

IN THE MATTER OF

KING’S COLLEGE LONDON ACADEMIC PROMOTIONS CRITERIA

COUNSEL’S OPINION FOR SEX MATTERS

INTRODUCTION & SUMMARY	2
FACTUAL BACKGROUND	3
The Promotion Application Form and Guidance	3
The Principles in Action Handbook.....	4
The Introduction to Equality, Diversity & Inclusion e-learning module	5
The Active Bystander training.....	7
Proudly King’s	8
The Trans Matters Training and Guidance.....	9
The Stonewall Workplace Equality Index submission 2021.....	9
The Religion and Belief Policy	11
Other relevant guidance and policies	12
RELEVANT LAW	12
The Human Rights Act 1998	12
The Equality Act 2010	14
Protected characteristics.....	14
Types of prohibited conduct	15
The Public Sector Equality Duty.....	16
The Education (No. 2) Act 1986 & The Higher Education (Freedom of Speech) Act 2023	16
CONCLUSIONS	20
The nature of KCL’s “equality, diversity and inclusion ambitions”	20
Indirect philosophical belief discrimination.....	25
Breaches of the law on academic freedom.....	30

INTRODUCTION & SUMMARY

1. I am asked to advise Sex Matters for Everyone Ltd (“Sex Matters”) as to the lawfulness of criteria applied by King’s College London (“KCL”) to the assessment of applications for promotion by academic staff. In particular, I am asked to advise on Part 5 of KCL’s “Guidance for Academic staff employed on Education & Research (‘E&R’) contracts and E&R NHS Consultants, 2023–24 Academic Promotion Round” (“the Guidance”).
2. I have had the benefit of meeting Dr John Armstrong (Reader in Financial Mathematics, KCL) in conference. He provided me with the documents referred to in this Opinion.
3. In summary, it is my view that:
 - 3.1. 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”. I think it strongly arguable that this requirement, when analysed in its context, amounts to indirect philosophical belief discrimination contrary to ss.10 and 19 of the Equality Act 2010 (“EqA”) against potential applicants who hold gender critical beliefs. See §§70–73 below.
 - 3.2. It is likely that if KCL persists in imposing the requirement in the next academic year it will find itself in breach of the Higher Education (Freedom of Speech) Act 2023 (“HE(FoS)A”), which is expected to come into force during 2024. In the meantime, the requirement may amount to a breach of s.43 of the Education Act. See §§75–76 below.

FACTUAL BACKGROUND

4. KCL is a London university with over 9,000 staff. It is a member of the Stonewall Workplace Equality Index and is a Stonewall Diversity Champion. It holds an Athena Swan Silver Award.

The Promotion Application Form and Guidance

5. Members of academic staff at KCL who are employed on "Education and Research" contracts and who wish to apply for promotion to Reader or Professor in the coming academic year must complete and submit the Application Form by 19 January 2024. Part 5 of the Application Form requires applicants to set out, on no more than one side of A4, information about their contribution to "Inclusion and Support".
6. Details of what is required in the answer to Part 5 of the Application Form are contained in the Guidance. This states that Part 5 captures information relevant to the "Practices" in KCL's "Principles in Action" handbook, including in particular Practice 1, "Understanding and including others".
7. The Guidance states that applicants are expected to have completed KCL's Introduction to Equality, Diversity & Inclusion e-learning module and to have undertaken or made plans to undertake within 6 months its Active Bystander training.
8. The Guidance goes on to state that applicants "should use Part 5 of the promotion application form to detail specific activity undertaken to support the university's equality, diversity & inclusion ambitions". The examples given are as follows:
 - 8.1. participating in equality, diversity & inclusion activity such as Athena SWAN, Race Equality and Stonewall LGBTQ groups;

- 8.2. promoting the university's community networks, such as:
 - a. Proudly King's: LGBTQ+ Network;
 - b. Access King's: Disability Inclusion Network;
 - c. NEST – (N)etwork to (E)ngage, (S)upport & bring (T)ogether Parents and Carers @ King's;
 - d. Elevate: King's Gender Equality Network; and
 - e. King's Race Equality Network.
 - 8.3. encouraging staff to undertake Introduction to EDI and other EDI training that is available on Skills forge;
 - 8.4. applying some of the ED&I Guidance and Support in everyday practice, and so on.
9. Neither the Guidance nor the Application Form give any indication of the weight to be attached to the answer given to Part 5. The Guidance states only that “applications will be assessed against the published criteria in this document”, that the decision will be informed by the Faculties' Academic Performance Framework and the Principles in Action and that a “rounded view” will be taken of applications.
10. I am instructed that no Equality Impact Assessment appears to have been conducted by KCL in respect of the promotions process or guidance.

The Principles in Action Handbook

11. KCL's “Principles in Action” Handbook (“the Handbook”) is a “behavioural competency framework” which is intended to support the implementation of the Strategic Vision and to “underpin the values and approaches that guide and challenge decision-making at King's to 2029”. It is meant to “reflect on our

individual strengths” and to enable members to “think about what would make us each even more successful in how we go about our work and interact with one another.” The Handbook expressly states that the Principles in Action:

are designed to support diversity of thought and positive interaction through a common language, facilitating robust yet collegiate debate. This shared language should encourage individuality, creativity, debate and freedom of expression, as well as provide a basis to constructively challenge unhelpful practices.

