NASUWT
The Teachers' Union

CONSULTATION RESPONSE

Government Equalities Office
Equality Act 2010 – employer liability for harassment of employees by third parties
7 August 2012

1. The NASUWT welcomes the opportunity to comment on the Coalition Government's proposal to repeal the third-party harassment provisions contained within the Equality Act 2010. Section 40 of the Equality Act makes employers liable for repeated harassment of their staff by a third party, such as a customer or service user, where the employer knew about it and failed to take reasonable steps to prevent it.

2. The NASUWT is the largest teachers' union in the UK representing teachers and school leaders.

GENERAL COMMENTS

3. As part of its 'burdens on business agenda', the Government stated in its 'Plan for Growth' published in March 2011, that it would 'consult to remove the unworkable requirement in the Equality Act for businesses to take reasonable steps to prevent persistent harassment of their staff by third parties as they have no direct control over it'.

4. This statement illustrates the flawed premise on which this change is being made. It is mistaken to believe that employers cannot control harassment by a third party and take steps to prevent it. Section 40 (2) of the provision only requires employers to take 'reasonably practicable' steps to prevent

harassment. It is simply inconceivable to consider that an employer with a duty of care to employees would do any other than take reasonably practical steps to protect employees. The fact that the Government concludes that an obligation to take 'reasonably practicable;' steps imposes an unreasonable burden on employers illustrates graphically the lack of understanding of and concern for working people.

5. The Ministerial Foreword states that the provisions governing third-party harassment were unnecessarily enacted by the previous Government and notes that there has only been one reported Employment Tribunal decision involving third-party harassment since they were introduced in 2008. It goes on to claim that alternative legal claims are available to employees who suffer repeated third-party harassment. For these reasons, it is proposed that section 40 be repealed.

6. It is disingenuous to imply that regulations were enacted for no reason. Third-party harassment provisions were introduced specifically because the courts were unable to address the issue.

7. The NASUWT notes that the first attempt in bridging the gap was through the decision of the Court in the Bernard Manning case (*Burton and anor v De Vere Hotels Ltd* [1996] IRLR 596), where the claims for discrimination were upheld on the basis that the employer had subjected the claimants to the treatment meted out by Bernard Manning and members of his audience, because it did nothing to protect the claimants. Although the House of Lords subsequently held in *Macdonald v Advocate General for Scotland and Pearce v Governing Body of Mayfield Secondary School* [2003] IRLR 512, that the Bernard Manning case had been wrongly decided, many people regarded the House of Lords' decision as unsatisfactory, as it left employees vulnerable to harassment from customers or service users and without any effective means of redress.

8. The enactment of the third-party harassment provision, stemmed from the judicial review (*Equal Opportunities Commission v Secretary of State for*

Trade and Industry [2007] IRLR 327) of the 'harassment provision' of the Sex Discrimination Act 1975 (Amendment) Regulations 2008 i.e. the definition of harassment as set out in the Sex Discrimination Act. Following the High Court's decision, the Government of the day responded by introducing explicit liability for third-party harassment 'related' to sex discrimination.

9. The 2008 Regulations were expressly made to implement the revised EU Equal Treatment Directive, as interpreted by the High Court in the judicial review case. In *Sheffield City Council v Norouzi* [2011] EAT, although the Respondent was a public sector employer the EAT decision suggests that the EU Equality Directive should generally be relied upon. Therefore, the Union asserts that employer liability for third-party harassment is required by the amended Equal Treatment Directive and therefore cannot be removed.

10. Removal of an existing legal protection against harassment for employees is both unnecessary and regressive.

11. The NASUWT believes that the Government should be focusing on introducing provisions to improve the third-party harassment safeguards i.e. removing the limitation on an employer's liability under s.40 (3). The section provides that harassment will not be established unless the employer 'knows' that the employee has been harassed 'on at least two other occasions by a third party' in the course of his or her employment (the so-called 'three-strikes rule'). This suggests that an employer that wilfully keeps itself in ignorance of the way in which customers and service users treat its employee cannot be liable for any harassment that takes place.

12.. Despite the general inference made in the Ministerial Foreword that most businesses are harassment-free, there is a wealth of evidence across the public services, including education, that this is a significant problem.

13. In 2011, a Perpetuity Research report commissioned by the NASUWT on the experience of prejudice- related bullying and harassment amongst teachers and headteachers in schools found just under a third of all respondents had been a victim of bullying/harassment in the last twelve months. A significant majority of those (65%) had experienced bullying or harassment more than once and around one fifth (21%) stated that they experienced it 'all the time', much of it emanating from third parties.

SPECIFIC COMMENTS

Chapter 2 - Introduction

14. The Consultation Document points out that there is only one reported Tribunal claim of third-party harassment brought under section 40 of the Equality Act (*Blake v Pashun Care Homes Ltd* [2011] EqLR 1293) and uses this as the justification for change on the basis that 'there is no evidence to suggest that third-party harassment provisions are serving a practical purpose'. However in the Consultation Document, the Government not only recognises that the majority of cases lodged with the Tribunal do not reach the hearing stage, it concedes that it did not have full information on which to draw conclusions.

