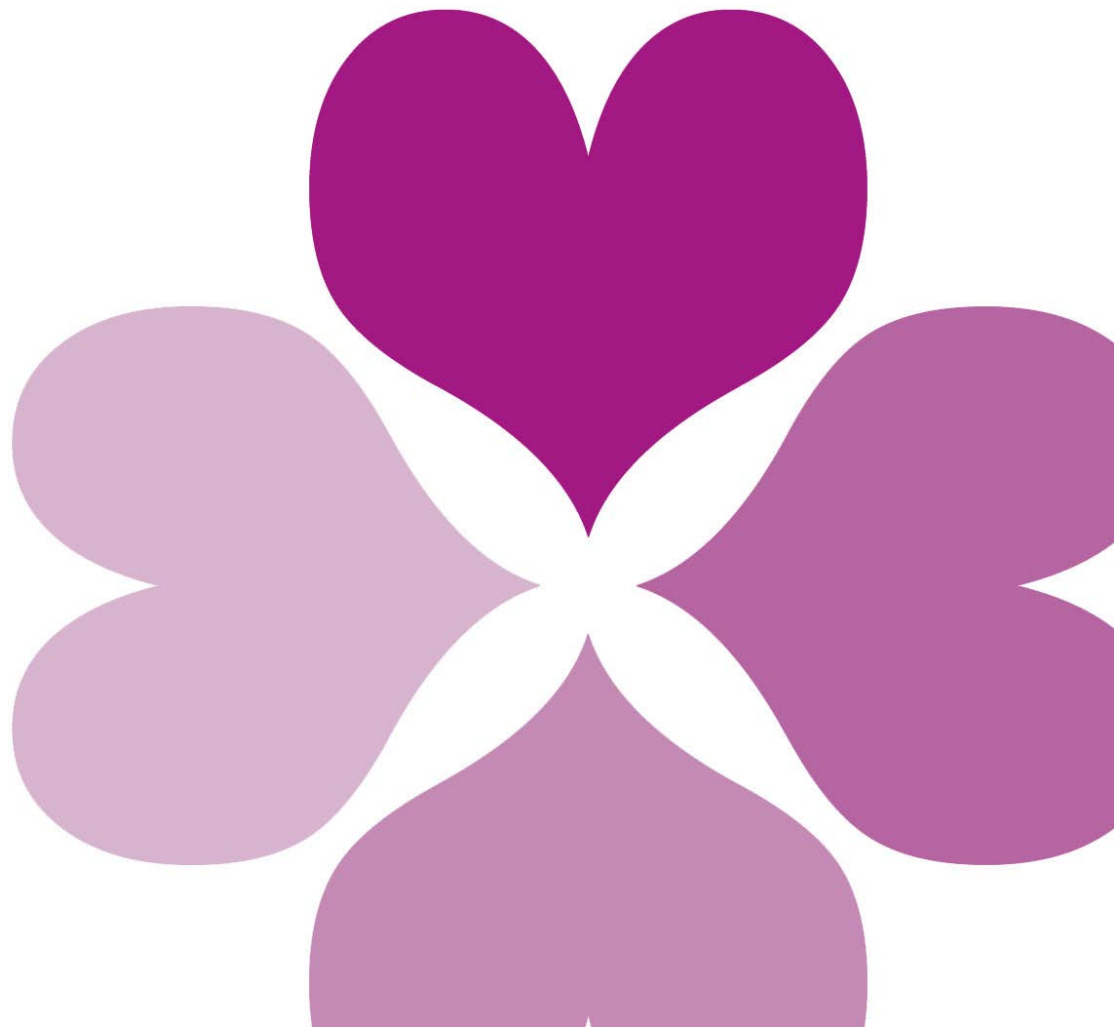




Equality Act 2010 Employer Liability for Harassment of Employees by Third Parties

CONSULTATION RESPONSE

August 2012



Equality Act 2010 - Employer Liability for Harassment of Employees by Third Parties

CONSULTATION RESPONSE

1. Introduction

The consultation document provides us with an important opportunity to shape key equalities regulation; with an aim to creating processes that are efficient, fit for purpose and having the desired outcome for all concerned parties. We have made a considerable effort in carefully putting together our response based on direct feedback from key staff from across the organisation.

