



Sent by email to:

Professor Karen O'Brien, Vice-Chancellor and Warden

Ms Tess Mantzoros, Head of Legal Services

Dr Shaid Mahmood, Pro-Vice-Chancellor (EDI)

Dr Amanda Wilcox, University Secretary

14 January, 2025

Dear Vice-Chancellor, Ms Mantzoros, Dr Mahmood & Dr Wilcox,

Legal and compliance problems at Durham University (the “University”) regarding the requirement for job applicants to commit to contested agendas and ideological positions

As you may be aware, Alumni For Free Speech (“AFFS”) is a non-partisan organisation which aims to encourage high standards of compliance with universities and other organisations to protect freedom of speech.¹

It has come to our attention that the University is likely to be in breach of its legal and regulatory obligations as a result of the requirements it places on applicants for jobs (the “**Application Requirements**”) as described below.

This letter serves to notify you of our concerns. It states the relevant facts as understood by AFFS before outlining the applicable legal requirements and explaining why we believe that the Application Requirements at the University are unlawful and in breach of its obligations relating to freedom of speech and academic freedom.

To enable you to take appropriate steps to ensure the University addressed the issues we raise without publicity or embarrassment, AFFS sent a draft of this letter on 9 December 2024. You recently replied to the draft letter saying that “We regularly review all of our policies and procedures to ensure that they are compliant with relevant legal and regulatory requirements, we are confident that our recruitment processes meet this threshold”. While we are glad to

¹ More information about AFFS can be found on our [website](#).

learn of the University's process of regular review, for the reasons explained below we do not consider that your conclusion is correct.

Relevant facts

The University advertises for roles through the recruitment hub on its website. Within the advertisement for some roles, most notably for academic positions, there is a requirement to include an "EDI & Values Statement". More information on this statement can be found in the University's Applicant Guidance for Academic Posts.² This document identifies a number of documents which applicants are required to upload as part of the application process, including the "EDI & Values Statement". This is described as:

"a statement (a maximum of 500 words), outlining work that you have been involved in which demonstrates your commitment to EDI and our values. Examples include but are not limited to:

- Awareness of current barriers faced by underrepresented groups (students and/or staff) in your area, through personal experience or research.
- Involvement in equality, diversity, and inclusion activities such as mentoring, volunteering, or involvement [*sic*] with Athenanna Swan [*sic*] or similar work"

Importantly, the document also states that this submission "will feed into the interview process", along with other standard documents like the applicant's CV, list of published works and covering letter.

While our initial research suggests that the requirement for an "EDI & Values Statement" is not required for all academic posts,³ we believe it is required for Professorship and Fellowship posts. We would be grateful if you would confirm the University's policy as to which advertisements contain this specific requirement at the initial application stage, and if other applications require this type of information at some later stage in the process.

Legal and compliance problems with HEPs requiring commitment to contested agendas and ideological positions

Relevant legal requirements

Both Section 43 of the Education (No 2) Act 1986 ("**Section 43**") and the Human Rights Act 1998 ("**HRA**") contain specific provisions requiring the protection of free speech and/or prohibiting actions which are contrary to people's free speech rights. Academic freedom of

² <https://www.durham.ac.uk/media/durham-university/professional-services/job-vacancies/job-descriptions/Applicant-Guidance-for-Academic-Posts.pdf>

³ For example, advertisements for Research Associates (within the "Academic" stream) and roles in other streams, do not appear to include this requirement.

thought and expression enjoys the highest protection for these purposes. Furthermore, as recently and repeatedly recognised in English courts, certain points of view (including some which are currently controversial such as disagreement with the trans ideology now advocated by many of our universities as a result of their affiliation with external organisations such as Stonewall and Athena Swan) are “protected characteristic” under Section 10 of the Equality Act 2010 (“**Equality Act**”).⁴ As a result, it is also unlawful for the University to discriminate against or harass anyone as a result of their holding such protected beliefs.

