



Government  
**Equalities** Office

Putting equality at the heart of government

**Equality Act 2010  
– employer liability  
for harassment of  
employees by third  
parties: A  
consultation**

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# Ministerial Foreword

This Government is committed to equal treatment and equal opportunity. This means building a society where no one is held back because of who they are, or where they come from.

A culture of unnecessary and constantly increasing regulation does not help to achieve this aim. Across the country, businesses tell us that regulation is one of their key concerns; its complexity damages their competitiveness. That is why tackling regulations that serve no useful purpose is a key priority for the Government.

We believe that the legal provisions governing third party harassment are a case in point. They were introduced by the previous Government without any real or perceived need. As far as we are aware, an employment tribunal has ruled on only one case involving the third party harassment provisions since they were introduced in 2008. And this consultation shows that, in any case, alternative legal routes exist that employees can pursue if they consider that they have been subject to repeated harassment by a third party.

In the workplace, most businesses do everything they can to ensure that their employees can work in an environment free from harassment, whatever its source. As well as being the right thing to do, this is just good business sense as it leads to a happier, better-motivated workforce.

But, in the meantime, the third party harassment provisions remain on the statute book, creating a potential regulatory burden on business to no apparent good purpose.

That is why this consultation proposes to repeal these provisions, as we announced in the *Plan for Growth* in March last year. We would like to encourage everyone with an interest in this issue, but employers and employees in particular, to let us know what they think.



A handwritten signature in black ink, appearing to read 'Theresa May'.

Rt Hon Theresa May MP Home Secretary  
and Minister for Women and Equalities



A handwritten signature in black ink, appearing to read 'Lynne Featherstone'.

Lynne Featherstone MP  
Minister for Equality

# Chapter 1 - About this consultation

## Purpose of the consultation

- 1.1 As announced in the Government's *Plan for Growth* in March 2011, this consultation seeks your views on removing section 40(2)-(4) of the Equality Act 2010. This imposes a liability on employers for harassment of their employees by third parties over whom they do not have direct control, such as customers and suppliers<sup>1</sup>.

## Intended audience

- 1.2 This consultation will be of particular interest to:
- business and employers' organisations;
  - trades unions;
  - equality organisations;
  - individuals
- Comments from other interested parties are also welcomed.

## Territorial scope

- 1.3 These proposals apply to England, Scotland and Wales.

## Duration of this consultation

- 1.4 This consultation begins on 15 May and ends on 07 August 2012. Any views received after the closing date may not be considered or reflected in our analysis.

## How to respond

- 1.5 We would be grateful if you would use the response form available on the Home Office website at **[www.homeoffice.gov.uk/equalities](http://www.homeoffice.gov.uk/equalities)**
- 1.6 Responses should be sent by email to: **[thirdpartyharassment@geo.gsi.gov.uk](mailto:thirdpartyharassment@geo.gsi.gov.uk)**

or by post to:

Third Party Harassment Consultation Responses  
Government Equalities Office  
Equality Law and Better Regulation Unit  
Home Office  
3rd Floor, Fry - North East Quarter  
2 Marsham Street  
London SW1P 4DF

<sup>1</sup> Throughout this document, this conduct is referred to as 'third party harassment'.

- I.7 Please ensure your response reaches us by 07 August 2012.
- I.8 Please tell us whether you are responding as an individual or whether you are representing the views of an organisation. If you are responding on behalf of an organisation please tell us whom the organisation represents and, where possible, how the views of members have been sought.

### Queries about this document

- I.9 Any queries about this document should be directed to Elizabeth Solowo-Coker on 020 7035 8088 or to **thirdpartyharassment@geo.gsi.gov.uk**.

### After the consultation

- I.10 We will publish a summary of the results of this consultation on the Home Office website within three months of the end of the consultation period.
- I.11 Subject to the outcome of the consultation, we will repeal section 40(2)-(4) of the Act through primary legislation.

### Freedom of information

- I.12 We may need to share any information you send us with colleagues in the Home Office, or to pass it on to other Government Departments, and we may also need to publish your response.
- I.13 All information you provide in your response, including personal information, may be subject to publication or disclosure if someone requests it under the Freedom of Information Act 2000 (FOI Act) or the Data Protection Act 1998.
- I.14 If you want the information you provide to be treated as confidential, please be aware that the FOI Act has a Statutory Code of Practice that we have to comply with which sets out our obligations on confidentiality. Because of this it would be helpful if you tell us why you want the information to be treated as confidential. If someone does then ask us to disclose the information we will be able to take into account your reasons for confidentiality, but we cannot guarantee that confidentiality can be maintained in all circumstances.
- I.15 Automatic confidentiality disclaimers generated by your IT system on emails will not of themselves be regarded as binding on the Home Office.

### Code of Practice on Consultation

- I.16 This consultation complies with the Code of Practice on Consultation produced by the Department for Business, Innovation and Skills (BIS).

## Impact Assessment

- I.17 An associated impact assessment for this policy is included in this consultation document. In addition to responses on the policy itself, we would welcome any further data or evidence and views you have on the assumptions and approach we have suggested, and on the estimates shown.

## Alternative formats

- I.18 We will consider any requests for alternative accessible formats of this document. Please send your request to

Email: **thirdpartyharassment@geo.gsi.gov.uk**  
(Please state “accessible format request” in the subject line)

Post: Third Party Harassment Consultation - Accessible Formats  
Government Equalities Office  
Equality Law and Better Regulation Unit  
Home Office  
3rd Floor, Fry - North East Quarter  
2 Marsham Street  
London  
SW1P 4DF

Telephone: 020 7035 8088

# Chapter 2 – Introduction

- 2.1 The legislation on third party harassment has developed through the interaction of EU and UK law, government guidance and judicial review.
- 2.2 In 2005, the then Government implemented the Equal Treatment Amendment Directive<sup>2</sup> through regulations which introduced a specific provision making harassment on the grounds of a person's sex or gender reassignment unlawful. It subsequently provided a factsheet to explain this change to the law. An updated version of the factsheet published in October 2006 included the statement that

*'on appropriate facts, the harassment provisions in the [Sex Discrimination Act 1975 ("the 1975 Act")] might be interpreted so that where an employer knowingly fails to protect an employee from, for example, repetitive harassment by a customer or supplier, the employer is 'subjecting the employee to harassment'.*

This was an illustrative example to demonstrate how broadly the Government considered the definition of harassment in the 1975 Act could be interpreted.

- 2.3 Through judicial review<sup>3</sup>, the Equal Opportunities Commission (the EOC) subsequently challenged the Government's implementation of the Directive in certain respects including the definition of harassment in the 1975 Act. The resultant Court ruling made it clear that the EOC and the Government agreed that there is nothing explicit or implicit in the Directive which requires Member States to impose employer liability for third party harassment in the way the then Government set out in its factsheet. The Court ruled however that the 2005 regulations did not adequately reflect the Government's interpretation and intention of the legislation as set out in its factsheet, and that the definition of harassment in the 1975 Act should be amended to cover the circumstances outlined in the factsheet. The then Government chose to comply with this ruling by introducing a specific provision which made such conduct unlawful. The Equality Act 2010 ("the 2010 Act") extended this provision so that employees are now also protected from third party harassment when it is related to age, disability, race, religion or belief, or sexual orientation as well as to sex and gender reassignment.
- 2.4 The Government is aware of only one case of the third party harassment provisions having been ruled on by an employment tribunal. The Government is also aware that the introduction of this provision has given rise to concern that business, especially small businesses, would find it difficult to comply with. Given these uncertainties, in March 2011, the Chancellor announced the Government's intention to consult on repealing this provision. Repealing it would also be in line with the Government's commitment to reducing the stock of unnecessary regulation

<sup>2</sup> Directive 2002/73/EC of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

<sup>3</sup> <http://www.bailii.org/ew/cases/EWHC/Admin/2007/483.html>

thereby removing barriers to economic growth and increasing individual freedoms. And it would not, in the Government's view, leave employees unprotected should employers fail to take reasonable steps to protect them from repeated instances of harassment whilst they are at work, because other avenues of legal redress are available – see Chapter 3 for more information.

- 2.5 We originally said that we would publish this consultation in September 2011. However, we decided to postpone publication until we had completed our assessment of the spotlight on equalities under the Red Tape Challenge<sup>4</sup> which ran in June, and which looked at the provisions in the Equality Act 2010 more broadly.
- 2.6 The outcome of the equalities spotlight, of which this consultation is a part, is being announced today.

<sup>4</sup> <http://www.redtapechallenge.cabinetoffice.gov.uk/themehome/equalities-act/>

# Chapter 3 – The proposal

## General

3.1 The *Plan for Growth*<sup>5</sup>, published by the Coalition in March 2011, announced that as part of its commitment to reduce the costs of regulation on all businesses, the Government would

*'consult to remove the unworkable requirement in the Equality Act [2010] for businesses to take reasonable steps to prevent persistent harassment of their staff by third parties as they have no direct control over it, which would save £0.3 million'.*

3.2 This consultation document seeks views on the proposed removal of the third party harassment provisions, given the current lack of evidence that there is a significant need for them or that they are effective in practice. Specific questions in the consultation also invite evidence of whether, and if so to what extent third party harassment occurs at work; how employees deal with it if it happens to them; and whether, and how, employers deal with it when they know it is happening.

## Evidence of the need for, and effectiveness of, the third party harassment provisions

3.3 The definition of third party harassment for the purposes of the 2010 Act can be found in Annex A.

3.4 The Government is aware of only once case of third party harassment having been ruled on by an employment tribunal under the relevant provisions of the 2010 Act or those in the 1975 Act which they replaced and extended<sup>6</sup>. We recognise, however, that the majority of claims that are lodged with an employment tribunal do not reach the hearing stage. The Ministry of Justice and HM Courts & Tribunals Service Employment Tribunals statistics for 2010 – 11<sup>7</sup> show that of the 32,510 discrimination cases disposed of<sup>8</sup> in the year to March 2011, the greatest numbers were

<sup>5</sup> [http://cdn.hm-treasury.gov.uk/2011budget\\_growth.pdf](http://cdn.hm-treasury.gov.uk/2011budget_growth.pdf)

<sup>6</sup> *Blake v Pashun Care Homes Ltd* [2011] EqLR 1293. The claimant who was employed as a care worker in the respondent's care home claimed that she was sexually harassed by a client at the home, and that the respondent took no action either to prevent or to minimise the harassment. The employment tribunal found that the respondent was aware of two incidents of third-party sexual harassment and took the view that the respondent should have taken steps either to prevent or to minimise the harassment. The tribunal gave some examples of reasonable steps that could have been taken in those circumstances to stop or minimise the harassment from occurring. The tribunal concluded that the third party sexual harassment complaint was well-founded.

