



Sent by email to:

Professor Shitij Kapur , Vice-Chancellor

Cc Ms Harjeet Moore, Interim Head of Diversity

Ms Hannah Childs, Legal Counsel

Mr Steve Large, Senior Vice President (Operations)

30th November, 2023

Dear Officers,

KCL indicating that supporting certain contested viewpoints is a positive for promotion and other matters: free speech compliance failures

Alumni For Free Speech (“AFFS”) is a non-partisan organisation which works to encourage high standards of compliance with UK universities’ obligations to protect the freedom of speech of their students, staff and visiting speakers. More information about AFFS can be found at www.affs.uk.

We are writing about the free speech and governance aspects of the following.

We understand that King’s College London (“KCL”) has distributed guidance to its current academic staff about achieving promotion.

As part of any promotion application, staff must submit a promotion application form which includes a section (Part 5) about “Inclusion and support”.

The accompanying guidance on how to fill out the form states the following.

- “Applications will be assessed against the published criteria in this document”, and applicants are “expected to demonstrate a commitment to our Principles in Action” (we have not seen this document).
- “You are expected to have completed the Introduction to Equality, Diversity & Inclusion e-learning module and Active Bystander training.” We have reviewed the Introduction to Equality, Diversity & Inclusion slides (but not the Active Bystander materials), and they contain untrue assertions regarding the Equality Act 2010 and its implications and present very contested activist ideology as fact or unassailable, and we know that at least one of KCL’s academics contests aspects of the materials (KCL needs to ask itself honestly: would people also contest aspects of the Active Bystander training?). People seeking promotion are required to undergo this training and take a test on it (which one passes or fails) at the end, even though many people will object to aspects of what it teaches.

- Part 5 should be used to “detail specific activity undertaken to support the university’s equality, diversity and inclusion ambitions”. In a list of appropriate examples, the guidance mentions “participating in equality, diversity and inclusion activity such as Athena SWAN, [Advance HE’s] Race Equality [Charter] and Stonewall LGBTQ groups”. (We refer to the campaigns referred to as the “**Relevant Campaigns**”.)

The clear implication of the above is that:

- Part 5 is a significant factor in promotion assessments, and people who do not complete it “satisfactorily” (e.g. by having taken and “passed” the Introduction to Equality, Diversity & Inclusion module) are likely to have their applications less favourably treated as a result;
- If specific activity is not undertaken to support the university’s equality, diversity and inclusion ambitions, this will be a negative for applicants; and
- participation in activities of the groups associated with the Relevant Campaigns is a positive for promotion, with the converse that not participating in them (or other listed activities) is a negative. As one of KCL’s academics has been reported as saying, “we are being told that if we campaign on Stonewall’s behalf it will help with promotion”.

The Relevant Campaigns are very controversial: while they promote agendas much of which would be generally accepted, they also promote positions and ideologies which are dissented from by a very substantial proportion of the UK population. Their agendas go a long way beyond what is legally required to secure compliance with requirements in equalities legislation. Since KCL is a member of the Stonewall Diversity Champions scheme and has submitted to the workplace equality index and has made no announcement of plans to leave, it seems clear that Stonewall’s agenda, although controversial and widely dissented from, is part of KCL’s “equality, diversity and inclusion ambitions”. Further, aspects of the activities of some at least of the KCL groups which are associated with the Relevant Campaigns are aggressive and intolerant of any dissent from their viewpoints, so create an intimidating and hostile environment for people who do so dissent. Staff are effectively being encouraged to join in creating such an environment. We have had confirmation that at least one of KCL’s academics sees it this way.

From the above, it is clear that KCL intends to:

- mark applicants for jobs “up” if they actively support the viewpoints of external campaigns such as the Relevant Campaigns (and thus give them an advantage over those who do not actively support those views or otherwise demonstrate support for relevant programmes), as part of applying considerations (“**EDI Considerations**”) relating to compliance with the relevant expectations, and active commitment to the relevant causes or ideologies, in the selection of people for promotion; and
- require applicants to provide information (“**EDI Information**”) as part of the application process, to demonstrate that compliance and commitment. The EDI Information provided

would form part of the assessment and appointment process, which will inherently include (whether overtly or not) adherence to the relevant agenda as a criterion for assessing the relative merits of the applicants, with people who have 'weaker' EDI Information marked down.

