed in relation to Article 10, and which is already a consideration for UK courts.
43. It can be noted in passing, however, that the speech which has been central to the trans inclusion, trans equality, and 'gender critical' 'debate' has only relatively rarely been located in academic journals. Most journals require peer review, and the need to obtain group consensus before publication limits them from soliciting material which disparages whole groups of people.<sup>35</sup> Often, what has been criticised is non-academic commentary, perhaps written by academics, but on social media or blogs or even in the national press and most often on subjects unrelated to those lecturers' academic expertise. As explained, such speech is not entitled to heightened Article 10 ECHR protection and is more vulnerable to the Article 17 exclusion. It would also not be protected academic speech under the Freedom of Speech Bill.
44. The Bill provides a wider set of enforcement options to those seeking to challenge Universities over free expression. At the time of writing, most speech disputes have been resolved internally by a University, with complaints addressed under that University's policies. The decision taken by Universities were capable of being challenged, for example, in judicial review or by civil proceedings for injunction,<sup>36</sup> however in practice even applications for injunctions let alone actual injunctions have been incredibly rare. For example, to the best of the authors' knowledge, not one speaker holding either trans-inclusionary or trans-exclusionary positions anywhere in Britain has gone from having their event at a University criticised or indeed cancelled to the next step of applying to the court for an injunction insisting it should go ahead. Until now, the main way in which freedom of expression

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<sup>35</sup> For an example of an article published in this area, despite the criticisms of the journal's editors, T. Bartlett, 'The Essay That Prompted an Editorial Revolt,' *The Chronicle of Higher Education*, 8 March 2022.

<sup>36</sup> For example, *R v University of Liverpool, ex parte Caesar-Gordon* [1991] 1 QB 124.

disputes have been litigated has rather been when employees have sought to challenge their employer's decisions (e.g. following dismissal or detriment short of dismissal) in the Employment Tribunal.

45. The Higher Education Bill is intended to create two new enforcement mechanisms. If or when the Bill passes it will create a new section 69B of the Higher Education and Research Act 2017 which will provide staff, members of Universities, students and visiting speakers with a route to complain to the Office for Students, which will establish a Free Speech Complaints Scheme to hear complaints against Universities or against students' unions. The Office for Students will have the power to find that a governing body or students' union<sup>37</sup> has breached its duties to protect freedom of expression. This mechanism is intended to be easy and accessible. There will be no fees for bringing complaints.
46. The Bill also proposes to amend the Higher Education and Research Act 2017 by introducing a new section A6 of the same Act, introducing a new civil right for staff, members of Universities, students and visiting speakers to sue Universities and students' unions to complain that these bodies have not upheld the freedom of expression and/or academic freedom of complainants.
47. Greater access to civil litigation is unlikely to increase the set of complaints brought by permanently-employed staff who have already had access to the Employment Tribunal, which (unlike the civil courts) is free to access and is a broadly costs-free jurisdiction. On the other hand, it may well result in a significant increase in the number of complaints brought by students, including graduate students, against Universities.
48. Where University managers protect the speech of 'gender critical' staff while restricting the Article 10 rights of their critics, those managers breach Article 10 and section 43, and make themselves vulnerable to report to the Office for Students and/or to civil claims including claims for injunctions and damages. As noted above, freedom of expression protects the right to debate, including the rights of the speaker and the rights of those protesting against them:

<b>INSTANCES OF PRO-TRANS EXPRESSION CURTAILED BY UNIVERSITIES</b>
A trans student at Bristol University was subject to disciplinary procedures, for writing a letter to University managers asking them whether they would permit meetings on campus of the anti-trans group Woman's Place UK. <sup>38</sup>

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<sup>37</sup> For the moment, students' unions are not covered by section 43 of the Education (No.2) Act 1986.

<sup>38</sup> 'University of Bristol not 'uncomfortable' disciplining trans activist,' *BBC News*, 11 February 2022.

