



Government
Equalities Office

Putting equality at the heart of government

**Equality Act 2010:
Employer liability for
harassment of
employees by
third parties**

Government response
to the consultation

October 2012

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Foreword

This Government is committed to equal treatment and equal opportunity. A culture of unnecessary, over-complicated and constantly increasing regulation does not help to achieve this aim or the Government's aim to help build and support a strong economy and sustainable growth.

Regulation remains a key concern of business; its complexity damages their competitiveness. That is why tackling regulations that serve no useful purpose is a key priority for the Government.

As part of this work, in a consultation in May, we set out our proposal to remove from the Equality Act 2010 those provisions which make an employer liable when an employee is harassed on more than two occasions by a third party, a customer for example, and the employer knowingly fails to take steps to prevent it happening to that employee again.

We are grateful to everyone who contributed their views. Those views and our reaction to them are set out in this document. Through responses to the consultation, many employers or their representative bodies have told us that they find this piece of legislation confusing and unnecessary. Whilst many responses expressed concern about repeal, this was mainly on the basis that this is the sort of legislation which is needed to ensure employers are mindful of their responsibilities towards their employees. We do not agree with this view in principle or in practice.

On the legislative provisions themselves, many respondents of all views were sceptical about their logic and their effectiveness. Some respondents therefore proposed further strengthening of the Act. But imposing additional liabilities on employers would go against our commitments to support growth and economic recovery.

Overall, we do not feel that responses to our consultation provided any substantial evidence that our proposal to repeal the regulation was wrong. We have therefore decided to proceed with the repeal of these provisions as soon as an opportunity arises.

Chapter 1: Executive summary

1. The Government is committed to striking the right balance between protecting people from discrimination and letting businesses get on with the job. As part of this process, the Government examined whether the existing legislation was a proportionate way of dealing with cases of third party harassment. Consulting on proposals to repeal third party harassment law in order to gather views on employers' liability is a key element of that work.
2. In our consultation which ran from 15 May to 07 August 2012, we proposed to repeal the provisions in section 40(2)-(4) of the Equality Act 2010. These make an employer liable for harassment of an employee by a third party, such as a customer – but only where the employer knows that that employee has been subjected to such conduct on two prior occasions but has not taken steps that would be reasonable in the circumstances to prevent that employee from being subjected to such conduct again.
3. We received 80 responses to the Government proposal to repeal the third party provisions in the Equality Act 2010 (“the 2010 Act”) which provided a wide range of views.
4. Of the 80 responses to this consultation, 16 (20%) agreed our proposal for repeal and 57 (71%) opposed it. Responses which agreed with the proposals came mostly from individual public, private and not-for profit sector employers and business organisations, although two individuals responded on their own behalf.
5. All business representative organisations supported repeal. Responses which disagreed with our proposal were mainly on behalf of public sector employers, unions and equality lobby groups. The small number of responses from legal organisations and bodies with legal expertise discussed legal arguments about the compatibility of our proposal with compliance with the relevant European Directives, and the extent to which the possible alternative avenues of legal redress might apply. Some legal respondents had represented either employees or employers in situations where accusations of harassment by a third party had been made. Invariably however, these were either settled without reaching an employment tribunal, or withdrawn.
6. Very few of the responses, whether from those opposed to or those in favour of repeal, offered quantifiable evidence or specific evidence based on actual situations and outcomes to support their views. It is clear that the legislation in its existing form is widely considered unsatisfactory, both by those favouring repeal (who want it to be scrapped) and those opposing repeal (who would like it to be strengthened and clarified). Several responses misunderstood the concept of third party harassment, and a larger number misunderstood its intention, which is to make the employer liable in specific situations, and not as a general way of encouraging employers to treat their employees better.
7. Taken as a whole, this response has not persuaded the Government that there is a need to re-think the proposals on which it consulted in May. The Government will therefore seek to repeal the third party harassment provision using the first available appropriate legislative vehicle.

Chapter 2: Overview of consultation feedback

8. The consultation¹ on our proposal ran from 15 May to 07 August 2012. We received 80 formal consultation responses: 68 from organisations, 11 from individuals, and one from the President and Regional Employment Judges of Employment Tribunals in England and Wales. We also received 19 campaign letters opposing our proposal
9. An analysis of the responses is provided in the following paragraphs.

What we proposed

10. In our consultation document, we proposed repealing the provision in the Equality 2010 Act which makes employers liable for repeated harassment of an employee by third parties over whom the employer does not have direct control, such as customers or clients.
11. Questions 1a to 3 in the consultation sought information about experiences of third party harassment from the point of view of employees, employers and those who have advised or acted for employees or employers.