We refer to the actions by KCL discussed above as the “**Relevant Actions**”.

Relevant law and requirements

Below are the main relevant legal requirements and internal rules, which are underlain by KCL’s conditions of registration relating to securing free speech.

The University’s own Statement on Free Speech

The University’s relevant Statement on Freedom of Speech (the “FS Statement”) (<https://www.kcl.ac.uk/about/freedom-of-speech>) includes the following:

“King’s College London and King’s College London Student Union have a strong commitment to the values of freedom of expression, freedom of thought, freedom of conscience and religion and freedom of assembly. [...] One of our central guiding principles in the King’s Strategic Vision 2029 is to ‘demonstrate open-mindedness and tolerance and expect to challenge and be challenged in protecting the freedom of expression’. King’s expects its academic and professional services staff, its students and visitors to the university to respect and promote this guiding principle. “

“The furtherance of intellectual inquiry necessarily involves ideas that are in dispute, that may cause controversy, that may cause offence and that may provoke a reaction amongst audiences in the university community and beyond.”

We ask: in what way does disadvantaging academics who dissent from, or do not wish to demonstrate support for, aspects of the agendas and ideologies of the Relevant Campaigns comply with the FS Statement?

The Education Act (No.2) Act 1986 (the “Education Act”)

The governing bodies of English universities and other higher education providers (“HEPs”) are required under Section 43(1) of the Education Act to take such steps as are reasonably practicable to secure freedom of speech for their members, students and employees (“**Participants**”). This is a demanding requirement: it means all such steps, and gives no material discretion to an HEP. Free speech obligations override other considerations, subject only to the following:

- the relevant speech must be lawful: unless the relevant expression of views is so extreme as to be unlawful – for instance as harassment under the Equality Act 2010 (“**Equality Act**”) (see below) – it is protected under the Education Act; and

- HEPs are only required to take the steps that are reasonably practicable for them to take. If KCL were required to take the Relevant Actions under applicable legal obligations, including legally mandated diversity requirements, then it would not be reasonably practicable for it to take a step which is inconsistent with that requirement. But this is not the case here.

Discrimination against people for dissenting viewpoints would be an obvious failure to comply with the above requirements, as would taking actions which are likely to result in that, or which pressurise people who want a career at HEPs to suppress or hide their opinions, or take actions or say things they do not believe in, in order to (as it appears to them) maximise their chance to secure a position or progress in their careers.

An obvious “reasonably practicable step” is for KCL to comply with its own FS Statement. See further such steps listed later in this letter.

Equality Act

Discrimination by an HEP against and harassment by it of people with “*protected characteristics*” are unlawful in a range of circumstances specified in the Equality Act, including the provision of services to the public and exercise of public functions, employment and further and higher education. Harassment is defined to include engaging in unwanted conduct related to a protected characteristic where the conduct has the effect of creating an intimidating, hostile or offensive environment for person with such a characteristic.

For such actions to be unlawful, they need to have been performed by the HEP, either directly or indirectly to the extent that it is legally responsible for certain acts of its employees and agents¹. HEPs have no duty in respect of the behaviour of Participants acting in capacities which do not give rise to responsibilities on the HEP’s part, other than under the second and third aims under the PSED as discussed below.

In the landmark *Forstater* case² in 2021, the Employment Appeal Tribunal decided that holding gender-critical views is a “*philosophical belief*” and therefore within the protected characteristic

¹ For instance, **Section 109** provides that anything done by an employee in the course of their employment, or an agent on behalf of their principal, must be treated as also being done by their employer or principal; it does not matter whether that thing is done with the employer's or principal's knowledge or approval. An employer has a defence if it can show that it took all reasonable steps to prevent the employee from doing the alleged act or anything of that description. However, opinions expressed and actions taken by the HEP's staff are only relevant for the purposes of the main provisions of the Equality Act if they are such as to constitute unlawful discrimination or harassment by the HEP itself.

