

**Equality Act 2010 - employer liability for harassment of employees  
by third parties**

**Equality and Human Rights Commission position paper**

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## **Background to this submission**

This paper sets out the Equality and Human Rights Commission's analysis of the government's proposals in the consultation paper 'Equality Act 2010 - employer liability for harassment of employees by third parties'.

The submission relates to a number of the Commission's statutory duties.

First, the Commission has a statutory duty under the Equality Act 2006<sup>1</sup> to encourage and support the development of a society in which: people's ability to achieve their potential is not limited by prejudice or discrimination; there is respect for and protection of each individual's human rights; there is respect for the dignity and worth of each individual; each individual has an equal opportunity to participate in society; and there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

Second, the Commission has statutory duties under the Equality Act 2006 to encourage good practice in relation to equality and diversity; promote understanding and awareness of rights under the Equality Act 2010; enforce the Equality Act 2010; and work towards the elimination of unlawful harassment.<sup>2</sup>

Third, the Commission is responsible for monitoring the effectiveness of the equality and human rights enactments and advising on the effectiveness of enactments, as well as the likely effect of a proposed change of law<sup>3</sup>.

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<sup>1</sup> Equality Act 2006, section 3.

<sup>2</sup> Equality Act 2006, section 8 sub paragraphs (1)(b), (d), (e) and (g) respectively.

<sup>3</sup> Equality Act 2006, section 11.

## **Equality and Human Rights Commission's analysis of the proposal**

The Equality and Human Rights Commission has analysed the government's proposal to remove the third party harassment provisions in s.40(2)-(4) of the Equality Act 2010. Our analysis concludes that:

- given the prevalence of third party harassment and its impact, there is a need for the law to provide protection against it
- there is a need for a better evidence base about the number of claims being brought under the current provision
- the identity based nature of discriminatory harassment means that the Equality Act 2010 is the best place to address it and the other remedies suggested as alternatives are not appropriate
- the proposed repeal would create uncertainty for employers about what the law requires

The Commission therefore does not support the proposed repeal of the current third party harassment provision.

### **1. Assessment of the scale and impact of third party harassment related to protected characteristics and the need for protection**

The Consultation Paper states that the Government wants "the law to provide appropriate protection against the harmful discrimination people experience".<sup>4</sup> The Commission believes there is evidence that discriminatory harassment by third parties is a significant issue against which the law should provide specific protection.

#### **1.1 Scale**

It is difficult to determine the extent of third party harassment because there is evidence that in some sectors employees do not report instances of verbal abuse or harassment and see it as "part of the job".<sup>5</sup>

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<sup>4</sup> Annex 2 to the Consultation Paper, p.41 para 3

<sup>5</sup> See, for example, the British Retail Crime Survey 2011 (British Retail Consortium), at p.44 which acknowledges underreporting of incidents of threats of violence and verbal abuse of retail staff, the causes of which BRC is seeking to identify through further research: [http://www.brc.org.uk/brc\\_show\\_document.asp?id=4324&moid=7614](http://www.brc.org.uk/brc_show_document.asp?id=4324&moid=7614).

However, research provides some evidence about the scale of third party harassment in specific sectors. For example:

- 19.2% of LGBT staff and students in higher education reported receiving homophobic/biphobic comments from students and 8.2% had encountered homophobic/biphobic verbal abuse from students<sup>6</sup>.
- 7% of NHS staff said that they had experienced discrimination at work from patients, relatives or other members of the public in the previous 12 months<sup>7</sup>

## 1.2 Impact

The focus of the government's impact assessment is on the direct costs of the current provision for employers. The impact assessment for the proposal should consider how to reflect the indirect cost to employers if third party harassment is not addressed effectively. This includes:

- "job burnout" and employees leaving a sector or employment
- loss of productivity through increased staff absence and stress-related ill-health.

The impact of abuse at work is captured in research by the Retail Trust<sup>8</sup> which reports that 40% of retail staff said that suffering aggression at work had made them question whether they wanted to stay working in the retail industry, a statistic the British Retail Consortium describes as "alarming".