Q1a: What we asked and what respondents said

Have you experienced conduct that you consider would count as third party harassment at work? [question for employees]

12. Only four responses answered 'yes' but none of the information provided suggested that the situation they raised would have been covered by the third party harassment provisions in the 2010 Act.

Our assessment

13. The responses suggest a level of misunderstanding of the third party harassment provisions in the 2010 Act.

Q1b: What we asked and what respondents said

You have stated that you have experienced conduct that you consider would count as third party harassment at work. Did you go on to make a claim to an employment tribunal against your employer? [question for employees]

14. Only one of the respondents to question 1a provided additional information at this point and said that they did not bring a claim against the employer as the incidents took place around two years prior to the commencement of the 2010 Act. However, this respondent said that the circumstances were reported to the employer's management and acted upon.

¹ Equality Act 2010: employer liability for harassment of employees by third parties

Our assessment

15. As the incidents the respondent refers to do not appear to fall under the third party harassment provisions, this information is not relevant to our consultation.

Q2: What we asked and what respondents said

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? [question for employers]

16. Only one employer answered 'yes' but provided no details. In addition, the Association of Colleges noted that their member Colleges have robust policies and procedures in place for promoting equality and diversity in the workplace, and for employees to raise grievances if they feel they have been unfairly treated in the course of their employment.

Our assessment

17. We have noted these responses.

Q3a: What we asked and what respondents said

Have you ever advised or acted for an employer who has had an allegation of third party harassment brought against it? [question for those advising or acting for employers]

18. Two respondents answered 'yes' to this question. The Employment Lawyers Association cited an example of an employee submitting a claim to their employer about having been racially abused by a social housing tenant.

Our assessment

19. Insufficient information was provided to indicate whether examples used would have fallen under the third party harassment provisions in the 2010 Act.

Q3b: What we asked and what respondents said

Have you ever advised or acted for someone claiming to have been the subject of conduct which would count as third party harassment? [question for those advising or acting for employees]

20. Nine of the 13 who responded to this question said that they had advised or acted for employees who considered they had been subjected to third party harassment. Amongst those with experience of advising potential claimants, Thompsons Solicitors and the TUC said they knew of a small number of claims which have been settled prior to a full employment tribunal hearing.

The TUC has supported a teacher with a third party harassment claim. The teacher had been “subjected to racist, sexist, homophobic and disablist language by pupils in nearly every lesson. He raised concerns with the head teacher and teacher in charge of pupil discipline but no action was taken. The claim was settled outside of an employment tribunal.”

21. UNISON states that it is aware of examples of its members experiencing serious and protracted homophobic harassment from a sectioned patient. The Gender Identity Research and Education Society “have been approached by trans people working on the checkouts of large supermarket chains who have been harassed by customers. The local managers were not acting to prevent this harassment. In these cases, the head offices of the companies were mindful of their legal responsibilities and, on being alerted to the problem, intervened to prevent its recurrence.”

Our assessment

22. It is evident that a small number of cases do occur when an employee takes initial action against their employer on the grounds that they have been subjected to third party harassment without the employer taking any, or appropriate action. In these situations, the claim appears either to result in a settlement by the employer or in withdrawal, but in either event without reaching the hearing stage at an employment tribunal.
23. Questions 4 and 5 in the consultation sought evidence of the impact of repealing the third party harassment provisions.

Q4: What we asked and what respondents said

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

24. Of the 80 responses to this consultation, 16 (20%) agreed our proposal for repeal and 57 (71%) opposed it. All business representative organisations supported repeal. However, very few of the responses, both those opposed to and those in favour of repeal, have offered significant quantifiable evidence or specific evidence based on actual situations and outcomes to support their views.
25. Responses which agreed came mostly from individual public, private and not-for profit sector employers and business organisations, although two individuals responded on their own behalf.
26. The British Retail Consortium stated that their members already do everything they can to ensure that their employees can work in an environment free from harassment. They consider that removing the third party harassment provisions will help remove “a potential regulatory burden on business while not affecting the other avenues of legal redress which an employee may use if they are subjected to conduct that would count as third party harassment”.
27. The EEF support repeal, but “do not regard the measure as a significant step in reducing the regulatory burden on employers”.

