

PROFORMA FOR THIRD PARTY HARASSMENT CONSULTATION RESPONSES

The consultation closes on 07 August 2012. Please let us have your response by that date.

When responding, it would be helpful if you could provide the following information.

Please fill in your name and address, or that of your organisation if relevant. You may withhold this information if you wish, but we will be unable to add your details to our database for future consultation exercises.

Contact details:

Please supply details of who has completed this response.

Response completed by (name):

Position in organisation (if appropriate):

Name of organisation (if appropriate):

Address:

Contact phone number:

Contact e-mail address:

Date:

Consultation confidentiality information

The information you send us may be passed to colleagues within the Home Office, the government or related agencies.

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory code of practice with which public authorities must comply and which deals, among other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.

I would like my response to remain confidential (please tick if appropriate):

Please say why

An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

You or your organisation

Q(i) In what capacity are you responding?

As an individual (if so, please go to Q1 in the main comments section)

On behalf of an organisation (if so, please go to Q(ii) below)

Other (please specify)

Q(ii) Is your organisation
(please tick the box that applies to your organisation)

A local authority (including health authority) or local authority organisation

An equality lobby group or body

A statutory body

An organisation representing employers

A professional organisation

A trade union or staff association

A legal organisation

Other (please tick box and specify)

Q(iii) If responding as an employer, how many people do you employ? (select one)

Between 1 and 5 employees

Between 6 and 14 employees

Between 15 and 49 employees

Between 50 and 249 employees

250 employees or more

Q(iv) **If responding as an employer please indicate which sector best describes you (select one):**

Legal services

Construction and/or building design

Communications

Wholesale and retail trade

Leisure – hotels, restaurants, pubs

Leisure – cinemas, theatres, museums

Leisure – other

Distribution/transport

Financial and/or business services

Electricity, gas and water supply

Advice and/or information services

Public administration

Education/training

Health and social work

Charity/voluntary work

Other (please tick box and specify)

Note:

In addition to the completed proforma, you can also send other supporting information if you so wish.

Completed forms should be e-mailed to the following address:-

thirdpartyharassment@geo.gsi.gov.uk

If you are posting the form please send 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

Thank you for completing this response form.

Section A: What are your experiences of third party harassment¹

Question 1a: (Question for employees)

Have you experienced conduct that you consider would count as third party harassment at work?

Yes

No

Don't know

Prefer not to say

If you have ticked yes, it would be helpful to understand more about what form of conduct you experienced. Please use the space below to provide further details and go to Question 1b

¹ See Annex 1 for the definition of 'third party harassment' in the 2010 Act

Question 1b: (Question for employees)

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?

Yes

No

Prefer not to say

If yes, if you are happy to do so, please use the space below to outline what happened to your claim once you lodged it with the employment tribunal

If no, if you are happy to do so, please use the space below to outline your reason for deciding not to bring a claim against your employer

Question 2: (Question for employers)

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?

Yes

No

Prefer not to say

If yes, if you are happy to do so, please say what happened with the claim

Question 3a: (Question for those advising or acting for employers)
Have you ever advised or acted for an employer who has had an allegation of third party harassment brought against it?

Yes

No

Prefer not to say

If yes, if you are happy to do so, please give details

The Firm represented the Respondent in an Employment Tribunal complaint of third party harassment.

The Claimant was a teacher and was being sexually harassed by students. She had made a number of complaints to other tutors about it.

We advised the Respondent that they had reasonable prospects of defending the claim on the basis that they took reasonably practicable steps to prevent the harassment; they had a clear policy on harassment, students were required to sign a handbook when they started that contained details of the policy, tutors would go through the handbook with students to make sure that they understood, all of the students were disciplined in relation to their conduct, and staff were encouraged to report such incidents.

We felt that arguably the Respondent could have gone further – e.g. they had not discussed the issues that the Claimant had raised with her and had not provided in-depth training to students and employees – but we advised that they had done enough to satisfy the “reasonably practicable steps” defence.

The matter also contained a claim for constructive unfair dismissal, as the Claimant had resigned. Given that the harassment had gone on for some time and the Claimant had suffered injury to her health, we advised the Respondent that, if the Claimant was successful, injury to feelings could be in the region of £10,000 - £15,000.

The matter settled prior to Hearing for £10,000.

Question 3b: (Question for those advising or acting for employees)

Have you ever advised or acted for someone claiming to have been the subject of conduct which would count as third party harassment?

Yes

No

Prefer not to say

If yes, if you are happy to do so, please give details

We acted for the Claimant in a claim for unfair dismissal and third party racial harassment. The Claimant worked for a department store. A customer would come into the store, call her a "black bitch", and throw their receipt in her face. The Claimant complained on at least two occasions and asked to be moved to a different store or for the customer to be barred, neither of which happened. However, the store manager did speak to the customer when he next came in and asked him not to approach the Claimant and the Claimant was informed that she should leave the till area next time the customer came into the store.

The matter settled for £3,000. Injury to feelings had been pleaded at £8,000 - £10,000.

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?

Agree

Disagree

Neither agree nor disagree

Don't know

Please use the space below to explain your answer

We disagree that the third party harassment provision should be repealed in whole or in part.