<sup>7</sup> Employment Tribunals and EAT statistics 2010-2011 (GB). <http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/employment-trib-stats-april-march-2010-11.pdf>

<sup>8</sup> A disposal is the closure of a case when work has ceased to be done. This can be through a claim being withdrawn, settled, dismissed or being decided at a hearing.

either withdrawn (35%) or were Acas-conciliated settlements (37%)<sup>9</sup>. We are not aware of any of these cases including a claim of third party harassment but do not have full information from which to draw conclusions.

- 3.5 We therefore have no evidence to suggest that the third party harassment provisions are serving a practical purpose or are an appropriate or proportionate manner of dealing with the type of conduct that they are intended to cover. We are also aware of public concerns that have been expressed about the potential scope of the provisions. In light of this, the Government proposes to repeal the third party provisions in section 40(2)-(4) of the 2010 Act when a suitable legislative vehicle is available. This consultation seeks views on that proposal.
- 3.6 Repealing these provisions would not affect the other avenues of legal redress which an employee may use if they are subjected to conduct that would count as third party harassment, depending on the circumstances of the individual case.
- 3.7 We are particularly interested in the views of employers, employees, organisations which represent them, and those who advise them.

### **Other legal remedies for third party harassment**

- 3.8 Other means of redress, as set out below, are already available under existing legislation and the common law which can be used in the same circumstances as the third party harassment provisions in the 2010 Act.

### **Duty of care**

- 3.9 Employers are under a common law duty to take reasonable care of the safety of their employees. This includes a duty to take reasonable steps to protect them from foreseeable physical or psychological injury, which could be caused by third party harassment. A failure to comply with this duty makes the employer negligent and potentially liable for any resulting injury to the employee.

### **Health and safety**

- 3.10 Employers also have a duty under the Health and Safety at Work etc Act 1974 to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees. This duty extends to the provision and maintenance of a working environment for employees that is, so far as reasonably practicable, safe and without risks to health. Regulations implementing a

<sup>9</sup> Of the rest, 11% were struck out, 4% were dismissed at a preliminary hearing, 10% were unsuccessful at Tribunal, 3% were successful and 1% resulted in a default judgment.

European Directive require employers to make risk assessments, so as to identify the measures they need to take to comply with the duty. The risks they must assess are those to the health and safety of their employees to which they are exposed whilst they are at work, which could include third party harassment.

### **General harassment provisions in the 2010 Act**

3.11 In recent years, at least three people have taken claims against their employer because of conduct by third parties under section 3A of the Race Relations Act 1976 (“the 1976 Act”)<sup>10</sup>, which defined harassment for the purposes of that Act. As the definition of harassment in section 26 of the 2010 Act, which replaced the relevant provision in the 1976 Act, is framed more broadly than the definition in the 1976 Act, it is possible that section 26 of the 2010 Act covers acts of conduct covered by section 40(2)-(4) of the 2010 Act. The two definitions of harassment are set out in Annex B.

### **Constructive dismissal**

3.12 If employers fail to comply with their common law duty of care, or their statutory health and safety obligations, in relation to an employee who has been subjected to third party harassment, this could amount to a breach of contract entitling the employee to resign and claim that he or she was constructively dismissed.

### **Protection from Harassment Act 1997**

3.13 The principal aim of this Act was to deal with stalking, but it also provides a remedy for employees who are harassed at work by other employees or by third parties. The employer can be held liable for harassment by other employees but not by third parties, though the latter can be held personally liable.

3.14 The Act makes harassment both a civil tort<sup>11</sup> and a criminal offence. Harassment is not specifically defined but it must be a course of conduct – defined as meaning conduct on at least two occasions – and includes alarming a person or causing them distress. It does not have to be related to a protected characteristic.

3.15 Victims of harassment can obtain an injunction from a civil court to restrain future harassment, which an employment tribunal cannot order, as well as damages for any loss or injury suffered.

<sup>10</sup> *Gravell v London Borough of Bexley* [2007] UKEAT 0587\_06\_0203  
*Conteh v Parking Partners Ltd* [2010] UKEAT 0288\_10\_1712, [2011] ICR 341  
*Sheffield City Council v Norouzi* [2011] UKEAT 0497\_10\_1406

<sup>11</sup> A tort for these purposes would be a wrongful act (e.g. sexual harassment) against another person resulting in their suffering loss for which the perpetrator becomes liable in damages.

## Consultation questions (part I) – summary

### **Section A: What are your experiences of third party harassment?<sup>12</sup>**

#### Question for employees

Question 1: a) Have you experienced conduct that you consider would count as third party harassment at work? b) If you have, did you make a claim to an employment tribunal against the employer? If yes, please give details; if you did not, please say why.

#### Question for employers

Question 2: Has an employee ever made a claim against you because they said they had experienced conduct which would count as third party harassment at work? If yes, please give details.

#### Question for those advising or acting for employers/employees

Question 3: Have you ever advised or acted for a) an employer who has had an allegation of third party harassment claim brought against it; or b) an employee claiming to have been the subject of conduct which would count as third party harassment? If yes, please give details.

#### Section B: what might be the impact of repealing this provision? (for all respondents)

Question 4: Do you agree or disagree that the third party harassment provision should be repealed? Please explain your answer.

Question 5: If this provision were removed, is there any other action that the Government should take to address third party harassment at work? Please explain your answer.

<sup>12</sup> See Annex I for the definition of ‘third party harassment’ in the 2010 Act

# Chapter 4 - impact assessments

## **Impact assessment**

- 4.1 The impact assessment relating to this consultation can be found at Annex C. It sets out some of the estimated benefits and costs to the public sector, private sector and individuals of removing subsections 40(2)-(4) from the 2010 Act. It is always very difficult to calculate the monetary value of the economic costs and benefits resulting from a measure of this kind. The impact assessment outlines a potential further approach by which benefits and costs to these groups could be monetised. We propose to use this consultation to test our assumptions further and gather additional information so that we can strengthen the impact assessment.

## **Consideration of the impact on equality**

- 4.2 Annex C includes consideration of the impact on equality, for people with each of the protected characteristics, of the proposal to remove the liability on employers for repeated harassment of their employees by people over whom they have no direct control.
- 4.3 We would welcome any further data or evidence and views you have on the assumptions and on the approach we have suggested to the monetisation of benefits and on the estimates we have used.

## **Assessment of the impact on justice**

- 4.4 Annex C includes a Justice Impact Test which considers the impact of our proposal on the justice system.

## **Consultation questions (part 2) – summary**

Question 6: a) Can you provide any further data or examples of costs and benefits which have not already been included in the Impact Assessment? b) Do you have any comments on the assumptions, approach or estimates we have used?

Question 7: How many third party harassment cases would you expect to be brought each year if the third party harassment provisions were retained? Please explain your answer.

Question 8: Does the consideration of the impact on equality in the impact assessment properly assess the implications for people with each of the protected characteristics? If not, please explain why.

Question 9: Does the justice impact test in the impact assessment properly assess the implications for the justice system? If not, please explain why.

**Equality Act 2010 – section 40: Employees and applicants: harassment**

*Note: Third party harassment is covered by subsections 2 to 4*

- (1) An employer (A) must not, in relation to employment by A, harass a person (B)—
  - (a) who is an employee of A's;
  - (b) who has applied to A for employment.
- (2) The circumstances in which A is to be treated as harassing B under subsection (1) include those where—
  - (a) a third party harasses B in the course of B's employment, and
  - (b) A failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.
- (3) Subsection (2) does not apply unless A knows that B has been harassed in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion.
- (4) A third party is a person other than—
  - (a) A, or
  - (b) an employee of A's.

**Section 3A of the Race Relations Act 1976 and section 26 of the Equality Act 2010:  
definitions of harassment**

**Race Relations Act 1976 – section 3A: definition of harassment**

- (1) A person subjects another to harassment in any circumstances relevant for the purposes of any provision referred to in section 1(1B) where, on grounds of race or ethnic or national origins, he engages in unwanted conduct which has the purpose or effect of—
  - (a) violating that other person’s dignity, or
  - (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.
- (2) Conduct shall be regarded as having the effect specified in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect.

*Note: Section 3A was inserted (19.7.2003) by The Race Relations Act 1976 (Amendment) Regulations 2003 (S.I. 2003/1626), reg. 5*

**Equality Act 2010 – section 26: definition of harassment**

- (1) A person (A) harasses another (B) if—
  - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
  - (a) A engages in unwanted conduct of a sexual nature, and
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
  - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

- (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
- (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;  
disability;  
gender reassignment;  
race;  
religion or belief;  
sex;  
sexual orientation.

**Impact Assessment of removing the provisions in the Equality Act 2010 which makes employers liable for persistent harassment of their employees by third parties over whom the employer has no direct control**

<b>Title:</b> <b>REVIEW OF THIRD PARTY HARASSMENT PROVISIONS</b>  <b>IA No:</b> GEO 1030  <b>Lead department or agency:</b> GOVERNMENT EQUALITIES OFFICE (HOME OFFICE)	<b>Impact Assessment (IA)</b>
	<b>Date:</b> 16/11/2011
	<b>Stage:</b> Consultation
	<b>Source of intervention :</b> Domestic
	<b>Type of measure:</b> Primary Legislation
	<b>Contact for enquiries:</b> Elizabeth Solowo-Coker 020 7035 8088
<b>Summary: Intervention and Options</b>	<b>RPC Opinion: Amber</b>

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
£-3.3m	£-2.9m	£0.3m	Yes   IN

**What is the problem under consideration? Why is government intervention necessary?**

In 2008, the Sex Discrimination Act 1975 was amended so that employers could be made liable, subject to specific conditions, if a third party such as a customer or supplier subjected an employee to sex harassment, sexual harassment or gender reassignment harassment. Sub-sections 40(2)-(4) of the Equality Act 2010 (the third party harassment provisions) have preserved this and have also extended the provision so that employers can now be made liable for repeated harassment of their employees by third parties over whom the employers have no direct control across the other relevant protected characteristics. We are unaware of any cases of third party harassment being brought forward since this protection was introduced in April 2008. In any event, and depending on the facts of the case, redress may still be available for employees under existing employment law breach of contract provisions or the Protection from Harassment Act 1997. We therefore consider that these Equality Act 2010 provisions have no effective practical purpose and should be removed.

