



FSU

FREE SPEECH UNION

The Free Speech Union
85 Great Portland St.
London W1W 7LT
FreeSpeechUnion.org

Lord Wharton of Yarm

10 December 2021

By email to: info@officeforstudents.org.uk

Dear Lord Wharton,

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 regarding our member, Professor Timothy Luckhurst, who is [reportedly under investigation](#) by Durham University for (now widely publicised) statements made during and after a formal dinner at South College, a Durham college he presides over as Principal.

Ahead of this investigation we will be writing to the University's to bring to its attention its legal obligations regarding freedom of speech and to make clear our expectation that these considerations will be foremost in the University's deliberations over this matter.

We hope that the Office for Students shares this expectation and will pay close attention to developments regarding the investigation and treatment of Professor Luckhurst by Durham University. This is especially so given that the University is already under investigation by the Office for Students due to concerns over the restrictiveness of the University's external speaker policy.

The University's duties

We will point out to the University the range of legal and internal duties it owes to Professor Luckhurst.

In accordance with section 35(3) of the University Statutes it must, in following its disciplinary procedure, ensure that Professor Luckhurst and all academic staff:

have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges.

The University's [Policy Statement on Freedom of Expression](#) gives rise to Professor Luckhurst's legitimate expectation that the University undertakes to protect 'the expression of views which may shock, disturb, or offend the deeply held beliefs of others' as well as 'discussion of issues that are controversial and which challenge established statutory, legal and regulatory frameworks.'

Under section 6 of the Human Rights Act 1998, the University has an obligation not to act incompatibly with the protection of the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). As your own Policy Statement on Freedom of Expression rightly affirms, this extends as a matter of law to the expression of views which may “shock, disturb or offend the deeply held beliefs of others.” (*Handyside v UK*, App. No 5493/72 (1976)).

Professor Luckhurst’s criticism of students’ intolerance of Rod Liddle’s speech – and indeed the students’ expression of that intolerance – were exercises of the right to free expression. Professor Luckhurst’s comments merit a high level of protection because they were political in nature, regarding ‘matters of public concern’ (*Wingrove v United Kingdom*, App no. 17419/90 (1996) [58]). The need for tolerance of those with differing views, and the non-existence of the right not to be offended, are matters of intense public controversy, as was made very clear in Mr Liddle’s speech.

We will therefore tell the University that it should take account of the high level of legal protection enjoyed by Professor Luckhurst. Lord Nicholls in *R v BBC, ex parte ProLife Alliance* [2003] UKHL 23 stated 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.

The European Court of Human Rights also affirms the high importance of political free speech (See: *Vajnai v Hungary*, App. no. 33629/06 (2010)). Indeed, in the case of *Gunduz v Turkey* (no 35071/97, (2004)) the Court specifically clarified that even if an expression of point of view can be found, objectively, to be highly offensive it is unlikely to be considered hate speech if expressed within the context of a public debate where different points of view are being exchanged and are open to challenge.

We note furthermore that Professor Luckhurst’s comments constituted an expression of his belief in the political philosophy of tolerant liberalism. As such, his comments are also likely to be protected under Article 9 of the European Convention.

We will also remind the University that, by virtue of section 43 of the Education (No 2) Act 1986, it is under an obligation to take reasonably practicable steps to secure freedom of speech within the law for academics, students and staff.

Professor Luckhurst’s duties

Professor Luckhurst is also under a number of duties himself. We will express to the University our hope it will refrain from any attempt to punish him for actions which he reasonably felt obliged, by law and by contractual obligation, to perform.

As an individual ‘concerned in the government’ of the University of Durham, we suggest that Professor Luckhurst was *personally* under the duty at section 43(1) of the Education (No 2) Act 1986 to take reasonably practicable steps to secure freedom of speech within the law for his visiting speaker Mr Liddle. It was therefore a reasonable performance of his duties under the Act for him to

invite Mr Liddle, and to criticise actions by students which undermined Mr Liddle's freedom to speak and indeed threatened to bring the speaking event to a premature close.

We hope the University will keep in mind also Professor Luckhurst's duties as a senior leader of the University to uphold and promote the policies and aspirations of the University and South College. The Policy Statement on Freedom of Expression states the following:

The pursuit of knowledge and the exchange of ideas should be conducted within the University in a tolerant manner, and without interference from internal or external parties.

Freedom of expression has to be set in the context of the University's values and the values of a democratic and inclusive society. The University expects all its members and visitors to respect those values and to be sensitive to its diverse and inclusive community.

Professor Luckhurst did his job and upheld those values. He invited a speaker to talk on the theme of tolerance and, quite consistently and quite reasonably, asked for tolerance from students and criticised them robustly for their intolerance.

The University's Code of Practice on 'Freedom of Expression in Relation to Meetings or Other Activities', with which the University *and* Professor Luckhurst are bound to comply by virtue of s.43(4) of the 1986 Act, states (emphasis added):

The University also recognises its responsibility to protect the freedom of expression of academics and other staff. The University will not allow complaints and protests to result in limitations on ... speaker events organised by academic staff.

It was reasonable for Professor Luckhurst to fear that the students' conduct would result in disruption or even cancellation of Mr Liddle's talk. While he rightly respected the free speech of the dissenting students (which includes the right to intolerance and close-mindedness), he was also right to take steps to ensure it did not extend to undermining the event entirely.

We understand that the University may wish to adduce internal obligations on Professor Luckhurst that limited his right to freedom of speech, and indeed his duty to secure Mr Liddle's lawful free speech.

However, the University should be mindful that its policies are not law, that Parliament and the courts rather than universities make law in this country, and that therefore the University's scope to interfere lawfully with Professor Luckhurst's Convention rights and statutory duties are duly limited.

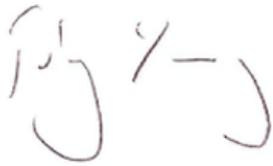
We will therefore remind the University that it must proceed lawfully, and must pay close attention to the Strasbourg authorities concerning when a contractual obligation can override a Convention right, specifically *Heinisch v Germany*, App. no. 28274/08 (2011) and *Wojtas-Kaleta v Poland*, App. no. 20436/02 (2009).

The role of the OfS

We respectfully ask the Office for Students to pay close attention to the University's conduct in this matter, and to ensure that it comply with its legal obligations to secure the right to free expression of Professor Luckhurst and his visiting speaker.

We trust that you share our anxious concern that the University act prudently and avoid any action that could further embarrass the University, the UK higher education sector, or the liberal and tolerant values of this country.

Yours sincerely,



Toby Young
General Secretary, The Free Speech Union
toby@freespeechunion.org

cc. Professor Tim Luckhurst
Professor Antony Long, Acting Vice-Chancellor, University of Durham
Professor Karen O'Brien, incoming Vice-Chancellor, University of Durham
The Rt Hon Michelle Donelan, Universities Minister, Department for Education
Ms Nicola Dandridge, CEO, Office for Students
Mr Iain Mansfield, Department for Education
Mr David Smy, Office for Students
Mr Richard Holden, MP for North West Durham