



**FSU**  
FREE SPEECH UNION

THE FREE SPEECH UNION  
85 GREAT PORTLAND ST.  
LONDON W1W 7LT  
[FREESPEECHUNION.ORG](http://FREESPEECHUNION.ORG)

Mr Alan Bookbinder  
Master  
Downing College  
Regent Street  
Cambridge CB2 1DQ

12<sup>th</sup> November 2021

Dear Mr. Bookbinder,

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.

One of our members has contacted us in a state of distress having stumbled upon your new '[report racism guidance](#)' (henceforth, 'the guidance') which they describe as essentially anti-Semitic in what it implies about anti-Jewish hatred not constituting racism.

Considering [our recent involvement](#) in alerting Cambridge's Vice-Chancellor to the questionable legality of the version of the University's 'Report + Support' policy that appeared on the University's website in May of this year, we were disappointed to find that Downing's new guidance – in what it asserts and promotes – appears to be a thinly veiled attempt to reintroduce the same potentially unlawful policy through the back door. This includes the racist and self-defeating definition of racism and microaggressions, the encouragement of anonymous reporting based on these problematic terms, and misleading representations of the law – all aspects of the contested 'Report + Support' policy which the University officially disowned weeks after it went live.

As a result, the College may face liability under the Equality Act 2010, via s.91, the Charities Act 2011, and the Human Rights Act 1998 (s.6). Indeed, note that the latter may open the College up to a challenge in the High Court by way of judicial review.

#### Discrimination under the Equality Act

The guidance starts by defining racism as:

an ideology and a set of practices based on ideas of inherited white 'racial' superiority that normalises control, domination and exclusion over people of colour, while legitimating privilege and oppression.

This is not the standard definition of racism. It is a highly contentious definition rooted in Critical Race Theory (CRT), key facets of which the [UK government's Commission on Race and Ethnic Disparities \(UKCRED\) has recently criticised](#).

The [Oxford English Dictionary](#) defines racism as “prejudice, antagonism, or discrimination” which can be perpetrated by any “individual, institution, or society” on the basis of “nationality... or membership of a particular racial or ethnic group”. The Equality Act echoes this definition. For example, it places a duty on higher education bodies not to discriminate against a student by “not affording a student access to a benefit, facility or service” based on a protected characteristic such as race (s.91(2)(d)). Race, herein, is defined as including any “colour, nationality, ethnic or national origin” (s.9). This is a sensible definition as it should go without saying that heinous [historical](#) and [current events](#) illustrate that anyone, regardless of colour or creed, can perpetrate and/or be the victim of racism.

Troublingly, the guidance now put forth by Downing College appears to disregard this reality and violates s.91 of the Equality Act by positing an inappropriately narrow definition of racism at its very outset, seemingly excluding several groups from accessing the mechanisms of support offered in the guidance. Those excluded will include, amongst others, Jewish, Polish and Irish students/staff, as well as anyone who has experienced racism perpetrated by a person of colour. This is compounded by the fact that the guidance directs its readers to the ‘End Everyday Racism’ website for the purpose of anonymously reporting ‘racist’ incidents based on this [same CRT definition](#), and suggests a reading list which include books such as Layla Saad’s *Me and White Supremacy*. That is a text which cruelly dismisses any claim of racism by a white person, such as our Jewish member, as “white fragility” and directs all those afflicted by this fragility instead to dwell on the fact that they, as a white person, have invariably “committed or participated in acts of racial harm”.

As a result, we are concerned that the College is not only breaching its negative duty not to implement a discriminatory service per s.91 of the Equality Act but also failing to adhere to its positive duty to have due regard to the goals of “eliminating discrimination” and “fostering good relations” between all members of the College in the exercise of its functions (s.149).

On top of this, members of the College are encouraged to report, whether anonymously or otherwise, ‘racism’ which the guidance stipulates may include “well-meaning comments or actions” and ‘microaggressions’ such as asking, “Where are you really from?” Apparently, such a question could be asked with intent to “subjugate people of colour”. While this may be true in certain (rare) circumstances – perhaps best judged by the context and tone in which such a phrase arose – extending any benefit of the doubt to people who ask such a question with innocent intent is not encouraged. In fact, the guidance states that if one is ‘unclear’ about whether a racist incident took place, the best thing to do is “follow your instincts and feelings” about the matter. Arguably, this fuels discrimination and encourages suspicion against fellow students and staff, particularly those who would not identify as a ‘person of colour’.

### Representation of the Equality Act and the HRA: Freedom of Speech and Belief

By spreading the idea that any ‘well-meaning’ comment by a white person might constitute a reportable offence, your new guidance, without a doubt, creates a culture of fear and self-censorship which has no place in a liberal democratic society – particularly within a College which forms part of the University of Cambridge. Indeed, students and staff are even ‘reminded’ that “racialized harm can and ought to be prosecuted as a form of hate crime or unlawful discrimination”. This is threatening, and, within the context of the guidance, also highly misleading considering the law and the guidance are working with completely different ideas of what constitutes ‘racialized harm’ in mind. Students and staff who read the guidance will be left with the impression that they might be prosecuted for whatever a person of colour may perceive as a ‘microaggression’ when, in fact, what is commonly understood as a ‘hate crime’ refers to the ‘aggravated’ and ‘stirring up’ offences created by the Crime and Disorder Act 1998 and the Public Order Act 1986, respectively, which turn on *objective*, not *perceived*, hostility or prejudice. What is more, it should be noted

that the College has a duty to present the Equality Act fairly. Doing so would help alleviate the fears of prosecution for minor/innocent comments and actions. Indeed, the guidance should make clear that any potential infringement, such as unlawful discrimination, must be weighed against competing rights, such as that of freedom of expression and academic freedom. (See: the Equality Act's explanatory notes, ss. 99.)