**What are the policy objectives and the intended effects?**

The policy objective is to reduce any regulatory burden on employers that the third party harassment provisions may impose, where that burden is deemed to be disproportionate. The intended effects are to ensure, if the results of the forthcoming consultation *on the need for provisions making employers liable for the harassment of employees by third parties over whom they have no direct control* identify these provisions as unnecessary, ineffective or unworkable, that steps will be taken to remove these provisions from the legislation without affecting redress already potentially available by other means in the same circumstances.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

Option 1 – **Do nothing.** Keep the third party harassment provisions in force.  
 Option 2 – **Remove the provisions entirely** (preferred option).  
 Option 3 – **Remove the extension in the Equality Act 2010 only**, thereby retaining employer liability for repeated harassment of an employee by a third party over whom the employer has no direct control, where this is related to sex harassment, sexual harassment or gender reassignment harassment.

Option 2 is the preferred option as this will ensure a consistent approach across all relevant protected characteristics and will most effectively achieve the policy objective.

<b>Will the policy be reviewed? It will not be reviewed. If applicable, set review date: N/A</b>					
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes	<b>Large</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b> N/A	<b>Non-traded:</b> N/A	

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible Minister: ..... Date: November 2011

# Summary: Analysis & Evidence

# Policy Option 2

Description: Remove the provisions entirely

## FULL ECONOMIC ASSESSMENT

Price Base Year 2011	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: -4.4	High: 4.3	Best Estimate: -3.3 *

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	2.1	N/A	2.1
High	4.4	N/A	4.4
Best Estimate	3.3	0	3.3

### Description and scale of key monetised costs by 'main affected groups'

A best estimate of an additional 0 cases would be brought under alternative forms of redress were the third party harassment provisions removed.

There would be transitional familiarisation costs to employers concerning the removal of this provision of £2.1-4.4 million.

### Other key non-monetised costs by 'main affected groups'

Any increase in instances of workplace discrimination would have costs for employers. Using illustrative assumptions that there would be 0-160 more instances of workplace discrimination would imply costs to employers of £0-0.87million per annum. These costs are considered as indirect and 'non-monetised' as the assumptions used provide insight into the scale of such costs only rather than any accurate assessment.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	0	0
High	N/A	0.74	6.4
Best Estimate	0	0*	0*

### Description and scale of key monetised benefits by 'main affected groups'

Possible annually recurring benefits from reduction in 0-92 third party harassment cases brought to tribunal annually:

Private Sector Employers: £0-0.26million per annum

Public Sector Employers: £0-0.18million per annum

Voluntary Sector Employers: £0-0.06million per annum

Individuals: £0-0.17million per annum

Exchequer: £0-0.06million per annum

**\*Whilst we have represented the benefit of a positive number of cases no longer being brought as the high estimate, our best estimate reflects the lower estimate, as the evidence suggests that the likelihood of any cases being brought under the third party harassment provisions is extremely low (see evidence base).**

### Other key non-monetised benefits by 'main affected groups'

This option will ensure a consistent approach across all relevant protected characteristics helping to reduce the scope of confusion as to the rights of employees and responsibilities of employers.

<b>Key assumptions/sensitivities/risks</b>	<b>Discount rate (%)</b>	3.5
<ul style="list-style-type: none"> <li>The average annual number of discrimination jurisdiction (excl. equal pay) employment tribunal cases accepted is 23,050 per annum.</li> <li>The number of third party harassment claims per annum is represented as an increase in the annual number of discrimination jurisdiction cases of 0-0.4%, or 0-92 cases, with the best estimate being 0 as no cases have been brought to date under the existing provisions.</li> <li>The best estimate of the annual number of cases that would be brought under alternative forms of redress in place is zero.</li> <li>We consider any risk of successful judicial review of a Government decision to remove the third party harassment provisions from the Equality Act would be extremely low.</li> </ul>		

## BUSINESS ASSESSMENT (Option 2)

<b>Direct impact on business (Equivalent Annual) £m:</b>	<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
Costs: 0.3	Yes	IN
Benefits: 0		
Net: 0.3		

# Summary: Analysis & Evidence Policy Option 3

**Description:** Remove the extensions to Third Party Harassment in the Equality Act 2010 only

## FULL ECONOMIC ASSESSMENT

Price Base Year 2011	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: -4.4	High: 4.3	Best Estimate: -3.3*

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	2.1	N/A	2.1
High	4.4	N/A	4.4
Best Estimate	3.3	0	3.3

### Description and scale of key monetised costs by 'main affected groups'

A best estimate of an additional 0 cases would be brought under alternative forms of redress were the third party harassment provisions removed.

There would be transitional familiarisation costs to employers concerning the removal of this provision of £2.1-4.4 million.

### Other key non-monetised costs by 'main affected groups'

This option may increase confusion as to the rights of employees and responsibilities of employers as it creates inconsistency across all protected characteristics.

Any increase in instances of workplace discrimination would have costs for employers. Using illustrative assumptions that there would be 0-160 more instances of workplace discrimination would imply costs to employers of £0-0.87million per annum. These costs are considered as indirect and 'non-monetised' as the assumptions used provide insight into the scale of such costs only rather than an accurate assessment.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	0	0
High	N/A	0.74	6.4
Best Estimate	0	0*	0*

### Description and scale of key monetised benefits by 'main affected groups'

Annually recurring benefits from reduction in annual number of third party harassment cases brought to tribunal:

Private Sector Employers: £0-0.26million per annum

Public Sector Employers: £0-0.18million per annum

Voluntary Sector Employers: £0-0.06million per annum

Individuals: £0-0.17million per annum

Exchequer: £0-0.06million per annum

**\*Whilst we have represented the benefit of a positive number of cases no longer being brought as the high estimate, our best estimate reflects the lower estimate, as the evidence suggests that the likelihood of any cases being brought under the third party harassment provisions is extremely low (see evidence base).**

### Other key non-monetised benefits by 'main affected groups' N/A

<b>Key assumptions/sensitivities/risks</b> <ul style="list-style-type: none"> <li>The average annual number of discrimination jurisdiction (excl. equal pay) employment tribunal cases accepted is 23,050 per annum.</li> <li>The number of third party harassment claims per annum is represented as an increase in the annual number of discrimination jurisdiction cases of 0-0.4%, or 0-92 cases, with the best estimate being 0 as no cases have been brought to date under the existing provisions.</li> <li>The best estimate of the additional annual number of cases that would be brought under alternative forms of redress in place is zero.</li> <li>We consider any risk of successful judicial review of a Government decision to remove the third party harassment provisions from the Equality Act would be extremely low.</li> </ul>	<b>Discount rate (%)</b>	3.5
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**BUSINESS ASSESSMENT (Option 3)**

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
<b>Costs: 0.3</b>	<b>Benefits: 0</b>	<b>Net: 0.3</b>	Yes	IN

# Evidence Base

## Background

In October 2005, regulations implementing Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (“the Directive”) in Great Britain came into force. These regulations amended the Sex Discrimination Act 1975 (SDA) and inserted a new, freestanding right to be protected from harassment. In October 2006, the Women and Equality Unit of the Department of Communities and Local Government (now the Government Equalities Office) published a fact sheet, to explain the changes to the law on harassment in the SDA, which included a statement that “*on appropriate facts, the harassment provisions in the [SDA] might be interpreted so that where an employer knowingly fails to protect an employee from, for example, repetitive harassment by a customer or supplier, the employer is ‘subjecting the employee to harassment’.*”

This demonstrated that the Government considered employer liability for harassment of employees by third parties was **implicit** in the SDA.

The former Equal Opportunities Commission (“the EOC”), which was a predecessor to the Equality and Human Rights Commission, challenged the Government’s implementation of the Directive by way of a judicial review<sup>1</sup>. This included a challenge to the definition of harassment in section 4A of the SDA on three grounds, one of which was that the legislation failed to implement the Directive in not introducing or enabling employer liability for harassment of employees by third parties. On this point, the Court ruled that the regulations which amended the SDA to implement the Directive did not adequately reflect the Government’s interpretation of section 4A set out in the fact sheet. But the Court judgment also records that both parties in the case agreed that employer liability for third party harassment is not required by the Directive (the point being that these provisions can be removed without reference to the EU).

To give effect to this element of the Court ruling, the Government subsequently made regulations<sup>2</sup> which defined the limits of protection from third-party harassment on the face of the legislation to reflect the position in the Women and Equality Unit’s fact sheet. However, the introduction of explicit provision on employer liability for third-party harassment, although important, was not expected to result in significant changes in practice.

Under the SDA, employer liability for third-party harassment applied not only to sex harassment but also to sexual harassment and gender reassignment harassment. In order to harmonise discrimination law so that the same level of protection against third party harassment was provided to employees in respect of all relevant<sup>3</sup> protected characteristics, and to reduce the scope for confusion about employers’ obligations and the protection for employees, the Equality Act 2010 extended employer’s liability for sex harassment, sexual harassment and gender reassignment harassment of their employees by a third party, such as a customer or a supplier, to the other relevant protected characteristics (age, disability, race, religion or belief and sexual orientation).

## Problem under consideration and rationale for intervention

We are unaware of any cases of third party harassment being brought forward since this protection was introduced into the SDA in 2008. This position is set out in the May 2011 issue of the *Equal Opportunities Review*<sup>4</sup>. It is not clear, therefore, whether the ‘third party harassment’ provisions are fit for purpose or if they are an appropriate or proportionate manner of dealing with the cases of third party harassment that they are intended to cover. We are therefore consulting on removing these provisions.

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<sup>1</sup> *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin).

<sup>2</sup> The Sex Discrimination Act 1975 (Amendment) Regulations 2008, SI 2008/656

<sup>3</sup> For the purposes of harassment under the Equality Act 2010, the relevant protected characteristics are age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

<sup>4</sup> *Impact of removing third party harassment protection*, Equal Opportunities Review, May 2011, Issue 212

## **Other means of redress already available**

### **Breach of Contract**

It is already the case that employers who know that an employee is being subjected to harassment by a third party over whom they have no direct control, and which they effectively condone if they do not take reasonable steps to prevent it when it is clearly within their power to do so, could be in breach of the implied duty not to act in such a way which is likely to harm the relationship of trust and confidence between an employer and employee. This could lead to the employee claiming a breach of contract which is so serious that it entitles the employee to resign and claim constructive dismissal under employment legislation.