28. The Institute of Directors said that the third party harassment provisions “create uncertainty and risk for employers or potential employers, and can be very difficult to comply with in practice”.
29. Responses which disagreed with our proposal were mainly on behalf of public sector employers, unions and equality lobby groups. The small number of responses from legal organisations and bodies with legal expertise discussed legal arguments about the compatibility of our proposal with compliance with the relevant European Directives, and the extent to which the possible alternative avenues of legal redress might apply. One response reiterated the point noted earlier, that, although only one employment tribunal case of third party harassment exists, several employers have chosen to reach a settlement without the case reaching the tribunal.
30. Some of these responses suggested our consultation document underestimated the scale of third party harassment that occurs in the workplace.
31. The response for the Equality and Human Rights Commission (EHRC) identified some research which could be relevant here². However this did not drill down to a level where the discriminatory treatment complained of would be covered by the third party harassment provisions in the 2010 Act. This response did, however, recognise that it is difficult to determine the extent to which third party harassment occurs in circumstances which the Act would cover.
32. The Equality and Diversity Forum’s (EDF) response stated that third party harassment “is more likely to be an issue in the catering and hospitality and in the care sectors than in the kind of office where customers or clients are rarely present”. They referenced research which cites examples in the care sector of employee harassment by third parties, as well as other experiences of inequalities as regards employment rights and addressing discrimination in employment more generally. This research also indicates that the responses of the employers may be varied³.
33. The TUC echoed EDF’s view that, on the basis of information from their affiliates, third party harassment is a problem experienced by workers across many sectors, many of whom are in vulnerable positions such as lone care workers or migrant contract cleaners.
34. One of the arguments made relied heavily on the principle that employers are more likely to take their duty of care to their employees seriously if there is a possibility that they may be taken to an employment tribunal under a specific provision in law. For instance, Redbridge Equalities and

² a) The experience of lesbian, gay, bisexual and trans staff and students in higher education. Equality Challenge Unit (2009); b) National NHS Staff Survey 2011. The survey does not break down that discrimination into harassment and other forms of discrimination. http://nhsstaffsurveys.com/cms/uploads/NHS%20staff%20survey%202011_nationalbriefing_final.pdf; c) The British Retail Consortium’s Retail Crime Survey 2011 – page 45; d) Workplace aggression: the effects of harassment on job burnout and turnover intentions – Stephen Deary, Janet Walsh and David Guest (Work, Employment and Society 2011 25:742, at 744)

³ http://www.compas.ox.ac.uk/fileadmin/files/Publications/Research_projects/Labour_markets/Migrant_care_workers/MCW%20report%20-%20final%20-%20website%20version.pdf

Community Council stated that the legislation “correctly places a duty of care upon employers to take steps to protect their employees from such harassment”.

35. Unite’s response stated that “Our aim in all matters of harassment and discrimination is that prevention should be our goal, and these measures assist in this process, ensuring employers take positive steps to provide a safe environment for their employees as well as their customers or clients”.
36. The Open University expressed the view that the third party harassment provisions should be seen as “a deterrent for the small proportion of employers who do not recognise this benefit and who do not act to protect employees where situations arise or become known. The majority of businesses therefore have nothing to fear from the regulations”. They also stated that the provisions are “important for creating a productive working environment.”
37. The Law Society expressed concern that “any deterrent effect of the legislation, which has supported and encouraged best practice amongst employers and potentially reduced incidents of third party harassment at work would be lost”.
38. Age UK and Stonewall Housing consider that it is too soon to repeal any provisions in the 2010 Act and that any proposals to this effect should arise out of the post-implementation review of the 2010 Act planned for 2015.

Our assessment

39. Although this question goes to the heart of the consultation, very little of the response to it, either for or against, was directly based in evidence. Those in favour of repeal adduced a variety of general arguments. Those against primarily took the view that a legislative basis is required to ensure employers fulfil an obligation to protect staff against unwanted behaviour by customers and other third parties. We note these arguments, though we do not accept the implication that employers can only be encouraged to do “the right thing” through the threat of legislation. We also disagree with the legal argument advanced, that third party harassment provisions are required under the Equal Treatment Directive⁴ and that to repeal them would be regression. It does not explicitly, nor even implicitly, require a Member State to impose vicarious liability on an employer nor negligent failure to take steps. Since the provision for third-party harassment is not connected to the implementation of the Directive, this repeal cannot be described as constituting regression.

⁴ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, amending Council Directive 76/207/EEC

Q5: What we asked and what respondents said

If this provision were removed, is there any other action that the Government should take to address third party harassment at work?

40. Thirty-four responses provided views on what action the Government should take if the third party harassment provisions were removed. An overwhelming majority of these responses stated that there should be awareness-raising for employers, making specific mention of practical information and/or guidance to encourage best practice. Another view was that the 'three strikes' element the third party harassment provision in section 40 of the 2010 Act should be removed with a view to strengthening protection for employees.
41. Thirteen respondents said that there is nothing further that the Government needs to do. In the main, they expressed the view that there is already adequate provision in existing legislation such as the Protection from Harassment Act 1997 and the harassment provisions in the 2010 Act, together with the employers' common law general duty of care towards their employees.