Members of an LGBT committee who wanted to oppose a meeting of a 'Women's Sex Based Rights' group at Edinburgh University in June 2019, complained that the University had censored them by prohibiting them from commenting on the talk without first obtaining the University's permission,<sup>39</sup>

Trans students and allies at Sussex University were described by the University's Vice Chancellor in autumn 2021 as a 'threat to cherished academic freedoms' and threatened with investigation after they objected to a Professor signing the Women's Declaration of Sex-Based Rights, a document which calls for the repeal of all legislation recognising the ability of people to change their gender by law including, in Britain, the Gender Recognition Act 2004.<sup>40</sup>

## 2.5. CRIMINAL LAW

49. As noted above, one of the other limitations to freedom of expression is criminal law. It is a crime to make threats to kill (section 16 Offences Against the Person Act 1861) or to speak or act in a way that indicates a willingness to use unlawful violence against another person (Section 39 Criminal Justice Act 1988).

50. Sections 4A and 5 Public Order Act 1986 prohibit the causing of harassment, alarm or distress. Section 4A applies to intentional harassment. Section 5 provides that:

A person is guilty of an offence if he—

- (a) uses threatening words or behaviour, or disorderly behaviour, or
- (b) displays any writing, sign or other visible representation which is threatening or abusive, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

51. A course of conduct of a similar seriousness is also likely to be prohibited by the Protection from Harassment Act 1997. Unlike the Public Order Act, the PHA is also capable of enforcement in the civil courts (section 1 PHA 1997).

52. Section 66 of the Sentencing Act 2020 requires courts to impose aggravated sentences for any offence aggravated by hostility related to sexual orientation, or transgender identity.

## 2.6. EQUALITY LAW

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<sup>39</sup> L. Brooks, 'Edinburgh LGBT+ committee resigns in row over speakers at feminist meeting,' *Guardian*, 6 June 2019.

<sup>40</sup> N. Badshah. 'University defends 'academic freedoms' after calls to sack Professor,' *Guardian*, 7 October 2021.

53. Other restrictions on freedom of expression are the Prevent Duty (section 26 of the Counter-Terrorism and Security Act 2015 requires public bodies to have 'due regard to the need to prevent people from being drawn into terrorism') and the Equality Act.
54. Section 91 Equality Act 2010 prohibits a University from discrimination against students whether by harassing them (section 91(5)) or by discriminating:
- (a) in the way it provides education for the student;
  - (b) in the way it affords the student access to a benefit, facility or service;
  - (c) by not providing education for the student;
  - (d) by not affording the student access to a benefit, facility or service;
  - (e) by excluding the student;
  - (f) by subjecting the student to any other detriment.
- (section 91(2) EA 2010).
55. Part 5 of the same Act makes Universities liable for Acts of discrimination carried out against their workers and employees.
56. Discrimination is prohibited under the Act against nine protected characteristics including gender reassignment and religion or belief (section 4 EA 2010).
57. The Act prohibits a number of statutory wrongs including direct discrimination on the grounds of a protected characteristic (section 13 EA 2010), indirect discrimination (section 19 EA 2010), and victimisation (section 27 EA 2010).
58. The most important of these statutory torts, in the context of freedom of expression is the prohibition on harassment, which is defined by section 26(1) EA 2010 as follows:
- A person (A) harasses another (B) if—
  - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
  - (i) violating B's dignity, or
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
59. Section 149(1) EA 2010 requires Universities, in common with all public sector to have due regard to the need to:
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

60. Section 149(3) EA 2010 provides further matters to which Universities must give due regard, including:

- (c) encourag[ing] persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

61. The Equality and Human Rights Commission has also published guidance, 'Freedom of Expression: a guide for higher education providers and students' unions in England and Wales' (see below para. 75).<sup>41</sup>

### **3. APPLYING FREEDOM OF EXPRESSION IN UNIVERSITIES**

62. To date many controversies involving trans equality, trans inclusion or 'gender critical speech, have taken either of the following forms: (a) a group has been made aware that a speaker or group has been invited to campus and have called for the rescinding of their invitation, or (b) a group has been made aware that an employee of the University has been expressing (typically) anti-trans opinions.

