

Prevent, free speech, ‘extremism’ and counter-terror interventions: exploring narratives about chilling expression in schools¹

Professor Helen Fenwick and Dr Daniel Fenwick

Introduction

The Prevent strategy – designed to avert the risk of persons being drawn into terrorism – creates polarisation of views to such an extent as to obscure its real impact on expression in schools, the focus of this article. Outside academia, the most high-profile and critical narratives claiming that Prevent chills expression appear to have arisen in the context of schools, as opposed to other educational sectors.² While referrals in education linked to far-right ‘radicalisation’ have recently risen steeply,³ such narratives are at present confined to the impact – or perceived impact – of Prevent on Muslims. The claimed compilation of a ‘secret’ database by police, storing details of persons subject to Prevent referrals, has also recently been criticised, not only as an invasion of privacy, but also as potentially placing inhibitions on speech.⁴ Opponents of Prevent, including Muslim civil society groups,⁵ have

¹ Our thanks are due to the anonymous reviewer for their valuable feedback.

² See e.g.: Rights Watch (UK), “Preventing Education? Human Rights and UK Counter-Terrorism Policy in Schools” (July 2016), pp.4-5.

³ Referrals for right wing ‘extremism’ accounted for 12% of referrals from the education sector in 2015/16, rising to 28% in 2018/19 (17% were Islamist-related, 44% related to unclear ideology); thus, such referrals increased by 70% between 2015-2019: Home Office, “Individuals referred to and supported through the Prevent Programme” (December 2019), <https://www.gov.uk/government/collections/individuals-referred-to-and-supported-through-the-prevent-programme-statistics> [Accessed 01.04.20], Appendix A at D.11. See also points made as to Prevent’s relevance to white supremacism, referencing the attack on a New Zealand mosque: HC Deb, 18 March 2019, Vol.656 col 793.

⁴ See J. Grierson, “Counter-terror police running secret Prevent database”, 6.10.19, *the Guardian* <https://www.theguardian.com/uk-news/2019/oct/06/counter-terror-police-are-running-secret-prevent-database> [Accessed 01.04.20]. But such collection of data could breach the Data Protection Act 2018, if the referral was mistaken, and a right to notification and erasure would appear to arise (ss45, 39, 47 DPA 2018), provided the information was not deemed to require exemption from those rights for the purpose of safeguarding national security (s45(4)(d), s48(3)(d)).

⁵ See MEND, “An Independent Review of Prevent: A Position Paper from Muslim Engagement and Development” (1 February 2019), <https://mend.org.uk/wp-content/uploads/2019/02/An-Independent-Review-of-PREVENT-A-Position-Paper-from-Muslim-Engagement-and-Development.pdf> [Accessed 01.04.20]; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, “Human rights impact of policies and practices aimed at preventing and countering violent extremism” (A/HRC/43/46, 21 February 2020).

drawn upon such criticisms to argue that Prevent normalises Islamophobia⁶ and as applied in schools is akin to a totalitarian measure intended to monitor Muslim pupils' speech for ideological compliance with 'British' values.⁷ Proponents, in contrast, claim that the impact of Prevent on free speech in schools⁸ is greatly exaggerated by its critics, and dispute its characterisation as a strategy targeting Muslim pupils generally,⁹ while it has also been suggested that some hyperbolic criticisms of Prevent are attributable to an anti-Prevent lobby that is itself associated with 'extremism'.¹⁰

It was clear from the inception of Prevent that the goals of countering 'extremism' and 'radicalisation' by promoting 'British' values had the potential to conflict with the goal of achieving free debate about political, cultural or religious grievances linked to terrorism,¹¹ potentially chilling expression. In exploring that possibility below, the efforts of the domestic courts recently, and of the ECtHR to interpret and balance these goals constructively in a manner that is compatible with Article 10 ECHR,¹² will be found to be relevant to the complex speech environment in schools, which is subject to a range of existing duties supporting critical thinking and plural debate on moral, religious and political issues. An independent review of Prevent pursuant to a 2019 statutory commitment¹³ is underway,¹⁴ although it itself is currently mired in controversy,¹⁵ so the determinations embarked on

⁶ See: M. Versi, "Concerns on Prevent: Meeting between David Anderson QC and the MCB" (Muslim Council of Britain 2015) <https://www.mcb.org.uk/wp-content/uploads/2015/10/20150803-Case-studies-about-Prevent.pdf> [Accessed 01.04.20]; Rupa Huq MP, Public Bill Committee, "Counter-terrorism and Border Security Bill" (10 July 2018, Bill 219, 2017–2019) pp.136-139.

⁷ CAGE Advocacy, "Beyond Prevent" (CAGE, 2020), www.cage.ngo/product/beyond-prevent-a-real-alternative-to-securitised-policies, p.26; J. Mohammed and A. Siddiqui, "The PREVENT strategy: A cradle to grave police-state" (CAGE, 2013), www.cage.ngo/prevent-strategy-cradle-grave-police-state Concerns are not limited to Islamic activist groups: W. Armbrust "'Prevent', free speech and anti-semitism" (Opendemocracy, 15 April 2017), <https://www.opendemocracy.net/en/prevent-free-speech-and-antisemitism/> [All accessed 01.04.20].

⁸ The term 'schools' will be used to refer to maintained primary and secondary schools (those controlled by Local Education Authorities), academies (defined in the Academies Act 2010 s1A, and funded by the DfE pursuant to an Academy agreement), and private independent schools.

⁹ See: Ben Wallace, Public Bill Committee, 'Counter-terrorism and Border Security Bill' PBC (10 July 2018, Bill 219, 2017–2019) pp.144-146; S. Greer and L. Bell, "Counter-terrorist law in British universities: a review of the 'prevent' debate" [2018] P.L. 84.

¹⁰ See e.g. R. Sutton, "Myths and Misunderstandings: Understanding Opposition to The Prevent Strategy" (Henry Jackson Society, September 2016) <http://henryjacksonsociety.org/wp-content/uploads/2016/10/Myths-and-Misunderstandings-PREVENT-Report-Final-29.09.2016.pdf> [Accessed 01.04.20], p.2.

¹¹ DfE, "The Prevent duty: Departmental advice for schools and childcare providers" ('DA') (June 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/439598/prevent-duty-departmental-advice-v6.pdf [Accessed 01.04.20], p.8.

¹² Applicable to state sector schools under ss6 and 2 Human Rights Act.

¹³ In s20(8) Counter-terrorism and Border Security Act 2019.

¹⁴ See Gov.uk, Independent Review of Prevent, 16.9.19, up-dated 20.12.19.

¹⁵ Lord Carlile was required to stand down as the Independent reviewer due to a threatened judicial review challenge from Rights Watch on grounds of an alleged lack of independence: Rights Watch (UK), "Government removes Lord Carlile as Prevent reviewer conceding RWUKs legal challenge to his independence" 20.12.19, *the*

below as to tension or consonance between Prevent's objective of countering terrorism, and free expression values are timely,¹⁶ and contribute to an academic literature largely focused on campuses.¹⁷ The key argument will be that, rather than abolition of Prevent, reforms to the Prevent Guidance, focussing on a re-envisioning of the term 'extremism', would create a greater likelihood of achieving such consonance than is the case under its current iteration, whilst also addressing the narrative as to Islamophobia.

The nature and operation of the Prevent duty in the school context

The Prevent strategy, originally introduced in 2006 as one of the four pillars of Contest,¹⁸ has been through a number of subsequent iterations,¹⁹ reflecting the increasing emphasis in domestic and international counter-terrorism efforts on early intervention.²⁰ That emphasis formed the background to the Counter Terrorism and Security Act (CTSA), Part 5,²¹ which placed the Prevent duty (PD) on a statutory basis with accompanying Guidance.²² In focussing on countering 'extremism' in schools,²³ apparently as part of the initial phase of 'radicalisation,'²⁴ Prevent was intended to address concerns as to 'radicalisation' raised by

Independent, <https://www.rwuk.org/government-removes-lord-carlile-as-prevent-reviewer-conceding-rwuks-legal-challenge-to-his-independence/> [Accessed 01.04.20].

¹⁶ The Review's report and recommendations were to be submitted by June 2020: Home Office, "Independent review of Prevent: terms of reference" (16.09.19) <https://www.gov.uk/government/publications/independent-review-of-prevent-terms-of-reference/independent-review-of-prevent-terms-of-reference> [Accessed 01.04.20]; however, the Review has subsequently been severely delayed. At the time of writing (2.4.20) no replacement Reviewer (see fn.15) has been appointed, although the government is seeking at present to recruit one: James Brokenshire, HC Deb, 17 March 2020, WA - 27060.

¹⁷ See: L. Zedner, "Counter-terrorism on campuses" (2018) 68 *University of Toronto Law Journal* 545; Greer and Bell, fn.9; I. Cram and H. Fenwick, "Protecting free speech and academic freedom in Universities" (2018) 81(5) *MLR* 825.

¹⁸ Home Office, *Countering International Terrorism: The UK's Strategy*, Cm.6888, 2006; Home Office, *Contest: The United Kingdom's Strategy for Countering Terrorism*, Cm.8123, 2011; Cm.9608, 2018.

¹⁹ See for discussion: C. Walker, "Counter-terrorism and counter-extremism: the UK policy spirals" [2018] *P.L.* 725.