Not only must freedom of speech and academic freedom be considered, the Human Rights Act 1998, which the College is bound by (s.6), upholds all individuals' freedom of expression (Article 10, European Convention of Human Rights) and places particular importance on the protection of academic free speech. (See: *Aksu v Turkey*, App. nos. 4149/04 & 41029/04 (15 March 2012) para 71.) Your new guidance will gravely inhibit interactions in the classroom which, in a college, should be largely free and unguarded. Indeed, the prudent academic or student would choose, in many contexts, simply to remain silent – especially considering that the guidance threatens penalisation for mere expression of “beliefs, feelings, attitudes, utterances, assumptions and actions” which may be interpreted as reproducing a system which “contributes towards the marginalisation of minority groups”. This is a vague, catch-all assertion which strongly incentivises members of the College to either remain silent with regard to key foundational topics within the social sciences or to regurgitate only CRT sanctioned views.

You should be aware, however, that the HRA (by way of the ECHR's Art. 9 and 10, respectfully) protects the right not to be obliged to manifest a belief or express a particular point of view which one disagrees with. (See: *Buscarini v Marino*, App no. 24645/94 [1999]; *Lee v Ashers Baking Company* [2018] UKSC.) Furthermore, it is certainly arguable that this guidance will have a ‘chilling effect’ on freedom of expression which may be unlawful. (See: *R (Miller) v The College of Policing & The Chief Constable of Humberside* [2020] EWHC.) Therefore, while the College, unlike the University, is not bound by section 43 of the Education (no 2) Act 1986 to take reasonably practicable steps to secure freedom of speech on their premises, it is nevertheless subject to liability for breaching principles of freedom of expression and of belief under the HRA which are enforceable in the form of judicial review within the High Court, or by way of a claim for damages.

### CRT and Charity Law

I would like to remind you that Downing College is an educational charity. Indeed, the College [presents itself](#) as being an ‘open and critical space’ where students can ‘stretch [their] minds’. This falls in line with how a college in a liberal democracy is meant to operate and educate. As Lord Hailsham aptly explained many years ago, education in England should be understood as “the picture of a balanced and systematic process of instruction, training and practice”. (See: *IRC v McMullen* [1981] A.C.1.)

Unfortunately, in presenting the highly controversial theory of CRT as indisputable fact and in promoting other ideological material and campaigns which accept its premises unwaveringly (e.g. the ‘decolonise’ campaign), your guidance does not present any type of ‘balance’, and, therefore, does not adhere to the educational standard Downing espouses, nor to the standard it is expected to uphold according to charity law. This is because, indisputably, CRT contains an overt social and political agenda. As an example, one of its most famous proponents, Ibram X. Kendi, whose book *How to Be an Antiracist* is promoted in the guidance, argues that “to love capitalism is to end up loving racism... [they are] two sides of the same destructive body”.

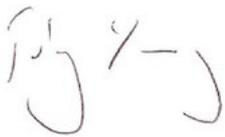
Let me be clear. Our issue is not with College members' exposure to CRT as a matter of reflection and debate. The issue is the fact that it is presented and promoted as indisputable truth and, on that basis, forms the foundation of a College-wide guidance. Indeed, in *Southwood v Attorney General* [2000] All ER (D) 886

the Court of Appeal made clear that education cannot be advanced for the public benefit if it promotes only one side in a matter of political controversy. An educational charity may promote uncontroversial ethical truths such as that 'all persons should be treated with dignity regardless of their gender', but it may not promote propositions that are the subject of reasonable difference.

In order to remain within the law, CRT, with its controversial propositions and definitions, should be presented as a theory for discussion only alongside material which offers alternate perspectives on the same issues CRT attempts to tackle, for example, [Thomas Sowell's \*Discrimination and Disparities\*](#) and/or [Shelby Steele's \*White Guilt: How Blacks and Whites Together destroyed the Promise of the Civil Rights Era\*](#).

Considering the guidance is uncomfortably similar in its legal issues to the version of the 'Report + Support' policy which the University of Cambridge promptly removed, I can only assume there was some governance failure within Downing College that allowed this guidance to slip through. I expect it will be remedied with urgency and in good faith. However, be aware that, if necessary, the FSU is prepared to take legal action, including the launching of judicial review proceedings, should this not be the case.

Yours sincerely,



Toby Young  
General Secretary  
The Free Speech Union  
[info@freespeechunion.org](mailto:info@freespeechunion.org)

cc Graham Virgo, Professor of English Private Law  
cc Rt Hon Michelle Donelan, Universities Minister  
cc Hon Kemi Badenoch, Minister for Women and Equalities  
cc Lord Wharton, Chair, Office for Students  
cc Nicola Dandridge, CEO, Office for Students  
cc Iain Mansfield, Special Advisor, Michelle Donelan  
cc Daniel El Gamry, Special Advisor, Kemi Badenoch  
cc David Smy, Office for Students