Why free speech needs to be a core

of your business's ESG and compliance

- ***Free speech is a vital human right, so why is it not part of your ESG programmes?***
- ***Recent cases have highlighted legal duties to protect your employees' free speech.***
- ***Have you kept up? Are you managing your risk appropriately?***

Free speech has long been taken for granted, so it has not been seen as a concern for businesses. But the arrival of bullying of employees for their opinions, including campaigns to have them sacked, has spotlit the surprisingly vulnerable state of free speech.

Free speech as a core ESG concern: Free speech is an essential human right and vital to a properly functioning democratic society. It should be a core part of businesses' ESG implementation programmes - both the Social and the Governance elements. If debate gets shut down and people with unpopular viewpoints pushed aside, corporate cultures will get less open and tolerant, to the companies' and their employees' detriment: they are likely to become less enjoyable places to work. Businesses which care about free speech need to include it in their S and the G [programmes].

Protecting free speech is required under Equality Act: risks: Opinions on a range of controversial areas constitute a "protected characteristic" for the purposes of the Equality Act 2010. Businesses must therefore prevent unlawful discrimination and harassment of their employees because they hold these opinions. Businesses are themselves ***liable for their employees' harassment of colleagues***, and, to avoid that, need to take "all reasonable steps" to prevent their staff from attacking people for their viewpoints in ways that would be likely to constitute harassment. A business that fails to protect its employees' free speech is thus at severe risk of cost and embarrassment, as recent excruciating cases demonstrate. (See more on the relevant law in Appendix 1.)

What boards need to do: To avoid liability, businesses need to do the following.

1. Resolve that their company needs **firm and effective policies and rules** for the protection of free speech, and to implement and give effect to them. Make sure that all senior managers are aware that this is a priority programme.

2. Appoint **someone to supervise and co-ordinate this task**. They should be senior and with appropriate authority, and their views should not mean that they will be likely to resist their task (ie, they should not be wedded to agendas that often lead to suppression of

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dissenting viewpoints), or indeed implement it with excessive zeal: moderation is everything.

3. Choose and **implement the right policies and requirements**, including ones prohibiting attacks on other employees (etc). This will involve research and taking appropriate advice on what policies and rules are appropriate in the context of their company to give effect to free speech and reduce the legal risks under the Equality Act; development of those policies and rules; and review and approval by the board or an appropriate committee. Plan for **review of effectiveness and refinement** of these policies and rules.

4. Make sure that the free speech policies and rules **can be and are effectively enforced**: put effective enforcement procedures in place and make sure they work.

5. Not allow **inappropriate enforcement of contested viewpoints**, for instance through its own policies, as this will itself be discrimination and harassment, and in particular **not allow its complaints and disciplinary functions** to become instruments of free speech suppression.

6. Ensure that their employees are **sufficiently trained** about protecting viewpoints, and their duties not to harass and discriminate against their colleagues for their viewpoints.

See Appendix 2 for a **detailed statement of what is required** in the way of policies, practices and requirements in order to avoid scandal and liability.

Best Free Speech Practice

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Appendix 1: Legal requirements: protected speech, harassment and employer risk

Equality Act: protected viewpoints, harassment and liability for employee actions

The **Equality Act 2010** (the "**Equality Act**") contains extensive provisions to prevent discrimination, harassment and other unlawful actions in specified contexts in respect of people with certain "*protected characteristics*". *"Religion or belief"* is one such characteristic. There have been several judicial decisions about what beliefs are protected by this provision.

"***Discrimination***" occurs where a person (A) treats another person less favourably than A treats or would treat others, and includes an employer subjecting an employee to a detriment because of their protected viewpoint[1].

In summary, "***harassment***" means unwanted conduct related to a relevant *"protected characteristic"* which has the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating, or offensive environment; the question of whether there has been such an "effect" has an objective element[2]. This has very wide implications, with many consequent detailed requirements for protecting "protected viewpoints".