2. Midland Heart

Midland Heart is one of the largest social housing, care and regeneration groups in the country and the largest based in the Midlands. We operate across over 55 local authorities, but have a particularly large number of properties in Birmingham, Wolverhampton, Coventry, Stoke-on-Trent and Leicester. Altogether, Midland Heart has close to 32,000 homes, including nearly 22,000 general needs rented properties, over 2,000 shared ownership homes and a very significant care and support provision of nearly 6,500 units of accommodation. Each year, we have invested over £100 million in improving homes, building new ones and making neighbourhoods more desirable and sought after places to live in.

Traditionally, Social Housing has accommodated and supported some of the most vulnerable and needy in society - including those on the lowest incomes - with higher health inequalities and the potential for high care needs, often unable to access any other form of housing. We believe that housing has now become a crucial part of the solution to the issues now confronting us.

Equality and diversity has, of course, always been at the very core of our work in meeting the needs of the diverse communities in which we operate. As part of our commitment to equality, we have been concerned to ensure that the diversity of our customers and staff in terms of race and ethnic origin, gender, transgender, disability, sexuality, religion, belief or age, social status or any other characteristics is fully acknowledged. This applies to the quality of homes we develop, how we recruit and manage people and, importantly, the services we provide.

The Equality Act 2010 strengthened previous equalities legislation and has been instrumental in the sector for the development of policies that not only focus on the attainment of all aspects of equality for customers, suppliers and key stakeholders but also importantly, for staff. Our 1700 members of staff are crucial to the provision of our homes and services we operate; and we are committed to our duty to protect them from all manner of discrimination, harassment or unfavourable treatment.

3. Summary of Our Response

- The consultation seeks views on the Government’s proposal to remove a section of the Equality Act 2010 which makes employers liable for harassment of their employees by third parties over whom they do not have direct control, such as customers, clients or suppliers. The key driver behind the repeal of this piece of legislation is the Government’s aim to tackle “regulations that serve no useful purpose”. The consultation presents this as a benefit to employers in that current processes appear to be lengthy and cumbersome.
- In principle we feel this aim is important; as it seems to address a key concern for a majority of businesses; likewise we feel that this would be a particularly hard process to manage for organisations such as Midland Heart who have a considerable proportion of third parties who we do not have direct control i.e. the customers who live in our 32,000 homes.
- However, since the provision of sanctions for third party harassment are fairly new and we have not had any experience of the provision, we feel it is still too early in the ‘lifetime’ of the provision to consider it’s removal without causing potential detriment to those who may rely on this action currently and in the future. Indeed there has only been one such case that has been brought to tribunal for the new provision; which could be attributed to a number of factors i.e. that the provision is still new, the provision has focused employers into better processes to address third party harassment before it reaches tribunal or more worryingly that cases are not reaching tribunal even though this is the outcome sought.
- Whilst we are of the strong belief that our own internal policies, procedures and processes endeavour to protect our employees from third party harassment on any level if the provision were to be removed or not, this can not be guaranteed across all business. Further work should be conducted before removing the provision which sought to focus employers in this area.
- We feel that if the provision were to be removed and at some level in addition to it; the Government should provide a mandatory level of protection against third party harassment with particular guidance for some business specific areas

4. Detailed Response

Midland Heart welcomes the opportunity to provide a response to the Government’s proposal to repeal the provision of the third party harassment legislation.