### **Protection from Harassment Act 1997**

Furthermore, where the circumstances are sufficiently serious, redress is also available under the Protection from Harassment Act 1997, whereby employees can bring claims of harassment against a customer of their employer, as demonstrated in a High Court ruling<sup>5</sup>. Although employers cannot be liable for harassment of an employee by a third party under the Protection from Harassment Act, we consider that the provisions ensure that adequate protection does exist for employees who do experience harassment by a third party, such as a customer or a supplier. The Protection from Harassment Act creates both criminal and civil remedies. There are two types of criminal offences covered by the Act. One is pursuing a course of conduct amounting to harassment; the other is a more serious offence where the conduct puts the victim in fear of violence. In addition to the criminal sanction, a civil court can also impose civil injunctions in harassment cases as well as awarding damages to the victim of the harassment.

We are unable to estimate the exact likelihood of additional cases being brought under these means of redress if sub-sections 40(2)-(4) were to be removed from the Equality Act. We will, therefore, be asking, as part of the consultation reviewing the third party harassment provisions, for evidence of whether employees experience this type of harassment, and if so, whether they have previously sought redress under the other avenues already available, and also of the likelihood that they would seek to do so in the future.

A review of sub-sections 40(2)-(4) of the Equality Act in the form of a public consultation, especially in the absence of any court ruling on the third party harassment provisions, will help to clarify whether employers would benefit from its removal, in line with the Government's commitment to reducing the stock of regulation thereby removing barriers to economic growth and increasing individual freedoms.

## **POLICY OBJECTIVE**

The policy objective is to reduce any potentially unnecessary regulatory burdens that the third party harassment provisions may impose on business.

## **OPTIONS**

Option 1 – **Do nothing**. By leaving the provisions in force, this could leave the Government open to criticism for implementing legislative provisions with no practical purpose, thereby imposing unnecessary potential burdens on businesses.

Option 2 – **Remove the provisions entirely**. This is our preferred option as we do not believe that the third party harassment provisions are fit for purpose. We are unaware of any cases being brought under the previous sex discrimination legislation or sub-sections 40(2)-(4) of the Equality Act 2010. We consider that by removing these provisions we will reduce unnecessary burdens on business. Simultaneously, we would ensure that guidance would be provided to explain that adequate protection for employees experiencing such treatment remains available under employment law and also under the Protection from Harassment Act 1997.

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<sup>5</sup> *Majrowski v Guys and St Thomas' NHS Trust* 2006] UKHL 34[2006] UKHL 34

**Option 3 – Remove only the extension of the provision to the additional relevant protected characteristics introduced by the Equality Act 2010 so that the protection in relation to sex harassment, sexual harassment and gender reassignment harassment only is retained in the Equality Act 2010.** This will perpetuate an inconsistency with the rest of the Equality Act 2010 as much of this legislation seeks to simplify the law by harmonising existing legislation across all characteristics. This may increase the scope for confusion about employers' obligations and protection for employees. This option is also likely to leave the Government open to criticism for unfairly retaining protection in respect of some protected characteristics but not others, when there is no evidence indicating a need to do so.

# **COSTS AND BENEFITS**

## **Option 1**

### **Costs**

In this impact assessment the costs and benefits of doing nothing are those which would be incurred were the provisions to remain in force, and the baseline against which the costs and benefits of other options are assessed. The Equality Act Impact Assessment, April 2010<sup>6</sup> assessed the impact of implementing additional protection against third party harassment before commencement. This assessment has been used as the principal basis for estimates of the costs and benefits of doing nothing, with assumptions and figures updated as described below.

### ***Number of cases brought per annum***

The 2005 Impact Assessment for the Regulations,<sup>7</sup> which introduced both a wider definition of harassment and employer liability for third party harassment in the workplace on grounds of sex, estimated that these provisions might result in a 0.5%-1% increase in harassment claims. Furthermore, it was estimated that only a fraction, 0.1% increase in claims, could be attributed to the introduction of employer liability for third party harassment, with the majority of extra claims being considered to arise because of the wider definition of harassment under these regulations.

The 2010 Equality Act impact assessment took a similar approach to estimating costs for the extension to protection, and assumed an increase of between 0.1-0.4% of discrimination employment tribunal cases being brought as a result of introducing employer liability for third party harassment in the workplace related to race, disability, religion or belief, sexual orientation and age, as was the case for sex, sexual and gender reassignment harassment at the time.

For the three years between 2007/2008 and 2009/2010 there was an average of 38,240 discrimination jurisdiction claims per annum accepted (not including equal pay).<sup>8</sup> However, to estimate the number of cases per annum which would have included a discrimination claim; it is necessary to adjust this figure by the average number of jurisdiction claims per case over the same period (1.66). Therefore, the estimate of the number of discrimination cases expected at employment tribunal per annum is **23,050**.

The assumptions relating to an increase in the annual number of discrimination cases accepted at employment tribunal have been altered to reflect the fact that since the 2010 Equality Act Impact Assessment was published, no claims have been reported as having been brought under third party harassment provisions, as set out in the May 2011 issue of the *Equal Opportunities Review*<sup>9</sup>. It is therefore assumed that the third party harassment provisions as brought into force by the Equality Act would result in an increase in the annual number of discrimination cases accepted at employment tribunal by 0-0.4%, or 0-92 cases each year. The assumed number of new cases is in order of magnitude similar to that used in previous assessments, which was never disputed during previous consultations on those proposals. However, the uncertainty around these assumptions is recognised, hence the need to use a wide range, and the sensitivity analysis set out on page 15.

**Whilst we have assumed here that a positive number of cases would be brought under the third party harassment provisions to give a representation of possible benefits, our best estimate of the number of cases which would be brought each year is 0, as no cases have been brought to date.**

Using the breakdown by sector of respondents to discrimination cases from the Survey of Employment Tribunal Applications (SETA) 2008, table1 sets out the number of cases per annum by sector of employer.

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<sup>6</sup> Annex J, Equality Act Impact Assessment, Final Version (Royal Assent), April 2010; <http://www.equalities.gov.uk/pdf/Equality%20Act%20Impact.pdf>

<sup>7</sup> Employment Equality (Sex Discrimination) Regulations 2005 SI 2005/2467

<sup>8</sup> Employment Tribunal Annual Statistics, 2007/2008-2009/2010; <http://www.justice.gov.uk/publications/docs/tribs-et-eat-annual-stats-april09-march10.pdf>

<sup>9</sup> *Impact of removing third party harassment protection*, Equal Opportunities Review, May 2011, Issue 212

**Table 1 – Breakdown of third party harassment cases by sector of employer, per annum**

	Percentage of Cases	Number of Cases	
		Low	High
Private Sector	52%	0	48
Public Sector	36%	0	33
Voluntary Sector	12%	0	11
<b>Total</b>	100%	0	92

Source: SETA 2008, GEO estimates

### Cost of third party harassment cases

Note: The cost estimates of discrimination cases used here have been updated and improved compared to the original 2010 impact assessment, using the available evidence.

Throughout this assessment all prices have been inflated to 2011 prices using HM Treasury GDP Deflator Series consistent with 23 March 2011 Budget Report unless stated otherwise

### Exchequer

The average cost of an accepted employment tribunal claim is calculated using the Employment Tribunals Service Annual Accounts and Report 2005/2006<sup>10</sup>; net operating cost divided by the number of claims accepted. Therefore, the average cost to the exchequer per claim accepted is **£693** in 2010/2011 prices.

### Individuals

The average costs to individuals are calculated using SETA 2008, and reflect average values where the primary jurisdiction of a claim was discrimination<sup>11</sup>. The cost to the individual of market work forgone as a result of claiming is represented by loss of earnings, which is also taken from SETA 2008. The overall average cost to an individual claimant of a third party harassment case is **£1,830**.

**Table 2 – Cost of a third party harassment case to the individual**

Cost for Advice and Representation	£887
Costs incurred from travel and communication	£31
Loss of Earnings	£913
<b>Total</b>	<b>£1,830</b>

Source: SETA 2008 adjusted for zero values

### Employers

The average costs to employers are calculated using SETA 2008. This is calculated as the cost of advice and representation, time spent by corporate managers and senior officials, and time spent by other employees, namely dedicated personnel, training and industrial relations managers, on the case. The median hourly wage is assumed to be £48.06<sup>12</sup> and £27.66<sup>13</sup> respectively for these two roles. The overall average cost to an employer of a third party harassment case is **£5,498**.

<sup>10</sup> Employment Tribunals Service Annual Accounts & Report, 2005/2006; <http://www.employmenttribunals.gov.uk/Documents/Publications/ARA0506.pdf>; More recent accounts for the Employment tribunals Service are not available as annual reports are now published under the Tribunals Service as a whole, which are not considered as indicative of the true actuarial cost

<sup>11</sup> Note, all cost figures taken from SETA 2008 in this Impact Assessment are adjusted from median figures to account for zero values

<sup>12</sup> ASHE 2010 –111 incl. 24% uplift for non-wage labour costs – Note: uplift derived from European Labour Costs Survey (2007)

**Table 3 – Cost of a third party harassment case to the employer**

Time spent on case by directors & senior staff	£2,019
Time spent on case by other staff	£581
Cost for advice and representation	£2,898
<b>Total</b>	<b>£5,498</b>

Source: SETA 2008 adjusted for zero values, ASHE 2010

### Settlements and compensation

No consideration of the cost of settlements and compensation awards to employers is considered here as this would be indicative of non-compliance with the law. Likewise, these transfer payments to individuals are also not considered within this assessment as benefits.

### Familiarisation costs

The final impact assessment for the Equality Act 2010 stated that there would be total transitional familiarisation costs due to the extension of protection against harassment outside the workplace and protection against third party harassment of £15.6million. Transferring across these assumptions, and updating figures, the overall familiarisation costs of the provisions in the Equality Act relating to third party harassment would have been approximately £16.6million to all employers (see table 4). However, as consistent with original assumptions made in the Equality Act Impact Assessment, all familiarisation costs would have been incurred within a year of commencement in October 2010, and should therefore not be counted here as part of the baseline.