²⁰ See: M. Lombardi et. al., *Countering Radicalisation and Violent Extremism Among Youth to Prevent Terrorism* (Amsterdam: IOS, 2014); C. Walker, "The War of Words with Terrorism: An Assessment of Three Approaches to Pursue and Prevent" (2017) 22(3) *Journal of Conflict & Security Law* 523, 544-50; UN Secretary General, "Plan of Action to Prevent Violent Extremism" (A/70/674, 24.12.15).

²¹ See Home Office, *Contest Annual Report*, Cm.9048, 2014, para 2.34.

²² Home Office, "The Revised Prevent Duty Guidance" ('PDG') (Home Office, "The Revised Prevent Duty Guidance" (10 April 2019), www.gov.uk/government/publications/prevent-duty-guidance [Accessed 01.04.20].

²³ Home Office, *Prevent Strategy*, Cm.8092, 2011, p.19.

²⁴ Defined as the process by which a person comes to be drawn into terrorism, coming to supporting terrorism and/or 'extremist' ideologies associated with terrorist groups, reflecting the government definition: Home Office, *Prevent Strategy*, Cm.8092, 2011, Annex A.

the ‘Trojan Horse’ affair, or more generally,²⁵ while recent convictions of pupils and teachers for terrorist offences provide it with an ongoing driver.²⁶ That focus, however, has limits: the duty would have complemented proposed legislation specifically targeting ‘extremism’ as a harm *regardless* of any link to terrorism;²⁷ while that proposal was ultimately shelved, the linkage envisaged in the accompanying Guidance itself lacks articulation.

The duty under Part 5, s26 requires “specified authorities”,²⁸ including schools,²⁹ to have ‘due regard’ to “the need to prevent people from being drawn into terrorism”³⁰ when carrying out their functions, but the steps to be taken to do so are left unspecified. Those terms are obviously highly imprecise; the revised Prevent duty Guidance (PDG),³¹ promulgated by the Home Secretary under s29(1), fleshes out s26 by mentioning matters to which schools ‘must have regard’ to fulfil the duty,³² but itself suffers from lack of precision. The Departmental Advice (DA) provided by the Department of Education (DfE)³³ is even more inexact; it also has the status only of advice, accompanied by no statutory duty to have regard to it.³⁴

Over-breadth of the ‘extremism’ terminology

²⁵ See: H. Fenwick and D. Fenwick, ‘Prevent in Schools after the Trojan Horse Affair’ in I. Cram (ed.) *Extremism, Free Speech and Counter Terrorism Law and Policy: International and Comparative Perspectives* (London: Routledge, 2019); P. Clarke, “Report into allegations concerning Birmingham schools arising from the ‘Trojan Horse’ letter” (HMSO, 2014). See also D. Woodward-Carlton, “Radicalisation and the Family Courts” (2019) 49 *Family Law* 752. See as to pupils who died fighting for Daesh: E. Carmi and A. Gianfrancesco, “Brighton & Hove Local Safeguarding children board serious case review: siblings W and X: Identifying the strengths and gaps in multi-agency responses to vulnerable adolescents at risk of exploitation through radicalisation” (27.7.17) <http://www.brightonandhovelscb.org.uk/wp-content/uploads/Siblings-W-and-X-SCR-July-2017.pdf> [Accessed 01.04.20].

²⁶ Examples include: Umar Haque (below, fn.94); a 17 year old pupil who planned an attack on Synagogues as part of a ‘race war’: L. Dearden, “Teenage neo-Nazi who planned terror attacks on synagogues as part of ‘race war’ jailed” *the Independent*, 7.1.20, <https://www.independent.co.uk/news/uk/crime/synagogue-attack-durham-neo-nazi-teenager-jailed-terror-antisemitism-a9273696.html> [Accessed 01.04.20]. See also: “Operation of police powers under the Terrorism Act 2000 and subsequent legislation” (Statistical Bulletin: 08/19, 13.06.19), p.14: under-18s accounted for 6% of arrests, a similar level to the previous year, “the highest proportion of under-18s arrested since data collection began in 2001”.

²⁷ See: Home Office, *Counter-Extremism Strategy*, Cm.9148, 2015, paras 9-20, 37-41; in relation to schools: *ibid*, paras 70-4; for criticism see J. Rivers, “Counter-Extremism, Fundamental Values and the Betrayal of Liberal Democratic Constitutionalism” (2018) 12(2) *German Law Review* 267, pp.275-77.

²⁸ In England, Wales, Scotland: section 51(1) CTSA 2015.

²⁹ Sched 6 CTSA, part 1, ‘Education, Childcare etc,’ para 1.

³⁰ By section 35(3) the term ‘terrorism’ bears the same meaning as in s1 Terrorism Act 2000, a definition recognized to be extremely broad: *R v Gul* [2013] UKSC 64 [26]-[34].

³¹ PDG, fn.22.

³² Pursuant to The Counter-Terrorism and Security Act 2015 (Risk of Being Drawn into Terrorism) (Guidance) Regulations 2015 s3. Under s29(2) authorities ‘must have regard’ to this guidance.

³³ DA, fn.11, p.8.

³⁴ The DA is not covered by s29(2). Local authorities have also produced guidance for schools.

An initial step to which schools should have regard in seeking to satisfy s26 involves countering ‘extremism’, but the term as used in the Guidance is, at face value, problematic since it is stated to include “vocal or active opposition to fundamental British values” without clarifying a link to ‘radicalisation’, and terrorism.³⁵ These values are stated, impliedly contrasting with ‘extremism’, to include a commitment to democracy, the rule of law, individual liberty, ‘mutual respect and tolerance of different faiths and beliefs’.³⁶ This PDG requirement is clearly directed at expression in schools opposed to such values which is *also* linked to inciting/supporting terrorism, comporting with the wording of s26. But the expression of *non-violent* ‘extremism’ is also covered, although such ‘extremism’ is not defined; reference is merely made to its possible results, such as creating social division and the encouraging of isolation.³⁷ An even greater lack of clarity pervades the DA, while it also fails to differentiate between violent and non-violent ‘extremism’, in providing that schools should have regard to the need to assess signs in pupils of supporting ‘extremist ideas, part of terrorist ideology’, while also preventing the dissemination to pupils of online ‘extremist’ material.³⁸ The PDG further refers to avoidance of ‘radicalisation’ to satisfy s26, without clarifying the link to exposure to ‘extremist’ expression; it also fails to define the term, merely indicating that it is a process by which individuals are brought to participate in terrorism, such as giving support to terrorist groups and to ‘extremist ideology’ linked to such groups.³⁹ The DA compounds the uncertainty, mentioning building pupils’ “resilience to radicalisation...by promoting fundamental ‘British’ values and enabling them to challenge extremist views”.⁴⁰

Unsurprisingly, use of the terms ‘extremism’ and ‘radicalisation’ has been criticized as a failing of Prevent and counter-extremism policy generally, most notably by the Commission for Countering Extremism;⁴¹ the *Butt* case, discussed below, could, however, lead in effect to some narrowing of the scope of the Prevent duty, re-emphasising the need for a link between

³⁵ See PDG, fn.22, para 7. For criticism of the linkage between ‘extremism’ and ‘radicalisation’ see: Cram and Fenwick, fn.17, 835; J. Holmwood and T. O’Toole, *Countering Extremism in British Schools?* (2018 Policy Press) pp.54-57.

³⁶ PDG, fn.22, para 7.

³⁷ PDG, fn.22, para 10.

³⁸ DA, fn.11, pp.5-6, 8.

³⁹ *Ibid*, part F, ‘Glossary of Terms’; Home Office, *Prevent Strategy*, Cm.8092, 2011, Annex A.

⁴⁰ *Ibid*, p.8. See also DfE, “Promoting fundamental British values as part of SMSC in schools” (November 2014), pp.5-7. For discussion, see M.Sedgwick “The Concept of Radicalisation as a Source of Confusion” (2010) 22 *Terrorism and Political Violence* 479.

⁴¹ “Challenging Hateful Extremism” (October 2019), p.94; see also Joint Committee on Human Rights, *Freedom of Speech in Universities*, (2017-19, HL 589, HC 111), para 66.

curbing ‘extremist’ expression and countering terrorist-related activity. Nevertheless, uncertainty is currently generated by the use of these terms, which is also exacerbated in the schools’ context since the impact of the Prevent duty on expression must be situated in the complex context of the safeguarding and other overlapping duties imposed on schools; account must also be taken of the extent to which the PD has influenced them. As the PDG and DA indicate, complementary duties to counter ‘extremism’ or promote plural debate⁴² are found in a number of other education-related statutory duties;⁴³ inter alia, schools must not engage in the promotion of “partisan political views”,⁴⁴ or “political indoctrination”⁴⁵ and have a duty to ensure a balanced treatment of political issues.⁴⁶ The DA further links “resilience to radicalisation” to the legal duty of schools to promote the “spiritual, moral, social and cultural development” of pupils,⁴⁷ while the PDG refers to the overlap between the PD and schools’ legal duties to further “community cohesion” and to promote equality.⁴⁸ Some linkage to the statutory duty of state sector schools to adhere to Article 10 ECHR also arises since the PDG and DA emphasise the need to ensure free discussion of ‘sensitive topics’ in adhering to Prevent.⁴⁹

But this web of overlapping and arguably conflicting duties – ‘discussing sensitive topics’ may not, apparently, include criticism of ‘British’ values – does not deliver a scheme clearly and effectively linked to intervention in pathways to engagement in terrorist-related activity. Equally, it does not provide a clear guide to balancing such intervention with enabling pluralistic debate in schools. It appears, in essence, to place two key over-lapping demands on schools, as discussed in the next two sections – first, to identify and refer to police pupils showing allegiance to ‘extremism’, and second to disallow ‘extremist’ speech in schools, whether from external speakers or otherwise. But even these demands under the current iteration of Prevent lack a precisely articulated linkage to the objective of s26.