63. In either scenario, staff and/or students have exercised their own rights of expression, by campaigning for the University to withdraw the proposed speaker's invitation, or to discourage the employee concerned from speaking in derogatory terms about others. In the advice that follows, we try to show how the courts are likely to consider each of these scenarios and the weighing of the rights of each side.

#### **3.1. SCENARIO A: CAMPAIGN TO RESCIND AN INVITATION**

64. The first question facing any court will be to ask itself how well the University has done in sufficiently balancing its competing obligations to the speaker(s) and to the protester(s). The University has a duty to protect the former. But it may have to balance its freedom of expression duties against the rights of the latter. The rights of protesting staff or students will carry greater weight where those opposed to the event have reason to believe that anything said or done there will cross the line into criminal behaviour, or the organising of the event would create a scenario

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<sup>41</sup> <https://www.equalityhumanrights.com/sites/default/files/freedom-of-expression-guide-for-higher-education-providers-and-students-unions-england-and-wales.pdf>.

where the University was effectively participating in the unlawful harassment of its staff or students.

65. There has been very little caselaw on the correct interpretation of the section 43 prohibition in relation to no platforming. It has been assumed that, although the University's free speech duty applies to senior University administrators, it has no consequences for staff for student bodies. If, or when, passed, the Higher Education Bill is intended to address that absence by requiring student unions as well as Universities to implement the section 43 duty. In practice, if a student union campaigned for a speaker to have an invitation rescinded, that speaker could potentially sue them.
66. It is possible to think of occasions where high profile opponents of trans rights have carried out behaviour which crosses the line so that a criminal prosecution might well be appropriate. So far, the clearest instance has been from activism in the United States:

<b>ANTI-TRANS ACTIVISM WHICH WAS CRIMINAL</b>
In 2016 the British anti-trans activist Milo Yiannopoulos held a campus tour in America, during which Yiannopoulos's supporters carried out rhetorical and actual violence, including at the University of Washington, which involved 'pepper-blasting' (i.e. spraying people with aerosol pepper sprays) and then shooting two members of the public opposed to Yiannopoulos's event. If a British University was asked to host events by a speaker with a similarly violent record, the section 43 obligation to uphold freedom of speech would not extend to requiring a University to host an event at which criminal behaviour was likely.

67. At the time of writing, anti-trans activists in Britain are experimenting with forms of direct action: for example, by adopting a policy of standing outside public libraries at which trans, drag or LGBT performers are due to give a reading and picketing those events. During these instances of direct action, hateful and demeaning language is often used to refer to the performers. As yet, there have been no reports of similar events taking place at Universities. However, should they start, then it is likely that Sections 4A and 5 Public Order Act 1986 and section 66 of the Sentencing Act 2020 would be engaged.
68. It is worth bearing in mind that the majority of what complainants might characterise as offensive speech does not breach the criminal law. For example, in February 2020, the High Court heard a complaint from a Harry Miller who had posted tweets commenting on trans rights in pejorative terms. He accused trans rights supporters of 'building an army,' told people who disagreed with them that

their views were ‘crap’, and posted messages belittling supporters of trans rights. After two dozen such tweets, and a complaint from a member of the public, Mr Miller was visited by a police officer, who recorded the events as hate incidents. In circumstances including that the complainant was not trans, the High Court held that the speech had not contravened the criminal laws set out in earlier in this document, and that the police were wrong to have recorded Miller’s tweets as a hate crime.<sup>42</sup> The decision was reversed on appeal (i.e. it was found that the officer had acted correctly in recording Mr Miller’s conduct as hate speech), but the Court of Appeal nevertheless endorsed the High Court’s findings that Miller’s tweets had not been criminal.<sup>43</sup> For the time being, therefore, much ‘gender critical’ speech should not be treated as illegal. It might be unpleasant or unwanted, but it is not actually criminal under current law.<sup>44</sup>

