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FREE SPEECH UNION

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Professor Stephen Toope
University of Cambridge
The Old Schools
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24th May 2021

Dear Professor Toope,

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.

I am pleased to see that the University of Cambridge has thought better of its proposed 'Report and Support' website, which made a brief appearance and has now been taken down. Several of our members at Cambridge drew our attention to this website and were rightly concerned that it would have a chilling effect on free speech.

The website and accompanying policy proposed a system of policing speech and everyday interaction at the University which, I believe, would have been inconsistent with its duty to take reasonably practicable steps to secure freedom of speech within the law.

Equality Act 2010 over-reach

As you will know, section 43 of the Education (No 2) Act 1986 requires the University to take such steps as are reasonably practicable to secure freedom of speech within the law for employees, among others.

Harassment, as defined in section 26 of the Equality Act 2010, is *not* speech that is protected by the Education (No 2) Act, and as such the University is under no duty to permit it. On the contrary, it has a public obligation to prevent it. However, we believe that the 'Report and Support' website went far beyond the requirements of the 2010 Act and unlawfully interfered with academics' free speech.

Behaviour constitutes harassment when it is unwanted conduct relating to a protected characteristic and has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. In determining whether the university is liable, directly or vicariously, for conduct with that *effect*, the following at s.26(4) must be taken into account:

(a) the perception of the affected person;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

In addition, the explanatory notes to the 2010 Act give a clear indication of the need to take into account the competing rights of freedom of expression and academic freedom:

> 99 In determining the effect of the unwanted conduct, courts and tribunals will continue to be required to balance competing rights on the facts of a particular case. For example, this could include balancing the rights of freedom of expression (as set out in Article 10 of the European Convention on Human Rights) and of academic freedom against the right not to be offended in deciding whether a person has been harassed.

The 'Report and Support' website and accompanying policy took no steps to entrench the key safeguard built into the Equality Act – to consider whether it is *reasonable* for conduct to have the effect of harassment. The list of 'micro-aggressions' – the slights 'experienced' by marginalised groups – makes no allowance for the fact that, in many such cases, taking offence at such behaviour would be unreasonable. The list includes:

- Behaviours such as a change in body language when responding to those of a particular characteristic, for example, raising eyebrows when a Black member of staff or student is speaking, dismissing a staff or student who brings up race and/or racism in a teaching and learning or work setting
- Mistaking a staff member from a racially minoritised group as a PA of a white person with whom they share an office
- Backhanded compliments
- Avoiding or turning one's back on certain people
- Being mis-gendered (especially after sharing one's pronouns)
- Referring to a woman as a 'girl'

These are all situations which may arise wholly innocently, through misunderstanding, a breakdown in communication, or a simple error. The website, to its credit, did clarify that 'micro-aggression' is not a legal term, and that the listed conduct *may* not amount to a breach of the Equality Act.

In the absence of the further evidence that is needed to ground a claim of harassment, there is no reason for the University to insinuate that *any* of the listed behaviours would constitute harassment. It is a misreading of the Act to inform staff or students that such behaviours give rise to a presumption of harassment, or are likely to be held to be harassment.

In the case of the University, such a misreading of the Act is, we believe, unlawful. While there may in some cases be a good moral argument for going beyond the requirements of the Act, the University is not at liberty to do so where the result would be to infringe its employees' right to freedom of expression.

This policy, as you must be aware, would radically interfere with how your academics teach, argue with and learn from students, as well as how students interact with each other. It would mean academics and students were under constant threat of being reported and investigated for having committed some wholly innocent but perceived slight, which would inevitably have a chilling effect on interactions that, in a university, should be free and unguarded. The prudent academic would choose, in many contexts, simply to remain silent. The end result would be wholly self-defeating – your academics would be likely to interact in a *less* thought-

provoking and challenging way when talking to a student from a minority background for fear of committing some reportable offence. I hope you agree that this inequality of outcome would be intolerable.

The list of micro-aggressions also includes 'mis-gendering'. We accept that using a person's preferred pronouns is an act of common courtesy and, where it doesn't conflict with religious or philosophical beliefs, is to be encouraged. We do not accept that such courtesy should be policed by a system of anonymous reporting. The freedom to hold and express gender-critical beliefs is protected by the law, as was made clear by the High Court in *R (Miller) v College of Policing* [2020] EWHC 225 (Admin). This freedom is especially important at universities – the front-line of the debate about gender.