12. The Handbook contains ten “Practices”. Of those, Practice 1 (“Understanding and including others”) is said to be important because KCL is a “diverse community ... where all individuals are valued and able to succeed”. It is said that “Seeking out and engaging with diverse people and opinions helps build trust and a sense of belonging”.
13. The Handbook also states that Practice 1 does not entail assuming that “everyone does, or should think the same” or confusing “an inclusive approach” with “a need for consensus on every issue”.

The Introduction to Equality, Diversity & Inclusion e-learning module

14. The EDI e-learning module purports to introduce KCL employees to key aspects of the EqA in the employment context.
15. The e-learning module identifies the characteristics “gender identity / gender expression” as falling within the scope of equality and diversity. It is stated that “our definition of diversity goes beyond the characteristics protected by law to include everything that makes us unique, from our backgrounds and experiences to our personalities and ways of thinking”. It describes KCL’s commitment to being “intersectional by default” as a core concept in its approach to EDI.
16. The e-learning module defines “inclusion” as being “about everyone being able to bring their whole self to King’s, without having to downplay or change

elements of their identity". There is a description of the ways in which KCL's approach to EDI is embedded in its activities, such as Education, Service and Research.

17. In the slide entitled "Legal reasons", the e-learning module states that "In the UK It is illegal to treat someone less favourably because they are different". The EqA is identified as the main piece of legislation in this area. It is suggested that the Public Sector Equality Duty ("PSED") in the EqA requires KCL to "Eliminate unlawful discrimination ... Advance equality of opportunity ... [and] Foster good relations between people who share a protected characteristic and those who don't".

18. The e-learning module identifies "sex" as a protected characteristic in the EqA, and states that:

In everyday language, 'gender' and 'sex' are often used interchangeably. To clarify, the definitions used by the UK government describes [sic] 'sex' as a set of biological attributes that are generally limited to female or male and typically attributed to individuals at birth. In contrast, 'gender' is a social construction related to behaviours and attributes and one's internal perception of oneself, whether as a man, woman or something else (such as non-binary).

19. In the definition of the protected characteristic of gender reassignment it is said that "all trans people are protected" by the EqA and that this includes non-binary and gender fluid people. It is further stated that although the EqA uses the term "transsexual", KCL prefers "trans" to describe "people whose gender identity and/or expression differs from their sex assigned at birth and includes people who live permanently or temporarily in one or more genders". Furthermore, rather than "gender reassignment", KCL notes that "we more commonly talk about gender identity", which is "a person's innate sense of their own gender".

20. The protected characteristic of religion or belief is given no substantive explanation or context.
21. The module briefly describes the main causes of action in the EqA (for example, direct discrimination and indirect discrimination). It does not explain the exceptions contained in the Act, such as those which permit direct sex discrimination and direct gender reassignment discrimination in certain circumstances.
22. The module touches on Active Bystander principles, which it says are meant to “equip... staff with the skills and confidence to intervene and respond” when they witness “inappropriate behaviour”. It enjoins KCL members to report and seek advice if they believe that there is discrimination in KCL’s recruitment and selection processes or in its policies and procedures. It further states that anybody who is responsible for developing policies, practices, projects or services should conduct an Equality Analysis (also known as an Equality Impact Assessment).

The Active Bystander training

23. KCL’s Active Bystander training is delivered via a webinar produced by an external body. I heard a recording of a training session which was delivered during lockdown. It consisted largely of practical suggestions as to how employees might best challenge perceived racism in the workplace. An example given of behaviour that “needs to be challenged” was a person expressing the opinion that the BLM protests during the pandemic were not about race but about people being fed up of lockdown. This was described as “racial evasiveness”.

Proudly King's

24. Proudly King's is KCL's LGBTQ+ staff network. It receives a budget from KCL as well as ad hoc sponsorship and funding for initiatives like its Rainbow and Digital Lanyard campaign. It is "Highly commended" by Stonewall, attends the Stonewall Workplace London Conference annually and is referred to at length in KCL's Stonewall Workplace Equality index submission for 2021. From that document it is clear that Proudly Kings is involved in and frequently consulted on policy formation by KCL. For example, it has formal representation on the EDI Forum, is a member of KCL's Athena Swan Gender Equality and Race Equality Chartermark Groups and fed in to KCL's pandemic response.
25. A Trans and Non Binary Allyship Toolkit created by Proudly King's is available to all staff. This contains multiple references to Stonewall resources, such as the Glossary of terms published on Stonewall's website. It also directs readers to trans advocacy groups Mermaids, GIRES and Gendered Intelligence. It asks employees to make changes to their language to make it more gender neutral and to "call out" transphobia, including "dead naming" and "misgendering" because it is "the right thing to do".
26. I have been shown a post on the Proudly King's X (formerly Twitter) account dated November 2022 which bears an image with the words "TERF FART" which is clearly derogatory of people with gender critical views,.
27. In October 2023 an article was published on the KCL website by a member of Proudly King's entitled "Standing with the Trans+ community". The article states that trans people are no risk to others, criticises statements made by members of the government on trans rights and says that Proudly King's is proud that KCL is a Stonewall Diversity Champion.