⁴² PDG, fn.22, para 58; DA, fn.11, p.8.

⁴³ See: Independent School Standards Regulations 2014 Sched 1 para 5(2), DfE, “Promoting fundamental British values as part of SMSC in schools” (November 2014).

⁴⁴ Ibid. para 5(c) (private independent schools and academies).

⁴⁵ Education Act 1996 s406 (maintained schools).

⁴⁶ Ibid, para 5(d) (private independent schools and academies), and Education Act 1996 s407 (maintained schools).

⁴⁷ DA, fn.11, p.8. See further Education Act 2002 s78 (maintained schools), s157 (private independent schools and academies).

⁴⁸ PDG, fn.22, para 12; see also: Education and Inspections Act 2006 s38 (maintained schools); Independent School Standards Regulations 2014, Sched 1 para 5(b)(v) re ‘cohesion’; Equality Act 2010 s149.

⁴⁹ DA, fn.11, p.8; PDG, fn.22, para 64.

Referrals for pupil ‘extremism’ - inhibiting speech by creating suspect groups?

The PDG, backed up largely by DfE or Ofsted-based sanctions,⁵⁰ and the threat of funding withdrawal,⁵¹ requires that schools can demonstrate via staff training⁵² as a core outcome that they are able to assess risks of ‘radicalisation’ and identify at-risk pupils, by, as one example, noting support for ‘extremist’ ideas.⁵³ The DA and PDG, however, fail to define clearly the signs of potential ‘radicalisation’ that schools should be looking for, which could lead to a referral of a pupil to a Channel Police Practitioner (CPP).⁵⁴ Unhelpfully, they need to be read alongside DfE Safe-guarding documentation⁵⁵ which itself refers to Channel guidance, identifying signs of ‘radicalisation’ as ‘vulnerability factors’, including pupil expression of ‘extreme’ political/religious views or of a range of ‘grievances’,⁵⁶ covering, for example, current and historical racial/cultural discrimination.⁵⁷ Police guidance and influence on school referrals similarly lacks rigour,⁵⁸ contributing to mistrust of Prevent in certain Muslim communities, some of whom consider it to create an “ideological purity test meaning Western

⁵⁰ The institution could fail an Ofsted inspection: Ofsted, “School inspection handbook” (Ref: 150066, 2018), p.42. Periodic inspections are required and authorized under s5 Education Act 2005; PDG, fn.22, para 72; see e.g.: Ofsted, “Inspection report: Lantern of Knowledge Secondary School, 15–17 January 2019” (2019), <https://files.api.ofsted.gov.uk/v1/file/50060206>; “Inspection Report for Olive Tree Primary School”, 13-15 May 2014” (2014) (literature appeared to endorse stoning and violent jihad), <https://files.api.ofsted.gov.uk/v1/file/2391277>; M. Smulian, “Islamic school rated ‘inadequate’ over offensive library books”, *Times Educational Supplement*, 08.03.19, <https://www.tes.com/news/islamic-school-rated-inadequate-over-offensive-library-books>. Special measures could be imposed: Education Act 2005, s44 and the Education and Inspections Act 2006 Part 4. Ofsted inspections of non-state schools are authorised under s110 of the Education and Skills Act 2008. See Ofsted, “Non-association independent school inspection handbook” (Ref: 160050, September 2018). See also the Independent Schools Inspectorate, “Inspection Framework” (2017), <https://www.isi.net/site/downloads/1.1%20Handbook%20Inspection%20Framework%202018-09.pdf> [All accessed 01.04.20]. Private schools could be withdrawn from the relevant register: Education Act 2002, s165.

⁵¹ Academies Act 2010, ss2A and 2D.

⁵² PDG, fn.22, para 70; DA, fn.11, pp.5-6. The cornerstone of such training is the “Workshops to Raise Awareness of Prevent” scheme, reflecting Home Office and police advice on ‘radicalisation’, focusing on an individual’s ‘vulnerability’ to being drawn into terrorism: Home Office, “Channel Duty Guidance: Protecting vulnerable people from being drawn into terrorism” (2015), paras 92-98.

⁵³ Ibid, paras 67,68. See also DA, fn.11, p.6: schools can consult Local Safeguarding Children Boards and Prevent co-ordinators (in Prevent Priority areas), supplementing duties of schools, LEAs to safeguard children under s17 Children Act 1989 and s11 Children Act 2004 (s28 Wales).

⁵⁴ Home Office, Channel Duty Guidance, fn.52, para 31.

⁵⁵ DfE, “Keeping children safe in education: Statutory guidance for schools and colleges” (2019) p.86; see also PDG, fn.22, para 62.

⁵⁶ See: Home Office, “Counter-Terrorism and Security Bill - Support for people vulnerable to being drawn into terrorism” (HO0143, 25 November 2014), highlighting the lack of a clear connection between terrorism and the broad Channel vulnerability criteria. See also fn.52.

⁵⁷ See M. Sukarieh, and S. Tannock “The deradicalisation of education: terror, youth and the assault on learning” (2016) 57(4) *Race & Class* 22,29.

⁵⁸ See: P. Dresser, “‘Trust your instincts— act!’ PREVENT police officers’ perspectives of counter-radicalisation reporting thresholds” (2019) 12(4) *Critical Studies on Counter-terrorism* 605, pp.614-15; Association of Chief Police Officers, “Prevent, Police and Schools. Helping Schools Stay Safe: Guidance for police...”, (June 2013), p.10

foreign policy cannot be criticised,”⁵⁹ and facilitating claims made by critics of Prevent that the prospect of referral of a pupil to the police is having a profound, widespread chilling effect on the expression of Muslim pupils,⁶⁰ implying at times that the majority of such pupils are at risk of referral.

The reality is somewhat different. Contrary to the perception of some critics of Prevent,⁶¹ the Channel Duty Guidance does not direct that referrals should be made purely on the basis of identifying one or more of the ‘vulnerability’ factors, but rather – in common with safeguarding good practice – requires that account should be taken of various factors, including, for example, mental health.⁶² The credibility of a concern must be checked, referring only where the attention of a specialist is genuinely required.⁶³ A referral may also be discontinued at the CPP stage unless a “vulnerability [of a pupil] to being drawn into terrorism”⁶⁴ is identified, in which case he or she may be referred to the local Channel Panel which will initially conduct a “Screening and Information-Gathering Stage”, without the consent of the pupil/parents, if deemed necessary,⁶⁵ thereby determining whether to discontinue the referral or set up an intervention.⁶⁶

Despite the numerous filtering mechanisms tending to insulate pupils from mistaken referrals, and governmental insistence that political, cultural or religious grievances are not the primary focus of Channel/Prevent,⁶⁷ Prevent interventions contributed to a number of complaints shortly after the duty was introduced, from Muslim pupils and parents against schools⁶⁸ and/or local authorities,⁶⁹ although some complaints were revealed to be incorrect or over-

⁵⁹ See Brighton & Hove Local Safeguarding children board, fn.25, para 6.1.18.

⁶⁰ See Rights Watch, fn.2, p.4.

⁶¹ See e.g. Mohammed and Siddiqui, fn.7, para 3.8.

⁶² Home Office, Channel Duty Guidance, fn.52, para 49.

⁶³ PDG, fn.22, para 21.

⁶⁴ CTSA s36(3) as amended by s20 Counter Terrorism and Border Security Act 2019; see further Home Office, Channel Duty Guidance, fn.52, para 30.

⁶⁵ This stage appears to have fuelled concerns raised in the media as to a ‘secret data-base’: fn.4.

⁶⁶ Home Office, CONTEST 2018, fn.18, fig 2.5. CTSA s36(4). The panel can create a support plan involving family or social welfare services, or direct the individual to a diversionary programme: CTSA s36(1)(3). Home Office, fn.52, para 39.

⁶⁷ See Home Office, CONTEST 2018, fn.18, pp.35-38.

⁶⁸ See: Rights Watch, fn.2, chap 4; Public Bill Committee, ‘Counter-terrorism and Border Security Bill’ PBC (10 July 2018, Bill 219, 2017–2019) pp. 136-139 per Rupa Huq MP; J. Halliday and V. Dodd, “UK Anti-Radicalisation Prevent Strategy a ‘Toxic Brand,’” *the Guardian*, 09.03.15, <http://www.theguardian.com/uk-news/2015/mar/09/anti-radicalisation-prevent-strategy-a-toxic-brand> [Accessed 01.04.20].