Our assessment

42. We agree that the way to influence behaviour so that the small number of employers, or employers in specific sectors where third party harassment is more apparent, is through raising their awareness of their duty of care to their employees.
43. Questions 6 to 9 in the consultation sought views on our impact assessments of our proposal.

Q6a: What we asked and what respondents said

Do you think that there are further costs and benefits to repealing the third party harassment provision which have not already been included in the impact assessment? Please provide any comments you have on the assumptions, approach or estimates we have used.

Q6b: What we asked and what respondents said

Comment on the assumptions, approach or estimates we have used.

44. Fifteen responses were made to one of more of these questions. A number of these responses, including a range of unions, Tate, the National Aids Trust and the Regional Equality and Diversity Partnership suggested that the impact assessment does not address the increased cost of discrimination. They refer to this in terms of indirect costs such as the cost of lost productivity and recruitment costs due to employees who were not adequately protected either leaving their job or taking time off because of stress or depression.

45. A different point made by Stonewall Housing was that “One case ruling of third party harassment is mentioned within the consultation and that should be enough to show that there is a need for such a clause in the Act as many other cases may have been settled or withdrawn before tribunal.”
46. A further point made by the Law Society was “It is suggested that the lack of cases pursued under section 40 of the Equality Act 2010 indicates there is little evidence of this type of harassment occurring and as a result, the provisions regarding third party harassment are unnecessary. We would be cautious about drawing such a conclusion. In our experience, harassment on all grounds is not uncommon”

Our assessment

47. Government notes the points made. We agree with respondents that the lack of hard evidence and specific case-law concerning third party harassment means that the impact assessment has to contain a number of assumptions the basis for which may be open to question. We do not agree that the existence of a single tribunal ruling on a legislative provision automatically validates the need for that provision.
48. Whilst we had noted the lack of cases reaching the employment tribunals hearing stage, this is not the basis on which we proposed repeal. Consultation responses suggest that harassment of employees by third parties does occur and we do not dispute this. However, the third party harassment provisions in the 2010 Act are not about providing direct protection to employees who are subjected to third party harassment, but about placing a liability on employers when they fail to address it in specified circumstances.

Q7: What we asked and what respondents said

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.

49. We received fifteen responses to this question, with the majority taking the view that numbers would be very low.

Our assessment

50. The Government notes these assessments.

Q8: What we asked and what respondents said

Does the consideration of the impact on equality in the impact assessment properly assess the implications for people with each of the protected characteristics? Please explain your answer.

51. Four respondents considered the impact on equality was properly assessed but 19 did not.
52. The key concern, expressed by some unions, the EHRC, JUST West Yorkshire and the Discrimination Lawyers Association (DLA), is that our consideration of the impact on equality in the consultation document did not assess the likely impact of repealing the third party harassment provisions on employees with particular protected characteristics, but focussed instead on how this would have the same impact on people with different protected characteristics. The EHRC also suggested that it would be advisable to base our consideration on the evidence base about the actual numbers of claims lodged at tribunals, as analysis of actual claims received would help assess whether removal of the current provision would have more of an impact on people with certain protected characteristics. The DLA further commented that “there is no evidence that the government has considered ways in which the adverse equality impact of its preferred option could be mitigated.”

Our assessment

53. We accept that our policy equality statement does not draw out the potential effect of repeal on specific employee groups who have a particular protected characteristic. One of the purposes of the consultation was to seek such evidence. This did not provide any significant amount of hard evidence, although the June 2009 Report 'Migrant Care Workers in Ageing Societies: Research Findings in the United Kingdom' brought to our attention in EDF's response⁵ provides data to suggest over-representation of women in the social care sector. A number of union responses suggested that those who would be most disadvantaged would be women, black and minority ethnic, lesbian, gay, bisexual and transgender, disabled and older employees. The response from Capability Scotland also suggested that younger people and women, who are likely to be over-represented in public facing industries such as tourism, retail, care and personal services, would be disproportionately affected by repeal. Assuming these assumptions are borne out in practice, consultation responses failed to cite examples where an employer had knowingly failed to take reasonable steps to prevent it.
54. HM Courts and Tribunals Service do hold numbers of discrimination claims lodged. However, these are not broken down into categories of discrimination. It is therefore not possible to identify the proportion of discrimination claims which include complaints of harassment. For this reason, this is not a viable evidence base that we can use.

