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FREE SPEECH UNION

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Professor Karen O'Brien
The Palatine Centre
Durham University
Stockton Road
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7th February 2022

Dear Professor O'Brien,

I am writing to you in my capacity as General Secretary of the Free Speech Union, a non-partisan, mass membership public interest body that stands up for the speech rights of its members and campaigns for free speech more widely.

We are writing to you about a requirement for those applying for the role of Assistant Professor in Durham's International Relations department. Specifically, applicants are told to "provide a statement (of no more than 1 side of A4) which outlines work which [they] have been involved in which demonstrates [their] commitment to Equality, Diversity, and Inclusion (EDI) and [the University's] values".

We are concerned that this seemingly innocuous requirement may, in fact, constitute a violation of the Equality Act 2010 (EqA) and have chilling repercussions on the free speech rights of applicants and members of the university under Article 10 of the European Convention on Human Rights 1950 (ECHR).

The EDI requirement

For clarity, the Free Speech Union has no issue with the requirement that applicants be asked to demonstrate commitment to [Durham's values](#).

Nor do we take issue with the moral values of equality, diversity and inclusion in the natural sense of those words. We support these goals and regard free speech as the precondition for their advancement. Indeed, as the eminent legal academic and former President of the American Civil Liberties Union Nadine Strossen argued in [her article on free speech and equality](#), free speech and the values of equality, diversity and inclusion are "mutually reinforcing". The issue is that 'EDI' as envisaged by the University strays quite far from the natural meaning of these words into territory which stifles free speech by prescribing a specific ideological doctrine.

For example, one of the ['key' EDI strands, LGBTQ+](#), is heavily influenced by Stonewall, a charity whose hard-line stance on issues such as gender identity has [alienated several public institutions](#), including the Equality and Human Rights Commission. Similarly, [Durham's EDI strand on race and ethnicity](#) endorses

the Black Lives Matter (BLM) movement and demands that Durham's community be "active in the fight against racism" – i.e., it is not enough to not be racist, one must be an active '[anti-racist](#)'. Yet, this is not an uncontroversial allegiance or request. The UK Commission on Race and Ethnic Disparities has [criticised](#) "[strident](#)" [anti-racism](#) and denounced "bleak new theories about race that insist on accentuating our differences". Further, [the gender equality strand](#) is informed by Athena SWAN, a gender training course which has been described by the barrister Naomi Cunningham, who specialises in equalities law, as "[totalitarian](#)" and "[clearly unlawful](#)" with regard to the demands placed upon participants to adhere to its dogmatic views.

Durham's EDI requirement is, therefore, an extensive one. It does far more than specify a particular qualification that applicants should evidence in their applications. In requiring a separate written statement, it invites applicants to profess and prove their conformity with a particular ideology. Heterodox applicants – who believe, say, that promoting EDI is less morally important than promoting socio-economic equality, or believe that EDI initiatives exacerbate division, or that identity politics is irrational and immoral – must either lie or not apply.

Free Speech

For the above reasons, we are concerned that the application requirement, both in the process it imposes upon applicants and the ensuing culture it creates within the department of international relations, may contravene the Article 10 right to freedom of expression of the ECHR, with which the university is obliged to comply with by virtue of s.6 of the Human Rights Act 1998.

In *Wille v Liechtenstein*, App no. 33629/06 (1999), the European Court of Human Rights found that the imposition of any "formality, condition, restriction or penalty" can be seen as an interference with an individual's Article 10 right. In that case, an announcement that Mr Wille's application for reappointment to a public post would not be successful due to his publicly expressed opinions was held to be just that. Moreover, the court found it had the "chilling effect" of preventing similar expressions to be made by him and others in the future. Indeed, the Court found that the lack of consideration of Mr. Wille's application on the grounds of his legal and political opinions was particularly problematic considering that "questions of constitutional law, by their very nature, have political implications".

The same can, of course, be said of international relations, in which maintaining a diversity in morality and political ideology within departments is a key consideration. Further, we are concerned that the natural implication of this requirement is that EDI will permeate frameworks of analyses within the department, leaving little room for diverging viewpoints. The successful applicant's knowledge that his or her commitment to EDI – whether genuine or invented – was a key part of securing the role will inevitably give rise to the reasonable expectation that any behaviour which may indicate a lack of commitment to EDI might impede their career progression, leading to self-censorship.