The Trans Matters Training and Guidance

28. KCL's "Trans Matters: Trans, Gender Identity and Gender Expression Guidance for Staff and Students" ("Trans Matters Guidance") adopts the definition of "trans" contained in Stonewall's Glossary, which is:

"Trans' is an umbrella term to describe people whose gender is different from, or does not sit comfortably with, the sex they were assigned at birth..."

Trans people may describe themselves using one or more of a wide variety of terms, including (but not limited to) transgender, transsexual, genderqueer (GQ), gender-fluid, non-binary, gender-variant, crossdresser, genderless, agender, nongender, third gender, bi-gender, trans man, trans woman, trans masculine, trans feminine and neutrois.

29. The Guidance commits to not tolerating discrimination because of a person's "gender identity, gender expression, trans status or history". It appears to recognise (although not explicitly) that this goes beyond the scope of the protections provided by the EqA. No definition is given of "gender".
30. The Trans Matters Guidance states that:
- 30.1. "All staff, students and visitors to King's can use the facilities (such as toilets and changing rooms) that they are most comfortable with", including in sports facilities.
- 30.2. In Learning and Teaching, "Programme content will not rely on, or reinforce, stereotype or assumptions about trans people".
- 30.3. "To share information about an individual's trans status, whether staff or student, without their permission is a form of harassment".

The Stonewall Workplace Equality Index submission 2021

31. The submission produced for KCL's membership of the Stonewall Workplace Equality Index in 2021 runs to 159 pages. I am told that it is produced by a full time "Stonewall officer". Of particular note for present purposes:

- 31.1. The form requires applicants to show that their employment policies prohibit discrimination on grounds of “gender identity and/or trans identity”. and on harassment “based on gender identity and gender expression”.
- 31.2. The form also asks applicants to show that “all trans employees can use the facilities (e.g. toilets, changing rooms) they feel most comfortable using”.
- 31.3. The submission states that KCL’s trans inclusion policy has been commended by both Stonewall and Athena Swan.
- 31.4. It is stated that “all new and revised policies at King’s are required to align with our intersectional EDI strategy including using gender-neutral language”.
- 31.5. It is stated that Stonewall’s definitions have been used “wherever possible” in the compulsory EDI e-training module.
- 31.6. The submission points out that applicants for academic promotion are “are required to evidence how they create an inclusive environment”, and makes reference to the Principles in Action. It is said that “Contributions to LGBTQ+ inclusion activity are explicitly recognised in the process with applicants asked to detail activity undertaken to support the university’s EDI ambitions. Criteria are designed to be nonexhaustive to recognise the multitude of ways staff may contribute to inclusion activities”.
- 31.7. It is stated that “The EDI and Executive Search teams have worked together to develop a bank of EDI interview questions, as well as tips for hiring managers on measuring EDI in responses and infusing EDI into questions”. In the annual promotion round all applicants “are

expected to have completed Diversity Matters training, and to recognise the structural inequalities which exist within any organisation".

- 31.8. The submission notes that in 2021 KCL received "multiple" Freedom of Information requests and letters of concern "following a national attack on Stonewall and general transphobic press coverage", but that KCL's Equality, Diversity and Inclusion Forum members had "universally and unequivocally endorsed a continued relationship with Stonewall and an explicit trans inclusion approach".

The Religion and Belief Policy

32. KCL's policy on religion and belief discrimination has a section entitled "Freedom of Expression, Academic Freedom and the sharing of religion and belief", which states that one of the guiding principles in KCL's Strategic Vision 2029 is to "demonstrate open-mindedness and tolerance and expect to challenge and be challenged in protecting the freedom of expression". Reference is also made to the KCL and KCLSU Joint Statement on Freedom of Expression, which states:

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.

33. The religion and belief policy also contains the following statement:

Whilst the university recognises the right to freedom of thought, conscience and religion, manifestations of these beliefs should be respectful to the multiplicity of world views, lifestyles and identities that exist at King's."

Other relevant guidance and policies

34. I have been shown other documentation including a Data Protection Guidance document, a pronoun policy, an LGBTQ+ Sharepoint site and an intranet page for Elevate, a KCL staff network which "aims to address and challenge issues of gender inequality at King's". This network is for all staff and students who identify as women or as non binary.

RELEVANT LAW

The Human Rights Act 1998

35. Universities are public authorities for the purposes of the Human Rights Act 1998 ("HRA"). This means that in exercising their public functions they must uphold the principles of the European Convention on Human Rights ("the Convention").
36. The public functions of universities almost certainly do not include their relationships with members of academic or professional services staff, which are governed by private law. Similarly, universities have private law contractual relationships with students. Nonetheless Convention rights remain relevant to these relationships, since courts and tribunals must interpret all other law consistently with the Convention.
37. The Convention rights which come into play in the present context are those in Article 10 (Freedom of expression) and Article 9 (Freedom of thought, conscience and religion).