69. If the allegation is that a speaker is likely to harass staff or students, contrary to section 26 of the Equality Act 2010 (see para 58, above), then the starting point is to enquire whether the Equality Act 2010 is engaged. The following are protected against discrimination including harassment: trans staff and students where the harassment was on grounds of gender reassignment,<sup>45</sup> trans staff and students where the harassment was on grounds of sex,<sup>46</sup> and (assuming that their beliefs are sufficiently cogent) people holding to the belief that trans rights should be sustained or extended.<sup>47</sup>
70. Equally, the following are also protected in principle<sup>48</sup> against discrimination: people holding anti-trans opinions where those opinions are of a similar cogency or status to a religious belief.
71. In *Grainger Plc & Ors v Nicholson*,<sup>49</sup> the Employment Appeal Tribunal held that for a belief to be protected it must ‘be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others’ (para 24). More recently, in *Forstater v CGD Europe & Ors*,<sup>50</sup> the EAT has

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<sup>42</sup> *Miller, R (On the Application Of) v The College of Policing & Anor* [2020] EWHC 225.

<sup>43</sup> *Miller, R (On the Application Of) v The College of Policing & Anor* [2021] EWCA Civ 1926, para 70.

<sup>44</sup> This does not mean, however, following the appeal in Miller’s case, that such instances should not be recorded as hate speech by the police, they should.

<sup>45</sup> In *Forstater v CGD Europe & Ors* [2021] UKEAT 0105/20, Choudhury J asked aloud whether most trans people come within the protection of s7 EA 2010, but his comments were dicta, i.e. not part of his decision. He was not addressed on the assurances given to Parliament when the Act was passed, that the wording of section 7 was intended to cover all trans people. *Hansard*, 12 June 2009.

<sup>46</sup> *Forstater v CGD Europe; P v S and Cornwall County Council* [1996] ICR 795 at 17-22.

<sup>47</sup> *Forstater v CGD Europe*. Where pro- or indeed anti-trans opinion relies on the protection of the Equality Act for religion or belief, it must come within the ‘Grainger’ criteria, as set out, below.

<sup>48</sup> They are protected from discrimination; their utterances may not be: see paras 93-5 below.

<sup>49</sup> *Grainger Plc & Ors v Nicholson* [2010] IRLR 4.

<sup>50</sup> *Forstater v CGD Europe & Ors* [2021] UKEAT 0105/20.



held that in deciding whether a belief is worthy of respect, the courts should apply the same test as they would under Article 17. The outcome of that case was that Ms Forstater, a person who held 'gender critical' opinions, including a belief that the Gender Recognition Act had been misconceived and that she was under no duty to respect trans people, held a belief which was protected under the Equality Act.

72. The decision in Forstater has been widely misunderstood and it is worth emphasising that the Appeal Tribunal in that case accepted that Ms Forstater had a protected opinion, does not mean that the manifestations of that opinion were protected.<sup>51</sup> At para 104 of its decision, the Appeal Tribunal drew the distinction between beliefs which were capable of protection, and actions which were (in practice) discrimination:

[The fact that gender critical speech was capable of protection under the Equality Act] does not mean that in the absence of such a restriction the Claimant could go about indiscriminately 'misgendering' trans persons with impunity. She cannot. The Claimant is subject to same prohibitions on discrimination, victimisation and harassment under the EqA [Equality Act] as the rest of society. Should it be found that her misgendering on a particular occasion, because of its gratuitous nature or otherwise, amounted to harassment of a trans person (or of anyone else for that matter), then she could be liable for such conduct under the [Equality Act].

73. For behaviour to qualify as harassment under the Equality Act, as noted above, it must have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. This idea of violating another person's dignity requires explanation. A very great deal of 'gender critical' speech takes the form of criticising trans people. Trans people are accused of being actual or potential criminals, rapists, abusers, liars, cheats, etc. Such language violates the dignity of trans people because it treats them, ultimately, as if they were less than fully human.

ANTI-TRANS ACTIVISM WHICH WAS HARASSMENT
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During the same tour, already discussed above, anti-trans activist Milo Yiannopoulos spoke at the University of Wisconsin-Milwaukee, Yiannopoulos named a trans woman student, displaying her photograph on screen for everyone attending to see, called her a slur word and threatened to rape her. <sup>52</sup>
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<sup>51</sup> *Mackereith v DWP* [2022] EAT 99 at 83, 99, 110 and 126.

