Free speech at the heart of your business's ESG/EDI:

Managing compliance risks

- ***Free speech is a vital human right, so it should be core to your ESG/EDI programmes.***
- ***Recent cases have highlighted legal risks from not protecting employees' free speech.***
- ***ESG/EDI themselves create risks and need careful management.***
- ***Has your compliance kept up? Are you managing your risks 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 highlighted the surprisingly vulnerable state of free speech. ESG/EDI have become a source of problems and risks as discussed below.

Free speech as a core ESG concern, and vital for your business: Free speech is an essential human right and vital to a properly functioning democratic society. It should be a core part of businesses' ESG/EDI programmes – both the Social and the Governance elements of ESG. If debate gets shut down and people with unpopular viewpoints are pushed aside, corporate cultures will get less open, tolerant and exploratory, to the companies' and their employees' detriment.

Intense competition means that businesses need the best ideas **– and a culture of open, tolerant debate and a diversity of viewpoints**. They need the best available staff, focused on business success. A diversion of time, resources and priorities to what have emerged as ideological programmes is a business disaster and can lead to business-wrecking errors like hiring by reference to factors other than business excellence.

Protecting free speech is required under Equality Act: risks: Opinions on a range of controversial areas are protected under the Equality Act 2010. Businesses must therefore prevent unlawful discrimination and harassment of employees who 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 constitute harassment. A business that fails to protect its employees' free speech is thus at severe risk of cost and embarrassment, as recent high-profile cases have demonstrated. The Jo Phoenix case is reputed to have cost the Open University in excess of £1m, as well as reputation and goodwill. (See more on the law and these cases in the Appendix.)

ESG/EDI create liability risk. The harassment of Jo Phoenix by her colleagues at the Open University because of her views had its roots in EDI. While the underlying core concepts of diversity and inclusion are accepted by many of us, "EDI" is a vague banner under which

contested concepts and agendas such as gender identity ideology and critical race theory are prompted and enforced, leading to controversy and liability when dissenters are attacked or even disciplined for their views. As the consultancy Advance HE has noted, in its guide "=*Embedding Freedom of Speech and Academic Freedom in Equality, Diversity and Inclusion*, it is the practical implementation of EDI initiatives that creates turmoil and liability. The Dandridge Review into the Open University case found that EDI created free speech problems, resulting in a culture of fear. Why do businesses want to foster discord and even fear among their staff? See further discussion of this in the Appendix.

ESG/EDI is expensive, both in financial terms but also in diversion of management time from the business. This can only make a business less productive. Can your business afford it?

What Boards need to do: To protect free speech, ensure a culture of tolerance and free debate and reduce their risks, businesses need to do the following.

1. **Agree 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 of the business.

2. **Develop a free speech statement** which declares the importance of free speech within the business and for its staff, and commits the business to: take all practicable steps to secure free speech within the business for its staff.

3. **Designate a person to supervise and co-ordinate this task**. They should be senior and with appropriate authority, and their personal views should not mean that they will be likely to resist their task (ie, being wedded to agendas that often lead to suppression of dissent).

4. **Maintain sufficient institutional neutrality on contested issues** so as to ensure compliance. Not allow inappropriate enforcement of contested viewpoints, for instance through its own policies, as this can itself become unlawful. Not allow its complaints and disciplinary functions to become instruments of free speech suppression.

   Increasing numbers of organisations are recognising the risks of taking sides in contested – often toxic – debates, and are staying neutral. The most striking example is the Financial Conduct Authority and Prudential Regulation Authority abandoning in March 2025 plans to regulate "lack of diversity": a key concern had been that this would entrench contentious EDI policies even further, which would have been a disaster for viewpoint diversity and created further risks of liability.

5. Create and **implement the right policies and requirements**, including ones prohibiting attacks on other employees, harassment and the like. This will involve doing research and getting advice on what policies are appropriate in the context of their company; development of those policies; and review and approval by the board or an appropriate committee. Plan to **review and revise** these policies over time.

6. Take all reasonable steps to **prevent its staff from attacking people for their viewpoints** in ways that would be likely to constitute harassment. Ensure that its free speech policies **can be and are effectively enforced**.

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

8. **Not discriminate in recruitment and promotion processes** against someone because of dissenting viewpoints from those promoted within the business. Not require employees or applicants to give evidence of commitment to particular values or agendas.

