Response to government consultation on Third Party Harassment

From: Transport Salaried Staffs' Association (TSSA)
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This response is from TSSA, a trade union in the transport and travel trades sectors. We represent over 25,000 members across the sectors, covering numerous large and small organisations. In many we have long-established formal recognition and bargaining rights, in others we represent members without the benefit of formal recognition.

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.

Substantial numbers of TSSA members have direct, day to day, contact with the public and are often subjected to verbal – and sometimes – physical abuse. Often that will take the form of harassment on the grounds of one of the seven protected characteristics, especially so where the characteristic is visibly apparent, such as gender or disability. For instance a recent case arose where a revenue protection officer working for one of the train operating companies was both verbally abused and then physically set upon by a customer who had not paid the correct fare. While abusing her, the passenger used gender specific derogatory terms which brought her actions directly into line with the third party harassment provisions. In the transport sector as a whole this is not an unusual occurrence. Therefore the third party harassment provisions will undoubtedly be of great assistance to this organisation in protecting the health and well being of our members.

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Question 4: Do you agree or disagree that the third party harassment provision should be repealed?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

TSSA does not agree that the third party harassment provision should be repealed. While we recognise there have been few cases for which an employment tribunal claim has been lodged we believe this to be evidence of the success of the provision, not evidence of its failure, which seems to be the rationale underpinning the proposal to repeal.

It is quite clear from even the briefest visit to any depot within the transport sector, or any journey undertaken on public transport that the third party harassment provisions have changed employer behaviour. That is a good

thing and has been achieved at negligible cost while setting clear standards of behaviour for customers.

There are now prominent notices in every depot and on every vehicle stressing that abusive behaviour towards staffs will not be tolerated by the companies and action will be taken against offenders. Thus the third party provisions have encouraged employers to take measures to preempt this type of harassment of their staffs.

This is a much more convincing explanation for the low number of employment tribunal claims than that the provisions are of no use and should be removed. This action avoids the need for any type of legal action and is a strong argument for the retention of the provisions.

The consultation document argues that other types of legal actions could be used by employees if the provisions were repealed. TSSA cannot see how this would reduce either the burdens on business, or enhance the working lives of transport and travel sector workers. Indeed, repeal of the provisions may lead to a diminution of the proactive approach taken by employers and so make recourse to other legal avenues and claims more likely.

The provisions, and especially the proactive response they have brought forward, have demonstrably resulted in recourse to legal types of redress being kept to an absolute minimum. It is, therefore, a quite bizarre response to say they should be repealed and other legal avenues recommended.

Indeed, the consultation paper suggests that there will be additional costs to government in the need to explain the new position to employers and employees. None of those costs will accrue if the provisions are retained.

The *Plan for Growth* asserts that the provisions are “unworkable”, but that is mere assertion. It is clear from industry practice that they have worked by encouraging employers in many sectors to display warning notices and thereby avoid much of the problem ever arising. That is the exact opposite of the provisions being unworkable – it is an extremely cost effective way of dealing with the issue to the advantage of both employers and employees.

The same document provides a savings figure of a mere £0.3 million. However, this consultation exercise itself will cost many times that figure. And if employers are then faced with alternative legal costs because employees need to take different types of legal actions those “savings” will rapidly be overtaken by additional costs.

The most cost effective method of dealing with what is in effect a non-problem is to leave the provisions quietly in place.

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.

TSSA believes this provision should not be removed. There would then be no need for other measures to replace the protections that would be taken away by their removal.

It appears to TSSA that this question is itself evidence of the recognition that there is a need for the provision. Otherwise there would be no need to ask what other protections should be put in place, which is itself an admission that there is a positive need for measures of some sort to challenge the inappropriate and unacceptable behaviour of a minority in society who see public service workers as easy and appropriate prey.

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?

a - There are the costs of this consultation, and of the creation of the government response. There are costs of parliamentary time in progressing repeal, and on-costs of making alternative provisions.

If employees are to rely on alternative legal remedies there will be costs to them, and to employers in providing responses to them.

Where there is a clear social problem of verbal and physical abuse of workforces in various fields, removing preventative provisions does not make the problem disappear – it merely makes resolution of the problem reappear in some other, quite possibly dearer, arena. There is here an obvious need for a change in social attitudes and behaviours on the part of a small minority of people. The existing third party provisions have begun to tackle that cultural change. Removal of the provisions will not remove the need; it will merely cause legal actions through other routes.

Since the public sector is major employer of workers likely to suffer third party harassment, the most likely employers to be put to additional costs for alternative legal actions are government, national and local, themselves. Repeal of these provisions will involve those substantial costs and clearly make the proposal a self harming ordinance.

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.

It is early days yet for these cases to arise although there have already been three reported cases.

However, the ideal situation is not for there to be a plethora of cases. That would not prove the value of the provision. The value of leaving the provision

in place is that it makes pre-emptive action by employers more likely. Success, therefore, is few cases – not many.

TSSA would support any cases where the employer had failed to take pre-emptive action once complaints had been raised with them. However, we would see that as a failure not only on the part of the employer, but on our own part. Constructive engagement between employers and their employees is more likely with the provisions in place, and is much more costs effective than devising – and paying for – alternative legal remedies.

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.

No. TSSA cannot see how it is possible to the conclude that repealing s.40 "will reduce confusion for employers and their employees about their respective responsibilities and rights" given the confusion and uncertainty about whether in the absence of s.40 third party harassment would be covered by s.26 of Equality Act 2010 or possibly be covered by a myriad of other statutory provisions. The easiest to understand solution is to leave the provisions in place, and thus to avoid the need to research the other available legal avenues.

The EqIA also wrongly seems to suggest that because all protected characteristics will be treated the same if s.40 is repealed there is no equality impact. The assessment of equality should focus on the impact the repeal of s.40 will have on those most likely to suffer third party harassment related to a protected characteristic (i.e. women, BME staff, LGB&T staff, older and younger people, disabled staff etc.) when compared to others who do not share a protected characteristic with them (i.e. men, white staff, heterosexual staff, non-disabled etc). The EqIA does not demonstrate that due regard has been had to the particular need to address the disadvantage certain groups suffer because of a protected characteristic nor does it address the under-representation of some groups in certain occupations or workplaces where they may be particularly vulnerable to harassment from third parties due to the kind of service users, customers or clients they deal with.