38. Since the right to speak only inoffensively is not a right worth having, Art 10 protects “the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative”¹. The only type of speech which is completely unprotected by Art 10 is that which is aimed at the destruction of the rights of others, such as holocaust denial². Other types of speech are protected on a sliding scale. Speech which is intended to inform or to contribute to debate or learning in a democratic society has higher protection than expression which is intended to offend or annoy. Academic speech has the “utmost protection”. Therefore where there is a conflict between freedom of academic speech and other Convention rights, the Article 10 considerations will weigh heavily in the balance.
39. By Art 10.2, speech may be subject to formalities, conditions, restrictions or penalties if they are prescribed by law and necessary in a democratic society for the protection of the reputation or rights of others (amongst other things). Thus, if a legal provision (like the harassment provisions in the EqA) authorises a public authority to interfere with the speech of a person, it may do so as long as the other conditions in Art 10.2 are satisfied.
40. Art 9 protects religious belief and philosophical belief. It gives absolute protection for the holding of any belief (other than those which are aimed at the destruction of the rights of others³). The freedom to manifest a belief “in worship, teaching, practice and observance “ is given qualified protection by Art 9. Thus, under Art 9.2, the manifestation of a belief may be interfered with in similar circumstances to those which may justify a restriction of freedom of expression under Art 10.2.

¹ *Redmond-Bates v DPP* [2000] HRLR 249 QB

² That is, speech which falls within the scope of Article 17 ECHR

³ As above

The Equality Act 2010

Protected characteristics

41. Part 2 Ch 1 EqA identifies and defines the “protected characteristics”. They include gender reassignment, sex and religion or belief (s.4 EqA).
42. A person has the protected characteristic of gender reassignment if “the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex” (s.7 EqA). A person who has the protected characteristic of gender reassignment is referred to in the Act as a “transsexual person” (s.7 EqA).
43. A “belief” means any religious or philosophical belief or a lack of the same (s.10 EqA). The meaning of “philosophical belief” for the purposes of s.10 EqA is identical to that of Art 9 ECHR⁴. Protected beliefs under s.10 EqA include the belief that biological sex is real, important, immutable and not to be conflated with “gender identity”, and the belief that conflating biological sex with gender poses a risk to women’s sex based rights (“gender critical beliefs”)⁵. Both holding and manifesting such a belief is protected by the EqA⁶.
44. The belief that “gender identity” is more important than “sex” (“gender identity belief”) is also a philosophical belief⁷. This belief often involves a commitment to the idea that the law should allow for trans people to self-identify.
45. “Sex” in the EqA is “a reference to a man or to a woman” (s.11 EqA) and man and woman means “male” and “female” respectively (s.212 EqA). The courts

⁴ See the criteria in *Grainger v plc v Nicholson* [2010] ICR 360

⁵ *Forstater v CGD Europe Others* [2022] ICR 1; *Miller v The College of Policing* [2021] EWCA Civ 1926

⁶ See *Eweida and ors v United Kingdom* (2013) 57 EHRR 8; *Higgs v Farmor’s School* [2023] ICR 1072

⁷ *Forstater*

have repeatedly said that “sex” is binary, biological and immutable⁸. However, as the law currently stands a “man” for the purposes of s.11 EqA includes a female person whose legal sex has been altered to male by way of a Gender Recognition Certificate issued under the Gender Recognition Act 2004 (and vice versa for “woman”)⁹.

46. Part 2 Ch 2 EqA defines the various types of conduct which are prohibited under the Act (direct discrimination, indirect discrimination, harassment etc). Parts 3–7 make prohibited conduct connected to the protected characteristics unlawful in some circumstances, including in employment (Part 5).

Types of prohibited conduct

47. Direct discrimination occurs when a person is treated less favourably because of a protected characteristic than others are or would be treated in like circumstances (s.13 EqA).
48. An employer indirectly discriminates against an employee (s.19 EqA) if it applies to her an apparently neutral provision, criterion or practice (“PCP”) which is discriminatory in relation to a protected characteristic. A PCP is discriminatory if it puts people with the protected characteristic at a particular disadvantage by comparison to others, and the employer cannot show that it is a proportionate means of achieving a legitimate aim. There is no need to show why the PCP causes or would cause particular disadvantage¹⁰.

⁸ *Elan-Cane v Secretary of State for the Home Dept* [2018] EWHC 1530 (Admin) (undisturbed by the CA and then the SC (*Elan-Cane v Secretary of State for the Home Dept* [2018] 1 WLR 5119; *Elan-Cane v Secretary of State for the Home Dept* [2022] 2 WLR 133 SC.; *R (C) v Secretary of State for Work and Pensions* [2017] 1 WLR 4127 §24; *Chief Constable of the West Yorkshire Police v A (No 2)* [2004] 1 AC 51, §30; *Corbett v Corbett* [1971] P83.

⁹ *For Women Scotland Ltd v Scottish Ministers* [2023] CSIH 37

¹⁰ *Essop v Home Office and Naeem v Secretary of State for Justice* [2017] IRLR 558

49. Harassment occurs when an employee is subjected to unwanted conduct related to a protected characteristic which has the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her (s.26 EqA). If the unwanted conduct had the effect (rather than the purpose) of violating dignity etc, it must be objectively reasonable for the purported victim to have experienced it in that way.
50. The EqA contains many exceptions, such as those in Sch 3 Part 7 which permit service providers to establish single sex services where it justified to do so.