Please see attached Appendix 1 - Pro Forma for Third Party Harassment Consultation Responses

**Appendix 1
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):	<input type="text" value="Martina Honeyghan"/>
Position in organisation (if appropriate):	<input type="text" value="Research & Policy Officer"/>
Name of organisation (if appropriate):	<input type="text" value="Midland Heart"/>
Address:	<input type="text" value="20 Bath Row
Birmingham
B15 1LZ"/>
Contact phone number:	<input type="text" value="0845 850 1020 Ext: 5831"/>
Contact e-mail address:	<input type="text" value="martina.honeyghan@midlandheart.org.uk"/>
Date:	<input type="text" value="6<sup>th</sup> August 2012"/>

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)

Registered social housing provider

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)

Housing provider

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 harassment?¹

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

- N / A

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

- N / A

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

- We have had one formal complaint that related to third party harassment. The complaint was originally submitted as a grievance. After an investigation it was agreed that it fell within the remit of our Harassment Policy and Procedure.
- A hearing was arranged to address the issues and was chaired by an impartial Senior Manager. The employee had the option to be represented at the hearing but declined this offer. The case concluded with an agreed outcome and the staff member did not appeal this decision.
- Both Midland Heart and the staff member concerned felt that the organisation's Harassment Policy & Procedure addressed the issue in a proportionate manner.
- We also have had some minor complaints of verbal abuse from customers which have not been taken forward formally and have been addressed at point of contact. We do expect this in the nature of the challenging groups we house and have strong mechanism in place to address this mainly in our policies, procedures and training for staff to deal with situations such as this.
- It would be useful for a more detailed exploration of the only case that has had a decision at tribunal (**Blake v Pashun Care Homes Ltd [2011] EqLR 1293**) to be made available for organisations within the remit of this consultation.

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

- N / A

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

- Midland Heart has an established Staff Forum, consisting of staff from across the business. The main remit of the Staff Forum is to represent and act on the behalf of staff; ensuring that their views are heard. They also play a key role in offering guidance to employees about topics of concern.
- The Midland Heart Staff Forum confirm that whilst they have not had any formal report concerning 3rd party harassment nor have had a request to act on behalf of any staff member experiencing such harassment; they are very aware of informal discussions across the business where frontline staff have complained about verbally abusive customers. Our Staff Forum, correctly feel that this translates as 3rd party harassment although staff have chosen not to report this formally.
- Whilst there are a number of reasons why such incidents are not reported formally e.g. formal training enables most staff members to deal with incidents at the point of contact or staff members escalate this to a Senior team member and again this is dealt with; we do not take lightly that our staff may be subject to numerous instances of third party harassment without our knowledge. We have produced in-depth briefings for all staff members to inform them of the third party clause to the Equality Act 2010 to provide them with the tools they need should they feel it necessary to make a complaint formally. We would say this that this has been driven by the provision.

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

- 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 Equality Act 2010 Act or those in the 1975 Act; which they replaced and extended. At this time we do not feel that the provision has been given a period long enough to provide any real evidence of the practices the Government wishes to eradicate as part of the Red Tape challenge. We would like to see some further evidence of this as we have not had any experience of the process ourselves.
- We recognise, however, that the majority of claims that are brought to an employment tribunal do not reach the hearing stage. The Ministry of Justice and HM Courts & Tribunals Service Employment Tribunals statistics for 2010 - 11 show that of the 32,510 discrimination cases disposed of in the year to March 2011, the greatest numbers were either withdrawn (35%) or ACAS - conciliated settlements (37%). Data does not show that any of these cases include a claim of third party harassment.
- As a business we do recognise the potential challenges the provision may incur for our organisation in terms of the customers we provide homes for or the contractors we do not have direct control of subjecting our staff members to any form of harassment.
- However, due to the focus of the provision as an organisation we have numerous policies that would cover third party harassment and staff may use these to address any issues if needed. These policies are open to all staff and would cover any complaints should the provision be repealed. They include:
 - Code of Conduct
 - Harassment Policy and Procedure
 - Preventing Bullying in the Workplace
 - Grievance Policy and Procedure
 - Single Equality Scheme & Action Plan

