



“Decolonising the curriculum”:

Free speech compliance risks for English universities

PRELIMINARY – EFFECTIVE DATE: this Statement sets out the position as at the date (expected to be later in 2023) when the main provisions of the Higher Education (Freedom of Speech) Act 2023, which amends HERA so as to have the effects described below, come into effect. This Statement is also an accurate statement in all material respects of the effects in practice of the existing legal obligations under the Education (No. 2) Act 1986, save that all references to the new requirements in HERA to protect academic freedom should be discounted for this purpose.

Introduction

Best Free Speech Practice (“**BFSP**”) is a non-partisan campaign to clarify and disseminate what the legal requirements and their implications in practice actually are for protecting free speech and academic freedom at UK universities and other Higher Educational Providers (“**HEPs**”).

There has been much public disquiet about the Quality Assurance Agency (“**QAA**”) issuing in late 2022 revised “Benchmark Statements”, which contained recommendations that English 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 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 itself concerned only with protecting free speech and academic freedom at our HEPs. We are a non-partisan campaign and have no interest in taking sides in debates such as this. 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.

Alumni for Free Speech (www.affs.uk) will be monitoring and liaising with HEPs to ensure that they are free speech compliant, and if necessary following this up with Freedom of

Information Requests. It will be publicising any continuing failures by them to comply with their free speech obligations under the law.

The relevant law and requirements

Sub-sections A1(1)-(2) of the Higher Education and Research Act 2017¹ (“**HERA**”) require the governing body of an English HEP to take “*the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take*” to secure freedom of speech (within the law) for the staff, members and students (“**Participants**”) of and visiting speakers to the HEP. This is a demanding requirement, and gives no material discretion to an HEP. It is limited only by reference to the speech being “*within the law*” and by what steps are “*reasonably practicable*”. Free speech obligations otherwise override other considerations.

This obligation results in various requirements in practice, including the following.

Institutional neutrality: If an institution takes sides, in an area of passionate and severely polarised debate, with one contested position, it necessarily formally sets itself against the other position. This gives rise to a very obvious risk of disadvantaging (discriminating against) or creating a hostile environment for (harassing) people who hold that other viewpoint. HEPs therefore need to maintain institutional neutrality in respect of matters of public debate while of course complying with their wider relevant legal obligations.

Not enforcing controversial agendas: Whenever HEPs promote certain viewpoints in respect of areas which are the subject of debate or controversy, to (directly or indirectly) require or exert pressure for the endorsement of or acquiescence to those viewpoints, or suppress the expression of lawful dissenting viewpoints, will be a clear breach of the primary requirements under HERA, unless they are legally obliged to take such actions.

Sub-sections A1(5)-(9) of HERA provide that academic staff must be free (within the law) to question and test received wisdom and put forward new ideas and controversial or unpopular opinions, without facing the risk of losing their jobs or privileges at the HEP or the likelihood of their securing promotion or different jobs at the HEP being reduced.

Under the **Equality Act 2010** (the “**Equality Act**”), 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. In respect of education, this includes by (inter alia) discriminating by subjecting a student to a detriment or harassing a student, although the provisions relating to education do not apply

¹ As introduced by the Higher Education (Freedom of Speech) Act 2023, with effect from a date to be fixed, but which is currently expected to be in late 2023.

to “anything done in connection with the content of the curriculum”². The precise extent of this is unclear, but it must mean that the choice of content for a curriculum is not itself discriminatory or harassment (e.g. because what is being taught upsets or offends people), whereas it would appear to be most unlikely to disapply the protections in respect of a student who has voiced reasoned disagreement with an aspect of what they are being taught and is being attacked or subjected to negative consequences as a result.