Research<sup>9</sup> has found that verbal harassment can have detrimental, sometimes devastating effects on employees, leading to "job burnout" and increased intention to leave that employment.

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<sup>6</sup> The experience of lesbian, gay, bisexual and trans staff and students in higher education. Equality Challenge Unit (2009).

<sup>7</sup> 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](http://nhsstaffsurveys.com/cms/uploads/NHS%20staff%20survey%202011_nationalbriefing_final.pdf)

<sup>8</sup> cited at p.45 of the British Retail Consortium's Retail Crime Survey 2011

<sup>9</sup> 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).

The Commission's information sources similarly suggest that repeated harassment related to a protected characteristic may have a destructive effect on a person's confidence and may lead, in some cases, to individuals leaving an employer or employment sector.<sup>10</sup>

The Consultation Paper suggests a reduction of 0.01% in instances of workplace discrimination per year would save employers £0.87m per annum.<sup>11</sup> This is more than the £0.3m per annum which repeal of the provision would save according to the Plan for Growth<sup>12</sup>.

### **1.3 Benefits to employers and the justice system of taking steps to prevent third party harassment**

There is evidence that where employers take action to address third party harassment, the impact of that harassment is reduced. Research has found that harassment is likely to have fewer negative effects on employees' wellbeing if they believe their organisation is willing to curb or prevent a recurrence of the behaviour<sup>13</sup>. Employees react less negatively towards harassment if they believe that the organisation is willing to act on complaints and has effective policies to tackle abusive behaviour.<sup>14</sup> This may be particularly important for those more likely to suffer harassment, such as minority ethnic employees<sup>15</sup>.

Employers and employee representatives already recognise that tackling workplace harassment is an issue of common concern. The Confederation of British Industry; the Partnership for Public Employers and the Trades Union Congress recognise that "Tolerance, diversity, dignity and respect are the benchmarks for business success".<sup>16</sup>

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<sup>10</sup> For a recent example of the impact of prolonged harassment see *Dr E Michalak v The Mid Yorkshire Hospitals NHS Trust* reported, for example at: <http://www.bbc.co.uk/news/uk-england-leeds-16224062>

<sup>11</sup> Summary: Analysis & Evidence of Police Option 2 at page 17 of the Consultation paper. this is based on Table 6 in the Impact Assessment which suggests the saving for private sector employers of reducing instances of third party harassment by 0.01% would be £0.52m

<sup>12</sup> [http://cdn.hm-treasury.gov.uk/2011budget\\_growth.pdf](http://cdn.hm-treasury.gov.uk/2011budget_growth.pdf) at para 2.51

<sup>13</sup> *ibid* at p.746

<sup>14</sup> *ibid* at p.756

<sup>15</sup> *ibid* at p.746 and 756

<sup>16</sup> "Preventing Workplace Harassment and Violence" - Joint guidance implementing a European Social Partner agreement - <http://www.workplaceharassment.org.uk/>

Where employers take reasonable steps to prevent third party harassment, claims may be avoided with a consequent reduction in costs to the employer and employees, and costs and workload of Employment Tribunals.

## **2. Assessment of the Government's reasons for proposing repeal of the current provision**

The Government consultation paper gives two reasons for proposing repeal of the current provision:

- that there is no evidence of the need for, and effectiveness of, the third party harassment provisions (prevalence of claims)
- that there are other legal remedies for third party harassment (alternative remedies)

The Consultation Paper also refers to the Plan for Growth which justified removing the provision because "businesses have no direct control over [third party harassment of its employees]". In the Commission's view this is based on a misunderstanding of the effect of the provision. The provision only imposes liability on an employer where the employer knows that an employee has been subject to harassment by a third party on two previous occasions and fails to take such steps as would be reasonably practicable to prevent further harassment. The business will not be liable where it has taken those reasonable steps but the harassment still occurs because controlling the harassment is outside a business' direct control.

Given the prevalence of third party harassment and its impact, the Commission believes that the lack of evidence about whether the harassment provisions are being used means that the government underestimates the prevalence of claims. The Commission also considers the alternative legal remedies suggested by the Consultation Paper to be inadequate.