**Table 4 – Updated transitional familiarisation costs of third party harassment provisions commenced under the Equality Act 2010**

	Number of Organisations	% of Organisations Affected	Hours	Cost per Hour	Total Cost
SMEs	1,177,470	100%	0.5	£24.71	£14,549,891
Large Firms	5,760	100%	2	£27.66	£318,691
Public Sector	26,678	100%	1	£27.66	£738,024
Voluntary Sector	185,000	44%	0.5	£24.71	£1,005,852
<b>Total</b>					<b>£16.6million</b>

Source: ASHE 2010, BIS SME statistics, HMT Whole of Government Accounts, DFE, England and Wales Charity Commission, National Survey of Charities and Social Enterprise, Office of the Scottish Charity Regulator

**Table 5 – Summary of costs under option 1**

	Annually Recurring		
	Low	High	Best Estimate*
Private Sector Employers	£0	£263,883	£0
Public Sector Employers	£0	£181,420	£0
Voluntary Sector Employers	£0	£60,473	£0
Individuals	£0	£168,406	£0
Exchequer	£0	£63,753	£0
<b>Total</b>	<b>£0</b>	<b>£737,935</b>	<b>£0</b>

\*The best estimate is that 0 cases of third party harassment would be brought per annum  
Source: GEO estimates

<sup>13</sup> ASHE 2010 –1135, incl. 24% uplift for non-wage labour costs

In summary, the annually recurring costs of Option 1 and the baseline against which other options are assessed ranges between £0 and £0.74million. The majority of these costs (69%) would be incurred by employers in addressing third party harassment cases brought against them

### **Benefits**

In ensuring that workplace claims of third party harassment can be brought, the Equality Act makes clear that the protection that previously existed for employees in relation to sex harassment, sexual harassment and gender reassignment harassment also applies across the other relevant protected characteristics. This eliminates the potential for confusion amongst both employers and employees as to their respective responsibilities and rights.

In making clear that employers may be liable for claims of third party harassment, these provisions provide employees with redress for such treatment and may also encourage all employers to ensure that their staff are reasonably protected from such treatment.

### ***Benefits of reducing discrimination in the workplace***

In response to a previous Regulatory Policy Committee (RPC) opinion regarding another work-related policy area that the benefits of reducing discrimination should be considered more generally, and monetised, where possible, when considering the impact of intervention, economic theory has been used to estimate the price of discrimination.

The benefits derived below should be considered as indicative only of scale, and treated as both indirect and 'non-monetised' in the context of this appraisal.

An assessment of the benefits requires not only an estimate of the price of discrimination but also of the reduction in the quantity of discrimination. Annex 1 to the impact assessment at Annex C fully describes the methodology and the results of the analysis adopted to assess these benefits. In line with the RPC's opinion, the benefits of reducing discrimination should not be those reflected in the number of cases or legal proceedings, but in the reduction in acts of discrimination more generally.

### **The Scale of the Benefits**

Using modest estimates for the reduction in the number of annual instances of discrimination that may occur as a result of this government intervention, we are able to identify the potential scale of these benefits.

Column 5 in table 6 below sets out benefits to employers of a 0% - 0.01% (0– 160 individuals) reduction in annual workplace acts of discrimination of **£0 - £0.87million**, or **£0 – £7.51million** over a period of 10 years in 2011 prices.

**Table 6: Estimated annual benefits of reducing instances of discrimination in the workplace by 0-0.01%**

Type of employer	Percentage of employees in this sector <sup>14</sup>	Reduction in instances of discrimination		Average price of discrimination	Total benefits	
		0%	0.01%		Low	High
Private Sector	72.1	0	115	£4,477	£ 0	£0.52million
Public Sector	20.6	0	33	£9,169	£0	£0.30million
Voluntary Sector	7.3	0	12	£4,611	£0	£0.05million
<b>Total</b>		0	160		<b>£0</b>	<b>£0.87million</b>

<sup>14</sup> Estimated using BIS SME 2009 stats for employees

Source: See Annex 1

## **Option 2**

The costs and benefits of the option to remove the third party harassment provisions entirely from the Equality Act 2010 for all the relevant protected characteristics have been assessed by using, as a baseline, the estimates of costs under option 1 above.

### ***Transitional costs***

Employers will need to familiarise themselves with the changes to the law brought about by the removal of the third party harassment provisions, and understand how this will affect them and their employees. The Equality Act Impact Assessment originally assumed 100% compliance, and therefore information obligations falling on 100% of employers form the new strengthening measures to discrimination law.

However, following the commencement of the Equality Act, the Government Equalities Office carried out a very brief survey of business representatives as to what the true proportion of small and medium employers that would actively seek to familiarise with changes to discrimination law was. This survey gave responses in the region of 20-50% of small and medium enterprises (and voluntary sector organisations). [Brief details of this survey have been included at Annex 3.] This fraction has been used to estimate the costs to employers of understanding the changes to the law a result of these proposals. Furthermore, it is also assumed the amount of time taken to understand the implications of removing these provisions will be significantly less than when they were implemented to begin with – an estimate of half this time has been used. Therefore, there will be total transitional costs to employers of **£2.1million - £4.4million**. (See table 7)

**Table 7– Transitional familiarisation costs of employers understanding the changes to third party harassment provisions**

	Number of Organisations	% of Organisations Affected		Hours	Cost per Hour	Total Cost	
		Low	High			Low	High
SMEs	1,177,470	20%	50%	0.25	£24.71	£1.45million	£3.64million
Large Firms	5,760	100%	100%	1	£27.66	£0.16million	£0.16million
Public Sector	26,678	100%	100%	0.5	£27.66	£0.37million	£0.37million
Voluntary Sector	185,000	9%	22%	0.25	£24.71	£0.10million	£0.25million
<b>Total</b>						<b>£2.1million</b>	<b>£4.4million</b>

Source: ASHE 2010, BIS SME statistics 2010, HMT Whole of Government Accounts, DFE, England and Wales Charity Commission, National Survey of Charities and Social Enterprise 2008, Office of the Scottish Charity Regulator

### **Annual costs**

There are no significant direct burdens on employers from removing these provisions. The principal rationale for intervention is to remove the possibility of any disproportionate burdens that may have been caused for employers in the future.

Furthermore, alternative protection for this type of harassment does to some extent already exist in law.

An employer who knows that an employee is being subjected to harassment by a third party over whom they have no direct control, could be in breach of the implied duty not to act in such a way which is likely to harm the relationship of trust and confidence between an employer and employee if that employer does not take reasonable steps to prevent it. This could lead to the employee claiming a breach of contract which may in turn entitle the employee to resign and claim constructive dismissal under employment legislation.

Some fraction of those individuals that would have brought a claim under the existing third party harassment provisions may choose this alternative form of redress, in which case, for those parties concerned, there would be no real cost reduction as a result of implementing option 2. However, it is

considered that this alternative route being used by individuals is highly unlikely, as it would include the need for the claimant to have resigned from their post. Therefore, the best estimate would be that no additional cases of constructive dismissal would be brought. However, the sensitivity analysis on page 15 sets out alternative estimates of the net costs and benefits of option 2 around this assumption. Furthermore, the consultation will be used to investigate the potential use of this alternative means of redress further.

Employees could also bring claims of harassment against a customer of their employer under the Protection from Harassment Act 1997.

The scale of benefits to employers described under option 1 from a reduction in discrimination more generally in the workplace would not be realised where the alternative forms of redress are not used, and should subsequently be considered as an indirect cost of removing the third party harassment provisions.

### ***Cost of producing information for individuals***

Under option 2, the Government Equalities Office would produce information to explain the removal of the third party harassment provisions. This would also include information about the other alternative avenues of legal redress that employees could explore. The administrative cost to GEO of producing this information forms part of the implementation of the policy, and therefore is not considered part of the direct impact of this option. Any opportunity costs for individuals of referring to this information would be minimal, and we certainly expect there to be no implicit requirement for employers to refer to this.

### **Benefits (See table 5)**

The principal benefits of option 2 would be the removal of the cost burdens described under option 1. 100% of these costs ought to be transferred as the benefits of removing these provisions, and there no longer being 0-92 third party harassment cases accepted by tribunals. There is no reason to suggest otherwise.

### **Non-monetised costs and benefits**

This option will ensure a consistent approach across all the relevant protected characteristics helping to reduce the scope of confusion as to the rights of employees and responsibilities of employers.

### **Option 3 (see table 5)**

The costs and benefits of option 3 would be identical to option 2 except that these would be relevant only to claims relating to sex harassment, sexual harassment and gender reassignment harassment. Retaining the protection that previously existed for employees in relation to sex harassment, sexual harassment and gender reassignment harassment but not across other relevant protected characteristics does not help to eliminate the potential for confusion amongst both employers and employees as to their respective responsibilities and rights.

### **Non-monetised costs and benefits**

This option may increase confusion as to the rights of employees and responsibilities of employers as it creates inconsistency across all protected characteristics. Furthermore, by retaining protection for some protected characteristics but not others, where there is no evidence to suggest that such a difference in available protection is justifiable, also creates unfairness across the protection afforded in relation to each of the protected characteristics.

### **Risks of preferred option**

- There has not yet been any public consultation about whether the third party harassment provisions in the Equality Act 2010 are working as intended.
- We have used available data and evidence to estimate the level of potential cases which we expect under the provisions and will seek to improve this during the consultation process.

- We are unaware of any cases which have been brought under either the previous sex discrimination legislation or the Equality Act 2010 so the savings made from removing this provision are minimal.
- Given the ruling following the judicial review brought by the EOC in relation to the original 2005 regulations which implemented the 2002 Directive (2002/73/EC) as set out on page 6 of this Impact Assessment, we consider any risk of successful judicial review of a Government decision to remove the third party harassment provisions from the Equality Act would be extremely low.

## **Sensitivity analysis**

The following sensitivity analysis demonstrates how the overall estimate of the net benefits of options 2 and three are sensitive to two main assumptions:

- That the number of annual third party harassment cases accepted under option 1 will be a 0-0.4% increase on the total number of discrimination related cases currently brought to employment tribunal
- That the best estimate of the fraction of those who would otherwise have brought a third party harassment case, but would instead seek to bring a constructive dismissal case is 0%

Table 8 below therefore shows how the overall best estimate of the net present value of removing the third party harassment provisions would vary dependent on these assumptions.

**Table 8 – Sensitivity analysis for net present value of options 2 and 3, £millions**

		Increase in number of existing discrimination employment tribunal cases		
		0%	0.2%	0.4%
Fraction of third party harassment claimants to seek alternative route for redress	0%	-3.3	-0.03	3.1
	5%	-3.3	-0.2	2.8
	20%	-3.3	-0.7	1.8
	50%	-3.3	-1.6	-0.7

Source: GEO estimates

## **Direct costs and benefits to business calculations (following OIOO methodology)**

For the purposes of One-In-One-Out scoring we calculate the direct costs and benefits to business and voluntary sector organisations as a result of this proposal in 2009 prices. The figures here are deflated using HM Treasury GDP deflator series.<sup>15</sup>

The best estimate of the Equivalent Annual Cost<sup>16</sup> to business and the voluntary sector of the preferred option are calculated as **£0.3million** in 2009 prices. This is effectively an annualised cost of familiarisation only, as under the best estimate no cases of third party harassment would be brought, and hence there are no direct monetised burden reductions on business from removing the provision.

