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1. Introduction

The Human Rights Act 1998 (HRA) came fully into force on 2 October 2000.

There are sixteen basic rights in the HRA, all taken from the European Convention on Human Rights (ECHR). In the context of the use of information technology in the further and higher education sectors some of the more important rights to be aware of include:

- the right to education (Article 2 of Protocol 1)
- the right not to be subjected to torture, inhuman and degrading treatment - (Article 3)
- the right to a fair trial (Article 6);
- the right to respect private and family life, home and correspondence (Article 8);
- freedom of thought, conscience and religion (Article 9);
- freedom of expression (Article 10); and
- freedom of assembly (Article 11)
- prohibition of discrimination (Article 14)

If an individual considers that an institution has breached their Convention rights they can:

- (a) use the HRA as a negotiating tool with the institution
- (b) take the institution to court in the UK for breaching their rights (within a year of the breach)

(c) rely on the Convention rights in the course of any other proceedings involving the institution, e.g. judicial review or a criminal trial.

Many of the matters arising out of the Convention rights relate equally to staff and students. A number of these rights and how they may concern colleges and universities are considered below.

2. The Right to Education (First Protocol Article 2)

'No person shall be denied the right to education ... '

The right to education enshrined in the First Protocol Article 2, and the prohibition of discrimination (Article 14) are most likely to have significance in areas such as admissions policies although the right to education is concerned primarily with elementary education and not advanced studies.

3. Torture, Inhuman and Degrading Treatment - (Article 3)

Article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Although torture is unlikely to be relevant for FE and HE institutions, complaints of degrading treatment may be possible and may occur through computer use. Inhumane and degrading treatment is prohibited under Article 3, but treatment has to reach a serious level before the article would be invoked. In determining this, the characteristics of the treatment and of the victim will need to be evaluated.

In exceptional circumstances

- severe marking,
- disparaging comments, particularly of a racist character, made publicly about a student by a lecturer, or
- the imposition of a disproportionately severe disciplinary penalty

might be considered 'degrading treatment' and provide grounds for a complaint. However, it is likely that the degrading treatment would need to be exceptionally severe in order to persuade a court to uphold such a claim.

Notwithstanding the above, behaviour towards an individual which falls short of degrading treatment – including forms of bullying or harassment of an individual by staff or students – may amount to an interference with Article 8's right to a private life (see below) which can include a right to physical and psychological integrity.

4. Regulating Students - the Right to a Fair Hearing - (Article 6)

Article 6: "In the determination of his civil rights everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal."

This article sets standards for the way decision making hearings should be run. Article 6 applies to both civil proceedings (cases involving disputes between individuals or organisations) and criminal proceedings (when someone is prosecuted for an offence).

The impact of the HRA on student disciplinary and grievance complaints procedures remains somewhat uncertain. There is clearly a distinction to be made between

- scrutinising the procedure (how a case is handled) and
- examining the merits of an academic decision that has been taken (something which is considered not to relate to human rights).

In summary

Some recommendations for the proper handling of student discipline, academic appeals and complaints include

- avoid delay - a hearing within a reasonable time is a specific requirement
- do not refuse a student the right to legal representation if, for example he or she is facing serious disciplinary charges
- include an oral hearing at some stage of the process and
- offer the opportunity of a hearing in public (which may be waived)
- disclose to the student all material information prior to any such hearing
- enable such information to be challenged and other relevant information to be introduced by the student
- give reasons for decisions .

The list above is adapted from information in the chapter "The Regulation of the Community: Student Discipline, Academic Appeals and Complaints" by Hart, N., (2002) in Palfreyman, D. and Warner, D. (ed), Higher Education Law – Bristol, Jordans, pp 137-161.

5. Monitoring and Surveillance

Article 8: "Everyone has the right to respect for private and family life, his home and correspondence."

The rights concerned with here include,

- the protection of personal information,
- the right to personal physical space and,
- the right to private communication

Interference with these rights can be justified for legitimate reasons if it is necessary and proportionate. This is particularly significant for how computer systems are monitored.

It is important that there are policies and procedures in place to ensure that staff and students have been made aware in advance of what would be a reasonable expectation of their privacy and what activity can be subject to monitoring,

In the UK this area is already largely governed by the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000 but there may be situations where infringement of one of these Acts may in addition breach human rights. (See separate **JISC Legal Essentials** on these topics.)

The European Court of Justice ruled in April 2007 that the monitoring by a Welsh college of an employee's email, phone and internet use was a breach of Article 8 of the European Convention on Human Rights. The ruling is important in that it reinforces the need for a statutory basis for any interference with respect to the private use of a telecommunications system by an employee.

More information on this case [Copland v United Kingdom, 62617/00 [2007] ECHR 253 (3 April 2007)] can be accessed on the Pinsent Masons backed OUT-LAW.COM website at - <http://www.out-law.com/page-7936>.

6. Freedom of Thought, Conscience and Religion - (Article 9)

This requires FE and HE institutions not to discriminate on the grounds of religious or other beliefs and applies equally in the electronic environment.

7. Freedom of Expression - (Article 10)

Article 10: "Everyone has the right to freedom of expression ... "

In the UK 'academic freedom' for academics is protected by legislation (Section 202(2) of the Education Reform Act 1988 and Section 26 of the Further and Higher Education (Scotland) Act 2005), but Article 10 applies to all individuals including students.

The right to free expression under Article 10 may be relevant to areas such as: student demonstrations, industrial action and "whistle-blowing" employees and has application in the electronic environment.

An individual can express themselves in ways that other people will not like, or may even find offensive or shocking. However the right to exercise freedom of expression carries with it a responsibility and does not imply a freedom to express views which interfere with the rights of others, such as the right to reputation, or that a student or staff member who does so will necessarily be protected from discipline. The right may legitimately be interfered with in certain circumstances including, for example,

- in the interests of public safety,
- the prevention of crime,
- the protection of health and morals,
- the rights and freedoms of others, and
- the prevention of defamation.

On the other hand with regard to recruitment, it may be unlawful for FE and HE institutions to refuse to recruit (or promote) people on the basis of their political or ideological views. Challenges to such decisions are likely to be supportable by Article 10.

8. Conclusion

- The HRA 1998 makes it unlawful for FE and HE institutions to violate the rights contained in the European Convention on Human Rights and means that they must pay proper attention to the potential impact upon students' and staff rights when they are making decisions that affect them.
- Many everyday acts by institutions touch upon Convention rights in one way or another. For example, how an FE or HE institution uses and permits use to be made of its communications systems could lead to situations where the rights of students and staff are impacted upon unfairly.
- At times the rights of different people may conflict and FE and HE institutions have to find a balance between these rights. For example, an animal rights protester might use the rights to freedom of expression (Article 10) and freedom of assembly (Article 11) to argue that they should be allowed to protest on a website about a scientist who does animal experiments. The scientist might use the right to respect private and family life, home and correspondence (Article 8) to try to stop the protest.
- In seeking to strike such a balance the institution must act proportionately, i.e. not interfere more than is necessary when restricting an individual's right so as to protect the right of another.
- An individual student or staff member should not be denied enjoyment of any of their ECHR rights because of their sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status including sexual orientation or trade union membership.

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