⁶⁹ See A. Straw, “Investigatory Powers Bill, the Prevent duty, state secrecy and fundamental rights” (Public Law Project, 08.12.16) <https://publiclawproject.org.uk/resources/investigatory-powers-bill-the-prevent-duty-state-secrecy-and-fundamental-rights/> [Accessed 01.04.20], para 45.

stated.⁷⁰ It has also been contended that the prospect of referral, could ‘securitise’ education⁷¹ and discourage pupils from expressing certain views in the classroom.⁷²

The claim therefore in much of the literature that the breadth and subjectivity of the vulnerability criteria could result in disproportionate inferences with free expression in schools, especially of Muslim pupils, has some substance.⁷³ While the contention that such interferences could have contributed to a perception that Contest/Prevent treat Muslims as a ‘suspect community’⁷⁴ has at times lacked substantiation,⁷⁵ it could in itself potentially undermine the wider goal of Prevent to build trust with Muslim communities so that they are more likely to assist in addressing the threat of terrorism and ‘radicalisation’.⁷⁶

But that anti-Prevent stance may now be due for some revision: while the referral scheme can readily be criticised for imprecision, it contains a number of checks before a police officer is involved, and any support eventually recommended must be consented to.⁷⁷ In response to widespread concerns about teachers’ lack of understanding of Prevent,⁷⁸ the government recently provided additional support for Prevent training,⁷⁹ which may have contributed to a diminution in the number of clearly mistaken referrals to the CPP from 2016 onwards, even

⁷⁰ One widely reported example concerned a pupil visited by police after writing that he lived ‘in a terrorist house’, apparently as a misspelling for ‘terraced’ (in his evidence to the JCHR David Anderson highlighted this referral as a ‘myth’ since the police disputed the parents’ assertion that the investigation was primarily about ‘radicalisation’ rather than concern for the wellbeing of the child, since he had also written that his uncle was abusing him (JCHR, *Counter Extremism* (2016-17, HL 39 HC 105), para 49). Certain reports concerned a child apparently referred under Prevent to Luton Council safeguarding hub - it was in fact a domestic abuse referral - for a drawing a teacher mistakenly thought was a ‘cooker bomb’, revealed to be a cucumber (ibid). See re Prevent ‘myths’ L. Casey, “The Casey Review: A review into opportunity and integration” (Department of Communities and Local Government, 2016), para 10.32.

⁷¹ Commission for Countering Extremism, fn.41, p.86.

⁷² See e.g.: O’Toole et. al., ‘Governing through Prevent? Regulation and Contested Practice in State–Muslim Engagement’ (2015) 50(1) *Sociology* 160.

⁷³ See: S. Hooper, “‘End Prevent’: UK government faces new calls to drop counter-terrorism strategy”, *Middle-East Eye*, 17.01.20, <https://www.middleeasteye.net/news/end-prevent-uk-government-faces-new-calls-drop-counter-terrorism-strategy> [Accessed 01.04.2020]; Rights Watch, fn.2, paras 29-33.

⁷⁴ See: Open Society Justice Initiative, “Eroding Trust: The UK’s PREVENT Counter-Extremism Strategy in Health and Education” (Open Society Foundations, 2016), pp. 23, 107-109; M. Breen-Smyth, “Theorising the ‘suspect community’: counterterrorism, security practices and the public imagination” (2014) 7(2) *Critical Studies on Terrorism*, 468; C. Pantazis and S. Pemberton “From the ‘old’ to the ‘new’ suspect community” (2009) 49(5) *British Journal of Criminology* 646; Parliamentary Office of Science and Technology, “Addressing Islamic Extremism” (Number 526, May 2016), p.4.

⁷⁵ See for criticism: S. Greer, “The myth of the ‘securitised Muslim community’” in C.Walker and G.Lennon (eds.) *Routledge Handbook of Law and Terrorism* (London: Routledge, 2017).

⁷⁶ Open Society Justice Initiative, fn.74, p.108.

⁷⁷ CTSA s 36(4)(b).

⁷⁸ See: Rights Watch, fn.2, p.9; C. Walker, “Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015” (2016) 79(5) *MLR* 840, 857.

⁷⁹ See Home Office, *CONTEST The United Kingdom’s Strategy for Countering Terrorism*, Cm.9608, 2018, paras 114, 118.

though the number of referrals to Channel has risen.⁸⁰ A number of mistaken Prevent interventions, including those high profile ones referred to in this article,⁸¹ failed to pass one stage of the filtering mechanisms; a higher number are currently passing it, including the CPP filter, and proceeding to the Channel panel;⁸² one explanation is that they are referrals with greater credibility, including higher numbers of referrals linked to far-right ideology. Research, including a significant recent academic study, suggests that the understanding of vulnerability to ‘extremist’ influence and ‘radicalisation’, as a safeguarding matter under Prevent, has improved,⁸³ as has teachers’ understanding of their responsibilities under the PD,⁸⁴ although the quality of Prevent training continues to attract some criticism.⁸⁵ While criticisms that the breadth of the Channel criteria for ‘radicalisation’-based referrals could lead to referrals on the basis of ignorance of or antipathy to certain political viewpoints or religious convictions are not entirely unfounded, the indications from more recent studies are that Prevent training may be having a positive impact in terms of discouraging inappropriate referrals.⁸⁶ The possibility remains, nonetheless, that narratives associating Prevent’s impact in schools with Islamophobia⁸⁷ could create a chilling effect out of proportion to the security

⁸⁰ “In the year ending March 2019, Prevent referrals were the lowest recorded since comparable data is available (year ending March 2016); however, the number of those discussed at a Channel panel (1,320) and adopted as a case (561) were the highest recorded” Home Office 2019 Report, fn.3, p.8.

⁸¹ See fn.70, fn.137 and associated text.

⁸² See Home Office 2019 Report, fn.3, p.12.

⁸³ J. Busher, T. Choudhury, P. Thomas and G. Harris, “What the Prevent duty means for schools and colleges in England: An analysis of educationalists’ experiences” (Centre for Peace, Trust and Social Relations, Coventry University and Aziz Foundation, 2017), <http://azizfoundation.org.uk/wp-content/uploads/2017/07/What-the-Prevent-Duty-means-for-schools-and-colleges-in-England.pdf> [Accessed 01.04.20]; it found little evidence that educational professionals perceive the duty to have led to a chilling effect on free speech in schools (p.53), and found “considerable support (41% of respondents) for the view that...Prevent had resulted in more open discussions...as to...extremism, intolerance and inequality” (p.51). See also: Commission for Countering Extremism, fn.41, p.87.

⁸⁴ See: Government Social Research, “The school snapshot survey: winter 2017” (July 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727807/The_school_snapshot_survey_winter_2017.pdf [Accessed 01.04.20], p.33.

⁸⁵ See e.g.: A. Moffat and F. Gerard, “Securitising education: an exploration of teachers’ attitudes and experiences regarding the implementation of the Prevent duty in sixth form colleges” *Critical Studies on Terrorism*, DOI: 10.1080/17539153.2019.1629860, p.8; Public Bill Committee, ‘Counter-terrorism and Border Security Bill’ PBC (10 July 2018, Bill 219, 2017–2019) pp.136-139 per Rupa Huq MP; “MEND responds to the announcement by the Government of an Independent review into PREVENT” (24 January 2019), <https://www.mend.org.uk/news/mend-responds-announcement-government-independent-review-prevent/> [Accessed 01.04.20]; T. Chisholm and A. Coulter, “Safeguarding and radicalisation” (Kantar Public, Social Science in Government, August 2017) pp.21-22.

⁸⁶ See fn.83.

⁸⁷ See e.g. L. Jerome, A. Elwick and R. Kazima, “The impact of the Prevent duty on schools: A review of the evidence” (2019) 45(4) *British Educational Research Journal* 821, pp.824-27; C. McGlynn and S. McDaid “Radicalisation and Higher Education: Students’ Understanding and Experiences, Terrorism and Political Violence” (2019) 31(3) 559, pp.567-68.

benefit of the measures,⁸⁸ a significant issue for the current independent Review, which should therefore address itself to clarification of the signs of allegiance to ‘extremism’ associated with ‘radicalisation’ in the Guidance and to clarification of the terms, deflecting criticism by aligning them more clearly with the stated objective of s26.

Speakers in schools: avoiding ‘extremist’ expression

Ambiguity also imbues the Prevent stance as to the link between ‘extremist’ speech and acceptance of ‘British’ values in schools. The governmental stance is that Prevent creates a safeguarding scheme that does not itself require the *promotion* of ‘British’ values,⁸⁹ but if a school tolerates “vocal opposition” to such values (‘extremism’),⁹⁰ the PDG indicates that so doing could facilitate a risk of ‘radicalisation’, contrary to the duty. It refers specifically to the need for “clear protocols” on visiting external speakers to ensure that they are “appropriately supervised”, implicitly in order to ensure that ‘extremist’ views are not expressed which might create that risk.⁹¹ Similarly, statutory safeguarding guidance, referred to in the DA, sets out a duty to take seriously allegations of staff ‘extremism’ and to have robust recruitment policies to avoid the appointment of ‘extremists’.⁹² Where a teacher contributes to a risk of ‘radicalisation’ by, for example, expressing ‘extremist’ views or inviting an ‘extremist’ speaker to the school, he or she could be subject to disciplinary procedures, dismissed, or in more serious cases subjected to a prohibition order, barring him or her from teaching.⁹³ The use of the term ‘extremism’ remains open to criticism, but that should not obscure genuine safeguarding concerns: a stark example of the need to investigate the background and activities of staff to protect pupils against ‘radicalisation’ was provided by a London school that had employed an unqualified Islamic Studies teacher, who was then

⁸⁸ Due to the involvement of the police; *Giniewski v France* (2007) 45 E.H.R.R. 23 provides a partial analogy (a criminal prosecution was merely mentioned, but it was found to create a chilling effect).