## **Wider impacts – Justice Impact Test**

The preferred option to remove the provision will impact the justice system as it increases the potential for alternative and additional criminal and civil cases to be brought before the courts. This will be explored further as part of the review. However, because this alternative protection already exists, we consider any impact on the justice system to be minimal as we do not envisage any new employment

<sup>15</sup> Consistent with series released 23<sup>rd</sup> March 2011

<sup>16</sup> Equivalent Annual calculations use formula:  $NPV / [1 + 1/r - 1/(r \times (1+r)^9)]$  for 10 year time period, where r is the standard social time preference discount factor (3.5%)

tribunal or court procedures, rights of appeal, further changes to primary and/or secondary legislation, or an increase demand for prison places.

## **Summary and details of implementation**

The preferred option, to remove the third party harassment provisions entirely from the Equality Act 2010, would entail repeal of primary legislation. We intend to review sub-sections 40(2)-(4) and collate views by way of public consultation in late 2011. Following the outcome of the consultation, if the results support our preferred option, any proposed date of repeal will depend on availability of an appropriate legislative vehicle.

## **Post Implementation Review (PIR) Plan**

As the preferred option is to remove the third party harassment provisions, which ensures a consistent approach across all relevant protected characteristics, there will not be a dedicated review of this action. However the GEO will monitor for any significant changes in harassment cases relating to the removal of third party harassment provisions and through existing channels of research and monitoring case trends seek to understand where alternative means of redress occur. GEO is also committed to reviewing the Equality Act as a whole, for a Post Implementation Review in 2015. Part of this review will aim to establish if individuals are protected by the Act, and whether organisations feel that the Act has help simplify legislation and it is more consistent. We hope to be able to also, where it is evident, collate evidence relating to experiences of third party harassment, and how redress is sought post removal of the provision, and also organisations experiences in this area – where this is available this will be collected as part of the wider evidence on the Equality Act 2010 .

# ***Annex 1: The Economic Price of Discrimination***

***An application using the Survey of Employment Tribunal Applications, 2008***

January 2011

## **Abstract**

- This paper seeks to use the economic theory of discrimination, as pioneered by Becker, to estimate the price of discrimination in the UK.
- Consequently we estimate the economic benefits to employers where government intervention results in a reduction in workplace discrimination.
- The analysis uses 2008 Survey of Employment Tribunal Applications data.
- The final offer made to claimants in discrimination employment tribunal cases is considered as a consistent proxy for the price an organisation is willing to pay to discriminate; or their revealed preference.
- The econometric bid function calculates the marginal willingness to pay for factors which affect this price to discriminate.
- Applying the estimated price to a 0.1% reduction in annual instances of discrimination in the workplace implies economic benefits to employers forgone as large as £71.8million over 10 years.

Our initial hypothesis was that the price of discrimination should be positively correlated with the competitiveness of the industry sector of the employer.

## **Introduction**

Becker (1957) shows that in competitive markets the costs and losses associated with instances of discrimination are borne by the discriminators. Discriminators face fewer trading partners, and the marginal reduction in their wealth (utility) would be representative of the implicit price they pay for their preferences. Therefore, discriminators pay for their taste (preference) to discriminate, and place a contingent value on the possibility that this could be restricted. If employers discriminate, they will bear the costs. Likewise, if discrimination is carried out by employees or customers, the discriminating agents should bear the full costs. The majority of the subsequent academic literature on the economics of discrimination is motivated and guided by the framework set out in Becker's influential study

An important corollary of Becker's theory is that competitive forces will eliminate employer discrimination over time. The discriminating firm will either face higher marginal costs, to compensate their taste to discriminate, or be unable to attract a high quality workforce at competitive market wage rates. Therefore, one would expect the relationship between the estimated price of discrimination, and the competitiveness of the industry sector within which a particular employer lies, to be positive.

Therefore, if we were able to calculate an implicit price of discrimination, and forecast an estimated reduction in instances of discrimination as a result of policy intervention, we can consequently monetise real benefits to economic agents. In this paper we consider employer discrimination only. Therefore the costs and benefits of reducing discriminatory behaviour, as presented below, relate to employers only.

## Wider Methodology

Despite the broad extent and applicability of the neoclassical approach to the economics of discrimination, wage differentials between groups of workers are often used to support and analyse the economics of discrimination. Becker argued that taste-based discrimination, in particular the disutility employers in the United States faced from hiring black workers, may produce a compensating wage differential in an imperfectly competitive economy. Arrow (1972) and Phelps (1972) however have demonstrated that the racial wage differential can be explained by a skills gap and imperfect information. However, other empirical studies, such as by Levine et al (2008), and Neal and Johnson (1996), have subsequently provided evidence to support Becker's initial theory. Whilst these studies are all focused on racial wage differentials, taste-based discrimination can apply equally to other personal characteristics such as disability and gender.

Taste-based discrimination however does not only have to refer to wages. In fact it can be applied to all aspects of an individual's experiences and outcomes in the workplace, from remuneration to harassment and bullying. Just as employers must pay some groups of workers a higher wage to reflect their taste-based employment preferences, they must similarly pay a price for other forms of discriminatory behaviour; the discriminating firm generally will not be able to attract the same quality of worker as the non discriminating employer for the same wage offer, where employees place some value on good treatment and fairness. This takes the form of a true economic opportunity cost, where increased turnover, profits and competitive advantage are forgone to accommodate taste-based discrimination. The theoretical concept of the business case for equal opportunity, through managing diversity, as set out by Kandola (1998) also in part underpins this logic. Empirical studies assessing the productivity effects of equal opportunities, such as Perotin (2000), also support this.

The neoclassical approach to the economics of discrimination suggests that competitive market forces must eliminate employer discriminatory behaviour. However, markets are never perfect. Nonetheless, in imperfectly competitive markets, the price of discrimination, or the contingent value employers place on their behaviour, still exists, but decreases as the market power of organisations increases. Theoretically, an employer who was a pure monopsony would place no price or value on their ability to continue to discriminate, as they forgo no reward as a result of their actions.

## Estimating the Price of Discrimination

We estimate the price of discrimination using multiple regression analysis from Survey of Employment Tribunal Applications (SETA) 2008 data, and based on similar work done by Brooks, Davidson and Chapman (2004),<sup>17</sup> controlling for type of discrimination and type of employer. This comprises a straightforward bid function, as opposed to a more complex utility difference model. A semilog-linear regression is used to ensure the model produces normally distributed residuals.<sup>18</sup> This functional form addresses the positively skewed distribution of the dependent variable.

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<sup>17</sup> Brooks, R., Davidson, S., & Jackson, M. (2004). *The Price of Discrimination: An economic analysis of the human rights and equal opportunity commission rulings, 1985-2000*; Economic papers, Vol. 23, The Economic Society of Australia

<sup>18</sup> See annex 2 for comparison of standardised residuals charts

$$\ln(\text{Weight\_Offer}_i) = \alpha + \beta_1 \text{priv}_i + \beta_2 \text{pub}_i + \beta_3 \text{vol}_i + \beta_4 \text{sex}_i + \beta_5 \text{race}_i + \beta_6 \text{disability}_i + \beta_7 \text{age}_i + \beta_8 \text{size1\_99}_i + \beta_9 \text{size100\_249}_i + \beta_{10} \text{size250 plus}_i + \varepsilon_i$$

*priv<sub>i</sub>*, *pub<sub>i</sub>* and *vol<sub>i</sub>* control for type of employer; private, public and voluntary sector. *sex<sub>i</sub>*, *race<sub>i</sub>*, *disability<sub>i</sub>* and *age<sub>i</sub>* control for type of discrimination in the case. *size1\_99<sub>i</sub>*, *size100\_249<sub>i</sub>* and *size250 plus<sub>i</sub>* control for the number of employees in the workplace.<sup>19</sup>

*Weight\_Offer<sub>i</sub>* is the weighted final offer made by the employer to settle a case where the primary jurisdiction is discrimination related. This is considered an appropriate proxy for the price of discrimination as it portrays the amount an organisation is willing to pay to avoid a tribunal hearing, and to continue to discriminate, or avoid formal legal sanction. This could also be viewed as the revealed preference of the employer. It is a more appropriate measure of the cost an employer places on discrimination than the compensation award, where an employer has breached the law, as it represents the exact willingness to pay. The compensation award comprises a punitive element, imposed by the employment tribunal, and is therefore less representative of the contingent value an employer places on discriminatory behaviour. Moreover, it should be noted that the choice of dependent variable here is consistent with a “Hicksian” approach to contingent valuation, and therefore more than likely an underestimate of the true price.<sup>20</sup> Consequently, for these reasons compensation would likely be an overestimate of the true price.

The price of discrimination is therefore estimated from the coefficients of the structural regression equation, which represent the differentials associated with the competitiveness of industry sectors, size of workforce and the type of discrimination. For this semilog-linear functional form, the exponential of the coefficients gives the median impact of that particular factor or combination on the price of discrimination. This ensures our results do not provide an exaggerated estimate due to the underlying skewed nature of the distribution of settlement offers.

## Calibration and Dataset

This basic regression analysis allows us to use SETA 2008 to estimate the implicit price of discrimination for different employers from a semilog-linear equation, without having to consider subsets of the data. The final weighted dataset used, when considering only those cases where discrimination is the primary jurisdiction, and removing missing variables, comprised 389 entries (See annex 1 below for full regression outputs and alternative models).

Based on the general theory of the economics of discrimination, we would expect the price to be significantly higher for private sector employers as these operate in more competitive markets.

Furthermore, we would expect the price to increase with the number of employees in the represented workplace as the offer of settlement can be construed as the price an employer

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<sup>19</sup> Note, this does not result in near or perfect multicollinearity as some cases do not state type of employer or size of workforce.

<sup>20</sup> The actual margin of differences to the two questions of “Compensation for loss” and “Willingness to pay for loss” are typically much too large to be explained by this distinction alone; Sen (2000)

is willing to pay to discriminate throughout the organisation, rather than only against the individual claimant concerned.