⁵ See footnote 3

55. It remains the case, therefore, that we have little quantifiable evidence that people with specific protected characteristics would be disadvantaged by our proposal.
56. Cases of employer liability for third party harassment, like all discrimination cases, are fact specific. So depending on the facts of a case, people with the protected characteristics listed above may be more likely to seek a legal remedy under the harassment provisions in the 2010 Act.

Q9: What we asked and what respondents said

Does the Justice Impact Test in the impact assessment properly assess the implications for the justice system?

57. Of the 18 responses to this question, seven were content that we had correctly assessed the impact on the justice system of our proposal for repeal. Those who did not consider that this was the case provided a range of comments about the general impact of repealing the third party harassment provisions and not impact on employment tribunals and courts.

Our assessment

58. The justice impact test is part of the impact assessment process that looks at the impact of policy right across the justice system and covers legal aid, courts and tribunals, prison and probation services, prosecuting bodies and the judiciary. The key reason for carrying out a justice impact test is to consider whether the proposal will increase the volume of cases going through the courts. Nothing in the consultation responses suggests we were wrong in our assessment that a formal justice impact test is not required.

Chapter 3: Conclusion and next steps

59. The consultation asked for evidence from employees, employers and those advising or acting for employees or employers about their experiences of third party harassment. Most of the information provided was anecdotal and there was some acknowledgement that it is difficult to unearth robust evidence on the scale of third party harassment at work. It is particularly difficult to identify the prevalence of situations where employers know harassment is happening but fail to take reasonable steps to prevent their employees from being subjected to such conduct in the future.
60. Some responses provided information about situations which did not count as third party harassment covered by section 40(2)-(4) of the 2010 Act. This appears to suggest a degree of misunderstanding about what is covered by these provisions in the 2010 Act. There is also misunderstanding about the purpose of such a provision. The purpose of section 40(2)-(4) of the 2010 Act is not to influence employers generally to treat their employees well, but to provide a specific legal remedy for an employee who is subjected to repeated harassment at work by third parties over whom the employer does not have direct control, such as customers. This particular section applies by making the employer liable if that employer knows this conduct has happened to that employee on at least two prior occasions and fails to take action that would be reasonable in the circumstances to prevent that employee from being subjected to further harassment by third parties.
61. Nothing in the consultation responses has persuaded us that there is a case for retaining the third party harassment provisions. There is a lack of robust evidence to support calls for the retention of the provision, and in particular little evidence to support the idea that the single employment tribunal case since 2008 in some way represents the “tip of the iceberg” (we note, but do not draw conclusions from, a small number of instances where respondents have mentioned an out of court settlement). We will therefore repeal the third party harassment provisions in the 2010 Act using the first appropriate legislative vehicle.

Organisations which responded

Organisations which provided formal consultation responses are as follows:

Acas	NAT (National AIDS Trust)
Age UK	National Union of Teachers
Association of Colleges	Network Rail Infrastructure Limited
Association of School and College Leaders (ASCL)	NHS Employers
Association of Scottish Police Superintendents	Northampton Trade Union Council
ATL (the education union)	Police Federation of England and Wales
Barnardo's	President and Regional Employment Judges of the Employment Tribunals in England and Wales
Bristol Disability Equality Forum	Prospect
British Retail Consortium	Rainbow Group
Capability Scotland	Redbridge Equalities and Community Council
Chesterfield Borough Council	Regional Equality and Diversity Partnership
Croydon Area Gay Society	Royal College of Nursing
Discrimination Law Association	Scottish Trades Union Congress
Disability Charities Consortium	Scottish Discrimination Law Association
Diversity Network for Cornwall & The Isles of Scilly	Squire Sanders LLP
EEF	Stonewall
Employment Lawyers Association	Stonewall Housing
Equality and Diversity Forum	Tate
Equality and Human Rights Commission	The Employment Law Bar Association Committee
Equanomics UK	The Law Society
FDA	The Open University
Gender Identity Research and Education Society	The Royal College of Midwives
Institute of Directors	Thompsons Solicitors
JUST West Yorkshire	Transport Salaried Staffs' Association (TSSA)
Justices' Clerks' Society	TUC
Lewis Silkin LLP	UNISON
LGBT Consortium	Unite – the union
Local Government Association	University and College Union
Lyons Davidson Solicitors	University of Oxford
Martin Searle solicitors	Velindre NHS Trust
Midland Heart	Wolverhampton City Council
NASUWT	

Note:

The list excludes organisations that asked for their names not to be made public or for their response to be in confidence.

In addition to the above list of organisations there were also a number of responses from individuals.



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