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Consultation on Equality Act 2010: consultation on employer liability for harassment of employees by third parties

Response from the Employment Lawyers Association

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INTRODUCTION

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or policy aims of proposed legislation, but rather to make observations from a legal standpoint. The ELA's Legislative & Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative & Policy committee of ELA under the chairmanship of Robert Davies (Dundas & Wilson LLP) and Emma Burrows (Trowers & Hamlins LLP) to consider and comment on the consultation document issued by the Government Equalities Office on employer liability for harassment of employees by third parties ("the Consultation Paper"). Its comments are set out below. A full list of the members of the sub-committee is annexed to the report.

We have not responded to Questions 1 and 2 given their subject matter. Also, in terms of the response for Questions 7 – 9, we have, necessarily, supplied high level observations rather than more granular statistical input.

QUESTION 3: Have you ever advised or acted for a) an employer who had 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.

a) **Yes**, our members have acted for employers who have received claims against them regarding harassment by third parties. For example, one employer has just received a claim from an employee who alleges that they were the subject of discriminatory treatment by a social housing tenant. The employee alleges the tenant refused him access to the tenant's property and racially abused him because of his race. In addition, although it did not become a claim, another employer had to contact a service user to take action to warn them of inappropriate conduct of a member of staff (racial harassment).

b) **Yes**, our members have acted for employees claiming to have been the subject of conduct which would amount to third party harassment. One member has confirmed that their firm has brought two claims of third party harassment which were both settled. The claims were brought on behalf of female brokers in respect of alleged sexual harassment by clients of their employer. The same firm has advised three female police officers on potential claims regarding sexual harassment by third parties which have not proceeded to litigation as yet.

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

4.1 ELA makes no recommendation on whether the third party harassment provision should be repealed as the decision involves considerations of policy, as highlighted in paragraphs 2.4, 3.1 and 3.5 of the Consultation Paper.

4.2 ELA recognises that there are a variety of factors likely to influence the Government's assessment, but with regard to the alternative avenues of legal redress, which would remain available in the event of repeal, in ELA's view there is uncertainty surrounding the extent to which section 26 of the Equality Act 2010 would cover acts of conduct which would otherwise fall within the scope of section 40(2)-(4) of the 2010 Act. This is reflected in paragraph 3.11 of the Consultation Paper which recognises only that is possible that section 26 may cover such acts and it may be helpful to expand upon this briefly.

4.3 Since the late 1990s various discrimination claims have been made by employees because of conduct by third parties which would now fall within the ambit of section 40(2)-(4) Equality Act 2010. Prior to the statutory recognition of harassment on prohibited grounds these claims were made under the direct sex or race discrimination provisions of the previous discrimination legislation, most notably in Burton v De Vere Hotels Ltd [1997] ICR 1.

4.4 The approach of the EAT in Burton was criticised in Pearce v Governing Body of Mayfield Secondary School [2003] ICR 937. However, since 2003 harassment claims have been made where it is argued that the unwanted conduct is the failure of the employer to take any action to deal with racist conduct of a third party in circumstances where the employer has knowledge of the offensive conduct. The employer's failure to act may contribute to the creation of a hostile work environment and thus such facts may constitute harassment by the employer (R (EOC) v Secretary of State for Trade and Industry [2007] ICR 1234; Conteh v Parking Partners Ltd [2011] ICR 341; Sheffield City Council v Norouzi [2011] UKEAT 0497_10_1406; Gravell v Bexley LBC [2007] UKEAT 0587_06_0203).

4.5 As noted by the Consultation Paper, the definition of harassment in section 26 of the Equality Act 2010 may be broader than section 3A of the Race Relations Act 1976, in that the unwanted conduct must be 'related to' a protected characteristic. However, it is not clear how 'related to' would be interpreted in circumstances involving third party harassment. For example, could it include circumstances where the third party has harassed a different employee from the complainant?

4.6 It may be that section 40(2)-(4) provides clarity for both employers and employees in terms of its scope and that the absence of cases under section 40(2)-(4) may be due to employers implementing clear procedures for responding to third party harassment as defined in section 40(2)-(4). Burton and cases such as Conteh indicate the uncertainty in relying on alternative provisions which were not designed specifically to cover third party harassment.

4.7 The Consultation Paper states that by removing the third party harassment provision from statute, this will save businesses £0.3million (paragraph 3.1). However, it is unclear the extent to which any cost/benefit analysis in the Impact Assessment has been addressed from the perspective of whether the provision is worth keeping *precisely because* relatively few claims are being brought as that may indicate that the current law is working and preventing instances of such harassment from occurring. For example, members report that their employer clients invest in training staff on this area to seek to ensure that steps are taken to manage the behaviour of third parties towards staff. Such wider education may in itself be proving a sufficient or efficient deterrent such that claims do not need to be brought at the Tribunal. Moreover, the Impact Assessment apparently does not explicitly quantify the potential cost of increased legal claims in other areas that may be brought as the suggested alternative routes in the Consultation Paper. For example, if an employee pursues a constructive dismissal claim, this is a potentially more costly route for both employer and former employee and may prompt more claims. Likewise, Protection from Harassment Act claims in the civil courts may be more expensive and complicated – and the costs risk may dissuade Claimants in any event.

