

Alumni for FREE SPEECH

BY EMAIL to:

Professor Karen O'Brien
Vice-Chancellor and Warden
University of Durham
Cc: Professor Mike Shipman, Deputy Vice-Chancellor and Provost
Dr Shaid Mahmood, Pro-Vice-Chancellor for EDI
Dr Amanda Wilcox, University Secretary

7 August 2023

Dear Professor O'Brien

Free speech compliance issues with “decolonising” the curriculum

Alumni For Free Speech (“AFFS”) is a non-partisan campaign that represents alumni to work with their universities and colleges to protect free speech better. More information about AFFS can be found at www.affs.uk.

In common with other leading UK universities, we recently sent Durham a standard form Freedom of Information request relating to its number of dedicated employees and aggregate expenditure on EDI and free speech respectively.¹ Given that it seems from the University’s website that it employs both a Pro-Vice-Chancellor for EDI² and a ten-person dedicated EDI team³, we were surprised and disappointed by the University’s failure to provide the information requested. We will be commenting about that when we publish our findings in the next few weeks, so I wanted to bring the University’s response to your attention by way of a final opportunity to provide the same information already provided by the great majority of those universities asked.

1



EDI costs FoI
request 29.03.23.pdf

2 <https://www.durham.ac.uk/about-us/governance/senior-leadership-team/dr-shaid-mahmood/>

3 <https://www.durham.ac.uk/about-us/professional-services/equality-diversity-inclusion/our-people/>

We are writing to you now, however, about the free speech and governance aspects of reports we have seen about Durham’s plans and proposed implementation of the “decolonisation” of its curricula, which have included descriptions of academics disagreeing with the plans but not feeling able to speak up.⁴ Concerns have been widely expressed that these sorts of initiatives (now commonplace at our universities) are grounded in controversial ideology rather than fact or credible research and that they are inappropriate for inclusion as part of any curriculum, except in genuinely relevant subject areas (e.g. politics).

We enclose with this letter a Statement about free speech protection aspects of “decolonialisation” (the “**BFSP Statement**”) produced by our associated campaign Best Free Speech Practice – www.bfsp.uk. The BFSP Statement is one among a number BFSP has prepared about aspects of free speech protection at UK universities, and the recent **Higher Education (Freedom of Speech) Act 2023** (“the 2023 Act”) at <https://bfsp.uk/universities-higher-education>.

The BFSP Statement goes into greater detail about the free speech legal and regulatory risks of “decolonialisation”, what they mean in in practice and what needs to be done – and avoided – to ensure that failures in free speech protection do not occur. Although we invite your attention to the whole document, the following are some key points from the BFSP Statement.

Relevant law and requirements: implications

It will be unlawful, and/or contrary to other regulatory requirements and expectations, for the University to implement a “decolonisation” agenda, save to the

⁴ Most recently in *The Times*, 5 August 2023.

See, also the following links in relation to “decolonisation” of, for example: (1) mathematics (<https://www.durham.ac.uk/departments/academic/mathematical-sciences/equality-diversity--inclusion/decolonisation/>, <https://www.telegraph.co.uk/news/2022/04/09/decolonise-maths-subtracting-white-male-viewpoint-urges-durham/> and <https://www.spectator.co.uk/article/why-is-durham-trying-to-decolonise-maths/>) (2) philosophy (<https://www.durham.ac.uk/departments/academic/philosophy/about-us/equality-diversity-and-inclusion/>) (3) music (<https://www.durham.ac.uk/departments/academic/music/about-us/equality-diversity-and-inclusion/>) (4) history (<https://www.durham.ac.uk/departments/academic/history/about-us/diversity/decolonising-history/>) (5) theology (https://www.durham.ac.uk/departments/academic/common-awards/policies-processes/curriculum/decolonisation/?gclid=Cj0KCQjwib2mBhDWARIsAPZUn_lxG3FcAhB9sHDLi3YdDPJgr6ZFBO29O0IRhhse8YAzX_ifBm6o8MkaArqIEALw_wcB) and (6) classics (<https://www.durham.ac.uk/departments/academic/classics-ancient-history/about-us/equality-diversity-inclusion/>).

extent that courses, teaching and materials are very carefully structured so as to avoid the risks and issues described below.

The University's own Statement on Free Speech, rules regarding behaviour, enforcement, discipline: we have considered the University's Policy Statement on Freedom of Expression ("**FS Statement**")⁵. and note that it includes requirements to the effect that the University expects its staff, students and visitors to be tolerant of the differing opinions of others. Obviously, this must extend to not taking actions to prevent people from voicing their viewpoints, including academics or students who disagree with or question the "decolonisation" agenda.

Section 43(1) of the Education Act (No.2) Act 1986 (the "Education Act"): English universities' governing bodies are required under **Section 43(1)** of the Education Act to take such steps as are reasonably practicable to secure freedom of speech for their members, students and employees and visiting speakers. This is already a demanding requirement which will soon be supplemented by the provisions of the 2023 Act. It already means all such steps and is limited only by reference to the speech being "*within the law*" and by what is reasonably practicable (which is to be judged objectively and not by reference to the subjective views or preferences of the managers of particular universities). It requires universities to be proactive. To the extent that academics or students question the "decolonisation" agenda, their free speech requires protection.