<sup>52</sup> C. Landsbaum, 'Alt-Right Troll Milo Yiannopoulos Uses Campus Visit to Openly Mock a Transgender Student,' *The Cut*, 15 December 2016.

Behaviour of that kind and seriousness would clearly be harassment, coming within s26 EA 2010.

74. Since the passage of the Enterprise and Regulatory Reform Act 2013 employers have not been liable for failing to prevent third party harassment. Universities are accordingly not in principle liable for acts of third parties, however they become liable at the point where a proscribed factor forms part of the motivation for inaction:<sup>53</sup> so, for example, where a trans rights campaign demands the cancellation of a particular talk, and the University refuses, with its internal documents saying that it has made a policy decision to always prioritise free expression over the demands of its trans and pro-trans staff and students. A University which permitted a talk to go ahead on that reasoning would be, on the face of it, adopting the harassment of the staff and/or students targeted by it;<sup>54</sup> it would be making a decision of its own which directly discriminated against its own pro-trans staff and students.
75. Previous guidance has been published by bodies including the Equality and Human Rights Commission and the Department of Education which unfortunately suggests that in the above scenario, a University would have no choice but to permit the event to go ahead – that, in effect, section 43 whether as drafted or amended by the High Education (Freedom of Speech) Bill, subjects the University to an absolute requirement to uphold free expression in all circumstances, even where behaviour crosses the line into harassment. So, for example, the Equality and Human Rights Commission guidance on Freedom of Expression provides a hypothetical case study of an anti-trans activist invited to speak on campus.<sup>55</sup> It hypothesises that all anti-trans speech is always, by definition, permitted under Article 10 ('the speaker's views are lawful'), and goes on to advise Universities that once an invitation has been given, it cannot be rescinded.
76. That advice is questionable and fails to grasp the distinctions laid out clearly in the caselaw between speech which deserves the protection of the Convention and speech which does not. The drafters of that document appear to have hoped that

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<sup>53</sup> *UNITE v Nailard* [2018] IRLR 730, para 99.

<sup>54</sup> That Universities can be liable for harassment by staff or students is shown by the case of *Raquel Maria Rosario Sanchez v University of Bristol*, claim No: 008LR988, Bristol County Court 2022, in which a 'gender critical' activist complained that she had been harassed by the supporters of trans rights. As it happened, the evidence of the Claimant in that case was not believed and she lost. The lasting significance of the case is, however, that all parties accepted that inter-student disputes can in principle cross the line into harassment. That acceptance is of significance not merely to 'gender critical' activists, but also their opponents.

<sup>55</sup> See, p36, <https://www.equalityhumanrights.com/sites/default/files/freedom-of-expression-guide-for-higher-education-providers-and-students-unions-england-and-wales.pdf>.

they could change the law, or at least practice, by purporting to automatically legalise all 'gender critical' speech. However, in reality, a proportion of anti-trans speech is either criminal or contrary to the Equality Act. We do not suggest that all or most such speech crosses the line, but some does. Accordingly, the drafters of that guidance were simply wrong in their understanding of the law. At the moment that the lines are crossed, and behaviour is either criminal or harassment contrary to the Equality Act, the duty to uphold freedom of expression ceases to apply.

77. Similarly, in a consultation document drafted by civil servants in support of the High Education (Freedom of Speech) Bill, civil servants suggested that student fears of harassment by speakers at public events are always misplaced and that Universities should always disregard them. '[A] speaking event where the content has been clearly advertised in advance is unlikely to constitute harassment if attendees attend with prior knowledge of the views likely to be expressed.'<sup>56</sup>
78. It seems that the authors of that guidance have little understanding of Higher Education, or any appreciation of how balanced these issues often are, let alone the risk of malicious conduct in what is a polarised 'debate'. They assume that a speech could only be unlawful in relation to those who attended it; and that anyone who chose not to attend it would be unaffected by it. There are some Universities in Britain (i.e. Oxford or Cambridge), which are spread over thirty or more Colleges, where it is possible to imagine an event occurring on a small setting far away from the large majority of students, so that the majority of them would not even know that a controversial event had taken place. However, even at such a University, a trans student targeted in the way we have described taking place at the University of Wisconsin-Milwaukee (i.e. being "dead-named",<sup>57</sup> and individually targeted for abuse), would have a claim of harassment. Once the talk had taken place, that student would face having to attend lectures and other University events alongside students who had observed their humiliation. They would have been shamed and disgraced in front of their peers. That student's treatment would almost certainly be found to have infringed their dignity, even if they did not attend the event. To say that the event was publicly advertised and at some distance from the student, and that they had a choice not to attend is to miss the point. They would be harassed in front of their contemporaries and their dignity infringed whether they were there or not.