In 2021, the landmark *Forstater* case³ established that holding gender-critical views (i.e., disagreeing with aspects of Trans ideology) 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 support for free speech and other human rights, and opinions (whether religiously or philosophically based) in respect of other currently contested areas (including in relation to aspects of CRT, in respect of which litigation and the first big payment have already happened⁴, and moves to “decolonise the curriculum”), must logically also be treated as protected beliefs in appropriate circumstances and will, in time, be confirmed as such⁵. It will be very risky, for HEPs and their staff personally, to do otherwise.

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 protected 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.

² Equality Act Section 94(2).

³ *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

⁴ This has already been litigated and subject to a substantial payment, albeit not yet a formal judgement. In May 2023, the Department For Work and Pensions paid Anna Thomas £100,000 just before a case came to the Employment Tribunal which involved her claiming discrimination for being dismissed following making whistleblowing complaints voicing concerns that (inter alia) the DWP’s adoption of aspects of Critical Race Theory, in particular the distribution of materials asking white employees to “assume” they were racist, was a breach of the Civil Service Code requiring them to be politically impartial and could lead to discrimination against white people.

⁵ For further discussion of this, see BFSP’s statement *Philosophical beliefs protected under the Equality Act: After the Forstater case* at <https://bfsp.uk/universities-higher-education>.

HEPs should therefore act on the basis that they must work to protect the freedom of speech and academic freedom 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**⁶ (the “HRA”). Political expression (in a wide sense rather than a narrow party-political 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.

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...*”⁷. Each HEP will need to design and structure its courses and activities 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 sufficiently clear in the relevant context where elements derive from contested and debatable ideology, rather than present them as unassailable and effectively preclude debate or disagreement.

Finally, the Department for Education (“DfE”) has stated⁸ 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*

⁶ 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).

⁷ Examples taken from [Cambridge University’s Statement on Freedom of Speech](#).

⁸ In its publication “*Higher education: free speech and academic freedom*”, 2021, at Annex B.

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 (and therefore compliance with its OfS conditions of registration), 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 legal and other obligations described above. Staff devising and teaching courses will be doing so on behalf of their HEPs, so must themselves act within these constraints.

HERA and FS Statement: To the extent, therefore, that courses, teaching and materials:

- (a) expressly or by implication present CRT and “decolonisation” and their 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, 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 marks; 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 HERA to secure free speech and are, therefore, unlawful. They are also likely to contravene the HEP’s FS Statement. 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 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 be contrary to HEP's obligations under HERA to secure free speech and, potentially, academic freedom and thus be unlawful, and will also likely to contravene the HEP's FS Statement.

Further, an HEP will need to ensure that course structures and content and teaching requirements, and the atmosphere and agendas and management processes connected with the relevant courses and departments of the HEP, are compliant with the provisions protecting academic freedom described above. This may require training and supervision of staff involved at all levels.

DfE Statement: the DfE's expectation in the DfE Statement is clear and very restrictive. In order not to contravene this expectation, HEPs will have to either avoid making changes to the curriculum to 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.

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 from the protections in the Equality Act as something "done in connection with the content of the curriculum"⁹) 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 marks; 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

⁹ While this exclusion effectively allows these things to be included in the curriculum without contravention of the Equality Act, it is unclear to what extent the Courts would consider that this would enable the teaching of ideological viewpoints (ie, CRT and "decolonisation"), and changes consequent on them, as fact and/or generally uncontested. The DfE Statement, while not directly addressing the Equality Act, indicates that requiring people to teach such material is considered unacceptable by Government: this may be taken into account by a Court.

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 HEP against, and/or are likely to amount, or lead, to harassment of, those who count as protected people. 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 the evidence indicates that there are many people who disagree with aspects of CRT "decolonisation" and 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.

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, in any event:

- (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 academic freedom and Participants' 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 contested ideology

so apparently uncritically, and consider that this was a good thing to recommend to HEPs without qualification?

- (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 other 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? Did it accept viewpoints from or use materials provided by them? If so, which ones, when and in what way?

Best Free Speech Practice

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Details of the Committee (authors) and Editorial and Advisory Board of BFSP are on the BFSP website.

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