Protected viewpoints: The landmark *Forstater* case[3] established that holding gender-critical views is a *"protected characteristic"*. Views which challenged aspects of critical race theory were subsequently ruled to be protected, as were anti-Zionist ones[4]. The law in this area is still evolving and, in order to avoid finding themselves in breach of the law, businesses need to

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[1] **Section 13**. Under **Section 19**, indirect discrimination may occur where a practice, policy or rule applies to many people in the same way (i.e., apparently neutrally) but it puts people with a protected characteristic (including a claimant) at a particular disadvantage (e.g. it has a worse effect on them) when compared with people who do not share that characteristic, and the HEP concerned cannot show it to be a proportionate means of achieving a legitimate aim. This can have real effects in practice, regarding, for instance, rules which equate "gender-critical" views with transphobia, training which insists that all white people should assume they are inherently racist and recruitment or promotion processes which require applicants to demonstrate support for particular viewpoints or agendas.

[2] **Section 26**. See detailed discussion of this in Appendix 2.

[3] *Forstater v. CGD Europe et al*., 2021 (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

[4] *Corby v ACAS*, September 2023 and *D. Miller v University of Bristol*, February 2024 [ET no: 1400780/2022]. It is worth noting that the Tribunal was alert to the distinction between opposing Zionism and antisemitism: in that case it ruled that the Mr Miller made "manifestations" of this which were antisemitic and thus not protected.

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work on the basis that it is highly likely that the following viewpoints are capable of satisfying the criteria for constituting protected beliefs, and will, in time, be confirmed as such.

- Belief in the importance of and advocacy for free speech and human rights.
- Holding views about, and questioning of or disagreement with, religious beliefs and dogma and their effects in practice.
- Holding views about significant aspects of politics, society and social and international relations which are matters of public controversy or debate. There is case law to the effect that left-wing democratic socialism counts as protected for these purposes, so logically other political viewpoints, at least non-extreme ones, must be qualify for equivalent protections.

See BFSP's detailed ***Statement about what sorts of beliefs are protected following the Forstater case***.

There can be "inappropriate manifestations" of protected beliefs which do not qualify for protection[5], and this appears to generally work to create a fair balance of outcomes between competing claims or considerations under the Equality Act.

Section 109 provides that anything done by an employee in the course of their employment must be treated as also being done by their employer; it does not matter whether that thing is done with the employer's knowledge or approval. An employer has a defence (the "**Section 109(4) 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.

What constitutes harassment (and discrimination) in respect of protected viewpoints under the Equality Act?

Recent case law under the Equality Act has dramatically strengthened the protections under the Equality Act for various viewpoints which count as "protected characteristics". The following are three crucial cases which define in detail what constitutes "discrimination" and "harassment" for these purposes.

- The *Fahmy* case[6]: an institution was found guilty of harassment as a result of not having taken reasonable steps (so as to qualify for the Section 109(4) Defence) to prevent its employees from harassing their colleague for her viewpoints by way of a very hostile online "petition". Further, the convener of an earlier meeting was criticised for expressing personal views in solidarity with one side of a toxic debate: while the Tribunal concluded that his actions did not cross the threshold for itself creating an intimidating etc environment, it stated that his taking sides provided "the basis, or opened the door, for the subsequent petition and the comments" which constituted the harassment in that case.

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5 See *Wasteney v East London NHS Foundation Trust* [2016] ICR 643.

6 *Ms D Fahmy v Arts Council England* (2023) ET case no 6000042/2022.

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The following were stated as (together) constituting harassment: describing gender-critical views as "bigotry", a "cancer that needs to be removed", "should not be tolerated" and "discriminatory, transphobic", and likening them to racism and sexism; and calling the LBG Alliance (which promotes gender-critical viewpoints and which Ms Fahmy was defending) a "cultural parasite and a glorified hate group that has [….] supporters that also happen to be neo-nazis, homophobes and Islamophobes".

In connection with the Section 109(4) Defence, the Tribunal noted that the employer had taken disciplinary action, but ruled that having an anti-harassment policy which omitted protected beliefs from a list of protected characteristics, and not having effected staff training about protected beliefs, led to it not having qualified for the Section 109(4) Defence.