## 2.1 Assessment of prevalence of claims

We believe that Consultation Paper underestimates the number of claims of third party harassment made to the Employment Tribunals (ET) and that further systematic research is needed to establish the true level of such claims before a conclusion can be reached.

### 2.1.1 Decided Case under the current provision

The Commission is aware of one decided case under the provision, which is the case of **Blake v Pashun Care Homes Ltd** referred to at footnote 6 of the consultation paper. ET statistics record discrimination cases by protected characteristic under the Equality Act 2010 (e.g. sex discrimination, race discrimination) but do not distinguish between third party harassment and other discrimination cases. It is not therefore possible to know for certain how many claims have been issued in the ET under the provision without examining the papers relating to each discrimination case.

### 2.1.2 Other cases of which the Commission is aware

The Commission is aware from its own experience of one other claim brought under the provision.

S.28 of the Equality Act 2006 empowers the Commission to give legal assistance to an individual who is or may become party to legal proceedings under the Equality Act 2010. The Commission grants s.28 assistance to a limited number of strategic cases each year.

Since the Equality Act 2010 extended third party harassment provisions to all protected characteristics on 1 October 2010, the Commission has granted s.28 assistance to one case of third party harassment.

The case involved a mixed race worker at a recycling site. He told his employer that he often was racially harassed while he did his job of helping people with their recycling. The abuse, which included racist insults and threatening behaviour, was so serious that the police investigated on three occasions.

The employer did not take any action. The employee's claim was settled on payment of settlement and agreement by the employer that all managers and staff would receive equality training or refresher courses and that it would also install signs warning that harassment of employees would not be tolerated.

### 2.1.3 Commission's estimate of the number of claims which could be expected under the current provision

The Commission's Helpline has received 25 calls relating to third party harassment since December 2007. Of these, 10 were calls from employees or employers seeking advice about specific incidents of third party harassment. The remainder were calls seeking general advice about this issue, which may or may not have been prompted by a specific incident having occurred.

Examples of the specific incidents about which the Helpline received calls include:

- a gay man working in a residential care home who had been subject to threatening comments and being called "a queer" by the family of one of his clients
- an employer seeking advice about a female member of their bar staff who had been harassed by a customer
- a security guard in a shopping centre being racially harassed by staff in a particular shop in the centre.

The Commission's helpline received 192 calls relating to harassment between December 2007 and June 2012. Of these, 25 (13%) were about third party harassment. This represents about 0.25% of the total of 9,813 actionable<sup>17</sup> employment discrimination complaints received by the Commission. Assuming that the Commission's calls are representative of discrimination complaints, then applying this percentage is applied to the average total number of discrimination

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<sup>17</sup> i.e. excluding calls which the Commission identified as not being within scope of the equality legislation for various reasons.



claims of 23,050 per annum<sup>18</sup> would result in 50 to 60 cases brought under the provision every year.

#### 2.1.4 Need for better evidence base

The Commission believes that further evidence gathering about the actual extent of third party harassment claims brought under the current provisions is needed. The Consultation Paper acknowledges the gaps in the government's current information and the current Consultation exercise may not fill that gap.

The evidence base relating to the number of actual claims to the employment tribunal under the provision is available in the form of claims lodged at the Employment Tribunals. Analysis of claim forms would establish with certainty the actual number of claims lodged under the provision.

A possible means of establishing with accuracy how many claims of third party harassment are lodged would be for Employment Tribunal offices to record any claims of third party harassment received for the next 12 month period.

#### 2.1.5 Assessment of impact on equality

The Equality Impact Analysis<sup>19</sup> appears to assume that removal of the provision would have the same impact on people with different protected characteristics. However, the evidence base about the actual numbers of claims lodged at tribunals is available. It would be advisable to base an analysis of the impact on equality of removing the provision on that evidence. Analysis of actual claims received would help assess whether removal of the current provision would have more of an impact on people with some protected characteristics under the Equality Act 2010. That analysis will contribute to ensuring the due regard to eliminating harassment and the other aims required by the Public Sector Equality Duty in s.149 of the Equality Act 2010.