We can see no lawful reason why the University should protect freedom of speech to a lesser extent than is required by law. The reasonably practicable step in this context would be to ensure that the policy went no further than is necessary to ensure compliance with the Equality Act 2010.

Scope for abuse

We believe that the policy lacked reasonably practicable safeguards that would secure freedom of speech at the University. What mechanisms were in place to ensure that merely vexatious complaints are weeded out? In assessing anonymous and confidential reports made via the website, how would the university have given effect to the 'reasonableness' safeguard contained in section 26 of the Equality Act 2010? What steps were in place to ensure that cross-checks and assessment take place before an academic career, and academic freedom, is interrupted by a potentially damaging anonymous denunciation, followed by a protracted investigation? Even if the academic in question is exonerated at the end of the investigation, the mere threat of being investigated will have a chilling effect. We know from having defended numerous students and academics investigated for breaching university speech codes how stressful such processes can be, even where we have defended them successfully. Too often, the process is the punishment.

Ensuring these safeguards were in place was quite clearly a reasonably practicable step that the University could easily have implemented. But it failed to do so.

Compelled speech

The justification for the website and policy was stated in highly politicised terms:

> Racism is a system of oppression, woven into the fabric of societies, institutions, processes, procedures, people's values, beliefs, attitudes and behaviour. It is a system of advantage that sets whiteness as the norm, manifesting in societies' valuing and promoting (implicitly or explicitly) being white. It is a system where people from racially minoritised backgrounds are more likely than white people to face multiple obstacles in life, from being targets of direct or indirect discrimination and micro-aggressions.

This statement, rooted as it is in Critical Race Theory, is highly contentious. A reasonable person may disagree with it. Indeed, the UK government's Commission on Race and Ethnic Disparities did disagree with it. We are concerned that by embedding this highly controversial theory in a high-level policy, under which academics could be sanctioned, the University would gravely imperil academic freedom.

This policy seems to compel the University's academics to uphold a belief system that may not be their own. It states as fact – that racism is inextricably bound up with whiteness – something that may reasonably be debated and disagreed it. It demands obedience instead of reflection and debate.

At the very least, we consider this to be a failure to secure freedom of speech. What reasonable junior academic would challenge or test the received wisdom set out here, given that it has been elevated to the level of enforceable policy?

We believe that the University may also have erred in demanding obeisance to a specific philosophical belief, in contravention of the law (see *Lee v Ashers Baking Company Ltd* [2018] UKSC 49).

Statements of belief in social justice and opposition to 'whiteness' – indeed, the whole edifice of Critical Race Theory – have every right to be upheld in our universities, but in seminar rooms, canteens and college bars. They have no place, however, in disciplinary policies, which should strive for neutrality when it comes to these contentious, highly politicised, ongoing debates.

Next steps

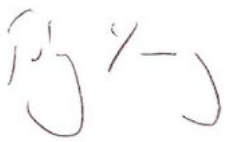
I along with many others applauded the University's liberal and far-sighted Statement on Freedom of Speech in December 2020. The 'Report and Support' policy therefore came as a bitter disappointment.

In light of the upcoming changes to the law surrounding freedom of speech in English universities, the new website and policy were also a surprisingly tone deaf, given that if any member of the University was reported and investigated and punished for 'misgendering' another member, the University could be sued for breaching its legal obligations to uphold free speech on campus once the Higher Education Act has been passed.

I can only assume that this website was created in error and without your knowledge. I took in good faith your commitment to freedom of speech, as set out in the December statement, and I am pleased that the website has now been taken down, presumably at your insistence.

However, you should know that in the event that the policy reappearing in anything like its original form, the Free Speech Union will seek to challenge its lawfulness in the High Court.

Yours sincerely,



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cc: The Rt Hon Michelle Donelan, Universities Minister, Department for Education
The Rt Hon Kemi Badenoch, Parliamentary Under-Secretary of State for Equalities
Mr Iain Mansfield, Department for Education
Lord Wharton, Chair, Office for Students
Ms Nicola Dandridge, CEO, Office for Students
Mr David Smy, Office for Students