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<sup>56</sup> Department for Education, 'Higher Education: Free Speech and Academic Freedom,' page 35.

<sup>57</sup> The authors of this document do not believe this is a purely hypothetical experience. Rather 'dead-naming', i.e. mocking trans people by referring to their birth names, even where they ceased using it many years ago, appears to be a regular practice within social media 'gender critical' discourse. Examples of it are cited by the courts in *Forstater v CGD Europe and ors*, Employment Tribunal Case No. 2200909/2019 (para 25), and *Miller, R (On the Application Of) v The College of Policing & Anor* [2020] EWHC 225 (para 33).

79. Moreover, there are several Universities in Britain where outside speaker events are infrequent, where they are housed typically on a single site right in the middle of the campus, so that those attending would be walking past all of a University's main Schools, posters advertising the event would be visible to most of every member of a University community, including not just the affected individual, but trans staff or students and their supporters, and where the hosting of an unwanted event would impact upon student life for hundreds if not thousands of people.
80. To see how this might happen, in May 2019, the campaign group Justice for Men and Boys demanded the right to hold an event at Cambridge University which the University hosted at a building containing the University's Centre for Gender Studies.<sup>58</sup> The holding of that event in that venue was widely and understandably criticised by staff and students, who said that the organisation had a history of misogyny and violence to women. They feared that posters advertising women's events would be torn down, and that after the event had ended their experience of the space would have been fundamentally changed. These were reasonable and practical fears of harassment, which a blithe insistence on free speech at all costs could not comprehend nor answer. It is very easy to imagine similar feelings arising where, for example, a module or degree course in trans issues was housed in a particular department, and the University then insisted on using the same premises to host a 'gender critical' event.
81. In those circumstances, it is not realistic for a University to insist that the event must go ahead, on the reasoning that students do not need to attend, and cannot be offended if they do. The distress would be felt in the changed experience of a part of the University which holds a particular emotional value to certain staff and students.
82. The practical reality is that in our law there is no lawful way that Universities can choose to consistently prioritise either their duties to promote free expression or their duties to prohibit discrimination. Both are foundational, neither overrides the other.
83. If a judge was forced to consider a University's decision to allow, or to refuse, a particular event to take place, what the courts would expect is that any decision would be based on a close factual analysis of all the circumstances, and a patient attention to the exact detail of the case, rather than an insensitive reliance on first principles, whether that was 'freedom of expression is absolute' or 'hate speech never allowed'.

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<sup>58</sup> S. Marsh, 'Cambridge University criticised for hosting anti-feminist group,' *Guardian*, 2 May 2019.

84. We can see this insistence on balance from the cases where the higher courts have had to deal with the competing demands of the section 43 freedom of speech obligation and the Prevent legislation. In a judicial review brought by a regular guest speaker at Universities, Mr Butt, the Court of Appeal struck down as unlawful guidance from the Home Office (the 'Higher Education *Prevent* Duty Guidance') which gave more weight to the need to prevent extremism than the need to protect freedom of expression. The Courts held that Universities (and those advising them) needed to be 'sufficiently balanced,' in their application of 'competing obligations'<sup>59</sup> – i.e. to do all they could in practical reality, both to allow freedom of expression and to prevent expression from crossing the lines set out above. The likelihood is that the Courts will expect similar prudence of Universities in future: both encouragement of free expression and a refusal to tolerate either criminal behaviour or the harassment of staff and students.