15. Very few Tribunal cases are reported and the vast majority settle prior to a hearing. In addition the regulations are preventative and the publicity around the introduction of the third-party harassment legislation may have prompted more employers to take appropriate steps to ensure that claims are not instigated against them.

16. Instead of focusing on the number of reported cases relying on section 40, the Government should recognise that what the reported case demonstrates is that there are steps which employers can take to influence or control third parties' behaviour and that section 40 is, therefore, workable.

17. The Consultation Document cites as a reason for repeal concern that businesses, especially small businesses, struggle to comply with section 40. There is no evidence to support this.

Chapter 3 – The proposal

18. Much of the Government's case for repeal relies on the assumption that other avenues of legal redress are available. The Government asserts there are several avenues which can be used in the same circumstances as the third-party harassment provisions. These are;
    - a common law claim for negligence;
    - breach of health and safety legislation;
    - a claim under the Protection from Harassment Act; and
    - a constructive dismissal claim.

19. None of these remedies are satisfactory. A negligence claim requires the claimant to prove they have suffered physical or psychological injury as a direct result of the harassment which was caused by the employer's negligence. It is not possible for claims to be brought by individual employees under Health and Safety legislation. A Protection from Harassment Act claim requires the harassment to amount to a criminal offence and can only be made directly against the harasser (not against the employer). A constructive dismissal claim requires the claimant to resign from their employment.

20. The NASUWT is particularly alarmed to see the option of resigning and claiming constructive dismissal at Employment Tribunal included as a possible remedy for an employer's failure to deal with third-party harassment. Resignation places an employee in immediate financial hardship and difficulty with the Department of Work and Pensions, as well as allowing the employer to continue with potentially unsafe or hazardous

policies, procedures or practices. Constructive dismissal cases are also complex and notoriously difficult to pursue successfully.

21. The NASUWT welcomes the Government's recognition in the impact assessment document (Annex 1, Option 2 of the Consultation), which correctly acknowledged that resignation is 'highly unlikely' and 'therefore, the best estimate would be that no additional cases of constructive dismissal would be brought'. This proves the NASUWT's point.

22. The NASUWT agrees with the Government's assertion that most Employment Tribunal claims do not reach a hearing. However, with 32,510 discrimination cases lodged in 2011 and 72% of these either withdrawn or conciliated by the Arbitration and Conciliation Service (ACAS), the NASUWT notes that the Government has already conceded that it '*does not have full information (on these cases) from which to draw conclusions'*.. This is hardly the basis on which to make such an important change.

23. The Government's case for repeal rests on the assumption that section 26 of the Equality Act 2010 (the general definition of harassment), may cover conduct falling within sections 40(2)–(4) of the 2010 Act (third-party harassment provisions) because it is 'framed more broadly' than the definition in the Race Relations Act.

24. The NASUWT is unconvinced by this suggestion. Section 26 applies where 'A engages in unwanted conduct related to a relevant protected characteristic'. In a case of third-party harassment, the main problem in satisfying this definition is that the unwanted harassment is not by 'A', the employer, but by a third party.

25. The difficulty is that the harassment by the third party may for instance be related to race but the statutory definition (s.26) may not be satisfied unless it can be inferred that the employer's decision to put the employee in the position where they were racially harassed was also tainted in some

way by race. As highlighted above, the Bernard Manning decision was overruled by the House of Lords (*Pearce* case) as a result of the difficulty in finding that the state of mind of the employer was in some way tainted by race. This was one of the reasons why a separate provision for third-party harassment was thought necessary.

26. The reasoning in *Conteh v Parking Partners Ltd* [2010] EAT (a case decided under the Race Relations Act 1976) further suggests that the Government's current view on the application of the statutory harassment definition under section 26 is wrong. In *Conteh*, the EAT took the view that an employer's inaction in the face of third-party harassment will rarely 'create' a hostile environment for the purposes of the statutory definition.

Annex C – Impact Assessment

27. The NASUWT questions the financial assumptions made in respect of the projected 'familiarisation costs' to employers. There is no evidence underpinning the Government's assumption that half of the 1,117,470 small and medium-sized enterprises (SMEs) are likely to spend time and resources familiarising themselves with changes to discrimination law at a cost of £4.4 million.

Conclusion

28. The NASUWT does not accept that the third-party harassment provision is unworkable and does not believe the Coalition Government has made the case for repeal. The Government should instead be publicising and advocating good employer practices on preventing harassment, actively promoting the safeguarding of working people and promoting the concepts and practices of equality.

29. The NASUWT believes that the third-party harassment provision in Section 40 of the Equality Act 2010 should be retained and the existing restriction contained in clause (3) removed entirely.

Chris Keates
General Secretary

For further information on the Union's response contact

Stephen Smith,
Equality and Training Team
NASUWT
Hillscourt Education Centre
Rose Hill
Rednal
Birmingham
B45 8RS

0121 453 6150
www.nasuwt.org.uk
nasuwt@mail.nasuwt.org.uk