Equality Act 2010 ("Equality Act"): the Equality Act contains extensive provisions to prevent unlawful discrimination and harassment in respect of people with various specified "*protected characteristics*".⁶ Holding (or not holding) a "*religious or philosophical belief*" is such a "*protected characteristic*". Since the landmark *Forstater* case⁷, it is highly likely that holding viewpoints which question aspects of Critical Race Theory (this has indeed already been litigated and subject to a

⁵ <https://www.durham.ac.uk/media/durham-university/about-us/pdfs/DurhamUniversityPolicyStatementonFreedomofExpression.pdf>

⁶ We note that some of the University's obligations under the Equality Act are referred to in the FS Statement. Although, as is often the case with the way these obligations are explained in the university sector, we have some concerns about the mis- and over-interpretation of the University's relevant obligations under the Equality Act in the FS Statement, this is not the occasion on which to ventilate them.

⁷ See: https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOI.pdf.

substantial payout⁸) and “decolonisation” agendas are protected characteristics. The University is therefore obliged to avoid unlawful discrimination against and harassment of people who hold such viewpoints. It also has a separate obligation under the 2010 Act to comply with its Public Sector Equality Duty in respect of people with such protected beliefs.

The Human Rights Act 1998 (“HRA”): as the University recognises in the FS Statement, the **European Convention on Human Rights** (as enacted in the UK by the HRA)) protects people’s rights to freedom of thought and to hold opinions and express them. Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic freedom. Compelled thought and no doubt speech are unlawful. This is very relevant as regards protecting those academics or students who question the “decolonisation” agenda.

The Department for Education (“DfE”) has stated⁹ its expectation (“**the DfE Statement**”) that [a university] “*should not interfere with academic freedom by imposing, or seeking to impose, a political or ideological viewpoint upon the teaching, research or other activities of individual academics, either across the whole [university] or at department, faculty or other level. For example, a head of faculty should not force or pressure academics to teach from their own political or ideological viewpoint, or to only use set texts that comply with their own viewpoint. This applies equally to contested political ideologies that are not associated with a particular political party or view, such as ‘decolonising the curriculum’.*”

What the University should do – and avoid – to ensure it complies with its legal and regulatory obligations re free speech?

The University must not impose a “decolonisation” agenda to the extent that to do so would contravene their legal and other obligations. Staff devising and teaching courses will be doing so on behalf of the University, so must themselves act within these constraints.

The BFSP Statement goes into greater detail about what the risks are in practice and what needs to be done – and avoided – to ensure that legal and compliance failures do not occur. The following are, however, some examples of circumstances which are likely to be contrary to the University’s legal obligations.

First, we ask: how is the University going to ensure that the way it imposes a “decolonisation” agenda does not contravene the DfE Statement?

⁸ See: <https://www.telegraph.co.uk/news/2023/05/27/civil-service-whistleblower-settlement-political-activism/>

⁹ In its publication “*Higher education: free speech and academic freedom*”, 2021, at Annex B.

To the extent that courses, teaching and materials:

- (a) expressly or by implication present “decolonisation” and its manifestations as fact or generally accepted (without appropriate explanation of their contested nature and fair presentation of the arguments to the contrary) and therefore not to be disagreed with, and/or present disagreement with those viewpoints in a negative light; or
- (b) require those viewpoints to be accepted or supported or presented favourably in order to achieve tutorial or other approval or have the best chance to achieve high marks; and
- (c) thereby effectively disallow or suppress, or impose negative consequences on holding, opinions which dissent from aspects on “decolonisation” as promoted or reflected in the relevant course, teaching or materials; or impose pressure on students to hold, or appear to hold, those opinions,

they are clearly contrary to the obligation to secure free speech and are, therefore, unlawful. To the extent that relevant modules are made compulsory, this will obviously increase the risk of non-compliance.

Requiring staff to teach courses and present materials which contain “decolonisation” ideology, in circumstances where they are not able to provide an appropriate explanation of their contested nature and a fair presentation of the arguments to the contrary, or indeed fairly present their own opinions on that aspect of the course, will be contrary to obligations to secure free speech.

In connection with the Equality Act and people who hold “protected viewpoints” as regards “decolonisation” (“**protected people**”):

- (a) potentially, presenting ideological viewpoints (i.e. aspects of “decolonisation”) as fact or generally accepted and/or uncontested, and therefore inappropriate to question or disagree with; and/or
- (b) presenting disagreement with those viewpoints in a negative light or imposing negative consequences for such disagreement; and/or
- (c) requiring those viewpoints to be accepted or supported or presented favourably, including treating them positively in essays and examinations, in order to achieve tutorial or other approval or have the best chance to achieve high marks; and/or
- (d) subjecting protected people to any detriment for refusing to teach courses which contain “decolonisation” ideology, or for teaching them in a way as regards the

relevant ideology and its presentation which is not approved by the HEP or other staff or students,

are liable to constitute unlawful discrimination by the University against, and/or are likely to amount, or lead, to harassment of, those who count as protected people.

Furthermore, imposing “decolonisation” on staff or students in the ways described above might well lead to breaches of their rights of free thought and expression protected under the HRA.

The University should, to the extent that it implements a “decolonising” agenda, in any event make clear to academics and students their rights to hold (or not hold) and to express their beliefs and viewpoints (or lack of them) about those issues; and that the University has legal obligations to protect academics’ and students’ free speech, which are backed up by rules and complaint and disciplinary processes.

We will be staying on this case, and seeking information from academics and students about what is imposed on them and on any legal and governance failures by the University. AFFS will report all real failures to the Office for Students.

We are happy to engage with the University about these matters, on a confidential basis if this is requested.

Given its potential relevance to their roles as described in the University’s website¹⁰, I have copied this letter to Professor Mike Shipman, Dr Shaid Mahmood and Dr Amanda Wilcox.

Yours sincerely

**Andrew Neish KC for
Alumni for Free Speech**

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¹⁰ <https://www.durham.ac.uk/about-us/governance/senior-leadership-team/>