### 3.2. SCENARIO B: CAMPAIGN TO WARN/DISMISS

85. Where staff or students are campaigning for an employee to be warned about their language or even potentially dismissed, the campaign's express or implicit reasoning is likely to proceed as follows. Such a campaign is likely to contain many people who are protected under the Equality Act. They believe that their enjoyment of the University is compromised by language which infringes their dignity, i.e. because a member of staff has expressed language which amounts to the harassment of trans people.

86. Sometimes, these campaigns are expressed in terms of a logic which is based ultimately on Article 17. In particular, it is said that 'gender critical' activists call for the destruction of trans people's rights and are objectively slanderous, prejudicial or offensive. And, therefore, that campaigners are entitled to call for their rejection, and to demand that the institution distance itself from them.

87. Some and perhaps most anti-trans speech does have the objective of severely restricting trans rights under the law.<sup>60</sup>

ANTI-TRANS EXPRESSION WHICH CALLS FOR THE DESTRUCTION OF OTHER PEOPLE'S RIGHTS
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It is common for 'gender critical' campaigners to refuse to accept the Gender Recognition Act 2004 or to insist that in principle anyone is entitled to ignore it, <sup>61</sup>
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<sup>59</sup> *Butt, R (On the Application Of) v The Secretary of State for the Home Department* [2019] EWCA Civ 256.

<sup>60</sup> It was perhaps for this reason that the European Parliamentary Assembly recently condemned the rise of anti-LGBTI prejudice, including especially in the United Kingdom, and referred to 'gender critical narratives' as 'highly prejudicial' and 'damaging to LGBTI people'. 'Combating rising hate against LGBTI people in Europe,' Resolution 2417 (2022).

<sup>61</sup> *Forstater v CGD Europe and ors*, Employment Tribunal Case No. 2200909/2019, para 88.

or to support declarations which aim to repeal all trans rights acknowledged by law,<sup>62</sup> or to support the existence of conversion therapies under which trans people would be required to live the rest of their lives under the gender assigned to them at birth,<sup>63</sup> or to campaign for the ending of medical interventions which assist trans people suffering from gender dysphoria.<sup>64</sup>

88. As noted above, that language, in itself, is not sufficient to cross the Article 17 boundary, which requires not merely the intention to destroy other people's rights but also 'activity' or an 'act' which is so bad that it engages Article 17.
89. In the majority of cases, anti-trans campaigners (in Britain, unlike in the United States) have been content to limit themselves to a vague and policy-oriented critique of trans rights. In so far as that critique has been generalised, and has not taken the form either of violence or indeed of prejudicial or offensive comments directed at any specific individuals, it has retained the protection of Article 10.
90. The points at which 'gender critical' speech is most likely to be found to be unlawful in the near future and/or attempts to limit would be lawful, are likely to be where such speech or political activism takes the form of:
- demands to remove trans staff or students from Universities<sup>65</sup>, or
  - behaviour which approximates to the activity that was found to have been rightly criminalised in *Norwood v UK*, i.e. speech implying that violence against trans people would be justified<sup>66</sup> or
  - behaviour akin to that we have described among trans opponents in the United States, for example, publicising photographs of individual trans people and inviting mockery or other forms of shaming of them.<sup>67</sup>
91. When anti-trans speech has been harassment, so as to satisfy Section 26 Equality Act 2010, the problem facing Universities is that they have, at first sight, *two* groups of people each demanding the protection of the same Act. We anticipate that as

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<sup>62</sup> For example, Article 1(c) Declaration on Women's Sex-Based Rights, a document often cited favourably by 'gender critical' theorists.

<sup>63</sup> J. Turner, 'Conversion therapy ban shouldn't be rushed,' *Times*, 3 December 2021.

<sup>64</sup> *Bell & Anor v The Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363.

<sup>65</sup> It would be the proposed removal of all trans staff or students from the University which would be an activity tending to the destruction of rights and freedoms engaging article 17.