² *Forstater v. CGD Europe et al.* (Appeal No. UKEAT/0105/20/JOJ): https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf.

of “Religion or belief”. In the *Corby*³ case of 2023, views which challenged aspects of Critical Race Theory were ruled to be protected. The law in this area is still evolving, and, in order to avoid finding themselves in breach of the law, HEPs should work on the basis that advocacy for free speech and other human rights, and opinions (whether religiously or philosophically based) in respect of other currently contested areas (including, for example, in relation to other aspects of Critical Race Theory and the “decolonisation” agenda), must logically also be treated as protected beliefs and will, in time, be confirmed as such⁴. KCL should therefore act on the basis that they have duties to work to protect the freedom of speech of people in respect of a wide range of opinions held, not held or expressed by them.

HEPs are, in the exercise of their functions, obliged under their Public Sector Equality Duty (“PSED”) in the Equality Act⁵ to have due regard to the need to eliminate unlawful discrimination and harassment (and other unlawful acts) under the Equality Act; advance equality of opportunity between those who share a protected characteristic and those who do not; and foster good relations between people who have a protected characteristic and those who do not. If an applicant’s viewpoint counts as a protected characteristic, then special care will be needed to comply with the PSED in respect of that applicant during the application and selection process. Various considerations arise:

- “Have due regard” is a duty to think and give appropriate weight in context, not to act: it does not require any particular steps to be taken, and is not in itself a mandate to override other considerations.
- The PSED is very specifically worded, and does not require (or justify) consideration of an HEP’s wider EDI related programmes or agendas beyond the aims stated in the PSED.

In summary, the above requirements mean that:

- HEPs must not to discriminate in the selection process (and ensure that those conducting the selection process do not so discriminate) against applicants because of their protected viewpoints, and must comply with their PSED in respect of those applicants.

³ *Corby v ACAS*, September 2023; note that this was a first instance judgement, so is not a binding precedent. Mr Corby was ordered to remove posts on an internal communications system which were critical of aspects of Critical Race Theory (“CRT”). He successfully claimed that this was discriminatory under the Equality Act. Whether views critical of CRT were protected had already been litigated and subject to a substantial payment, albeit not a formal judgement: in May 2023, the Department For Work and Pensions paid Anna Thomas £100,000 just before a case came to the Employment Tribunal which involved her claiming discrimination for being dismissed following making whistleblowing complaints voicing concerns that (inter alia) the DWP’s adoption of aspects of CRT, in particular the distribution of materials asking white employees to “assume” they were racist, was a breach of the Civil Service Code requiring them to be politically impartial and could lead to discrimination against white people.

⁴ For more information, see BFSP’s Statement “The Equality Act and the *Forstater* case: protected viewpoints” [here](#).

⁵ Section 149.

- HEPs will need to ensure that the EDI Information process and any investigations made about applicants' opinions do not themselves operate unlawfully, for instance by producing information which could itself be discriminatory under the Equality Act or contrary to their PSED by inappropriately affecting the selection process by, for instance, creating or feeding biases in the selectors for or against certain applicants in connection with their protected viewpoints; or by harassing people with certain viewpoints by creating or contributing to an intimidating or hostile environment for such people and thus creating a "chilling effect".

Human Rights Act and compelled thinking

The free thought and speech rights of academics and students are protected under Article 9 (Freedom of thought, conscience and religion) and Article 10 (Freedom of expression) of the European Convention on Human Rights ("**Convention**"), as enacted into UK law by the Human Rights Act 1998 (the "**HRA**"). These freedoms include the freedom to offend, shock and disturb. Compelled thought and no doubt speech are unlawful⁶. Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic freedom. Any interference by an HEP with the holding or expression of opinions of its academics and students will therefore require justification which itself satisfies the HRA.

Treating an applicant negatively in a job application process because of their previously expressed lawful viewpoints, or not adhering to agendas and programmes being promoted, is therefore highly likely to be contrary to the HRA, unless that is justified under contrary laws which themselves satisfy Articles 9 and 10. While this may require litigation to resolve, it appears that seeking EDI Information about a person's compliance with an HEP's agendas is likely to be unlawful under the HRA, not least because of the "chilling effect" mentioned above.

Personal liability

There are various potential sources of liability for individuals involved with free speech protection failures. Officers of organisations who, through default or negligence, cause their organisations to breach the law and thereby suffer loss can be at risk of personal liability for that loss. An employee or agent of an HEP contravenes **Section 110** of the Equality Act if he or she does something which is treated as having been done by the relevant HEP and the doing of that thing amounts to a contravention of the Equality Act by the relevant HEP. Under **Section 111** of the Equality Act, a personal claim may be brought against anyone who has instructed, caused or induced a contravention of relevant parts of the Equality Act.