- The *Meade* case[7]: an employer and a regulatory body were found guilty of discrimination and harassment as a result of inappropriate disciplinary action against an employee for expressing dissenting views on a matter of controversy. In particular, they had both subjected her to harassment related to her beliefs as follows.

  - The regulator subjected her to a prolonged investigation into her beliefs, and "fitness to practise" proceedings, and sanctioned her for misconduct. The Tribunal stated that the regulator's "failure to check if [the complainant] could be malicious, and not checking his previous social media history, is indicative of a lack of rigour in the investigation, and an apparent willingness to accept a complaint from one side of the gender self-identification/gender critical debate without appropriate objective balance of the potential validity of different views in what is a highly polarised debate."

  - The employer subjected her to a disciplinary process; suspended her on charges of gross misconduct; issued an investigation report which was hostile in tone and content; and issued a final written warning. Importantly, the Tribunal ruled that the employer's implied continuing disapproval of her conduct, both during return-to-work meetings and when withdrawing the final warning, and its continued restraint on her freedom of expression, themselves constituted harassment; and that a staff member conducting the disciplinary process "labelling [Ms Meade's] Facebook posts as being transphobic was …sufficient…to constitute harassment."

  In the *Meade* case, it was actions by the employer and regulator themselves which were the primary events of harassment, rather than failing to prevent employees attacking their colleague.

- The *Phoenix/Open University* case[8]: personal attacks on a senior member of staff for her viewpoints, including an aggressive open letter and an online pile-on, were held to be

[7] *Ms R Meade v Westminster City Council and Social Work England* (2024: Case No: 2201792/2022 & 2211483/2022).

[8] *Ms J Phoenix v The Open University* (2024) ET Case No: 3322700/2021 & 3323841/2021.

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unlawful harassment and/or discrimination attributable to the Open University. There were more than 25 counts of discrimination and harassment, and more than 395 individual events of harassment as a result of individuals signing the open letter being found to be harassment.

It is useful to list some of the things that were ruled to constitute harassment: as in the *Meade* case, equating gender-critical views with transphobia, as was calling the Open University's Gender Critical Research Network a 'hate group'; now famously, a senior colleague telling Professor Phoenix that having her in the department was like having a racist uncle at the Christmas dinner table; an open letter signed by 368 people (almost all the signatories were found to have harassed Professor Phoenix by signing the letter); a number of tweets, and retweets of hostile statements and information; a key feature of many of the events which were harassment was that they were considered to be inviting people to join the pile-on; and, finally, leaving a hostile statement on the Open University's website, despite requests to remove it, itself constituted a separate act of harassment from the issuing of the statement itself.

The Open University did not even attempt to claim it had qualified for the Section 109(4) Defence.

- It is also worth mentioning in passing that Lloyds Banking Group recently had to pay damages and costs under the Equality Act which [exceeded] £800,000 for mistreating an employee over something he said (the recent *Mr Carl Borg-Neal v Lloyds Banking Group* case).

There are detailed BFSP statements explaining the findings in the *Fahmy*, *Meade* and *Phoenix* cases.

What is required in practice for businesses to qualify for the Section 109(4) Defence, i.e. to avoid liability for employees' misdemeanours is set out at Appendix 2.

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Appendix 2: Actions required to reduce the risk of liability for discrimination and harassment

The key direct implications of the issues/failures addressed in the cases discussed in Appendix 1 are that the following actions by an employer are required to avoid breaches on their own part or to qualify for the Section 109(4) Defence as regards their employees.

- Take all reasonable steps **to prevent its staff from attacking people** for their viewpoints in ways that would be likely to constitute harassment, including by writing or signing aggressive open letters, joining social media pile-ons, making unjustified complaints and the like. This means:

  - **having appropriate policies and requirements** prohibiting attacks on other employees (etc), such as making clear that malicious or unjustified complaints will themselves be disciplinary matters (ie, preventing the unjust complaint that led to the failures in *Meade*); and

  - **enforcing them** appropriately, bringing disciplinary proceedings against employees who harass their colleagues. If rules are known to be toothless, they will be ignored.