The Public Sector Equality Duty

51. Universities are subject to the PSED in s.149 EqA. This requires them to have due regard to the needs to:
 - 51.1. eliminate discrimination, harassment and victimisation;
 - 51.2. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
 - 51.3. foster good relations between people who share a protected characteristic and persons who do not share it.

The Education (No. 2) Act 1986 & The Higher Education (Freedom of Speech) Act 2023

52. Universities are currently subject to s.43 Education (No. 2) Act 1986 ("E2A"). As such, every individual and body of persons concerned in the government of the university is under a statutory duty to take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for its employees and visiting speakers.
53. Academic freedom is an overlapping but slightly different concept to Art 10 freedom of speech. It is, in essence, the freedom of academics to challenge

received wisdom and established doctrine without putting themselves in fear for their jobs or at risk of loss of advancement within the institution. Academic freedom is integral to the purpose of a university.

54. Academic freedom should be exercised professionally and is subject to established principles of intellectual rigour, scientific inquiry and research ethics. That is not to say, however, that the ideas expressed must be correct or meritorious. It extends outside the academic's work environment, and covers use of social media or online discussion forums.
55. As with freedom of speech under Art 10, a cornerstone of the law of academic freedom is that academics are entitled to express themselves in a way that may be felt to be offensive. Another way of putting it is that universities are places for questioning, exploring and challenging received wisdom, such that in a university environment students and staff can expect to encounter ideas which they may experience as an affront to their own personal identity. This is unlikely to amount to unlawful harassment or other unlawful conduct unless it is targeted at an individual or gratuitously personal.
56. Universities are regulated by the Office for Students ("OfS") pursuant to the Higher Education and Research Act 2017 and it is a condition of their ongoing registration that they comply with the public interest governance principles. The first of these is academic freedom. A university's governing documents must be consistent with upholding academic freedom and it must, in practice, deliver upon that commitment. It must have in place adequate and effective management and governance arrangements to ensure that the university operates in accordance with its governing documents and delivers upon the public interest governance principle to protect academic freedom.
57. Currently there is little or no meaningful legal redress for academics in relation to breaches of their right to academic freedom. The Employment Tribunal has

no jurisdiction to determine complaints under s.43 E2A, which can only realistically be enforced by way of judicial review proceedings and is consequently of little practical use to individuals. However, on the coming into force of HE(FoS)A – expected to happen in the summer of this year – academics will have access to a complaints scheme to be operated by the Office for Students, and thereafter to a civil court claim in respect of breaches of their rights to academic freedom.

58. Under HE(FoS)A (which will replace s.43 E2A in England), both governing bodies and students unions will have duties to take “the steps that it is reasonable for them to take” to secure freedom of speech and academic freedom, having particular regard to the importance of freedom of speech. Arguably, this duty is stronger than the PSED (see above), since paying due regard to a need is a lower order of requirement than taking reasonable steps to secure a right.
59. Universities will also have duties under HE(FoS)A to:
 - 59.1. take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for them to take in order to secure that applicants for academic employment are not adversely affected in relation to the application because they have exercised their academic freedom (s.A1(9) – this is part of the “secure duty” in ss.A1 and A4 HE(FoS)A); and
 - 59.2. promote the importance of freedom of speech and academic freedom (s.A3 – the “promote duty”).
60. In order effectively to secure and promote academic freedom, universities will be expected to maintain institutional neutrality on controversial matters, including in their employment policies and procedures. Furthermore, under

HE(FoS)A academics should not be required to demonstrate allegiance to particular political or ideological positions¹¹.

61. On 26 March 2024 the OfS launched a consultation on draft "Regulatory advice 24: Guidance related to free speech". This draft guidance relates to universities' duties under HE(FoS)A, and is to be published in its final form on 1 August 2024. The OfS' online briefing on the draft guidance¹² states that the draft guidance is intended to "provide transparency about the issues that the OfS may consider when making decisions about free speech matters". It is therefore safe to assume that it broadly reflects the approach that the OfS is likely to take in determining complaints of breaches of HE(FoS)A brought under the complaints scheme. Furthermore, whilst it is not statutory guidance, it is likely that the courts will have regard to it when deciding civil cases brought under the Act.
62. The draft guidance contains summaries of relevant principles and case study examples. It states:

Promotions

57. Each provider and constituent institution must take reasonably practicable steps to achieve the objective of securing that, where a person applies for academic promotion, 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. The following may be reasonably practicable steps.

58. Providers and constituent institutions should not require applicants for academic promotion 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.

59. Any academic promotion process should include a sufficiently detailed record of all decisions. This record should include evidence that the promotion process did not penalise a candidate for their exercise of academic freedom.

¹¹ See Annex B of *Higher education: free speech and academic freedom*, Department for Education 2021

¹² <https://www.officeforstudents.org.uk/consultations-on-free-speech/consultation-on-proposed-regulatory-advice-and-other-matters-relating-to-freedom-of-speech/proposal-a-regulatory-advice/>

63. Example 9 in the draft guidance is as follows:

University A requires all candidates for academic promotions to submit a 500-word statement of evidence of commitment to University A's work advancing equality of outcome.

