

Information Note on the Legal and Regulatory Context Concerning Freedom of Expression and Academic Freedom

PURPOSE

Freedom of expression and academic freedom are recognised as fundamental to the effective functioning of Universities in the fulfilment of their missions to advance learning, teaching and research. However, such freedoms are not absolute and are subject to legally and contractually imposed limits to protect the rights and freedoms of others.

This information note has been produced to assist University managers responsible for implementing University policies and procedures where freedom of expression or academic freedom may have a bearing¹, by outlining the regulatory framework and context surrounding these matters which may be relevant and therefore require more detailed consideration according to the circumstances of individual cases.

The note also outlines how further guidance may be sought on such matters where appropriate.

ACADEMIC FREEDOM & FREEDOM OF EXPRESSION: CONTEXT

Academic Freedom

Academic Freedom in Scottish universities is enshrined within the **Further & Higher Education (Scotland) Act 2005**, the **Higher Education Governance (Scotland) Act 2016** and is also recognised under Edinburgh Napier University's governing instrument, **The Napier University (Scotland) Order of Council 1993**. There is also contractual recognition of Academic Freedom for academic staff reflecting this. Accordingly, academic staff are allowed freedom within the law, and as far as the University considers reasonable, to hold and express opinions, question and test established ideas or received wisdom, develop and advance new ideas or innovative proposals and present controversial or unpopular points of view without adverse effect on appointments held or sought, and entitlements or privileges enjoyed.

Freedom of Speech and Freedom of Expression

There is a long standing common law recognition of the general right to free speech in Scots law, and more recently the **Human Rights Act 1998** has enshrined into UK law a number of European Convention on Human Rights provisions relevant to freedom of

¹ Such are likely to include, but are not limited to; staff and student disciplinary policy and procedures, fitness to practice regulations, staff grievance and student complaints procedures, public interest disclosure policy, other HR policies and procedures, applicant and public complaints procedures, facilities booking procedures, terms of use and security procedures.

speech and expression. These are applicable to all staff, students, visitors and others connected with the work of the University, and the detailed provisions are included in the **Appendix**.

These rights are, however, qualified and may be restricted by law for a range of purposes including the prevention of disorder and crime, the protection of the rights of others and the prevention of disclosure of confidential information. Such can usually be considered consistent with the restrictions on behaviour contained within the University's policies and procedures, however care must be taken to be satisfied that this is the case. In particular, the provisions of the Public Interest Disclosure policy should be considered in cases where disclosure of otherwise confidential information is concerned.

An overview of the various strands of legislation concerning equality and discrimination, racial and religious hatred, violent, threatening or abusive conduct and speech, harassment and terrorism which apply in Scotland and serve to limit academic freedom and freedom of expression is provided in the **Appendix**.

It should be noted that The Education (No. 2) Act 1986 places a specific legal obligation on institutions in England and Wales to promote and protect freedom of speech.

FURTHER ASSISTANCE WITH CASES CONCERNING FREEDOM OF EXPRESSION & ACADEMIC FREEDOM

University managers responsible for implementing University policies and procedures where freedom of expression or academic freedom may have a bearing should be mindful of the regulatory framework and context outlined in this information note and its potential relevance to the matter under consideration.

In cases where managers are unsure as to applicability, interpretation or the course of action which should be taken, advice may be sought from Governance Services in the first instance who will refer to the University Secretary for information and guidance as appropriate.

Governance Services
September 2018

Appendix:

HUMAN RIGHTS ACT 1998: PROVISIONS CONCERNING 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).

The Act qualifies these provisions through acknowledging 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.

Therefore, the right to academic freedom, freedom of speech and freedom of expression is not absolute and is subject to a range of legal restrictions.

LEGAL RESTRICTIONS ON ACADEMIC FREEDOM AND FREEDOM OF EXPRESSION

Equality and discrimination legislation

Equality and discrimination legislation acts as 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'. UK discrimination law is 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.

Violent, threatening or abusive conduct and speech

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 are contained within **The Public Order Act 1986**. These offences are characterised by violent conduct or by speech or actions which threaten violence or cause fear, alarm or distress.

Racial and religious hatred

Specific criminal offences relating to the stirring up of racial and religious hatred, which can be committed by speech and conduct, are contained within **The Public Order Act 1986 (as amended by The Racial and Religious Hatred Act 2006)** with offences relating to racially-aggravated harassment contained within the **Crime and Disorder Act 1998**. The **Offensive Behaviour at Football and Threatening Communications (Scotland) Act** contains two offences which may be committed by speech and conduct; Offensive Behaviour at a regulated football match and Threatening Communications. The former covers the expression or inciting of religious, racial or other forms of hatred and threatening or offensive behaviour at football matches. The latter strengthens existing law covering threats of serious harm and criminalises threats inciting religious hatred. The offence does not prevent peaceful preaching or proselytising, restrict freedom of speech including the right to criticise or comment on religion or non-religious beliefs, even in harsh terms, or criminalise jokes and satire about religion or non-religious belief.

Harassment

Criminal offences and civil law rights and remedies relating to the offence of harassment (defined as 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) are created under **The Protection from Harassment Act 1997**. Provisions relating to the application of the Act in Scotland expressly state that harassment of a person includes causing the person alarm or distress. Section 50a of the **Criminal Law (Consolidation) (Scotland) Act 1995** also contains an offence of racially aggravated harassment.

Terrorism offences

A range of criminal offences are defined under the **Terrorism Acts 2000 and 2006** concerning the direct or indirect encouragement and incitement of terrorism. In summary these are:

- belonging to a proscribed organisation
- disseminating terrorist publications
- 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; and
- giving or receiving training in terrorist techniques.

A number of these offences directly restrict freedoms of speech and expression, and academic freedom, by making the relevant speech or conduct unlawful. 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.

The **Counter-Terrorism and Security Act 2015** introduced a statutory duty on Universities to have "*due regard to the need to prevent people from being drawn into terrorism*". The accompanying Statutory Guidance requires that institutions have in place policies and procedures for the management of speakers and events that balance the need to ensure freedom of speech and academic freedom within the law, whilst ensuring the wellbeing of students, staff and visitors.

Civil law constraints

The rights to freedom of speech, expression and academic freedom are also subject to a number of civil law constraints, including those relating to defamation and malicious falsehood as well as the civil law rights under the **Protection from Harassment Act 1997**. 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. Charges of defamation can be defended on grounds that a statement or imputation is true or constitutes fair comment.