



# QAA revised Benchmark Statements: how English universities “decolonising the curriculum” can be unlawful

## Introduction

There has been much public disquiet about the Quality Assurance Agency (“QAA”) issuing revised “Benchmark Statements”, which contain recommendations that English universities and other Higher Educational Providers (“HEPs”) incorporate what are effectively elements of “critical race theory” (“CRT”) into their curriculums, as part of the “decolonisation” of courses in every subject.

Concerns have been expressed by others that these requirements are grounded in controversial ideology rather than fact or credible research, that they are themselves racist, and that they are inappropriate for inclusion as part of any curriculum, except perhaps as a topic for debate in relevant subject areas (e.g. politics, philosophy and sociology).

Best Free Speech Practice (“BFSP”) is, however, itself concerned only with protecting free speech and academic freedom at our HEPs. We are a non-partisan campaign and have no interest in becoming embroiled in the so-called Culture Wars. We have prepared this statement to highlight the fact that the revised QAA Benchmark Statements will, depending on how they are implemented, risk HEPs acting unlawfully or non-compliantly under laws and other requirements relating to the protection of free speech.

### *The relevant law and requirements*

Under Section 43 of the **Education (No.2) Act 1986** (the “**Education Act**”), HEPs must take such steps as are reasonably practicable to secure freedom of speech for its members, students and employees and, when necessary, visiting speakers. This is a demanding requirement, limited only by reference to the speech being “*within the law*” and by what is reasonably practicable. It gives no discretion to HEPs as to the steps they take: if a step is reasonably practicable, it must be taken. Free speech obligations otherwise override other considerations.

Under the **Equality Act 2010** (the “**Equality Act**”), as public bodies, HEPs must avoid unlawful discrimination against and harassment of people, including academics and students,

with the “*protected characteristic*” of holding (or not holding) particular religious or philosophical views, including various viewpoints on matters of current public controversy. The Equality Act specifies various contexts in which unlawful actions can occur, including employment and, in respect of education, by (inter alia) discriminating by subjecting a student to a detriment, or harassing a student (although the provisions relating to education exclude “anything done in connection with the content of the curriculum”).

In 2021, the landmark *Forstater* case<sup>1</sup> established that holding gender critical views is a “*protected characteristic*”. The law in this area is still evolving and, in order to avoid finding themselves in breach of the law, HEPs need to work on the basis that advocacy for free speech, and opinions (whether religiously or philosophically based) in respect of other currently contested areas (including, for example, in relation to aspects of CRT and moves to “decolonise the curriculum”), must logically also be treated as protected beliefs in appropriate circumstances and will, in time, be confirmed as such.

Furthermore, the **Public Sector Equality Duty** (“**PSED**”) imposed under **Section 149** of the Equality Act requires HEPs, in the exercise of their functions, to have due regard to the need to eliminate unlawful discrimination and harassment against people who hold or express those beliefs, to advance equality of opportunity between persons who share a relevant protected characteristic (e.g., those who question CRT and “decolonisation”) and persons who do not share it, and to foster good relations between persons who share a relevant protected characteristic (e.g., those who question CRT and decolonisation) and persons who do not share it.

HEPs should therefore act on the basis that they must work to protect the freedom of speech of people in respect of a wide range of opinions held, not held or expressed by them, and that this extends to opinions and beliefs about CRT and “decolonisation”. Given that many people disagree with or have significant or doubts about CRT and “decolonisation”, or aspects of them, there will be many people with this “protected characteristic”: this creates a major risk area for HEPs which seek to include CRT and “decolonisation” into their curriculums.

Furthermore, the free speech rights of academics and students are protected under the **European Convention on Human Rights** (as enacted in the UK by the **Human Rights Act 1998**<sup>2</sup> (the “**HRA**”). Political expression (in a wide sense rather than a narrow partly-political

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<sup>1</sup> *Forstater v. CGD Europe et al.* (Appeal No. UKEAT/0105/20/JOJ): [https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya\\_Forstater\\_v\\_CGD\\_Europe\\_and\\_others\\_UKEAT0105\\_20\\_JOJ.pdf](https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf)

<sup>2</sup> The HRA directly enacts the European Convention on Human Rights (“**ECHR**”) into UK law, including and relevantly for present purposes, **Article 9** (Freedom of thought, conscience and religion) and **Article 10** (Freedom of expression).

one) attracts the highest degree of protection, as does academic freedom. Any interference by an HEP with the expression of opinions and academic freedom of its academics and students will require exceptional justification. The QAA should be very wary of recommending that HEPs do things which may be contrary to the HRA.

Each HEP will have a statement or code and/or rules on freedom of speech (“**FS Statement**”). Each will differ. Typically, however, they include requirements that its staff, students and visitors be “*tolerant of the differing opinions of others, in line with the University’s core value freedom of expression*” and provide that all staff and students must “*engage with intellectual and ideological challenges in a constructive ... and peaceful way, even if they find the viewpoints expressed to be disagreeable...*”<sup>3</sup>. Each HEP will need to design and structure its courses so as to comply with its own FS Statement. Each will, for example, need to avoid preventing or closing down disagreement and discussion about elements of courses, teaching and materials which derive from CRT and “decolonisation” ideology. This will, in turn, require each HEP to ensure that courses are structured so as to make it clear that these elements derive from contested and debatable ideology, rather than effectively preclude debate or disagreement.

