

Human Rights – Overview



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1. Introduction

The Human Rights Act 1998 (HRA), which fully came into force on 2 October 2000, makes it unlawful for a public authority (including publicly funded FE or HE institutions) to contravene sixteen key rights laid down in the European Convention on Human Rights (ECHR), unless an Act of Parliament meant that it could not have acted differently. These rights derive from the aspirational terms of the Universal Declaration of Human Rights issued by the United Nations in 1948.

The HRA is a unique piece of legislation. It does not set out to deal with any particular mischief or address specifically any discrete subject area within the law. It marks a change in the constitutional relationship between individuals and the state. The HRA makes rights from the European Convention on Human Rights into a form of higher law in the United Kingdom

Human rights are based on principles of equality, dignity and respect. They require a balance to be struck between the rights of an individual and the rights of others or the wider community. FE and HE institutions are required by the HRA to operate in a way that upholds and protects the human rights of those they deal with.

Particular Significance for FE and HE

All institutions must pay proper attention to individuals’ rights when they are making decisions that affect them. 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 individuals are impacted upon unfairly.

In most cases existing law will provide the framework for legal action and for many institutions the HRA should present little or no difficulty. By and large FE and HE institutions will already have procedures and practices in place to protect the rights of individuals. However a new higher level of scrutiny of an institution's treatment of individuals is now possible.

Areas such as admissions and other decision making situations will attract the closest examination but many everyday acts by institutions touch upon Convention rights in one way or another.

In the context of the further and higher education sector some of the more important rights which attach to individuals 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);
- freedom of assembly (Article 11), and
- prohibition of discrimination (Article 14)

Many of the matters arising out of the Convention rights relate equally to staff and students. The most relevant of these rights and how they may concern colleges and universities will be considered below:

2. The Right to Education (Article 2 Protocol 1)

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

Although not directly concerning the use of ICT in FE and HE perhaps the most important new right contained in the HRA as far as the education sector is concerned is the right to education itself.

The European Convention did not originally include a right to education but the UK became one of the first signatories to add the protocol including this new right in 1952. So far, European Court rulings have come down against those who have sought a right to a particular type of education, for example those who have claimed that the state should provide education tailored to a minority religion.

Particular Significance for FE and HE

The ECtHR has contended that the right to education in Article 2 Protocol 1 is concerned primarily with elementary education and not advanced studies. Therefore individual rights in respect of one level of education may not be the same as for another. Case law appears to suggest that selective access to higher education is permitted. The court held that, in a case taken against the UK (*X v United Kingdom* [1980] 23 DR 228),

" ... where certain, limited, higher education facilities are provided by a state, in principle it is not incompatible with Article 2 of Protocol 1, to restrict access thereto to those students who have attained the academic level required to most benefit from the courses offered."

This would appear to rule out the possibility that an individual could claim a right to be given a college or university place simply because of Article 2 of protocol 1 ECHR.

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 could occur by computer misuse. 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.

A public authority can, in certain circumstances, be held responsible for the acts of people who work for them even if they do not know or approve of what those people are doing and this applies equally to the use of computers.

Particular Significance for FE and HE

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 possibly 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 the right to a private life (Article 8) 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).

An individual can challenge a decision taken by an institution whose procedures fail to satisfy Article 6. However, the whole process needs to be considered. If the original decision is taken by an institution whose procedures do not satisfy Article 6, the requirement may still be met if that decision can be reviewed (in the form of an appeal on both facts and law) by a court or tribunal that does satisfy Article 6.

Particular Significance for FE and HE

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).

For example, it is unresolved whether students' issues are "civil rights and obligations" and whether a public hearing needs to be oral. A failure to achieve a degree was found not to concern a civil right in *R (Varma) v HRH The Duke of Kent* [2004] EWHC 1705; [2004] ECR 616.

A narrow interpretation of the applicability of Article 6 was adopted in *R (Thompson) v Law Society* [2004] 2 All E.R. 113. From this judgment it can be concluded that even if a student's issues are within Article 6, many FE and HE procedures will, nonetheless, be human rights compliant. This is because of the recognition that the requirements were met if an oral hearing was available, as an exception, if fairness required one, for example, to resolve a core disputed issue of fact.

Source: Annual Report 2004 of the Independent Adjudicator for Higher Education - <http://www.oiahe.org.uk/>.

Article 6 in Summary

Institutions have a duty to act fairly towards students in cases of disciplinary action or appeal. This means that the student must, at the least, be given adequate notice of the allegation against him or her, an adequate hearing (not necessarily oral) and that the appeal body must be unbiased.

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 of 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

Source: Hart, N., (2002) "The Regulation of the Community: Student Discipline, Academic Appeals and Complaints" in Palfreyman, D. and Warner, D. (ed), Higher Education Law – Bristol, Jordans, pp 137-161.

5. Employee Monitoring and Surveillance - Communications at Work/Surveillance - (Article 8)

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

The rights concerned with here are, the protection of personal information, the right to personal physical space, and the right to private communications including electronic communications.

In general, the right to a private life means that the individual has the right to live their own life with such personal privacy as is reasonable in a democratic society, taking into account the rights and freedoms of others.

It is important that there are policies and procedures in place to ensure that individuals 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 Overviews** on these topics).

Particular Significance for FE and HE

These Article 8 rights might be harmed by an FE or HE institution as a result of the disclosure of personal information, for example, and could be used by students or staff to challenge some forms of CCTV surveillance and disproportionate monitoring of emails and telephone calls.