It should also be noted that the applicant in *Wille* was not an assistant professor but President of the Liechtenstein Administrative Court. I think we can infer from this that the "chilling effect" of your criterion, and its tendency to suppress expression of heterodox beliefs, would be found to be all the greater by the Strasbourg court due to the junior status of those it applies to.

Additionally, you should be aware that any constraint based on political ideology would be particularly frowned upon by the Court, given the high importance placed on both academic freedom and political speech within the law. Indeed, Lord Nicholls in *R v BBC, ex parte ProLife Alliance* [2003] UKHL 23 affirmed that:

Freedom of political speech is a freedom of the highest importance in any country which lays claim to being a democracy. Restriction of this speech need to be examined rigorously by all concerned.

This sentiment has been echoed at European level (*Vajnai v Hungary*, App. no. 33629/06 (2010)) along with several strong defences on academic freedom (E.g. *Sapan v Turkey*, App. No. 44102/04; *Aksu v Turkey*, App. no. 4149/04).

Indeed, academic freedom receives special protection because, as identified by [the Parliamentary Assembly of the Council of Europe in 2006](#) and quoted by the Strasbourg Court in the case of *Sorguc v Turkey* (App. No. 17089/03), violations of academic freedom “have always resulted in intellectual relapse, and consequently in social and economic stagnation”.

Discrimination

The application requirement may also contravene the Equality Act 2010 by directly or indirectly discriminating against applicants who hold beliefs which are inconsistent with the tenets of social justice theory, as well as by indirectly discriminating against applicants from countries, especially outside the Anglosphere, in which such theories are uncommon or unknown.

Section 39(1) of the Act provides that an “employer must not discriminate against a person [on the basis of a protected characteristic] in the arrangements [it] makes for deciding to whom to offer employment”. It seems, however, that this is exactly what is happening as a result of this application requirement. Applicants seeking to become academic staff who hold strong beliefs that are inconsistent with the tenets of EDI such as, for example, those who hold a religious belief which cannot support the LGBTQ+ agenda advocated by Stonewall, will very much be at a “particular disadvantage” compared to fellow applicants who do not share those beliefs. They will, for obvious reasons, lack convincing work experience which “demonstrates commitment” to EDI.

Similarly and relatedly, it is mainly applicants from beyond the Anglosphere who will be at a disadvantage compared to their peers. Not only are they less likely to have been given the opportunity to ‘demonstrate’ commitment to EDI principles, they may be completely unaware that it is a prescriptive doctrine which encompasses non-standard definitions of terms like “equality”. As such, they are bound to formulate an unconvincing application essay and/or be put off from applying.

The stated purpose of the requirement is to create a “supportive and inclusive environment” in pursuit of attracting and recruiting the “best candidates from all backgrounds and identities”, yet for the reasons set out above the requirement itself will prevent these aims being realised.

For clarity, we contend that the law would allow a requirement that favoured applicants, say, from countries with a strong tradition of teaching international relations to stand as it might justifiably serve the pursuit of best candidates. However, it is much more difficult – impossible, perhaps – for a university to justify objectively a criterion that rewards either conformity or intellectual dishonesty.

Next Steps

In light of these issues I hope you will reassess the inclusion of this application requirement and commit to a legally compliant, fair and neutral application process for academics wishing to work at Durham.

To that end, we would ask you to respond to the following:

1. Did any compliance check take place before this requirement was introduced to ensure it complied with academic freedom and the university’s duties to uphold and promote free speech?

2. On what grounds does Durham believe the requirement is objectively justified under equalities law and is a justifiable interference with Article 10?
3. Will Durham waive the requirement to demonstrate commitment to EDI for any candidate who objects and commit not to discriminate against them in the application process?

Finally, in light of the Higher Education (Freedom of Speech) Bill, which is due to pass into law in due course, I recommend Durham take this letter seriously and commit to the promotion of an institutional culture which values diversity of thought and freedom of inquiry so that it avoids liability under the Bill.

Yours sincerely,



Toby Young
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- cc. Lord Wharton, Chair, Office for Students
Ms Nicola Dandridge, CEO, Office for Students
The Rt Hon Michelle Donelan, Universities Minister, Department for Education
Mr Iain Mansfield, Special Advisor, Department for Education
Mr David Smy, Office for Students