⁸⁹ See: Select Committee on Citizenship and Civic Engagement, “Oral Evidence” (Evidence Session 1, 6 September 2017), <https://www.parliament.uk/documents/lords-committees/Citizenship-civic-engagement/Oral-Evidence-Volume.pdf> [Accessed 01.04.20], p.20, per Hardip Begol.

⁹⁰ PDG, fn.22, para 7.

⁹¹ PDG, fn.22, para 68.

⁹² DA, fn.11, p.6; DfE, fn.55, pp.85-6; see also on safeguarding duties generally: DfE, *ibid*, parts 2 and 4; s175 Education Act 2002.

⁹³ See The Teachers' Disciplinary (England) Regulations 2012 SI 2012/560 regs 4,5(1),7(5),13; DfE ‘Teacher misconduct....Advice on factors relating to decisions leading to the prohibition of teachers from the teaching profession’ (April 2018): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700607/Teacher_misconduct-the_prohibition_of_teachers.pdf, p.13; DfE, ‘Teachers’ Standards’ (June 2011) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/665520/Teachers_Standards.pdf [Both Accessed 01.04.20], p.14.

convicted of various terrorist offences after grooming pupils to create a ‘jihadi’ army.⁹⁴ No Prevent intervention had occurred.

The central problem for schools seeking to follow the current iteration of the PDG in ensuring that their staff or speakers do not “vocally oppose” fundamental ‘British’ values as an aspect of countering ‘extremism’ is that there is no single authoritative and clear statement explaining why “democracy, the rule of law, individual liberty and mutual respect” are put forward as distinctively *British* values, and recent studies confirm that educationalists have not tended to adopt a common understanding of such values.⁹⁵ That lack of a clear rationale has resulted in two of the most prevalent criticisms of Prevent: firstly, that values must be identifiable as ‘British’ to be worthy of protection⁹⁶ and, secondly, that it is unclear what is meant by fundamental ‘British’ values and ‘extremism’.⁹⁷ Such criticisms are key to objections to the Prevent duty raised by schools⁹⁸ and teaching unions;⁹⁹ they have also fostered claims from certain Muslim civil society groups to the effect that Prevent is in reality a totalitarian measure intended to challenge Islamic cultural values, or “de-Islamise Islam”.¹⁰⁰ In associating teaching ‘British’ values with counter-terror efforts the PDG might appear to indicate that expression of cultural, political and religious values differing from those held by

⁹⁴ See J. Grierson, “Isis follower tried to create jihadist child army in east London”, *the Guardian*, 02.03.18, www.theguardian.com/uk-news/2018/mar/02/isis-follower-umar-haque-jihadist-child-army-east-london--radicalise; “Haque attempted to radicalise....110 children at [a] mosque and school...35 of them [needed]...long-term support”.

⁹⁵ See: L. Jerome et. al., fn.87, pp.827-29; Busher et. al., fn.83, p.65. See also J. Busher, T. Choudhury, P. Thomas, “The enactment of the counter-terrorism ‘Prevent duty’ in British schools and colleges: beyond reluctant accommodation or straightforward policy acceptance” (2019) 12(3) *Critical Studies on Terrorism* 440, p.447; A. Elwick and L. Jerome “Balancing securitisation and education in schools: teachers’ agency in implementing the Prevent duty” (2019) 40(3) *Journal of Beliefs & Values* 338, p.350.

⁹⁶ See e.g.: Rights Watch, fn.2, p.4.

⁹⁷ See: C. Walker and O. Cawley, “The Juridification of the UK’s Counter-Terrorism Prevent Policy” (2020) *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2020.1727098, pp.9-10; Commission for Countering Extremism, fn.41, p.94; U. Maylor “I’d worry about how to teach it’: British values in English classrooms” (2016) 42(3) *Journal of Education for Teaching* 314, 322-325; D. Lowe, “Prevent Strategies: The Problems Associated in Defining Extremism: The Case of the UK” (2017) 40(11) *Studies in Conflict & Terrorism* 917, 921.

⁹⁸ See e.g.: P. Nye, “Inspections reveal Ofsted’s approach to British values in wake of ‘Trojan Horse’”, *Schools Week*, 27 November 2014, <https://schoolsweek.co.uk/inspections-reveal-ofsteds-approach-to-british-values-in-wake-of-trojan-horse/> [Accessed 01.04.20]; U. Siddique, “Losing faith in Ofsted” (Claystone, 2018), p.18.

⁹⁹ See K. Hollinshead and S. Soyei, “Responding holistically to the requirement to promote Fundamental British Values” (National Association of Schoolmasters Union of Women Teachers, EqualTeach CIC, 2015), <https://www.nasuwts.org.uk/uploads/assets/uploaded/b49175fd-4bf6-4f2d-ac5b2759c03015be.pdf> [Accessed 01.04.20], p.7.

¹⁰⁰ R. Shabi, “Deradicalising Britain: the activists turning young Muslims away from extremism”, *the Guardian*, 13.3.16, www.theguardian.com/uk-news/2016/mar/18/deradicalising-britain-the-activists-turning-young-muslims-away-from-extremism [Accessed 01.04.20].

the majority in Britain could be met with a state-mandated adverse response,¹⁰¹ countering Prevent's ostensible goal of allowing the "discuss[ion of] sensitive topics".¹⁰² So leeway has been created for opponents of Prevent to argue that the policy prevents such debate, since on their view it is unclear when opposition to 'British' values will be considered to amount to 'extremism'¹⁰³ and, relatedly, that the policy excludes participants deemed to have values that are 'non-British', particularly Muslims.¹⁰⁴ Prevent's promotion of 'British' values is, in the view of its detractors, self-contradictory, since they find that the strategy opposes such values, particularly of tolerance and freedom of speech.¹⁰⁵

These concerns should not, however, be overstated. The PDG makes it clear that neither staff nor students are required to adopt a state-sponsored ideology,¹⁰⁶ as occurs in nationalistic schooling, associated with indoctrination.¹⁰⁷ The DA calls for schools to counter 'extremism' by encouraging pluralistic debate, so schools should provide "a safe environment for debating controversial issues"...enabling staff and pupils to "develop the knowledge and skills to....challenge extremist arguments".¹⁰⁸ The prevalent characterisation of Prevent as a measure that is necessarily intolerant does not comport fully with the most recent research indicating that educationalists are not struggling to reconcile countering 'extremism' with the PDG's promotion of discussion of 'sensitive topics' or with the statutory obligations discussed to promote free speech, equality and social cohesion.¹⁰⁹

Most significantly, avoidance of non-violent 'extremist' speech in schools should now be subject to reinterpretation of the PDG, following the *Butt* case.¹¹⁰ The applicant, an Islamic scholar who had spoken at university Islamic society events, complained that as a result of

¹⁰¹ Select Committee on Citizenship and Civic Engagement, "The Ties that Bind" (2017-18, HL 118), paras 62-70.

¹⁰² PDG, fn.22, para 64.

¹⁰³ See: Rights Watch, fn.2, pp.35-40; A. Kundnani, *A decade lost: Rethinking Radicalisation* (London: Claystone 2015).

¹⁰⁴ See: S. Warsi, *The Enemy Within* (London: Penguin, 2017), pp.109-111; Siddique, fn.98.

¹⁰⁵ See: Rights Watch, fn.2, p.4; A. Neal, "University free speech as a space of exception in Prevent" in I. Cram (ed.) *Extremism, free speech and counter-terrorism law and policy* (London: Routledge, 2019), chap 5.

¹⁰⁶ PDG, fn.22, para 64.

¹⁰⁷ See e.g.: Y.W. Leung, 'Nationalistic Education and Indoctrination' (2004) 6(2) *Citizenship, Social and Economics Education* 116.

¹⁰⁸ DA, fn.11, pp.5-6.

¹⁰⁹ See: D. McGhee and S. Zhang, 'Nurturing resilient future citizens through value consistency vs the retreat from multiculturalism and securitisation in the promotion of British values in schools in the UK' (2017) 21(8) *Citizenship Studies* 938, 945-47; Ofsted, fn.50, p.47: school leadership must ensure that: "...training develops staff's vigilance, confidence and competency to challenge pupils' views and encourage debate"...