Article 8 has been found to provide a general right to privacy within the workplace. In *Halford v UK* [1997] IRLR 471, the ECtHR held that to tap an office telephone was on the face of it a breach of Article 8, unless the employer warned the employee that it was doing so. However, an employer may attempt to argue that to tap a telephone, even if a breach of Article 8, is necessary to protect the 'rights and freedom of others' (i.e. itself). Email monitoring to ensure that employees are not sending offensive emails which might amount to harassment of other employees may be justified in the same way. Further, under the Regulation of Investigatory Powers Act 2000 (RIPA) interception is allowed for certain listed purposes without the consent of employees. Employers are authorised to monitor staff emails, internet use and even phone calls at work, provided they have a 'lawful' business purpose and that they make 'all reasonable efforts' to inform users of the monitoring.

The Employment Practices Data Protection Code - Part 3 'Monitoring at Work' issued by the Information Commissioner provides guidance on how to balance the individual's right to privacy with the employer's need to carry on his business.

http://www.ico.gov.uk/for_organisations/topic_specific_guides/employment.aspx

A Qualified Right

Article 8 is a qualified right. This means that an interference with the right can be justified in certain circumstances. The interference with must:

- Be 'in accordance with the law' - this means that there has to be clear legal basis for the interference and that the law should be readily accessible.
- Pursue a legitimate aim - there are six legitimate aims set out in Article 8(2), e.g. 'the prevention of disorder or crime'. A public authority which intends to interfere with a person's rights under Article 8 must be able to show that what they are doing pursues one of these six legitimate aims. This is rarely a problem, as the legitimate aims are so wide.
- Be 'necessary in a democratic society' - this is usually the crucial issue. There must be a good reason for the interference with the right and the interference must be proportionate. This means that it should be no more than is necessary.

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)

Article 9 protects the right to practise or demonstrate religion or beliefs in public and in private. The right to practise religion or belief is a qualified right. This means that an interference with the right can be justified as with rights under Article 8. (See above under Article 8).

Particular Significance for FE and HE

This requires FE and HE institutions not to discriminate on the grounds of religious or other beliefs.

7. Freedom of Expression - (Article 10)

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

This includes the right to "hold opinions and to receive and impart information and ideas without interference by public authority". 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.

“Expression” can cover holding views or opinions, speaking out aloud, publishing articles or books or leaflets, television or radio broadcasting, producing works of art, communication through the Internet, some forms of commercial information and many other activities. It can also cover the right to receive information from others, so an individual possess expression rights as a speaker and as a member of an audience. An individual can express themselves in ways that other people will not like, or may even find offensive or shocking.

Particular Significance for FE and HE

The right to free expression under Article 10 may be relevant to areas such as: political demonstration, industrial action and “whistle-blowing” employees.

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, e.g. the right to reputation. Accordingly, a student or staff member who does so will not necessarily be protected from discipline through claiming reliance upon freedom of expression. The right may legitimately be interfered with in the interests of public safety, preventing crime, protection of health and morals, or the rights and freedoms of others and 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. Free Assembly and Association - (Article 11)

The right to assemble with other people in a peaceful way includes by electronic means such as via websites and email. The circumstances in which a restriction of these rights can be justified are similar to those which justify an interference with rights under Article 8 (see above). The right of free assembly includes the individual's right to protest in a peaceful way, particularly against the state. This right can be exercised freely provided that, while exercising the rights, the individual does not commit any wrongful act and acts peacefully and without violence or threat of violence. The individual also has the right not to take part in an assembly against their will. Presumably this could be extended to include all sorts of electronic "associations" such as weblogs and email groups, where the right to free assembly must not be infringed.

9. Who Can Bring a Case Under The Human Rights Act 1998?

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

- (a) use the Act 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.

Proceedings under the HRA can only be brought if they can be classed as the "victim" of a breach of one or more Convention rights by a public authority. A victim is someone who is directly affected by the act or omission of the institution and has suffered a breach of an identifiable ECHR right. Victims can include companies as well as individuals and may also extend to relatives of a victim where a complaint has been made about her death. It may also be someone who is at risk of being directly affected by a proposed measure. In that sense the HRA looks forward and proposals can be challenged before they happen. This will occur when there is the real danger of an individual suffering 'serious and irreparable harm' on the basis of a future violation.

Source: Association of University Teachers - www.aut.org.uk

10. Conclusion

- The HRA 1998 makes it unlawful for FE and HE institutions to abuse individuals' rights as contained in the European Convention on Human Rights.
- Individuals who believe that their rights have been infringed now have access to the UK courts making the process quicker and simpler.
- At times the rights of different people conflict and the courts have to find a balance between these rights. For example, an animal rights protester may use the rights to freedom of expression (Article 10) and freedom of assembly (Article 11) to argue that they should be allowed to protest outside the house of a scientist who does animal experiments. The scientist may use the right to respect for their home (Article 8) to try to stop the protest.
- An individual should not be treated differently, nor have their rights taken away, because of their race, colour, sex, language, religion or political opinions. Their basic rights should be respected no matter what country they are born in or how rich or how poor they are.
- A new higher level of scrutiny is possible as a result of the HRA and it represents an opportunity for FE and HE institutions to revisit practices and procedures which relate to the relationship between the institution and students, staff and outsiders with a view to ensuring that fairness is fundamental to that relationship.

Sources used in the compilation of this article include:

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- Study Guide to the Human Rights Act - Department for Constitutional Affairs - <http://www.justice.gov.uk/>
- The Crime Reduction Website - The Human Rights Act: Guidance - <http://www.crimereduction.gov.uk/hra.htm>
- The Charity Commission - <http://www.charitycommission.gov.uk>
- Human Rights: Human Lives - a handbook for public authorities - <http://www.justice.gov.uk/>
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