It is important to keep in mind that, while much that is promoted under the “EDI” flag is uncontroversial, and in a narrow range of cases legally required, various highly controversial beliefs and agendas are also promoted (and indeed effectively enforced) under it, such as are associated with extreme trans and “critical race theory” ideologies (opposition to both of which has been held to be a “protected viewpoint” for the purposes of the Equality Act.

We attach:

- A Statement by our associated campaign Best Free Speech Practice (“**BFSP**”) titled *Free speech protection at English universities: The law and requirements in practice* (the “**Principal BFSP Statement**”). This sets out details of the relevant legal and regulatory requirements and their implications.
- BFSP’s exposure draft of a Statement *EDI considerations and inquiries in the recruitment and research approval process at English universities: Free speech compliance issues* (the “**EDI Information in Recruitment Statement**”). Note that this statement is written with reference to the key requirements of the Higher Education (Freedom of Speech) Act 2023 (“**HEFSA**”), which are yet to come into effect at time of writing. However, as the Principal BFSP Statement explains, the relevant requirements in that Act and of Section 43 are very similar. EDI Information in Recruitment Statement should, AFFS considers, therefore be taken as an accurate statement of the law and its implications in all material respects for the purposes of the issues at hand.

Draft OfS Guidance

In relation to the requirements under Section 43 and recommended best practice, parts of the draft guidance *Regulatory advice 24: Guidance related to freedom of speech* of March 2024 (“**Draft OfS Guidance**”) issued by the Office for Students (“**OfS**”) in connection with HEFSA are relevant to the issues in hand, even though that Act has yet to come fully into effect. This is on the basis that such guidance in various critical ways reflects both the existing requirements under Section 43 (because those obligations and equivalent obligations in

⁴ Which includes “any religious or philosophical belief” among the “protected characteristics” to which the Equality Act applies and makes clear that “a reference to belief includes a reference to a lack of belief”.

HEFSA are very similar) and what appears to be the OfS's own expectations of HEP actions for compliance. The Draft OfS Guidance explicitly states that:

"Providers [...] should not require applicants to any academic position to commit (or give evidence of commitment) to values, beliefs or ideas, if that may disadvantage any candidate for exercising their academic freedom within the law." ⁵

Reindorf Opinion

A very relevant example of the potential legal issues that the University may face by continuing to impose the Application Requirements can be found in the detailed opinion by Akua Reindorf KC,⁶ which was commissioned by the Sex Matters campaign in response to King's College London ("KCL")'s requirement that applicants for promotion demonstrate their support of that university's "equality, diversity and inclusion ambitions". Ms Reindorf found that this requirement was likely to amount to indirect philosophical belief discrimination in violation of the Equality Act and would also violate Section 43 of the Education Act.⁷ The Application Requirements are also likely to be unlawful for the same reasons.

Further, like KCL and as outlined above, the University specifically names Athena Swan as an example of an organisation with which applicants could show involvement. The University,

⁵ Paragraph 46. Paragraph 45 also states that "Each provider [...] must take reasonably practicable steps to achieve the objective of securing that, where a person applies to become a member of academic staff, the person is not adversely affected in relation to the application because they have exercised their freedom within the law to question and test received wisdom, or to put forward new ideas and controversial or unpopular opinions." Paragraph 57 sets out similar requirements in respect of applicants for academic promotion.

Indeed, the Draft OfS Guidance even illustrates this exact scenario in Example 5, stating that: "this requirement may penalise candidates for opinions or speech that have no bearing on disciplinary competence. In these circumstances, removing this requirement before advertising is likely to have been a reasonably practicable step that University A should have taken. Withdrawing the advertisement, and re-advertising without this requirement, is likely to be a reasonably practicable step that University A should now take."