¹¹⁰ *Butt v Secretary of State for the Home Dept* [2017] EWHC 1930 (HC); *R (Butt) v SSHD* [2019] EWCA Civ 256 (CA).

the Prevent duty, and due to being named as an ‘extremist’ by a Home Office press release,¹¹¹ invitations to speak would be less likely to be forthcoming. His challenge to the lawfulness of the Higher Education Prevent Duty Guidance (HEPDG)¹¹² succeeded in part, on appeal,¹¹³ on narrow grounds specific to a defect in one paragraph: in promulgating the Guidance it was found that the Secretary of State had acted unlawfully since the requirement to have “particular regard to the duty to ensure freedom of speech” under s31(3)(a) CTSA had not been satisfied.¹¹⁴ But his claim that the Guidance equated “non-violent extremism with terrorism”, and that therefore issuing it was ultra vires the Secretary of State’s power under s29 to fulfil the s26 duty, was rejected: “If there is some non-violent extremism, however intrinsically undesirable, which does not create a risk that others will be drawn into terrorism, the guidance does not apply to it”.¹¹⁵ The inclusion of non-violent ‘extremism’ was not therefore found to go beyond what the Prevent duty lawfully permits, *if* in the circumstances it *could* be linked to the risk of drawing persons into terrorism. This important clarification of the relationship between the HEPDG and s26 would apply equally – or more strongly – to the PDG as it applies to schools, given the greater vulnerability of school children to persuasion from authority figures, as compared to students. It follows from that finding that the guidance to schools in the PDG and DA to curb the expression of views contrary to fundamental ‘British values’, taking the form of *non-violent* ‘extremism’, should be disapplied, *unless* a potential link to drawing persons into terrorism is shown. Clearly, that clarification of the reach of the Prevent duty as delineated by the PDG, re-emphasising the link to terrorism, has a strong claim to be considered in the current Review, and then expressly recognised in revised Guidance.¹¹⁶

¹¹¹ The press release concerned the use of the Prevent duty to prevent “‘extremists radicalising students on....campuses [and referred to 70 such events]....Dr Butt was among six speakers ‘named as expressing views contrary to British values’ on campus”: *ibid* [1].

¹¹² *Butt v Secretary of State for the Home Dept* [2017] EWHC 1930 (HC) [41]-[49].

¹¹³ *R (Butt) v SSHD* [2019] EWCA Civ 256 (CA).

¹¹⁴ HEPDG, para 11 stated that a University must be “entirely convinced” that the risk of an external speaker drawing individuals into terrorism must be “fully mitigated”, or the event should not proceed; that requirement was found to be too unbalanced, so it was likely to mislead a university as to its duty to balance the PD with its s31(2)(a) duty (*ibid* [176]).

¹¹⁵ *Butt v SSHD* [2017] EWHC 1930 at [30]; *R (Butt) v SSHD* [2019] EWCA Civ 256 [155] (confirming the first instance finding).

¹¹⁶ In response to *Butt* the Home Office issued an interim instruction to relevant institutions to consult the judgment transcript as to the offending paragraph: Home Office, “Prevent duty guidance for Scotland and England and Wales.” (Updated 10.4.19) https://www.gov.uk/government/publications/prevent-duty-guidance?utm_source=90559936-221e-4569-b74c-146c879fa966&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily#history [Accessed 01.04.20].

But despite attempts in the current iteration of the Guidance to lend support to free debate and expression of a plurality of views in schools, there is substance to the criticism that the term ‘British’ values is unclear, contributing to the narrative claiming that Prevent is opposed to the free expression of non-British cultural values, and also leaves links between ‘extremist’ speech, ‘radicalisation’ and terrorism largely unarticulated. On that note, this article turns to a more intensive scrutiny of that perception, or its actuality, in the context of the Article 10 ECHR guarantee of free expression.¹¹⁷

Conflicts between free expression values and Prevent’s curbs on ‘extremist’ speech?

Freedom of expression is clearly of acute significance in educational settings, but no specific duty arises to promote freedom of speech in schools similar to that imposed on universities under s31 CTSA and the Education Act (no 2) 1986, s43.¹¹⁸ That freedom finds statutory protection under Article 10 ECHR due to s6 HRA; Article 10 is therefore binding upon maintained and academy schools, Ofsted, central and local authorities that produce Prevent guidance. It is not, however, binding on private schools, although they are covered by s26;¹¹⁹ that is clearly a matter of concern since the aim of some private faith schools, in particular, unregistered and illegal ones, appears to be to segregate pupils from a pluralistic society of differing faiths and none, confining them within a faith-based, rather than a human rights-based, zone, resulting in their subjection to a narrow curriculum, with subsequent damage to their educational experiences and life choices post-school.¹²⁰ Such schools, if registered, are, however, subject to the educational standards framework discussed above, intended to ensure plurality of political debate,¹²¹ as well as to the PDG/DA requirements as to ‘free debate’ and adherence to democracy, liberty and tolerance, although such requirements are not reinforced by a legal duty to adhere to the ECHR.

¹¹⁷ At the time of writing there has been no Prevent-related successful challenge to Ofsted by a school under the HRA; see for an example of an unsuccessful challenge *HM Chief Inspector of Education, Children's Services and Skills v The Interim Executive Board of Al-Hijrah School* [2016] EWHC 2813.

¹¹⁸ It creates a duty to take such “steps as are reasonably practicable to ensure that freedom of speech within the law is secured for...visiting speakers”.

¹¹⁹ See fn.29.

¹²⁰ See: Ofsted, “Annual Report 2016/17” (2017, HC 618) pp.18, 44-45; The Casey Review, fn.70, paras 7.48-7.59; Commission for Countering Extremism, fn.41, p.89.

¹²¹ See text to fn.42-fn.47.

But interferences via Prevent with state school-based speech may be justifiable under Article 10(2) where links to terrorism, violence or hate speech are apparent. Claims might fail at the outset under a narrow interpretation of the term ‘victim’ under s7 HRA: the applicant’s claim in *Butt* that the HEPDG was unlawful since it had contributed to creating a chilling effect, indirectly preventing him from exercising his Article 10 right,¹²² was rejected on the basis that he could not claim to be a ‘victim’ since he had not advanced any evidence that University societies had failed to invite him to speak or rescinded invitations, or that they would be likely to do so.¹²³ In the schools’ context, then, a claim that the PDG had resulted in interference with a speaker’s Article 10 right *indirectly* would probably fail; specific evidence that discouragement of expression had occurred, or was likely to occur,¹²⁴ would appear to be required.¹²⁵ In that case, if ‘extremist’ expression opposing fundamental ‘British’ values¹²⁶ as defined in the PDG was at issue, it would tend to fall within the scope of Article 10(1) unless Article 17 applied since, as is well established, the term ‘expression’ covers all sorts of expression, including disturbing, or even discriminatory material;¹²⁷ it was accepted impliedly that the ‘extremist’ speech at issue in *Butt* would have been covered by Article 10(1).¹²⁸

But Article 17, providing that there is no “right to engage in any activity....aimed at the destruction of any of the [ECHR] rights and freedoms”, could play a role in precluding a finding that an interference fell within Article 10(1)¹²⁹ due to measures adopted under the

¹²² *Butt v SSHD* [2017] EWHC 1930 [72].

¹²³ *Ibid* [95]. Justice Ousley referred to the Strasbourg Court’s “Practical Guide on Admissibility Criteria”: “to claim to be a [potential] victim...an applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur; mere suspicion or conjecture is insufficient...However...a law [could violate] rights, in the absence of an individual measure of implementation, if he or she is required either to modify his or her conduct or risks being prosecuted, or if he or she is a member of a class of people who risk being directly affected by the legislation” (*ibid* [82]).

¹²⁴ *Ibid* [92], citing *Altuğ Taner Akçam v Turkey* (2016) 62 E.H.R.R. 12, para 68.

¹²⁵ An example in which that test could have been satisfied concerned an apparent Prevent intervention attributable in part to teachers’ mistaken belief that a pupil’s t-shirt endorsed the leader of Daesh; the intervention was discontinued before the CPP stage was reached: Rights Watch, fn.2, p.32.

¹²⁶ PDG, fn.22, para 7.

¹²⁷ See *Ibragim Iragimov and ors v Russia* (App nos. 1413/08 and 28621/11), judgment of 28 August 2018; that material was contextualised by the theme of tolerance in the text in question. See further eg: *Handyside v UK* (1979-80) 1 E.H.R.R. 737; *VBK v Austria* (2008) 47 E.H.R.R. 5; *IA v Turkey* (2007) 45 E.H.R.R. 30, para 28; *Gough v DPP* [2013] EWHC 3267; *Giniewski v France* (2007) 45 E.H.R.R. 23; *E.S. v Austria* (App no. 38450/12), judgment of 25 October 2018.

¹²⁸ *Butt v SSHD* [2017] EWHC 1930 [96]-[151].

¹²⁹ See: *Roj TV A/S v Denmark* (App no. 40454/07) decision of 17 April 2018, para 47; *Molnar v Romania* (App no. 16637/06), decision of 23 October 2012, para 23 (concerning in part homophobic expression); *Williamson v Germany* (App no. 64496/17), judgment of 8 January 2019, paras 25-27.