Finally, the DfE has stated<sup>4</sup> an expectation (“**DfE Statement**”) that an HEP 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 HEP 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’. While this does not have the force of law, the authorities are likely to have reference to it in judging HEPs’ performance in promoting and protecting free speech, so HEPs would do well to comply with it.

## **Implications for HEPs: potential unlawfulness and compliance problems**

HEPs must not impose ideologies or viewpoints (including CRT and “decolonisation”) to the extent that to do so would contravene their obligations: (a) to secure free speech and comply with their own FS Statement, (b) not to discriminate against or harass people in respect of views which count as “protected characteristics” and to comply with their PSED in respect of those people, and (c) to give effect to students’ free speech rights under the HRA, or not comply with the DfE Statement. Further, for these purposes, academics teaching courses will be acting on behalf of their HEPs, so must themselves act within these constraints.

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<sup>3</sup> Examples taken from [Cambridge University’s Statement on Freedom of Speech](#)

<sup>4</sup> In its publication “*Higher education: free speech and academic freedom*”, 2021, at Annex B,

**Education Act:** To the extent, therefore, that courses, teaching and materials:

- (a) expressly or by implication present CRT and “decolonisation” 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, including by treating them positively in essays and examinations, in order to achieve tutorial or other approval or have the best chance to achieve high mark in examinations; and
- (c) thereby effectively:
  - disallow or suppress, or impose negative consequences on holding, opinions which are contrary to CRT and “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 primary obligation under the Education Act to secure free speech and are, therefore, unlawful. They are also likely to contravene the HEP’s **FS Statement**. To the extent to which modules are made compulsory, that will obviously increase the risk of non-compliance.

**DfE Statement:** the DfE’s expectation that an HEP 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 HEP or at department, faculty or other level, is very limiting. In order not to contravene this expectation, HEPs will have to either avoid making changes to the curriculum that reflect CRT or a “decolonisation” agenda, or make it clear that elements of the revised curriculum reflecting CRT or a “decolonisation” agenda are theoretical and derived from an activist agenda and are contested, so as to enable relevant academics to teach freely.

**FS Statement:** Similarly, requiring staff to teach courses and present materials which contain CRT and “decolonisation” ideology, especially in subjects to which they have no obvious relevance (e.g. mathematics), in circumstances where:

- (a) 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; or
- (b) it is likely that negative consequences will result from them in doing any of the above,

will also be contrary to HEP's primary obligation under the Education Act to secure free speech and thus be unlawful, and also likely to contravene the HEP's FS Statement.

In connection with the **Equality Act and the PSED** and people who hold "protected viewpoints" as regards CRT and "decolonisation" ("**protected people**"):

- (a) (to the extent not excluded as something "done in connection with the content of the curriculum"<sup>5</sup>) expressly or by implication presenting ideological viewpoints (ie, CRT and "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 mark in examinations; and/or
- (d) subjecting protected people to any detriment for refusing to teach courses which contain CRT and "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,

is liable to be unlawful discrimination by the HEP against, and could also amount, or lead, to harassment of, those who count as "protected people" under the Equality Act. Such conduct would also risk being a failure to comply with the HEPs' PSEDs, as would failing to plan ahead in order to ensure that courses, teaching and materials avoid doing the above. Given that there will be many may people who count as "protected people", this creates a major risk area for HEPs which seek to include CRT and "decolonisation" into their curriculums.

Furthermore, imposing CRT and "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.

**Conclusion:** It will therefore be unlawful in our view, and likely to be contrary to HEPs' FS Statements and the DfE Statement, for HEPs to implement the QAA revised Benchmark Statements (even in relation to subjects where CRT and "decolonisation" might have some clear relevance), save to the extent that courses, teaching and materials are very carefully structured so as to avoid the risks and issues described above.

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<sup>5</sup> To the extent that these things are allowed by this exclusion to be included in the curriculum, it is hard to see how that would extend to allowing the presentation of ideological viewpoints (ie, CRT and "decolonisation") as fact or generally accepted and/or uncontested.

HEPs should, to the extent that they intend to follow (so far as is lawful) the QAA's revised Benchmark Statements in relation to CRT and "decolonising" elements, also:

- (a) 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
- (b) inform students that the HEP has legal obligations to protect students' free speech, and that those obligations are backed up by rules and complaint and disciplinary processes to which the students may resort if concerned about the courses, teaching and materials.

## **Issues and questions for the QAA**

Recommending to HEPs, through its revised Benchmark Statements, that they act in ways which involve a high risk of unlawfulness and non-compliance is wholly inappropriate. It is extraordinary that it has done this.

As a responsible organisation, the QAA must at the least bring to HEPs' attention the risks we explain above and the constraints they will need to comply with in order for their course, teaching and materials to be lawful and compliant.

AFFS would be interested to know:

- (a) How the QAA, which is supposed to be working dispassionately to promote the highest standards of teaching in HEPs, came to buy into this ideology so apparently uncritically, and consider that this was a good thing to recommend to HEPs?
- (b) The extent (if any) to which it considered whether its revised Benchmark Statements could cause HEPs to contravene their obligations under the Equality Act and free speech obligations? If not, why not?
- (c) Whether the QAA took legal advice about possible implications of the Benchmark Statements? If not, why not?
- (d) Whether the QAA liaised with external pressure or advocacy groups about the subject-matter of the Benchmark Statements? If so, which ones, when and in what way?

## **Best Free Speech Practice**

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