<sup>66</sup> This, we see, as the essential facts of *Norwood*, the insistence on Muslim violence (embodied in the poster representing the Twin Towers in flames) and the invitation to non-Muslims for revenge (expressed in the words of the poster, 'Islam out of Britain – Protect the British People').

<sup>67</sup> The distinction between this example and the generalised criticism of trans rights which we described earlier is that expression of this sort moves on from merely criticising a group to violating the dignity of individuals, and in that way engages the Equality Act prohibition on harassment.

more cases of this sort come before the courts, the latter will expect Universities to follow something like the following reasoning.

92. The Courts will expect Universities to establish where behaviour has been so bad that it meets the objective standard set out above, of violating people's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. A part of this test is that the behaviour concerned must have sufficient connection to the person complaining about it. How close that connection has to be is a matter of art, not absolute rules. The High Court has previously ruled that the Equality Act 'does not apply to statements published to the public at large in the press or online'.<sup>68</sup> In a University, of course, all relationships are closer: a member of teaching staff is employed by the same University which provides a student's tuition, even if that lecturer does not teach that particular student. However, while generalised statements of disagreement with trans rights (or indeed disagreement with 'gender critical' opinions) are unlikely to qualify as harassment, by contrast, the more that the language relied on was likely to make a particular staff member or student feel that their own dignity has been infringed, the more likely it is to qualify as harassment.
93. A person accused of harassment is likely to have a protected characteristic. The University will have to decide whether that characteristic requires protection and/or whether it was the reason for sanction. In the simplest scenario, the subject of a no-platform campaign will say that they have 'gender critical' views, and insist that their views require protection, and should take priority over their critics' rights. Universities will therefore have to balance the relevant factors when determining the outcome in such a scenario, as discussed next.
94. Not all warnings or dismissals of a person with a protected characteristic are *because of* that person's characteristic. In reality, this is the point on which almost all cases invoking trans equality, trans inclusion, and 'gender critical' speech turn. The employee may tell a Judge something like the following, 'I was warned / dismissed because of my opinions.' They are saying that the reason they were sanctioned is because they held 'gender critical' opinions. The employer may well respond as follows. 'No, you were sanctioned because of your conduct. You had been an employee of ours for many years, we knew your views, and we did nothing to restrict them. The moment when we began investigating you was X...' when that was the moment at which that employee's behaviour crossed the line into the harassment of the people around them.
95. The distinction between these analyses is that it is unlawful to sanction or dismiss a person because of their opinions (where those opinions are expressed

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<sup>68</sup> *Sube & Anor v News Group Newspapers Ltd & Anor* [2018] EWHC 1234.

moderately). It is however entirely lawful to sanction or dismiss a member of staff because their behaviour crosses the line into the active harassment of other staff or students. Employment judges call this question 'the reason why'.<sup>69</sup> Their job is to understand why a sanction took place, whether it was for the reason of the employee's opinion (which will be unlawful, for most 'gender critical' speech) or for the reason of the employee conduct (which may well be lawful).

96. In a typical harassment case the court will focus carefully on the possible reasons for a decision to sanction or dismiss – they will ask if it was related to someone's opinions, or was it because of something they said or did. Judges will listen to both sides and consider which explanation better fits what actually happened.
97. Universities cannot pre-empt this analysis, for example by postponing decisions, adopting a covert policy of refusing to warn or dismiss, or by treating section 43 as a trump card to override the institution's responsibilities under the Equality Act.
98. Although it is only in rare cases that an employee of the University will have engaged in behaviour which was so bad as to constitute harassment; where they have and the University has let that behaviour pass, the passage of the Higher Education (Freedom of Speech) Bill, will mean that other staff and (above all) students will potentially be able to bring damages claims of their own, some of which Universities will lose.
99. The right way for Universities to act is to take anxious care to properly investigate the facts of each situation, to look carefully to see if there is any risk that behaviour will cross the line into criminal behaviour or discrimination. The duty to protect freedom of expression cannot be an excuse for the harassment of trans staff or students.

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<sup>69</sup> *Shamoon v Chief Constable of the RUC* [2003] ICR 337, paras 10-11.