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<sup>18</sup> used in the impact assessment at page 17 of the Consultation Paper

<sup>19</sup> At Page 41, Annex 2 to the Consultation Paper.

The provisions relating to the protected characteristics (other than sex) have been in force a relatively short period of time. Establishing the impact of removal of the current provision in relation to those other protected characteristics will be particularly important before deciding that it is appropriate to limit protection to the characteristic of sex.<sup>20</sup>

#### 2.1.6 Significance of the provision not being used

If the evidence shows that the provision is not being used, this should not automatically lead to its repeal. Given the prevalence of third party harassment, the government should establish first why claims were not being brought under the provision before deciding that repeal is appropriate.

## 2.2 Assessment of alternative legal remedies

The Commission believes that to be effective legal protection from third party harassment related to protected characteristics should:

- recognise the particular character of discriminatory harassment, which involves a person being treated differently on grounds which Parliament has recognised to be impermissible<sup>21</sup>
- recognise that employers are best placed to address harassment in the workplace
- not impose liability on employers for matters beyond their direct control
- provide clarity for employers by setting out their responsibilities

The Consultation paper suggests other legal remedies. Of these, we believe that only the possibility of a claim under the "general" harassment provisions in s.26 of the Equality Act 2010 satisfies the criteria listed above. It is the only provision which recognises the

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<sup>20</sup> Policy Option 3 in the Consultation Paper

<sup>21</sup> The difference between discriminatory harassment and other harassment is recognised, for example, in the availability of compensation for injury to feelings in discrimination cases, reflecting the fact that " Compensation for discrimination necessarily involves an award for the humiliation of being treated differently on an impermissible ground such as race or sex." Nicol J at para 77 of *S & D Property Investments Ltd v Nisbet* [2009] EWHC 1726 (Ch)

particular nature of discriminatory harassment linked to the employee's protected characteristics (as referred to above), as distinct from other abuse or aggression an employee may face at work.<sup>22</sup>

### 2.2.1 Assessment of the General Harassment Provisions in s.26 of the 2010 Act

In the Commission's analysis, the three Employment Appeal Tribunal (EAT) cases at para 3.11 of the Consultation Paper illustrate the unsatisfactory situation which will apply if the provision is repealed leaving the issue to be governed by the general harassment provisions of the Equality Act 2010.

- in **Gravell v London Borough of Bexley [2007]** the EAT did not decide whether or not the claim of third party harassment could be brought as one of "general" harassment under the Race Relations Act 1976, only that it was arguable.
- in **Conteh v. Parking Partners Ltd [2010]** an employee was subjected to racist abuse. The EAT decided that a third party harassment claim failed because the Race Relations Act 1976 required that the employer's failure to act had itself to be motivated by race.
- in **Sheffield City Council v Nourozi [2011]** the employer agreed they could be liable in law and so the EAT did not have to decide the point. The EAT said that "[they] were initially troubled as to whether the basis of the claim in law was really as clear cut as the council's concession would suggest but ..... we see how the case can be put".

We believe that the cases above suggest that it is by no means certain that the definition in s.26 of the Equality Act 2010 would provide protection in the circumstances that the provision currently does. The Consultation Paper itself only goes so far as saying that "it is possible that [the general definition of harassment] covers acts of conduct covered by [the current provision]".

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<sup>22</sup> For example, while the Protection from Harassment Act 1997 enables compensation to be made for "anxiety" it does not allow compensation for injury to feelings reflecting the humiliation of being treated differently on an impermissible ground as referred to by Nicol J in *Nisbet* (footnote 17)

Although the wording of the provision in the Race Relations Act 1976 on which **Conteh** was decided differs from the wording of s.26, it is not clear that it would have been decided differently under the Equality Act 2010. A respected commentator has suggested that "**Conteh** illustrates that....if there was no right to make a claim in respect of third-party harassment, it would relieve an employer, who knowingly sends an employee into a third party's workplace where they are racially or sexually harassed, from liability under UK discrimination law unless it could also be shown that the employer's decision to send the employee there was itself on discriminatory grounds"<sup>23</sup>.