- Ensure that their employees are **sufficiently trained** about protecting viewpoints, and their duties not to harass and discriminate against their colleagues for their viewpoints and the boundary between robust but legitimate debate and bullying or harassment.

- Not allow **inappropriate enforcement of contested viewpoints**, as this will itself be discrimination and harassment, and in particular **not allow its complaints and disciplinary functions to become instruments of free speech suppression.** The *Meade* case was about wrongful disciplinary actions by institutions against someone for her viewpoints and included a ruling that labelling her gender-critical views as being transphobic was enough to itself constitute harassment; the *Fahmy* and *Phoenix/Open University* cases were in essence about attacks by employees made to harm and distress a person for her views which dissented from the ideology held by the attackers constituting harassment attributable to the employer.

- Maintain sufficient **institutional neutrality** on contested issues so as to ensure it satisfies its duties under the Equality Act: all the failings in these cases arose from an underlying failure of objectivity and endorsing and enforcing (or not preventing the unlawful enforcement of) one side of a heated debate.

It is clear that other actions will later result of scandal and liability unless the following further actions are taken.

- Not **discriminate in the employment/recruitment** process against someone because of viewpoints which dissent from those being promoted within the business. Not require employees, or applicants for positions or promotions, to commit (or give evidence of

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commitment) to values, beliefs or ideas, if that may disadvantage any candidate who holds, or has expressed, particular viewpoints.

- **Update their policies, practices and requirements** to make sure they are consistent with their duties under the Equality Act, including by avoiding:

  - acts that can constitute harassment or discrimination, such as labelling "gender-critical" views as transphobic (the *Meade* case); and

  - unjustifiably preventing or restricting the expression of protected viewpoints, for instance by mis-defining "harassment", by giving inappropriate emphasis to concepts such as "harm" or "safety" so as effectively to justify suppressing unpopular viewpoints, or by mis-stating or exaggerating legal obligations on them which may conflict with their obligations to secure those viewpoints.

These primary requirements which have so far become clear have many necessary secondary or associated implications. They include that employers need to do the following.

- Have **appropriate systems** in place for reporting and management of problems, and for review and improvement of its policies, practices and requirements; and

- Ensure they have appropriately senior, experienced, empowered and non-conflicted **personnel with responsibly** to carry the above into effect.

- Ensure that their **internal communications systems** (whether email, online meetings, chat or others means) are controllable and monitorable; and be ready to actively control and monitor them when necessary, making prompt and effective interventions (including requiring suspensions or deletions) where needed (see the *Fahmy* and *Phoenix* cases for what happens when this does not happen).

- **Restructure or terminate relationships with external activists** where they have caused or may cause the employer to go down the path to unlawfulness, for instance by requiring "no debate" policies or conflating gender-critical views with transphobia in its policies or official pronouncements.

  Business' internal policies or requirements are sometimes written in ways which reflect the viewpoints or desired outcomes of campaign organisations but which misrepresent relevant legal requirements or the nature of the business' and its employees' obligations and/or operate to suppress dissenting viewpoints. Free speech issues with training and tests regarding diversity matters have sometimes arisen because they have been designed by or acquired from campaign organisations or other external providers which have (deliberately or otherwise) misstated or exaggerated the relevant legal requirements and their implications. These must not be allowed to happen.

  [The recent Cass review into the profound NHS failures regarding the inappropriate treatment of children with gender issues – e.g. giving puberty blockers to children as

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young as [ ] when there was no good science as to the risks of such treatment – made clear that a lot of the problems arose as a result of systematic suppression of dissent and questioning scientists by or pursuant to policies of campaign groups such as Stonewall.] Businesses getting too close to such organisations creates risk, as does enforcing their agendas (as, for instance, a condition of qualifying for [approvals]) leads to a profound loss of neutrality and discrimination and harassment of people who dissent from the viewpoints being enforced. Unless such relationships can be restructured, they need to be terminated.

- Use **reliable specialist advisers** who do not themselves have agendas which conflict with giving dispassionate advice so as to secure both legal compliance and proper support for free speech. There are, for instance, recruitment consultants which focus in finding the best candidate for a position without imposing any ideological agendas about candidates' views or characteristics.

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