9. **Restructure or terminate relationships with external activists** where their influence may take the employer down the path to unlawfulness, for instance by recommending policies that misrepresent relevant legal requirements and/or operate to suppress dissenting viewpoints. Free speech issues with training on diversity often arise because they misrepresent the relevant legal requirements or act to enforce contested agendas.

10. **Structure and monitor its ESG/EDI functions** so as to ensure that they do not promote or enforce agendas or viewpoints (beyond what are required to secure compliance with the Equality Act) in ways that would compel assent to and/or visible support for those agendas or viewpoints; involve discrimination or harassment or other negative consequences for people who dissent from the agendas or viewpoints being promoted; or otherwise suppress or restrict free speech within their business. Make this a key duty of its ESG/EDI staff.

See BFSP's statement ***Protected viewpoints under the Equality Act: Risks and necessary actions for employers and others*** for a **detailed statement of the risks, and 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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See information on BFSP in the Appendix below. BFSP is part of DAFSC Ltd, company no 14189200. Registered office: 27 Old Gloucester St, London W1N 3AX.

Best Free Speech Practice is a non-partisan campaign to clarify and publicly share what the legal requirements and their implications in practice actually are for protecting free speech at UK organisations, companies, and institutions. These requirements are generally much more demanding than organisations appear to appreciate. The legal obligations of many organisations in relation to freedom of speech are extensive.

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

See BFSP's statement ***Protected viewpoints under the Equality Act: Risks and necessary actions for employers and others*** for a detailed explanation of the matters outlined below.

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.

"Harassment" means, in summary, 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. This has very wide implications, with many consequent detailed requirements for protecting "protected viewpoints".

Protected viewpoints: The landmark *Forstater* case established that holding gender-critical views[1] is a *"protected characteristic"*. Views which challenged aspects of critical race theory were subsequently ruled to be protected, as were anti-Zionist ones and ones which challenged aspects of Islam. The law in this area is still evolving and, in order to avoid finding themselves in breach of the law, businesses need to 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

[1] There is passionate and often toxic debate between trans activists and so-called "gender-critical" people about the meanings of sex and gender and how they apply in the context of trans people.

other political viewpoints, at least non-extreme ones, must be qualify for equivalent protections.

There can be so-called "inappropriate manifestations"[2] of protected beliefs which do not qualify for protection, and this appears to generally work to create a fair balance of outcomes between competing claims or considerations under the Equality Act.

Section 109 of the Equality Act 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 two crucial cases illustrate in detail what constitutes "discrimination" and "harassment" for these purposes.

- The *Meade* case[3]: in this expensive and embarrassing failure, 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 regulatory body subjected her to a prolonged investigation into her beliefs, and "fitness to practise" proceedings, and sanctioned her for misconduct. The Employment 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 a staff member

[2] E.g., straying from anti-Zionism (a protected belief) into antisemitism.

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

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[4]: in this costly reputational disaster, 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 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 subsequently commissioned a review by Dame Nicola Dandridge, former Chief Executive of the OfS.[5] Some key relevant findings of the Dandridge Review were that there was a culture at the Open University that there are "right" ways of viewing things, which can lead to dissenting views being suppressed; and an imbalance between EDI and free speech requirements. The Dandridge Review cited numerous ways in which EDI requirements and agendas cause problems for free speech. The Dandridge Review also recommended an "underpinning principle" of institutional neutrality in relation to contentious issues. This is the only safe course to avoiding liability for mistreatment of staff with dissenting viewpoints.

- 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

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

[5] See: https://www.open.ac.uk/blogs/news/wp-content/uploads/2024/10/Indpendent-Review-N-Dandridge-09.09.24.pdf

See BFSP's detailed analysis of the Dandridge Review at https://bfsp.uk/wp-content/uploads/2025/02/The-Dandridge-Review-re-the-Open-University-Jo-Phoenix.pdf

employee over something he said (the recent *Mr Carl Borg-Neal v Lloyds Banking Group* case).

What is required in practice for businesses to qualify for the Section 109(4) Defence, i.e. to avoid liability for employees' misdemeanours, is reflected in the main body of this Statement, and explained in more detail in BFSP's statement ***Protected viewpoints under the Equality Act: Risks and necessary actions for employers and others***.