Depending on the circumstances, University A may be restricting the lawful expression of certain viewpoints. For instance, University A's work on equality of outcome might focus on areas where a lecturer thinks that equality of opportunity is more important than equality of outcome. The lecturer may be deterred from expressing this view. If so, removing this requirement from promotion processes is likely to be a reasonably practicable step that University A should now take.

CONCLUSIONS

The nature of KCL's "equality, diversity and inclusion ambitions"

64. KCL's various policies, training materials and guidance relating to the protected characteristics of sex and gender reassignment are incorrect, as a matter of law, in several substantial respects. These include:

64.1. The decision to "go beyond" the EqA's protected characteristic of gender reassignment in favour of protecting a wider group of people under the "umbrella" concept of "trans", described variously by reference to "gender", "gender identity" and "gender expression" (see §§15 and 19 above re the EDI e-learning module and §28 above re the Trans Matters Guidance) . Neither the umbrella concept nor any of the descriptive terms used is satisfactorily defined in any of the documents, meaning that it is impossible to understand the scope of the protection offered. The EqA does not contain the words "gender expression" or "gender identity". Where conflicts of rights may or do exist there is considerable legal risk in expanding a protected characteristic beyond that covered by the legislation. By way of example:

- a. Section 159 EqA permits positive action in recruitment and promotion to rectify under-representation, but only in respect of those with an actual protected characteristic. There would be a significant danger of committing unlawful discrimination against other job applicants if positive action were to be taken to increase the representation of trans people where they do not fall within the scope of the protected characteristic of gender reassignment.
 - b. If KCL is to comply with the PSED (under which equality impact assessments are conducted), it must ensure that it focusses on the protected characteristics in the EqA. If it expands or otherwise distorts the categories it risks being unable to show that it has complied with the PSED.
 - c. See §64.3 below for another example of the consequences of going “beyond the law” in this way.
- 64.2. The EDI e-learning module (as well as some of the other material) contains numerous incorrect or misleading assertions about the law. These include (but are not limited to) the following:
- a. That it is contrary to the EqA “to treat someone less favourably because they are different” (§17 above). This drastic oversimplification is wholly misleading.
 - b. That the PSED requires KCL to “eliminate unlawful discrimination [etc]” (§17 above). The PSED merely requires KCL to pay due regard to the need to eliminate unlawful discrimination (etc).
 - c. That the government defines the protected characteristic of “sex” as described at §18 above. To my knowledge the government does

not adopt such a definition (and the relevance of any definition which might be adopted by the government is unclear to me). More importantly, insofar as it is suggested that this definition has the force of law, this is entirely incorrect.

- d. The implication that the law contains a definition of the word "gender". This word does not appear in the EqA other than in the context of the phrase "gender reassignment". Certainly nowhere in law is it suggested that "gender" refers to a person's "internal perception" of themselves (§18 above).
- e. The assertion that "all trans people" are covered by the protected characteristic of gender reassignment (§19 above). The case law referred to in the e-learning module in which an Employment Tribunal found that a "genderfluid" person was covered by the Act¹³ is not binding authority, meaning that no other Tribunal would follow or be persuaded by its reasoning. In any event it is of highly questionable correctness. There are other significant problems with the contents of the e-learning module on this point.

64.3. The commitment in the Trans Matters Guidance to permit trans people to use facilities on a self-ID basis places KCL in considerable legal jeopardy, particularly when combined with the expansion of the category of trans people protected under KCL's policies (discussed above). Allowing trans people who do not fall within the definition of the protected characteristic of gender reassignment to use opposite-sex toilet or changing facilities has the following legal consequences (amongst others):

¹³ *Taylor v Jaguar Landrover* Case 1304471/2018 (ET, 26 November 2020)

- a. It renders it impossible for KCL to establish that the facility is in fact single sex. Thus a man could successfully complain of direct sex discrimination because he is excluded from a women's facility.
 - b. It may amount to unlawful indirect discrimination against those of the opposite sex and/or people with other protected characteristics, such as women with certain religious beliefs which prohibit them from undressing in front of men, women with certain disabilities or older women.
 - c. It is likely to put KCL in breach of the Workplace (Health, Safety and Welfare) Regulations 1992, which mandate that workplace toilets and changing facilities must be provided either on a single-sex basis or in individual lockable rooms.
 - d. It may undermine KCL's satisfaction of its safeguarding duties under the Children Act 1989 and the Safeguarding Vulnerable Groups Act 2006, since it allows an ill-defined, self-identified subset of male people to use spaces and services which have been designated as single-sex in order to protect women from sexual violence and harassment perpetrated overwhelmingly by men.
- 64.4. It is not inevitably "a form of harassment" to share information about an individual's trans status without their permission, as stated in the Trans Matters Guidance (§30.3 above). The analysis of what amounts to harassment under the EqA is a nuanced one, and must always take account of the facts of the individual case (see §49 above).