- Dignity in the Workplace
- We also have a Staff Forum who acts on behalf of our staff. Staff can seek confidential advice and guidance on a range of issues. Staff may choose to have a member of the Staff Forum represent them at formal meetings. As an organisation we provide an Employee Assistance Programme. The programme provides staff with free, confidential advice on a wide range of issues.
- Whilst we are of the strong belief that our own internal policies, procedures and processes endeavour to protect our employees from third party harassment on any level if the provision were to be removed or not, this can not be guaranteed across all businesses. Further work should be conducted before removing the provision which sought to focus employers in this area.

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

- If the provision were removed the Government should proactively raise awareness of what third party harassment entails and find ways through existing legislation to enforce organisations to have the internal policies and procedures in place to address any issues that third party harassment may raise. The Government should provide detailed guidance and a mandatory minimum level of internal functions to safeguard employees from third party harassment.
- We feel that if the provision were to be removed and at some level in addition to it; the Government should provide a mandatory level of protection against third party harassment with particular guidance for some business specific areas such as where organisations such as Midland Heart work with service users who are particularly abusive, and where we receive funding to do so.
- The Government said that employers are already legally required to take "reasonable care" of the health, safety and wellbeing of their employees at work. This responsibility, enshrined in case law and health and safety legislation, provides "adequate protection" for employees whose employers are aware of inappropriate action by third parties. This would need to be made more prominent than 'reasonable' if the provision was removed.
- While the Government feels the current provision is not fit for purpose it does provide a level of consistency in terms of the action that can be taken; if this was removed there would need to be a standard across all sectors with guidance for those who may have exceptional circumstances.

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

- While we feel we do not have enough information about the provision and the case that has had a decision at tribunal, we do feel that the Government should give consideration in the proposal to repeal the provision in terms of the potential cost to employers/employees in potentially representing themselves in the civil courts rather than an employment tribunal. We feel that this is contradictory to the Government aims.

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

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

- Please see response to 6a
- While the entry into civil court may address the harassment/discrimination act itself this also does not provide enough sanction for the offending employer in terms of the failure to act on a report of third party harassment

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 have only ever had one case of third party harassment it is likely that the number will continue to remain low if the third party harassment provisions were retained. If the provisions were retained and a complaint of third party harassment emerged we have the internal policy and procedures in place to deal with this accordingly. At Midland Heart we have a Staff Forum which represents staff across the business. Staff can approach the Staff Forum for confidential support and guidance regarding a number of issues including third party harassment.
- Whilst we feel that the numbers of third party harassment cases would remain low; we believe that we have benefitted from the provision as it has been a key factor in ensuring our policies and procedures are compliant and we will retain them whether the legislation is repealed or not. Our concern lies with other organisations that may not have this structure in place as yet and we would urge caution as to the disadvantage that the repeal of this legislation could cause.
- However, the we feel that issue is not about the number of claims that have potential to be brought, but the whether it this or any replacement provision is proportionate to the issue and achieves a satisfactory and fair outcome for all concerned parties.

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

- There does not appear to be any data to support the assumptions made within the equality impact assessment therefore making it harder to rely upon the decisions brought forward from it.
- A significant amount of consideration is given to the Gender characteristic and legislation surrounding this. Further consideration should be given to Disability, Sexual Orientation and Race legislation as well as making reference to all other characteristics including the newly introduced characteristics i.e. pregnancy and maternity. There is a tendency to focus on the higher profile characteristics but with a proposal such as this, in its aim in removing a provision a thorough consideration should be given.

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

- The Government should give consideration in the proposal to repeal the provision in terms of the potential cost to employers/employees in potentially representing themselves in the civil courts rather than an employment tribunal. We feel that this is contradictory to the Government aims. This may have an effect on the justice system in terms of the number of cases brought before the civil courts.

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.