This risks returning the law to the position as it was in the case of **Pearce v Governing Body of Mayfield Secondary School [2003] UKHL 34** and prior to the judicial review proceedings brought by the Equal Opportunities Commission referred to at para 2.3 of the Consultation Paper.

The uncertainty also has practical consequences for employers. Although there are aspects of the current provision which are unsatisfactory<sup>24</sup> it does have the virtue of setting out clearly when an employer's duty to take reasonable steps arises.

The existence of a separate provision dealing specifically with third party harassment also may have the practical consequence of raising employers' awareness of third party harassment as a specific issue which may affect customer-facing employees and which a business needs to address. The Commission has, for example, seen training materials used by businesses which bring their staff's attention to the need to take reasonable steps to prevent harassment by third parties.

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<sup>23</sup> Michael Rubenstein: "Government consults on Equality Act changes": Equal Opportunities Review issue 225

<sup>24</sup> for example, it does not provide protection where a regular customer repeatedly harasses different members of staff rather than repeatedly harassing one.

## 2.2.2 Assessment of other alternative legal remedies

The Consultation paper suggests four other legal remedies which may provide appropriate protection for third party harassment. As stated above, we believe that such protection should recognise the particular nature of harassment related to protected characteristics. None of the remedies set out below meet this criterion in addition to other flaws as protection for third party discriminatory harassment:

- duty of care<sup>25</sup>: such a remedy would be available, as the Consultation Paper notes, only where an employee sustains "psychological or physical injury". It would not enable a claim to be brought where an employee had suffered harassment which, though serious, had not caused such an injury. Such harassment could lead to an award of "injury to feelings" under the Equality Act 2010 provisions.
- Health and Safety<sup>26</sup>: as the Consultation paper acknowledges, this applies to the risks to the health and safety of employees which "could include third party harassment". However, it is not certain in which circumstances health and safety would cover third party harassment. The Health and Safety legislation has been in place for decades but the Commission is not aware of it being used to bring claims based on a failure to prevent discriminatory third party harassment.
- Constructive dismissal<sup>27</sup>: requires a claimant to resign from their job to bring a claim.
- Protection from Harassment<sup>28</sup>: this provides a remedy only against the third party harasser. It does not provide a remedy against an employer who chooses to ignore harassment of its employees by a third party. It does not therefore contribute to the aim of the provision which is to eliminate discrimination in the workplace.

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<sup>25</sup> para 3.9

<sup>26</sup> para 3.10

<sup>27</sup> para 3.12

<sup>28</sup> para 3.13-3.15

### **3. Steps which the government should take if the provision is repealed**

The Consultation Paper asks what steps the government should take if it does decide to repeal the current provision. We do not believe that the provision should be repealed.

However, if the Government proceeds with the proposed removal without further analysis we assume it may believe that other legal provisions already provide an appropriate remedy. Paragraph 3.11 of its consultation paper says that it is "possible" that third party harassment is covered by the definition of harassment in s.26 of the Equality Act 2010.

If s.40(2)-(4) is repealed we would urge the Government to take steps to make it clear that third party harassment is covered by s.26. This would offer certainty for employers on the extent of their obligations. Failure to provide this clarity would significantly increase the risk of more litigation about when third party harassment is covered by s.26 and whether that definition of harassment provides the degree of protection against harassment in the workplace required by European directives<sup>29</sup>.

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<sup>29</sup> e.g. Directive 2002/73/EC referred to at para 2.2. of the consultation paper. This uncertainty gave rise to the judicial review brought by the Equal Opportunities Commission referred to at para 2.3 of the consultation paper

## **About the Equality and Human Rights Commission**

The Equality and Human Rights Commission is a statutory body, established under the Equality Act 2006, which took over the responsibilities of Commission for Racial Equality, Disability Rights Commission and Equal Opportunities Commission.

It is the independent advocate for equality and human rights in Britain. It aims to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights.

The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation, and encourages compliance with the Human Rights Act. It also gives advice and guidance to businesses, the voluntary and public sectors, and to individuals.