65. Many further assertions of dubious legality may be found in the suite of policies and guidance documents produced by KCL which relate to sex and gender¹⁴. In my view these errors and misstatements may reasonably be regarded as tendentious, since in their sum total they tend to shore up an erroneous and ideological interpretation of the law which is frequently put to use in justification of the “gender identity belief” referred to at §44 above.
66. It is demonstrable that Stonewall and Athena Swan promote the gender identity belief, not least by the fact that many of the errors and misstatements referred to above have their genesis in materials produced by those organisations. For example:
- 66.1. The Stonewall Workplace Equality Index submission form requires the institutional applicant to show that its policies prohibit discrimination on grounds of “gender identity and/or trans identity” and harassment based on “gender identity and gender expression”. In its submission, KCL asserts that it has used these Stonewall definitions “wherever possible”.
- 66.2. The Workplace Equality Index submission form also requires internal guidance to make clear that “all trans employees can use the facilities (e.g. toilets, changing rooms) they feel most comfortable using”. This is reflected in KCL’s policies.
- 66.3. The definition of “sex” purportedly used by the UK government (§18 above) is taken directly from Athena Swan guidance.
67. It is also of note that Stonewall provides training to Proudly King's, which in turn contributes to the development of internal policies in KCL. The relationship

¹⁴ So far as I am able to tell from what I have seen, a similar point may be made about the materials which relate to race (in particular the Active Bystander Training: §23).

of trust between Proudly King's and Stonewall is demonstrated in the October 2023 article (§27 above). The esteem in which KCL holds Stonewall can be seen in statements made in the Workplace Equality Index submission and the decision to continue to take part in the Workplace Equality Index after receiving expressions of concern (see §31.8 above).

68. These factors are all indications that KCL / Proudly King's are enthusiastic supporters of Stonewall. By contrast, the animus felt by Proudly King's towards people with gender critical beliefs is illustrated both in the October 2023 article and in the TERF FART tweet. Similarly, I have seen correspondence which shows a marked lack of receptiveness – and at times outright hostility – towards gender critical staff by KCL leadership and administration. For example, the EDI Chair in the Natural Mathematical and Engineering Sciences Faculty signed an open letter condemning the appearance of Professor Alice Sullivan of UCL at an Advance HE conference, which described her views as “dangerously transphobic”. The letter stated that the signatories would refuse to work on diversity projects that they considered “transphobic”. Dr Armstrong raised this matter with the Faculty Dean, Bashir Al-Hashimi, whose response can, in my view, fairly be described as a brush-off. There are several other similar examples.
69. Against this background I think it strongly arguable that KCL's approach to EDI in respect of sex and gender conflicts with and/or actively contradicts the law in certain key respects, and that it is partisan and ideological in nature.

Indirect philosophical belief discrimination

70. A consequence of crafting internal policies with the aim of satisfying the ideological preferences of single-interest accreditation schemes is that it carries a risk of disturbing the balance of rights which the EqA seeks to achieve. Of

relevance in the current context, it is likely to result in a conflict between the employer's policy aims and the rights of employees who hold protected philosophical beliefs which conflict with those of the accreditation schemes in question. For example, any requirement placed by KCL upon members of staff to demonstrate support of the gender identity belief is plainly likely to place people with gender critical beliefs at a disadvantage, particularly if it is accompanied by a penalty for failure to demonstrate such support.

71. In my view it is strongly arguable that this is the category into which Part 5 of the Application Form and the accompanying section of the Guidance fall. I consider these provisions to be likely to amount to unlawful indirect religion or belief discrimination against those with gender critical beliefs, for the following reasons:

71.1. Part 5 clearly amounts to a PCP for the purposes of s.19 EqA (see §48 above). In my view the PCP is best described as a requirement to demonstrate support for KCL's EDI ambitions.

71.2. The Guidance offers applicants a range of non-exhaustive examples of activities which may demonstrate support of KCL's EDI ambitions. Not all of these relate to sex and gender. Thus it may be possible for gender critical applicants to satisfy the requirements of Part 5 by some means other than by demonstrating outright support for the gender identity belief. However, the options for doing so are clearly limited at best, since:

a. The core requirement is to demonstrate support for KCL's "EDI ambitions". It is apparent from the Workplace Equality Index submission and other documents that these ambitions are informed across the board by adherence to the gender identity belief, which is in direct opposition to gender critical beliefs. It is

difficult to see how support for the EDI ambitions could be regarded as separable from support for the gender identity belief.

- b. There is a mandatory requirement to complete and pass the EDI e-learning module, in which the gender identity belief is a running theme. Passing this module is likely to entail giving answers which are contrary to the beliefs of a gender critical person (and which she either believes or knows to be incorrect in law).
- c. The examples of supporting activity are heavily skewed towards working with organisations which adhere to the gender identity belief: Stonewall, Athena Swan, Proudly King's and Elevate. Thus the gender critical applicant is left with a much reduced range of suggested options by comparison to others, and is given a clear signal as to which type of external organisation is considered an acceptable partner. It appears highly unlikely that participation in the work of Sex Matters, the LGB Alliance or other similar gender critical organisations would be welcomed.

71.3. Thus, it seems to me that the requirement to demonstrate allegiance to the EDI ambitions as a criterion for advancement places those with gender critical beliefs at a particular disadvantage when compared to others.