⁶ <https://sex-matters.org/wp-content/uploads/2024/04/KCL-advice-for-publication.pdf>

⁷ In this regard, the Reindorf Opinion (in sub-paragraphs 3.1 and 3.2) concludes that it is "likely to be unlawful for KCL to place a requirement upon applicants for promotion that they demonstrate their support of the university's "equality, diversity and inclusion ambitions". [...] this requirement, when analysed in its context, amounts to indirect philosophical belief discrimination contrary to ss.10 and 19 of the [Equality Act] against potential applicants who hold gender critical beliefs. [...] the requirement may amount to a breach of [Section 43]."

again like KCL, is also a member of Stonewall's Diversity Champions scheme.⁸ Both of these organisations were found to be problematic in the KCL case and are likely to be so in the University's case as well.⁹

The University's own free speech code

The University will also be likely to be violating its own Code of Practice on Freedom of Speech¹⁰ if it does not allow – or effectively suppresses – dissent from contested agendas and viewpoints. Specifically, the Code of Practice upholds academic freedom consistently with the provisions of the Education Reform Act 1988. The Code therefore includes within the concept of academic freedom “freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions”).¹¹

How these requirements apply in this context

The Application Requirements ask applicants to provide evidence of their support for certain values, beliefs or ideas. They also imply that the University intends to apply considerations relating to compliance with EDI expectations in the selection process: why else would it be seeking this information? This raises freedom of speech concerns, and is, or is highly likely to be, unlawful and contrary to the statutory and regulatory requirements referred to above and inconsistent with the University's Code of Practice, for the following reasons (from the basis of which is considered in greater detail in the EDI Information in Recruitment Statement referred to above).

Discrimination in the selection process prohibited: treating an applicant negatively in a job application/assessment process because that person holds particular viewpoints, or lawfully dissents from or does not demonstrate support for aspects of the EDI agendas or programmes or values, beliefs or ideas being promoted by the relevant university, will likely be:

- unlawful under the primary free speech protection obligations under Section 43;
- contrary to, and therefore unlawful under, the HRA; and

⁸ <https://www.durham.ac.uk/about-us/professional-services/equality-diversity-inclusion/initiatives/lgbtq/>.

⁹ See: paragraphs 71.2.C and 75-77.

¹⁰ <https://www.durham.ac.uk/about-us/governance/governance-documentation/statutes-and-regulations/codes-of-practice/#d.en.1051903>

¹¹ See: Section 202 as referred to in Clause 20.3 of the University's Statutes and in the section titled “Academic Freedom” in its Code of Practice.

- unlawful discrimination (and, depending on the circumstances and the nature of any consequences, potentially harassment in that it creates a hostile environment for certain applicants) under the Equality Act, if the relevant applicant's dissent or non-compliance is as a result of a viewpoint which count as “protected” under the Equality Act.¹²

Seeking relevant information is prohibited, and is likely preparation to discriminate: The only purpose of seeking the relevant information (“**EDI Information**”) about compliance with EDI expectations or commitment (or otherwise) to EDI related programmes, agendas and causes or particular values, beliefs or ideas (“**Relevant Agendas and Values**”), and demonstrated active commitment to Relevant Agendas and Values, would be to provide information for an assessment process in order to put the university or its relevant staff in a position to discriminate – whether deliberately or unconsciously – against applicants with the “wrong” views. Further, the practical effect of requiring the EDI Information as part of the Application Requirements will, in many cases, be either to compel applicants to profess their agreement with the Relevant Agendas and Values (as to which, see further below) or face being treated less favourably than other candidates. Requiring EDI Information as part of a job application or promotion process must therefore be highly likely to be contrary to:

- the University’s primary obligations under Section 43;
- the HRA; and/or
- the University 's duty or need to secure compliance with the Equality Act in respect of applicants with viewpoints which count as “protected”.

A relevant factor is that the knowledge of the Application Requirements would be likely to put off people with viewpoints inconsistent with those apparently expected to be supported from applying for the relevant position.

The above also applies in respect of conducting investigations, e.g. online searches, about a potential applicant’s viewpoints and past expressions of them (although this can be validly done in limited circumstances described in the EDI Information in Recruitment Statement referred to above).