PDG or DA in schools.¹³⁰ The Article was relied on to effect such an exclusionary approach in *Norwood v UK*¹³¹ in relation to an expression of anti-Muslim sentiment;¹³² inadmissibility was found to arise, although the expression was unlikely to inspire violence;¹³³ rather, it linked Muslims as a group with “a grave act of terrorism....” and was incompatible with Convention values, “notably, tolerance, social peace and non-discrimination”.¹³⁴ A more readily defensible reliance on Article 17 arose in *Belkacem v Belgium*:¹³⁵ an Article 10 claim from a Salafist preacher convicted of offences relating to incitement to violence against non-Muslims was declared inadmissible; the Court, however, elided the application of Article 17 to incitement to violence - “defending Sharia while calling for violence to establish it could be regarded as ‘hate speech’” – with a statement of much more general import: “each Contracting State was entitled to oppose political movements based on religious fundamentalism.”¹³⁶ Interference under Prevent with speakers or literature in schools expressing similar ‘extremist’ viewpoints would tend to fall within Article 17, following this over-broad approach, especially if associated with groups opposed to ECHR values, such as the BNP in *Norwood* or Sharia4Belgium in *Belkacem*. A potential example is provided by school-boy Rahmaan Mohammadi who read out pro-Palestinian leaflets produced by the pro-Hamas organization, Friends of al-Aqsa mosque, in the classroom, and was referred to police by the school,¹³⁷ although no action was taken.¹³⁸

But this broad exclusionary approach is clearly open to criticism as failing to confine itself to expressions of support for violence, and as demonstrating a striking contrast to the Court's tendency to create a broad scope for Article 10(1), combined with the demand under Article 10(2) for particularly weighty justification for interference with speech of political or moral import.¹³⁹ Such a justification was, however, identified in respect of one form of ‘extremist’ speech in *preference* to relying on Article 17 in *Vejdeland v Sweden*;¹⁴⁰ the applicants had distributed homophobic leaflets in a secondary school, resulting in their convictions for “agitation against a national or ethnic group”. The school setting, it was found, militated in

¹³⁰ See e.g.: *Garaudy v France* (App no. 65831/01), decision of 24 June 2003 (French only).

¹³¹ *Norwood v UK* (2005) 40 E.H.R.R. SE11.

¹³² *Ibid*, para 111.

¹³³ *Ibid*, para 113-14.

¹³⁴ *Ibid*, para 114.

¹³⁵ *Belkacem v Belgium* (App no. 34367/14), decision of 20 July 2017.

¹³⁶ *Ibid*, pp.2-3.

¹³⁷ Rights Watch, fn.2, paras 99-115.

¹³⁸ Open Society Justice Initiative, fn.74, pp.86-89.

¹³⁹ *Baka v Hungary* (2017) 64 E.H.R.R. 6, para 159; see further *Butt v SSHD* [2017] EWHC 1930 [112].

¹⁴⁰ (2014) 58 E.H.R.R. 15.

favour of finding that the interference with their activities was justified, given the unacceptability of homophobic expression in a democratic society.¹⁴¹ A similar stance was adopted in *Butt* (hypothetically); it was initially claimed that the HEPDG was unlawful on the basis that it was not ‘prescribed by law’ under Article 10(2) since it was not drafted with sufficient precision, it contained discretionary powers of uncertain scope and it lacked safeguards against abuse of those powers.¹⁴² Those arguments, which reflect those of certain NGOs and academics,¹⁴³ were rejected, primarily because they misconstrued the nature of the HEPDG’s status, since the Guidance must merely be “taken into account” by a relevant decision-maker.¹⁴⁴

The claim in *Butt* that the HEPDG was not a necessary measure in a democratic society since it was intended to prevent people being drawn into *non-violent* as well as violent ‘extremism’ was also rejected,¹⁴⁵ in a significant judicial exposition of the links between terrorist violence and ‘extremism’: non-violent ‘extremism’, it was found, could be characterised as promoting “hatred and division...encouraging isolationism”,¹⁴⁶ a sense of separateness, alienation, victimhood...at one with a rigid....version of religion or ideology” capable of justifying violence,¹⁴⁷ since those persuaded by the expression might reject the democratic means of effecting legal change.¹⁴⁸ Inclusion of such ‘extremism’ was therefore found to be rationally connected to the aim of protecting the rights of others to be free from threats of violence.¹⁴⁹ Those findings in respect of speech inconsistent with democratic values, including intolerance of non-state actors for other groups, would also apply in schools as regards satisfying the necessity test. Such an approach would also be consistent with that taken to non-discrimination under Article 14 and with the emphasis on the preservation of a

¹⁴¹ Ibid, paras 54-56. See also *Ibragim Iragimov and ors v Russia* (App nos. 1413/08, 28621/11), judgment of 28 August 2018, paras 61-63: application of Article 17 was not accepted and a breach of Article 10 found since statements condemnatory of non-Muslims were put forward, but in a context of tolerance; see also *Perincek v Switzerland* (2016) 63 E.H.R.R. 6, para 115.

¹⁴² *Butt v SSHD* [2017] EWHC 1930 [96].

¹⁴³ See Rights Watch, fn.2, para 18, and fn.74.

¹⁴⁴ *Butt v SSHD* [2017] EWHC 1930 [98].

¹⁴⁵ Ibid [128], [140].

¹⁴⁶ Ibid [127], [129].

¹⁴⁷ Ibid [134]-[137]. This description conforms to the stance of Islamic ‘extremist’ groups, such as Al-Muhajiroun; see e.g. M. Kenney, *The Islamic State in Britain* (Cambridge: CUP, 2018), chap 3. See further fn.159.

¹⁴⁸ Ibid [138].

¹⁴⁹ Ibid [132]-[140]. These findings were not disturbed on appeal: *R (Butt) v SSHD* [2019] EWCA Civ 256 [155]-[157].

democratic society under Protocol 1, Article 2,¹⁵⁰ while it is also bolstered by provisions of the UN Convention on the Rights of the Child providing for the free expression of children, and for their self-development in education.¹⁵¹

Proportionality demands under Article 10(2) would tend to be satisfied where the ‘extremist’ speech targeted had links to terrorism, and also since the consequences for pupils of interventions are normally fairly minimal; as discussed, most do not proceed past an initial enquiry,¹⁵² and if referral of a pupil for support occurs it is voluntary. The imposition of a prohibition order¹⁵³ against a member of staff or a ban on a speaker found to express ‘extremist’ views to pupils, would have a more significant impact, but, depending on the evidence as to the link with terrorism, the need to manage the risk of ‘radicalisation’ posed by such individuals would tend to be greater.¹⁵⁴

Such a full application of the tests under Article 10(2) to Prevent-based interference with non-violent ‘extremist’ expression, confining reliance on Article 17 to expressions of violent ‘extremism,’¹⁵⁵ would avoid setting “aside substantial principles and safeguards that are characteristic of the European speech-protective framework”,¹⁵⁶ while also bringing greater methodological consistency to the policing of the divide between Articles 17 and 10.

A reformed iteration of Prevent – redefining ‘extremism’

Although, as discussed, Prevent might survive another specific Article 10-based challenge, this time in the context of schools, revision of the Guidance is still required: its broadened scope in opposing ‘radicalisation’ and non-violent ‘extremism’ has not been accompanied by

¹⁵⁰ See: *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 E.H.R.R. 711, para 53; *Campbell and Cosans v UK* (1982) 4 E.H.R.R. 293, para 58.

¹⁵¹ Article 13 protects children’s freedom of expression, while under Article 29(1)(a) education should be aimed at the “development of the child’s personality, talents and mental and physical abilities to their fullest potential”, and the “preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes” (Article 29(1)(d)).

¹⁵² See fn.80.

¹⁵³ See fn.93.

¹⁵⁴ In a different context it has been found: “a college...is entitled to have rules restricting the nature of the language it is appropriate for teachers...to use towards students...this comes within...Article 10(2) ECHR...”: *Wood v Oldham College* [2004] EWCA Civ 1833 [28].

¹⁵⁵ As in e.g. *Hizb ut Tahrir and Others v Germany* (App no. 31098/08), decision of 12 June 2012, para 73 (a representative of the Islamic group had advocated the destruction of Israel and had written articles purporting to justify suicide attacks).

¹⁵⁶ H. Cannie and D. Voorhoof, “The Abuse Clause and Freedom of Expression in the ECHR: An Added Value for Democracy and Human Rights Protection?” (2011) 29(1) Netherlands Law Quarterly 54, p.83.

a PDG statement delineating more clearly both the nature of the ideologies associated with terrorism that the strategy opposes, and the need to identify the link to terrorism. Prevent therefore continues to rely on imprecise concepts of fundamental ‘British’ values, ‘extremism’ and ‘radicalisation’, without clearly tracing the links between them, meaning that the scheme is doubly imprecise, due both to the lack of certainty as to the demands placed on schools and the wording of s26.¹⁵⁷ This lack of clarity has contributed to occasional disproportionate actions by schools, fuelling the widespread criticism of Prevent to the effect that it chills school-based expression.

But the focus of the critical debate should *also* encompass the impact that certain forms of ‘extremism’ have in chilling the expression of the groups deemed ‘inferior’, as appears in what may be termed ‘supremacist’ ideology. The term ‘supremacist’ as used here refers to ideas associated with white supremacism – a movement that seeks to seize power for its cultural/religiously or racially (self)-defined ‘group’ on the basis of its perceived intrinsic superiority to other such ‘groups’; the term covers isolationist/separatist supremacist groups seeking to seize power to isolate themselves from other groups.¹⁵⁸ While the term is commonly associated with white supremacism, and is used in that sense here, it can also be applied to certain Islamic movements: for example, the ideologies of Al-Nusra Front, ISIS or Al Qaeda amount to forms of Muslim supremacism, due to the interpretations placed upon concepts of loyalty and enmity/disavowal and offensive Jihad,¹⁵⁹ which amount to a belief that Muslims must seize power on a basis resembling that of white supremacist ideology.¹⁶⁰ Examples of ‘supremacism’ would include the view taken of non-Muslims and Ahmadi, Shia or Sufi Muslims by Sunni Muslim supremacist groups,¹⁶¹ or of Muslims generally by white/European supremacist groups.¹⁶²

Expressions of supremacism in schools are already combated to an extent under Prevent: the PDG and DA make it clear that the duty is not designed to override existing duties inviting

¹⁵⁷ See C. Walker, fn.19, 732-36.