*Table 1: The price of discrimination – regression coefficients*

Independent Variables	Coefficients
Constant ( $\alpha$ )	7.008
Private Sector ( $\beta_1$ )	0.229
Public Sector ( $\beta_2$ )	0.518
Voluntary Sector ( $\beta_3$ )	0.166
Sex discrimination ( $\beta_4$ )	0.465
Race discrimination ( $\beta_5$ )	0.586
Disability discrimination ( $\beta_6$ )	0.606
Age discrimination ( $\beta_7$ )	0.004
1-99 Employees ( $\beta_8$ )	0.106
100-249 Employees ( $\beta_9$ )	0.431
250+ Employees ( $\beta_{10}$ )	1.052

Source: SETA 2008

*Note: We are not able to estimate the explicit price of discrimination on grounds of sexual orientation/religion or belief, and trans-gender as the dataset does not provide enough examples of such cases.*

*Although the regression is statistically significant, the statistical robustness of these estimates ( $t$ -statistics and  $R^2$ ) could be improved by increasing the degrees of freedom. This could be achieved by creating a dataset comprising SETA 1998, 2003 and 2008. However, we feel this would not significantly alter the point estimates.*

Using the results of this regression analysis, we estimate the median price of race discrimination for an employer of 250 or more employees, as an example, to private, public and voluntary sector employers in 2010 prices as<sup>21</sup>:

Private sector:

$$P(\text{private}) = e^{\alpha + \beta_1 + \beta_5 + \beta_{10}} = \text{£}7,352$$

Public sector:

$$P(\text{public}) = e^{\alpha + \beta_2 + \beta_5 + \beta_{10}} = \text{£}9,815$$

Voluntary sector:

$$P(\text{voluntary}) = e^{\alpha + \beta_3 + \beta_5 + \beta_{10}} = \text{£}6,903$$

Our estimate of the price of discrimination derived here is not consistent with the theory that the price should exhibit a positive relationship with the competitiveness of the industry sector. However, on reflection we do not find this particularly surprising. In reality, other factors such as unionisation of the workforce, and the exposure to subsequent discrimination claims would both affect the likely settlement offer made by the employer. Furthermore, negative impacts on the reputation of an organisation as a good practice employer are a greater risk for public sector organisations.

<sup>21</sup> HM Treasury GDP Deflator used to maintain consistency with Green Book guidance. Ideally would use a Fisher Index.

## Benefits of Reducing Discrimination

However, despite it being possible to estimate the price of discrimination, it is far more difficult to forecast the reduction in instances of discrimination we expect as a result of policy intervention. The Fair Treatment at Work Survey 2008 indicated that as many as 6% of employees have experienced discrimination at work with their current employer<sup>22</sup>. Applying this to the total number of employees in Great Britain, this implies that approximately 1.6million employees feel discriminated against by their current employer<sup>23</sup>.

Therefore, we can provide an estimated indication of the potential benefits of reducing workplace discrimination generally, not considering specific types. If government intervention reduced the annual instances of workplace discrimination by a very modest 0.1-0.2%, using 1.6million as a proxy for the current annual number of instances of discrimination in the workplace, the economic benefits to employers would be as great as **£16.7million** per annum, or between **£71.8million - £143.6million** over 10 years<sup>24</sup>.

Table 2: Estimated annual benefits of reducing instances of discrimination in the workplace by 0.1-0.2%, 2010 prices

Type of employer	Percentage of employees in this sector <sup>25</sup>	Reduction in instances of discrimination		Average price of discrimination	Total benefits	
		0.1%	0.2%		Low	High
Private Sector	72.1	1,154	2,307	£4,280	£4.9 million	£9.9million
Public Sector	20.6	330	660	£8,766	£2.9million	£5.8million
Voluntary Sector	7.3	116	232	£4,408	£0.5million	£1.1million
<b>Total</b>		1,600	3,200		<b>£8.3million</b>	<b>£16.7million</b>

*Note: In order to apply the results of the regression analysis here more generally to discriminatory behaviour, we use a weighted additive combination of effects from Table 1 to represent the price of discrimination for the average employer in each sector. This is significantly affected by the distribution of organisations by number of employees, and therefore the weighting used is appropriate to calculate the typical price. The weighting reflects the sample used to derive the point estimates and, where  $X_j = \frac{n_j}{N}$ ;  $n_i$  is the number of cases of discrimination where  $j \in \{Sex, Race, Disability, Age\} = J$ , and also the proportion of employees working in employers of different sizes by sector,  $Z_k$  where  $k \in \{1 - 99, 100 - 249, 250 +\} = K$ <sup>26</sup>*

<sup>22</sup> Fair treatment at Work Report: Findings from the 2008 Survey; <http://www.berr.gov.uk/files/file52809.pdf>

<sup>23</sup> 6% x 26million; BIS SME stats 2009

<sup>24</sup> Present value calculated using standard HM Treasury Green Book social time preference discount rate – 3.5%

<sup>25</sup> Estimated using BIS SME 2009 stats for employees

<sup>26</sup> BIS SME Stats 2009

*E.g. The price of discrimination for a private sector organisation generally is:*

$$P(\text{privat}\theta) = e^{\alpha + \beta_1 + \sum_{j \in J} \sum_{i=4}^7 \beta_i X_j + \sum_{k \in K} \sum_{i=8}^{10} \beta_i (Z_k | \beta_1 = 1)}$$

### **Conclusion**

Whilst theoretically employer discrimination should be eliminated by competitive market forces, markets are rarely perfect. Furthermore, where labour market discrimination is observed, in reality the origin of an economic agent's preference is important, and may be endogenous to a particular society or legal framework, and therefore unaffected by simple rational economic behaviour or competition. Hence, despite the theoretical aspect of discrimination, and the likelihood that in the long-term competitive forces should be able to reduce it, there remains a case for a government to intervene, to ensure that this happens unabated by societal factors.

With regard to further work, creating a dataset, incorporating 1998, 2003 and 2008 editions of SETA may enable the regression analysis to be expanded, and a greater richness to the determinants of the implicit price of discrimination to be explored. Furthermore, it may be possible to improve the statistical robustness of the model we have presented by doing this work.

Also, further study, using similar simple methods, could be applied to the price of discrimination in the provision of goods and services. However, due to the non-extensive and incomplete nature of courts and general tribunal statistics, this would be a difficult and potentially impossible exercise.

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## Annex 1 (1)

### Model1: Basic linear bid function model

#### Model Summary

R	R2	Adj. R2	Std. Error of the Estimate
.078	.006	-.012	99228.86

#### Anova

	Sum of Squares	df	Mean Square	F	Sig.
Regression	2.273E10	7	3.247E9	.330	.940
Residual	3.751E12	381	9.846E9		
Total	3.774E12	388			

#### Coefficients

	Unstandardised Coefficients		Standardised Coefficients	t	Sig.
	B	Std. Error	Beta		
<b>(Constant)</b>	4147.0	30959.5		.134	.894
<b>Private</b>	12726.3	27322.0	.063	.466	.642
<b>Public</b>	4791.5	28499.3	.021	.168	.867
<b>Voluntary</b>	279.5	31666.6	.001	.009	.993
<b>Sex</b>	-3465.2	15953.3	-.017	-.217	.828
<b>Race</b>	-2580.7	16608.9	-.010	-.155	.877
<b>Disability</b>	9105.2	16479.2	.046	.553	.581
<b>Age</b>	-4904.3	18213.9	-.016	-.269	.788

### Model 2: Removal of outliers using Cook's Distance test and 99.5% one-tail (upper) confidence interval of dependent variable – Linear bid function

#### Model Summary

R	R2	Adj. R2	Std. Error of the Estimate
.243	.059	.040	5080.7

#### Anova

	Sum of Squares	df	Mean Square	F	Sig.
Regression	5.749E8	7	8.214E7	3.182	.003
Residual	9.190E9	356	2.581E7		
Total	9.765E9	363			

**Coefficients**

	Unstandardised Coefficients		Standardised Coefficients	t	Sig.
	B	Std.Error	Beta		
<b>(Constant)</b>	1908.8	1593.6		1.198	.232
<b>Private</b>	499.4	1401.9	.047	.356	.722
<b>Public</b>	2194.3	1469.4	.182	1.493	.136
<b>Voluntary</b>	103.2	1629.4	.006	.063	.950
<b>Sex</b>	2448.2	836.7	.224	2.926	.004
<b>Race</b>	2914.7	878.5	.222	3.318	.001
<b>Disability</b>	2752.7	858.9	.263	3.205	.001
<b>Age</b>	729.7	949	.046	.769	.443

*Model 3: Semi-log linear bid function, no removal of outliers, and inclusion of control variables for employer size*

**Model Summary**

R	R2	Adj. R2	Std. Error of the Estimate
.373	.139	.117	1.34915

**Anova**

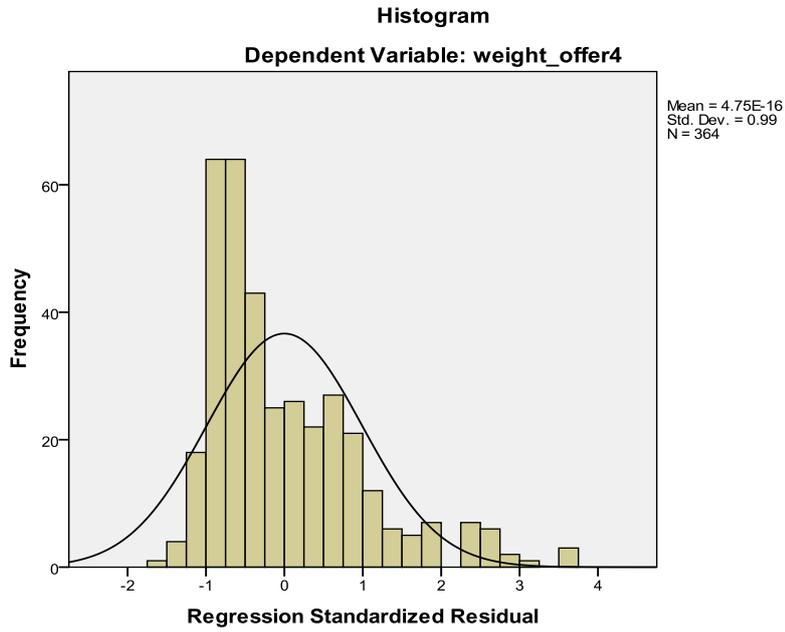
	Sum of Squares	df	Mean Square	F	Sig.
Regression	111.533	10	11.153	6.127	.000
Residual	688.040	378	1.820		
Total	799.573	388			