⁶ See, for example: *Buscarini and Others v. San Marino* App. No. 24645/94 (1999), which held that a requirement to swear an oath on the Gospels contravened Article 9.

How the Relevant Actions are unlawful

Applying EDI Considerations or seeking EDI Information creates severe risks of unlawfulness for KCL, as follows.

Discrimination in the application process: treating an applicant negatively in a job application/assessment process because that person lawfully dissents from or does not demonstrate support for aspects of the EDI agendas or programmes being promoted by KCL will be:

- likely to be unlawful under the free speech protection obligations under the Education Act;
- discrimination (and possibly harassment, depending on the circumstances and the nature of the consequences) under the Equality Act, if the relevant applicant's dissent or non-compliance is as a result of opinions which count as protected characteristics under the Equality Act; and a potential breach, depending on the relevant detailed context, of its PSED in respect of such person; and/or
- contrary to the HRA.

Seeking EDI Information as preparation to discriminate: as the only purpose of seeking EDI Information would be to provide information for an assessment process in order to put KCL or its relevant staff in a position to discriminate – whether deliberately or unconsciously – against applicants with the “wrong” views, or breach KCL’s obligations under the Education Act in respect of them as described above, requiring EDI Information as part of a job or funding application process must be contrary to:

- KCL’s obligations under the Education Act;
- KCL’s duties under the Equality Act to avoid discriminating against or harassing (ie creating a hostile environment for) people with such views and likely, depending on the detailed context, to be contrary to its PSED in respect of people with those protected characteristics; and
- possibly the HRA.

A relevant factor is that the knowledge that EDI Information is being sought would be likely to put off people with such viewpoints from applying for the relevant position.

Compelled thinking and chilling effect: further, creating a situation where people who seek (or are likely to seek) promotion at KCL think they need to visibly not dissent from, or even demonstrate adherence to and actively promote, an agenda aspects of which they do not necessarily agree with, is:

- contrary to the Education Act;

- unlawful under the Equality Act to the extent that this counts as suppressing (i.e. discriminating against or harassing (creating a hostile environment for) people with) views which count as protected characteristics and likely, depending on the detailed context, to be contrary to its PSED in respect of people with those protected characteristics; and
- potentially contrary to the HRA as a result of it reducing applicants' willingness (or perceived ability without having their career prospects blighted) to hold or express certain viewpoints; i.e., its "chilling effect" on people's freedom of thought and speech.

Finally, while this is not the main focus of this letter, courses such as the Introduction to Equality, Diversity & Inclusion, especially if compulsory, are highly risky under free speech protection legislation, especially if they contain untruths or misrepresentations, including by presenting matters as required by the Equality Act when they are not, or present ideology as fact or otherwise unassailable. For an explanation, see our associated project Best Free Speech Practice's statement on this subject here: <https://bfsp.uk/wp-content/uploads/2023/06/BFSP-re-compulsory-EDI-training-and-free-speech-27.6.23.pdf>. KCL appears to be very likely to be acting unlawfully as regards this course. We strongly recommend that it reviews all such courses for free speech compliance.

Governance failures

KCL is required by its conditions of registration (E1 and E2) to have governing documents that uphold, and to have in place adequate and effective management and governance arrangements to deliver in practice, the public interest governance principles that apply to it. These include principles relating to securing freedom of speech and academic freedom.

The Office for Students ("OfS") has publicly stated⁷ that, in considering whether a university complies with condition of registration E2, it may consider questions such as:

- Does the university have robust decision-making arrangements, which require it to consider the impact of its decisions on free speech and academic freedom as part of the decision-making process?
- Does the university have checks and balances to ensure that its policies and processes do not adversely affect free speech or academic freedom?

KCL has suffered significant governance failures through not having appropriate systems in place to ensure, and identify risks of failures regarding, free speech protection; or, if those systems are in place, their not working appropriately.

⁷ In its Insight publication *Freedom to question, challenge and debate*, December 2022: <https://www.officeforstudents.org.uk/media/8a032d0f-ed24-4a10-b254-c1d9bfcfe8b5/insight-brief-16-freedom-to-question-challenge-and-debate.pdf>.