71.4. I do not see strong grounds for an argument on the part of KCL that Part 5 is a proportionate means of achieving a legitimate aim. KCL may well be able to show that improving EDI generally is a legitimate aim, but it would seem difficult to argue that an appropriate or reasonably necessary way to achieve that aim is to require applicants to demonstrate commitment to a model of EDI which contradicts the law

and asks them to engage in activities which conflict with their protected beliefs.

- 71.5. Furthermore, the suggestion in Part 5 of the Guidance that academics work with specified external organisations appears to be wholly unwarranted. It is hard to escape the conclusion that these suggestions are geared towards the commercial objective of improving KCL's rankings with Stonewall and the Advance HE chartermarks, rather than representing a genuine attempt to achieve the aim of improving EDI in the university. A measure which is not a genuine attempt to achieve its purported aim cannot properly be justified.
- 71.6. In conducting the "proportionate means" analysis, a court or tribunal may be expected to weigh heavily in the balance the "utmost" free speech protection and the academic freedom rights afforded in law to academics. Academic freedom, in particular, has an explicit purpose of enabling academics to challenge received wisdom without putting themselves at risk of loss of advancement. I consider Part 5 of the Application Form and Guidance to infringe that principle, since its effect is to force gender critical academics into a choice between manifesting their beliefs and achieving promotion. If that is right, then Part 5 must require very cogent justification.
- 71.7. In seeking to provide that justification it would be difficult for KCL to point to a strong policy framework which encourages and supports freedom of speech, academic freedom and freedom of belief within the university. KCL's statements in support of freedom of speech and academic freedom (eg §§11 and 32 above), whilst satisfactory on their face, are substantially undermined by the somewhat desultory character of the religion and belief policy and its statement that

manifestations of belief “should be respectful to the multiplicity of world views, lifestyles and identities that exist at King’s” (§33 above). “Respect” is not a condition for the exercise of free speech or academic freedom, still less respect for “lifestyles and identities”. This statement gives the strong impression that religion or belief is undervalued by comparison to the other protected characteristics.

- 71.8. Moreover, the apparent failure of KCL to undertake an Equality Impact Assessment in respect of the Application Form and Guidance would be of evidential value in showing that it has failed to conduct the balancing exercise that is required to show that a measure is proportionate.
72. A less discriminatory alternative to Part 5 would be to ask applicants to demonstrate a commitment to “service” (or a similar neutral concept), without direction as to working with specific external bodies. This would give appropriate leeway for academics to act within their consciences and in a manner which is consistent with their rights to freedom of expression and academic freedom.
73. On a note of caution, indirect discrimination is a difficult cause of action. The arguments set out above are complex and would require careful exposition. Employment Tribunals are not usually closely acquainted with the particularities of the higher education workplace, and might need to be persuaded of the special importance of and reasons for academic freedom and freedom of speech in that context. There are sensible arguments to be made on KCL’s part, principal amongst them being the argument that Part 5 of the Application Form and Guidance do not mandate any particular activity but merely make suggestions. This is not, therefore, an open and shut case. Nonetheless I am confident that it is a strongly arguable one.

74. Finally, in this Opinion I have not considered the question of time limits for the presentation of a claim of indirect discrimination under the EqA. This would have to be given careful and early consideration if an Employment Tribunal claim is under consideration.

Breaches of the law on academic freedom

75. I consider it likely that the requirement in Part 5 of the Application Form could form the basis of a complaint of a breach of s.43 E2A (§52 above). As explained above, in my view the requirement in Part 5 amounts to a restriction on the freedom of speech of potential applicants who are gender critical. A reasonably practicable step to take to secure the freedom of speech of those employees would be simply to remove the requirement. However, the expense and complexity of enforcement of s.43 E2A by way of judicial review mean that this cause of action is unlikely to be a viable way forward. Furthermore there are very strict time limits in judicial review, which would probably rule out a complaint on this matter.
76. However if the current scheme is maintained in the next academic year a similar complaint might be brought under the OfS complaints scheme when HE(FoS)A comes into force. The specific provision in HE(FoS)A relating to applicants for employment might also be relied upon (§59.1 above), as well as the obligation under the Act for universities to promote freedom of speech and academic freedom. I consider it demonstrable that KCL has failed to maintain institutional neutrality in the highly controversial sex and gender debate, and that Part 5 of the Application Form requires employees to demonstrate allegiance to the ideological position to which KCL has chosen to adhere.
77. Predicting the prospects of success in such a complaint is difficult because the Act has not yet been the subject of judicial interpretation. However on the face

of it I think it properly arguable that the requirement in Part 5 is a breach of the new Act, and it is particularly notable that Example 9 in the OfS' draft Guidance (§63 above) is strikingly similar to the present scenario. It is in my view likely that the OfS would conclude that if KCL maintains the current scheme after the coming into force of HE(FoS)A, this would amount to a breach of the secure duty.

78. I hope that this Opinion will be of assistance to those instructing me. If I can be of further assistance they should not hesitate to contact me.

5 January 2024 (amended 18 April 2024)

AKUA REINDORF KC

Cloisters Chambers
1 Pump Court
Temple
London EC4Y 7AA
020 7827 4000
ar@cloisters.com