**Coefficients**

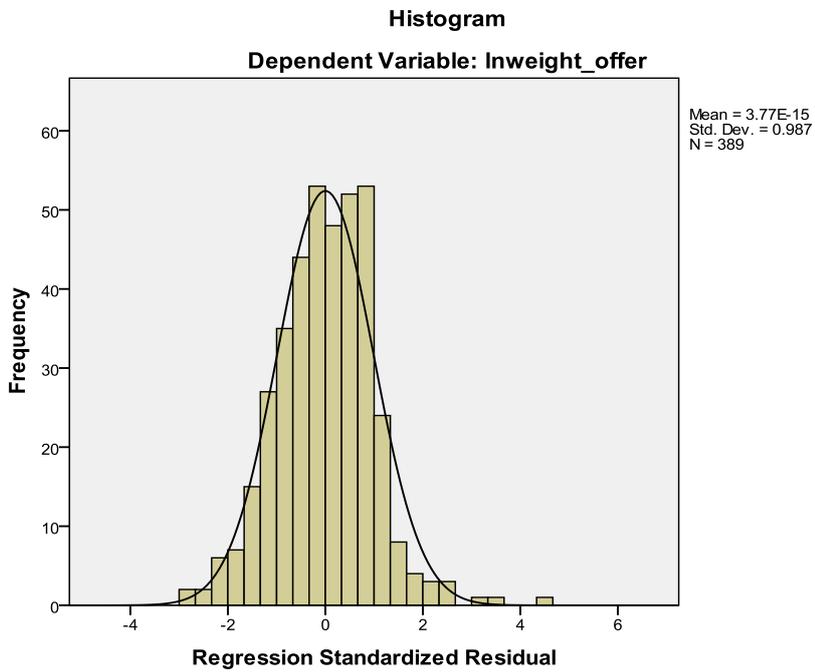
	Unstandardised Coefficients		Standardised Coefficients	t	Sig.
	B	Std.Error	Beta		
<b>(Constant)</b>	7.008	.467		15.007	.000
<b>Private</b>	.229	.378	.077	.604	.546
<b>Public</b>	.518	.393	.157	1.318	.188
<b>Voluntary</b>	.166	.440	.032	.377	.706
<b>Sex</b>	.465	.218	.154	2.134	.033
<b>Race</b>	.586	.228	.162	2.577	.010
<b>Disability</b>	.606	.226	.209	2.681	.008
<b>Age</b>	.004	.248	.001	.018	.986
<b>Size 1-99</b>	.106	.300	.037	.354	.724
<b>Size 100-249</b>	.431	.336	.106	1.281	.201
<b>Size 250+</b>	1.052	.312	.324	3.368	.001

Annex 2 (1)

**Standardised Residuals - Model 2 – Linear Bid function, excluding “outliers”**



**Standardised Residuals - Model 3 – Semi-Log Bid function**



## ***Annex 2: Equality impact***

### **Review of employer liability for third party harassment at work**

#### **INTRODUCTION**

This Equality Impact Assessment considers the impact of the provisions in the Equality Act 2010 relating to employer liability for third party harassment at work on, age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

The aim is to ensure that the implications for equality for all the protected characteristics have been properly assessed during the development of the review, taking account of views expressed, and to provide assurance that changes needed to mitigate any potential adverse impacts have been identified. This Annex considers the impacts on age, disability, gender reassignment, race, religion or belief and sexual orientation in line with the integrating policy of the Equality Act 2010.

We want the law to provide appropriate protection against the harmful discrimination people experience. However, we are unaware of any cases of third party harassment being brought forward since this protection was introduced in relation sex harassment, sexual harassment and harassment on grounds of gender reassignment in 2008. It is not clear, therefore, whether is the 'third party harassment' provisions are fit for purpose or if they are an appropriate or proportionate manner of dealing with the cases of third party harassment that they are intended to cover. We will therefore be consulting *on the need for provisions making employers liable for the harassment of employees by third parties over whom they have no direct control*.

#### **Methodology**

A full Equality Impact Assessment, for House of Lords introduction, was published in December 2009<sup>27</sup> covering the impact of the employer liability for third party harassment at work provisions in the Equality Act in respect of the relevant protected characteristics, (age, disability, gender reassignment, race, religion or belief, sex and sexual orientation). We consider that the impact of repealing the provisions is the reverse of the potential impact identified by the earlier published Equality Impact assessment.

Without these provisions employers will no longer be liable under the Equality Act for harassment of an employee by a third party. However, there are alternative provisions in place which may be able to provide adequate legal protection for employees who experience harassment by a third party, such as a customer or a supplier. Employees who experience this type of harassment will therefore be able to continue to be protected in relation to each of the relevant protected characteristics.

To help us assess the impact of removing the provision, we will be asking, as part of the consultation reviewing the third party harassment provisions, for evidence which indicates the likelihood that employees experiencing this type of harassment would seek to use an alternative means of redress.

#### **The Provision**

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<sup>27</sup> Equality Bill – equality impact assessment: December 2009 – ISBN: 9780108508714

Sub-sections 40(2)-(4) of the Equality Act 2010 extended employer liability for third party harassment of their employees in the workplace where the harassment is related to age, disability, race, religion or belief or sexual orientation.

Such protection already existed in relation to sex harassment, sexual harassment and harassment on grounds of gender reassignment.

## **OPTION 1 – do nothing**

### General impact

Retaining the existing employer liability in the Equality Act for harassment of their employees by third parties such as customers or suppliers provides a consistent level of protection for employees in relation to the protected characteristics of age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

So if an employee were to be subjected repeatedly to third party harassment in respect of any of these protected grounds, and if the employer knew this was happening and failed to take reasonable steps to stop it happening to that employee again, the employee would still be able to bring a claim against the employer.

It is clear that employees have the same rights in this respect for all the relevant protected characteristics.

## **OPTION 2 – remove the employer liability for third party harassment at work entirely**

### General impact

Removing employer liability for harassment of their employees by third parties over whom the employer does not have direct control means that if an employee were to be subjected repeatedly to third party harassment related to any of the protected characteristics, and if the employer knew this was happening and failed to take reasonable steps to stop it happening to that employee again, the employee would no longer be able to bring a claim under this provision against the employer.

There are alternative provisions in place which may be able to provide adequate legal protection for employees who experience harassment by a third party in relation to each of the relevant protected characteristics.

This option will reduce confusion for employers and their employees about their respective responsibilities and rights in this respect and make it clear that employees have the same rights in this respect for all the protected characteristics.

## **OPTION 3 – remove only the extension of the ‘third party harassment’ provision from Equality Act 2010**

### General impact

Retaining employer liability for harassment of their employees by third parties such as customers or suppliers for sex harassment, sexual harassment and harassment related to gender reassignment only, as was the position before the commencement of the Equality Act 2010, provides an inconsistent level of protection for employees across the relevant protected characteristics. This means returning to the unfair position where some of the relevant protected characteristics are covered but not others.

Therefore, if an employee were to be subjected repeatedly to third party harassment on any of these other protected grounds, and if the employer knew this was happening and failed to take reasonable steps to stop it happening again, the employee would not be able to bring a claim under this provision against the employer.

However, there are alternative provisions in place which may be able to provide adequate legal protection for employees who experience harassment by a third party, in relation to those protected characteristics not covered by the Equality Act 2010.

This option is likely to cause confusion for employers and their employees about their respective responsibilities and rights in this respect as employees will not have the same rights for all the protected characteristics. Retaining protection for some protected characteristics but not others, where there is no evidence to suggest that such a difference in available protection is justifiable, also creates unfairness across the protection afforded in relation to each of the protected characteristics.

## ***Annex 3: GEO survey of businesses on familiarisation with the Equality Act 2010***

### **Details of GEO Survey**

- (1) The survey was carried out between November 2010 and February 2011 and consisted of:
  - i. telephone interviews with representatives of ACAS, British Chambers of Commerce, British Retail Consortium, CBI, CIPD, Employers Forum on Age, Employers Forum on Disability, Federation of Small Businesses, Forum of Private Businesses, Opportunity Now (See **Table 1** for detailed description of representation of business by relevant organisations);
  - ii. a workshop on familiarisation costs and simplification benefits with around 75 small business members of the British Chambers of Commerce
- (2) Each interview lasted around 20 minutes. Interviewees were asked:
  - i. what proportion of their members would actively familiarise themselves with the new Act (as distinct from reactive familiarisation for a particular reason)
  - ii. whether they agreed with the proposition that the Act would make things simpler
  - iii. if so, to confirm particular examples of where time might be saved through simplification (e.g. where a complaint is made or a recruitment is undertaken) and to estimate, if possible, how large a proportion of time might be saved

#### *Summary of responses to question (i)*

- (3) No-one agreed with the assumption, in the Impact Assessment published in April 2010 for the Equality Act, that 100% of businesses/organisations would proactively familiarise themselves with the Act. Although interviewees made clear that they were only estimating, the range of estimates provided in the telephone interviews ranged from 10% (in two cases) to 50% (in one case). All agreed that large businesses (250+ employees, with their own in-house legal and HR advice) were more likely to proactively familiarise themselves with the Act than SMEs. In the BCC workshop, fewer than 10% of the approx 75 delegates were familiar with the Act

#### *Summary of responses to question (ii)*

- (4) There was general agreement that the Act would make things simpler as a result of bringing all the legislation into one place and removing inconsistencies. However, in the short term there would be a “learning curve” for those businesses which undertook proactive familiarisation.
- (5) Interviewees mentioned various sources of information and guidance to assist this process, including in-house lawyers/HR specialists (large firms), the GEO’s quick-start and summary guidance (the number of “hits” on the GEO Equality Act guidance page since July 2010 is approximately 140,000 to date), ACAS guidance, trade association newsletters, guidance and help lines.

*Summary of responses to question (iii)*

- (6) Interviewees confirmed that simplification examples could include preparation of a tribunal or court case and recruitment processes. They were reluctant to commit to an estimate of time saving but no-one disagreed with a suggested range of 5%-20% time saved in relation to these tasks as a result of simplification.

Table 1: Number and % of businesses represented by organisations interviewed

<b>Organisation</b>	<b>Number of Businesses Represented</b>	<b>Percentage of all UK Businesses<sup>28</sup></b>
BCC	100,000 +	8%+
CBI	200,000+	16%+
CIPD	135,000 +	11%+
FSB	215,000+	18%+
FPB	25,000+	2%+

*Source: various, including annual reports for organisations covered*

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<sup>28</sup> BIS SME Stats – Denominator used is UK Private Sector, all employers: 1,220,070



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