Compelled thinking/speech and chilling effect: Further, creating an environment in which people who are likely to seek jobs or promotions at a university, i.e. including people at the university, think that, in order not to impair their career prospects, they need to visibly not dissent from, or even demonstrate adherence to and actively promote, Relevant

¹² Depending on the detailed context of any particular application, the Application Requirements might also give rise potential breach of the University’s Public Sector Equality Duty (“**PSED**”) under Section 149(1) of the Equality Act. Further references to potential breaches of duties under the Equality Act should also be understood as potentially giving rise to breaches of the University’s PSED.

Agendas and Values, both pressurises people into publicly aligning with Relevant Agendas and Values, and reduces people's willingness (or perceived ability without having their career prospects blighted) to hold or express certain viewpoints and thus creates a "chilling effect" on people's freedom of thought and speech. This is:

- contrary to the primary requirements under Section 43;
- contrary to the HRA; and
- unlawful under the Equality Act to the extent that it results in discrimination against (or harassment of) people with viewpoints which count as protected characteristics.

Contrary to the Draft OfS Guidance: given that the Draft OfS Guidance (inter alia) specifically prohibits requiring applicants to commit (or give evidence of commitment) to values, beliefs or ideas, this is strong evidence that the Application Requirements would be in breach of Section 43 for the reasons stated above, as well as being contrary the OfS's regulatory expectations. Removal or sufficient revision of them to ensure compliance would be a reasonably practicable step the University can and should take.

What the University needs to do

For all of the above reasons, it appears that the University's job application requirements are highly likely to be unlawful and represent a serious free speech failure.

This is a serious letter from an external whistle-blower,¹³ which we hope provides you with enough information immediately and comprehensively to address the likely legal and regulatory failures that it describes arising in connection with the Application Requirements in order to bring itself into legal and regulatory compliance and uphold freedom of speech.

This is likely to involve:

- ensuring that its recruitment processes are reviewed and revised to make it absolutely clear that applicants' lawful views on political and societal matters, Relevant Agendas and Values, and especially matters of current controversy, are not to be taken into account in the recruitment process, and in assessing candidates' merits or in interviews;
- ensuring that no requirements are imposed for applicants to give any EDI Information in the application process;
- taking all reasonably practicable steps to avoid a situation where people who seek (or are likely to seek) jobs or promotion at the University do not think that they need to

¹³ We note in this regard the suggestion in the University's response to AFFS's draft version of this letter that we should use the University's whistle-blower procedure. However, having reviewed that document, AFFS believes that it refers to and is suitable only for internal whistle blowing and not to external letters of the present kind.

demonstrate adherence to and actively promote (or, at the least, not openly dissent from) any a Relevant Agendas and Values; and

- making it clear to relevant staff that they are required to ensure that the above requirements are complied with.

Further, the University needs to investigate whether its officers acted consistently with their statutory and regulatory obligations on receipt of the earlier draft of this letter. Did they:

- Inform relevant officers who should be made aware of the detailed contents of the draft letter?
- Take appropriate specialist external legal advice as we urged? The law and regulatory requirements have changed very significantly in recent years, as this letter and the BFSP statements it refers to explain. Was the statement “We regularly review all of our policies and procedures to ensure that they are compliant with relevant legal and regulatory requirements, we are confident that our recruitment processes meet this threshold” made without any checking as to whether the University could have fallen out of date?
- Consider the points carefully and dispassionately, which a view to proper assessment of whether AFFS is correct in its analysis?

We strongly urge the University, through you as the relevant officers, to immediately consult specialist external lawyers (if it has not already done so) in order to advise it about addressing and correcting these likely failures and help it ensure that it avoids unlawfulness and its consequences in the future.

There are various potential sources of liability for individuals involved with free speech protection failures, and any risk of this must be exacerbated where they are made aware of potential unlawfulness and do not act to address the issues we have raised.

We hope to see the required changes enacted as soon as possible at the University and that the University will avoid unlawfulness and better protect free speech rights going forward.

Yours faithfully,

Alumni For Free Speech

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