We do not agree that the small number of decided cases under section 40(2) Equality Act 2010 is a sound basis for repealing the provision. In the right circumstances, s40(2) provides a valuable recourse for employees, as is demonstrated by the examples given above and, we would suppose, examples given in other responses to this consultation.

We do not agree with the government's contention that other means of redress are already available which can be used in the same circumstances as s40(2). We shall deal with the examples given in turn.

Duty of care – As is alluded to in the consultation document, an employee would need to have suffered physical or psychiatric injury as a result of the harassment to be able to rely on the duty of care. Often, this will not be the case; it does not need to be the case under the third party harassment provisions.

Health and safety – Health and Safety at Work Act 1974 does not provide a remedy in such circumstances per se. As with the duty of care, an employee would need to have suffered physical or psychiatric injury to bring a claim for compensation caused by a breach of duty.

General harassment provisions in the 2010 Act – The cases referred to in footnote 10 of the consultation document essentially follow the Employment Appeal's decision in the case of *Pearce v Governing Body of Mayfield Secondary School* [2000] IRLR 548. The fundamental difference between the principle set out therein and the protection afforded by s40(2) is that the case law requires that the employer's inaction be on the ground of the relevant protected characteristic. Thus in *Gravell* the employer's alleged explicitly stated policy of ignoring racial harassment by third

parties would render the employer liable, but in Conteh a manager's inaction in response to a complaint for reasons other than race would not render the employer liable, even where the complaint itself was of racial harassment.

S40(2) removes the requirement for an employer's inaction to be because of (in the language of Equality Act 2010) the relevant protected characteristic.

S40(2) arguably provides greater certainty for employers than the said case law. In Sheffield City Council the employer was held to have provided sufficient protection to the employee from February to April 2008; however, after 7th April 2008 they had not done enough. This was plainly a fact-based judgment. The advantage to employers of s40(2) is that they know that, if they are made aware of two incidences of harassment by a third party and fail to take reasonably practicable steps to prevent further harassment, they will be liable. Uncertainty will remain over what constitutes reasonably practicable steps in the circumstances, but this uncertainty is amplified by the other uncertainties in the protection for employees that is afforded by case law.

Constructive dismissal – Without doubt the circumstances envisaged by s40(2) will give rise to a valid claim for constructive unfair dismissal. However, this is an unattractive remedy for an employee, given that it requires them to resign and, therefore, suffer a period without earnings (whether or not they are subsequently compensated).

Protection from Harassment Act 1997 (“PHA”) - It is difficult for employees to establish the gravity of conduct necessary to establish liability under PHA. The case of Hammond v International Network Services UK Ltd [2007] EWHC 2604 sets out that the conduct must be of a nature that would sustain criminal liability, with the consequence that very few PHA claims get off the ground. In the case of Veakins v Kier Islington [2009] EWCA Civ 1288 CA, the Court said that it would be rare for workplace cases to give rise to liability under PHA. In our experience Judges seem reluctant to use this form of redress in employment-type situations.

Further, PHA provides for vicarious liability of an employer for an employee, but does not provide for vicarious liability where third parties, such as customers, are involved. It would appear likely that third parties would not have sufficient funds to make it worth an affected employee's while seeking legal redress.

Further, PHA claims must be issued in the civil courts, with increased costs for employees and employers in pursuing these claims and the risk that the losing party will have to pay their opponent's costs.

It should be noted that in a PHA case an employee does not have to show the harassment was on a prohibited ground and they have 6 years (rather than 3 months) to bring a claim.

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

Yes

No

Don't know

Please use the space below to provide further details

Plainly a legislative solution is not envisaged.

We consider that the most effective prevention is through education on issues of equality and diversity. We note that this is within the compass of the Equality and Human Rights Commission and is a function that can be fulfilled by ACAS.

Question 6a: 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?

- Yes, I think there are further costs to include
- Yes, I think there are further benefits to include
- No, I think all costs and benefits have been included
- Don't know

If yes to further costs, please use the space below to provide detail

The cost to general well-being and the economy of employees suffering third party harassment without adequate redress does not appear to have been considered. Costs to the economy could include employees leaving jobs and therefore not receiving an income as a result of such treatment, the effect this would have on the company for which they worked, and reduced motivation and productivity of employees who are forced to suffer such treatment.

If yes to further benefits, please use the space below to provide detail

N/A

Question 6b: Please use the space below to provide any comments you have on the assumptions, approach or estimates we have used

Please use the space below to provide detail

N/A

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

Number of cases

Please use the space below to explain your answer

We do not feel able to provide a reliable estimate of how many third party harassment claims might be brought each year throughout the country.

However, we can confirm that, in the 20 months since Equality Act 2010 was introduced, we have advised on 2 such cases. We receive approximately 2,500 instructions per year. Therefore, approximately 0.05% of instructions received incorporated an element of third party harassment.

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?

Yes

No

If no, please use the space below to explain your answer

We consider that repealing s40(2) will impact most significantly on people in roles that are traditionally more transient in nature, such as bar and restaurant workers. Such roles are more likely to be filled by the young.

Question 9: Does the Justice Impact Test in the impact assessment properly assess the implications for the justice system?

Yes

No

If no, please use the space below to explain your answer

Thank you for completing this response form.

Responses will be used to help the Government assess your views on its proposal to repeal the employer liability for third party harassment of their employees provision – section 40(2)-(4) of the Equality Act 2010.