Actions which KCL must take to address its unlawful actions

KCL clearly needs to do the following in respect of the Relevant Actions and this letter.

- Investigate, with reference to specialist legal advice, whether it is indeed acting unlawfully, as we strongly allege.
- If it is acting unlawfully, it needs to take appropriate action, including acknowledging that this is the case, apologising for it and stating that it will work to ensure that unlawfulness of this nature does not happen again and that it will be reviewing its governance, practices and requirements to ensure that they are compliant as regards free speech protection.

Actions to ensure KCL is free speech compliant include the following. All of them are “reasonably practicable steps” so are required by the Education Act, and many of them are required to qualify for the defence in Section 109(4) of the Equality Act⁸.

- Review and revise: (a) its relevant rules, procedures, practices and requirements relating to free speech (“**Relevant Requirements**”), to ensure that they reflect and properly implement KCL’s legal and other obligations relating to freedom of speech; and (b) its other rules, procedures, practices and requirements, to ensure that they are compatible with its legal and other obligations relating to protecting freedom of speech.
- Establish systems at all levels of relevant management to ensure the implementation and enforcements of Relevant Requirements promptly, firmly and effectively; and review and revise its structures, systems and relevant personnel to ensure that it complies with its governance requirements.
- Ensure that both staff and students receive proper training and regular information about the importance of free speech generally and the Relevant Requirements more particularly. This will involve relevant staff (particularly those in the EDI function) understanding how the Relevant Requirements affect their work and responsibilities.
- Ensure that its governing body is taking appropriate steps to discharge its duties regarding the protection of free speech. This must include free speech being a regular agenda item.
- Appoint a Free Speech Officer to be KCL's internal advocate for free speech, with responsibility for ensuring that it complies with its legal obligations and follows and enforces its own rules appropriately. The Free Speech Officer should be appropriately senior and qualified, not subject to significant conflicts of interest, and appropriately empowered.

⁸ For more information on this requirement, see <https://bfsp.uk/wp-content/uploads/2023/11/BFSP-Stmt-re-Eq-Act-harassmt-and-Fahmy-case-22.11.23.pdf>.

- If an institution takes sides with one position in an area of passionate and polarised debate, it necessarily sets itself against the other position. This gives rise to a very obvious risk of disadvantaging (i.e. discriminating against) or creating a hostile environment for (i.e. harassing) people who hold that other viewpoint. KCL therefore needs to maintain institutional neutrality in respect of matters of public debate, while of course complying with its wider relevant legal obligations.
- Ensure that it does not impose ideologies or viewpoints, to the extent that to do so would contravene its obligations to secure free speech; and that it and its staff do not unlawfully discriminate against or harass people in respect of their views which count as protected characteristics.
- Avoid or restructure any association or relationship with any organisation where that relationship requires it to take sides in relation to contested issues, or requires or encourages it to suppress the expression of views which dissent from the agenda being promoted by any such organisation. This potentially applies to its relationships with Stonewall *et al*, and is one of the main reasons why public bodies like the BBC, Ofsted, Channel 4, the EHRC, the CPS, the Cabinet Office and other government departments and increasing numbers of universities (including UCL, the LSE, Edinburgh, Glasgow and St Andrews) are exiting such relationships.

We would point out that not properly addressing the issues we have raised will itself be a governance failure. Whereas the failures we write about could be argued to be inadvertent (although it appears to us that there must be some culpability), further failures would be deliberate, as KCL is now aware of these issues. We should mention two recent public scandals which are very relevant to this case.

- The British Museum failed to heed the warnings of an external whistleblower (we are external whistleblowers) about thefts from its stores. This led to resignations.
- NatWest bank lied and made inappropriate disclosures about the closure of the account of Nigel Farage. This led to resignations.

AFFS will be reporting the free speech failures referred to in this letter to the Office for Students and the Equality and Human Rights Commission.

Yours faithfully

William Mackesy
Andrew Neish KC
for

Alumni for Free Speech

www.affs.uk / info@affs.uk Alumni For Free Speech is part of DAFSC Ltd, company number 141189200 Registered office: 27 Old Gloucester St, London W1N 3AX.