¹⁵⁸ See further L. Bowman-Grieve “Exploring ‘Stormfront’: A Virtual Community of the Radical Right” (2009) 32(11) *Studies in Conflict & Terrorism* 989.

¹⁵⁹ M. Kenney, *The Islamic State in Britain* (fn.147), p.131; G. Kepel, *Jihad: The Trail of Political Islam* (LB Tauris & co., 2002) pp. 219-222; *Shakeel Begg v BBC* [2016] EWHC 2688 [107],[115],[119]-[130],[370].

¹⁶⁰ See: K. Chaudhry, “Like white supremacy, another monster rears its head in America, and no one is talking about it”, *Huffington Post*, 26.11.17, https://www.huffpost.com/entry/like-white-supremacy-another-monster-rears-its-head_b_5a174fa6e4b0250a107bfe94 [Accessed 01.04.20].

¹⁶¹ See: Commission for Countering Extremism, fn.41, p.110; D. Gartenstein-Ross, ‘The role of consensus in the contemporary struggle for Islam’ (2008) 6(4) *The Review of Faith & International Affairs* 13, 14-16.

¹⁶² See S. Khan and T. McMahon, *The Battle for British Islam* (London: Saqi 2016), chap 2.

pluralism of debate,¹⁶³ and the DA indicates that pressure should be brought to bear against governors, teachers and pupils who espouse and express such intolerant views, contrary to promoting ‘mutual respect’ between groups,¹⁶⁴ a pressure it is hard to describe as illegitimate in free speech terms.¹⁶⁵ Various sources, including local authority¹⁶⁶ and teaching union guidance,¹⁶⁷ have emphasised that promotion of ‘British’ values opposes the singling out of certain groups as either inferior or superior, or as more or less entitled to enjoy freedoms and benefits than others, while schemes to support schools to promote such values have been found to improve teaching on pluralism and tolerance.¹⁶⁸ ECHR values opposing supremacist expression, reflected in particular under Articles 10 and 14, Protocol 1 Article 2¹⁶⁹ – supporting plurality of debate, democratic participation, the search for truth, self-development,¹⁷⁰ non-discrimination – may thus be said to find some, albeit inadequate, reflection in the current iteration of the Prevent strategy.

The current independent Review therefore provides the twin opportunities, first for creating more precisely focused curbs on certain forms of school-based supremacist speech in a revised PDG and DA. Secondly, such revision should reject an over-broad notion of ‘extremism’, as starkly illustrated by the much criticised recent (albeit, temporary) inclusion of Extinction Rebellion in Prevent documents.¹⁷¹ The current all-encompassing definition of ‘extremism’, impliedly linking the notion to all forms of ‘radicalisation’ and ‘terrorism’, is a

¹⁶³ PDG, fn.22, paras 58,64, DA, fn.11, p.8.

¹⁶⁴ DA, fn.11, p.8.

¹⁶⁵ See Greer and Bell, “Counter-terrorist law in British universities: a review of the ‘prevent’ debate” [2018] P.L. 84, 97-99.

¹⁶⁶ See, e.g. “Understanding Tower Hamlets’ Prevent Guidance for Schools” https://www.towerhamlets.gov.uk/Documents/Education-and-skills/Tower_Hamlets_prevent_resources/Understanding_Tower_Hamlets_Prevent_Guidance_for_Schools.pdf [Accessed 01.04.20], p.24.

¹⁶⁷ National Union of Teachers, “Education and Extremism: Advice for Members” (2015) <https://www.teachers.org.uk/equality/equality-matters/education-and-extremism> [Accessed 01.04.20], pp.3-4.

¹⁶⁸ See: T. Chisholm and A. Coulter, ‘Safeguarding and radicalisation’ (Kantar Public, Social Science in government, August 2017) p.28; Ofsted, “Annual Report 2016/17” (2017, HC 618) p.8.

¹⁶⁹ See e.g.: *Folgerø v Norway* (2008) 46 E.H.R.R. 47, para 84; *Hasan and Eylem Zengin v Turkey* (2008) 46 E.H.R.R. 44, paras 47-55; *Dojan v Germany* (App no. 319/08), decision of 13 September 2011, p.14. Discrimination within the scope of Article 10 or Protocol 1 Article 2 would be covered by the guarantee against discrimination under Article 14.

¹⁷⁰ See further as to these speech rationales: F. Schauer, ‘Free Speech in a World of Private Power’, T. Campbell, ‘Rationales for Freedom of Communication’ and E. Barendt, ‘Importing United States Free Speech Jurisprudence?’ in T. Campbell and W. Sadurski (eds.), *Freedom of Communication* (Aldershot: Dartmouth Publishing, 1994); I. Loveland, ‘A Free Trade in Ideas—and Outcomes’ and J. Laws ‘Meiklejohn, the First Amendment and Free Speech in English Law’ in I. Loveland (ed.), *Importing the First Amendment, Freedom of Expression in Britain, Europe and the USA* (Oxford: Hart, 1998); H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford: OUP, 2006) chapter 1.

¹⁷¹ CAGE, Beyond Prevent, fn.7, p.11.

key failing of the policy,¹⁷² since the term does not clearly identify the groups and ideas which must be opposed; thus it is readily misrepresented as targeting broader groups, such as Muslims. But this conceptual weakness, inherent in counter-‘extremism’ policy, need not mean that CTSA Part 5 underpinning guidance linking counter-extremism with counter-terrorism should simply be repealed.¹⁷³

Rather, in order to seize these opportunities, the interpretation placed upon ‘extremism’ by the High Court in *Butt*,¹⁷⁴ which also demanded a link to terrorism, could provide a foundation for clarifying the PDG and DA to refer to “supremacist extremism,” since groups with supremacist goals necessarily oppose anti-discrimination efforts inherent in the securing of human rights in democratic societies. So use of the term would cohere with the support of the ECHR expressed in Articles 10(2), 14 and 17 for the rights and freedoms enjoyed in such societies; in particular, Article 10 read with 14 would oppose a strong appeal to freedom of religious expression to justify supremacist failures of tolerance in relation to other groups.¹⁷⁵ The Commission for Countering Extremism, in a significant Report, found that such supremacist beliefs (and expressions of hatred/hostility to other groups) should form a core element of the definition of ‘extremism’,¹⁷⁶ although the replacement term recommended in the Report, ‘hateful extremism,’ does not, it is argued, depart sufficiently from the current overbroad definition. It would also be essential to state in the PDG that supremacist ‘extremism’ denotes opposition to ‘fundamental British *human rights* values’: since such values are universal, Prevent would be less susceptible to criticism due to its perceived opposition to ‘non-British’ cultural values.¹⁷⁷ Further, clearly, some supremacist groups are unlinked to terrorism in the UK and are not the target of Prevent; therefore the PDG would also need to specify the need for a potential linkage between the “supremacist extremism,” in question, whether pertaining to the far-right or otherwise, and terrorist-related activity.

Conclusions

¹⁷² See Commission for Countering Extremism, fn.41, p.94.

¹⁷³ Repeal of all such legislation was recently recommended by the Special Rapporteur: fn.5.

¹⁷⁴ [2017] EWHC 1930 (HC); [2019] EWCA Civ 256 (CA). See also *Shakeel Begg v BBC* [2016] EWHC 2688. For discussion of such juridification of the term ‘extremism’, see: Walker and Cawley, fn.97, pp.6-7.

¹⁷⁵ See to similar effect *Birmingham C.C. v Afsal (No 3)* [2019] EWHC 3217 (QB) [61] in relation to anti-LGBT protests outside Birmingham schools.

¹⁷⁶ See fn.41, p.33.

¹⁷⁷ See further Hollinshead and Soyei, fn.99, p.7; Select Committee on Citizenship and Civic Engagement, fn.101, para 40.

Revising the PDG to target “supremacist extremism,” *if* potentially linked to terrorism, relying on the exposition as to such linkage in *Butt*, would cohere with Prevent’s aspiration to be compatible with free speech values, furthering its goal more transparently of supporting the expression of a plurality of views in schools, as opposed to a supremacist promotion of pupils’ isolation from such plurality. Prevent would then not only be rendered more clearly compatible with free expression values, but would also have a stronger claim to support equality of expression by members of minority groups, such as Muslims, as against both white/European supremacists who reject their values as ‘non-British’, and against Muslim supremacists who claim that values of political, religious and sexual tolerance are ‘British’, and so irreconcilable with ‘Muslim’ values.¹⁷⁸ Clearer alignment of a new iteration of Prevent with human rights values, and with an anti-supremacist approach clearly linked to countering terrorism, would tend to curb persistent narratives to the effect that Prevent chills school-based free expression.

Professor Helen Fenwick
Durham University

Dr Daniel Fenwick
Northumbria University

¹⁷⁸ See in relation to the wide range of Islamic ideas opposed to such supremacism, and as to British Muslims challenging supremacist views, S. Khan, *The Battle for British Islam: Reclaiming Muslim Identity from Extremism* (London: Saqi, 2016), chapter 5.