QUESTION 5:

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

The question implies that the Government wishes to assess whether third party harassment can be deterred/remedied by alternative means to those identified in the Consultation Paper. We have therefore considered such additional options but for the avoidance of doubt, the policy decision as to whether such approaches *should* be adopted is beyond the scope of this response.

5.1. The first option would be to amend the EHRC Employment Code to establish that Section 13 (1) and/or Section 26, Equality Act 2010 can cover such third party acts. Therefore, the employee may argue direct discrimination in that a failure by the employer to take adequate steps to prevent harassment by a third party is less favourable treatment by the employer because of a protected characteristic and the employee suffered a detriment and/or amounts to harassment by the employer itself. This allows an employee to remain in employment and bring a claim in an employment tribunal with the costs advantages of such a process. The Consultation Paper refers to breach of contract as being an alternative remedy, for the employee for third party acts of harassment but this means an employee has had to leave their job to access a remedy whereas Section 13 and or 26 Equality Act 2010 can be used whilst the person remains in their employment. The Consultation Paper also refers to a potential personal injury claim but that remedy entails medical evidence being established to show the physical or psychological injury suffered thus placing an onus on the employee greater than that currently needed under the Equality Act provision at Section 40.

5.2. A second option would be to consider the introduction of a specific Health and Safety at Work obligation for an employer to undertake a risk assessment which specifically covers the risk of third party harassment in a workplace. There is no specific risk assessment to cover this issue at present.

5.3. A third option may be to amend the Protection Against Harassment Act 1997 to enable an employee to be able to use it against his/her employer in respect of third parties. This amendment may be limited to the civil tort rather than also a criminal liability; any such revision will also need an express potential defence to such a claim on the part of the employer.

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?

6.1 As noted at Response 3 above, from the surveys conducted of our members and their clients, we are aware of at least three claims that have been brought for third party harassment. Two claims were brought on behalf of female brokers who had suffered sexual harassment from clients of their employer. These claims were settled. Another claim has been brought by an employee who believes he has suffered harassment because of his race by a service user of his employer.

6.2. Our surveys also revealed three examples of our members advising individuals on potential claims for sexual harassment and harassment because of sex by third parties and another example of an employer taking action in respect of a service user alleged to have racial harassed an employee. Please also refer to Paragraph 4.7 above.

6.3 Appendix 1 of the Consultation Paper makes clear that the monetisation of "cost" and "benefit" in a discrimination context is anything but a straightforward exercise. The purpose of reiterating the points at paragraphs 6.1 – 6.2 is only to suggest that the Government may need a "wide angle lens" approach: there may well be discernible estimated financial benefit through the removal of financial liability as a result of the repeal in question but equally there may be additional "costs" which arise from (possibly creative) litigation intended to fill the perceived gap from a Claimant's perspective. Query also whether there may be a broader "cost" associated with the repeal, to the effect that some employers may consider an inevitable diminution of emphasis placed on taking practical steps to seek to prevent third party harassment.

QUESTION 6b) Do you have any comments on the assumptions, approach or estimates we have used?

6.4 An assumption is made in the Consultation Paper that no cases have been brought - but we are aware through our own membership of at least three claims that have been brought in the Tribunal and of further examples which may become claims. The assumption is therefore incorrect. Further, as suggested above at paragraph 4.7 even if the number of actual claims is low, perhaps this because the issue is being resolved through prevention rather than cure, which is catalysed by section 40 Equality Act 2010 .

6.5 The Impact Assessment looks at the "general impact" of repealing the provision from the perspective of employers. It states at page 42 that "*This option [*i.e. the removal of third party harassment liability in its entirety] *will reduce confusion for employers and their employees about their respective responsibilities and rights in this respect and make it clear that employees have the same rights in this respect for all the protected characteristics*". This suggests that repeal of the provisions will benefit the employee as they will be clear that they have no rights.

6.6 It is unclear as to the extent to which consideration has been given to the impact that a total repeal would/may have on, for example, women working on the "front line" as police officers; and the front line of direct customer contact, such as waitresses; likewise ethnic minorities and/or disabled people in those roles. It may be helpful to consider and explore, more specifically, what may be the main sectors where employees are working in contact with the public, and who might be most vulnerable to harassment from those third parties, and to assess the breakdown in terms of gender, race and disability (in particular) in those industries. We appreciate, however, that such data may well be generated through the Consultation responses and may be fed into a revised Impact Assessment.

6.7 It is also unclear the extent to which the potential cost to employers of on-going training/preventative measures has been factored in. Table 4 and Table 5 and the related text at page 25 deals with the original transitional familiarisation costs but does not appear to identify/estimate on-going compliance costs per se. The same issue applies at Table 7 in respect of Option 2

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

7.1 This is a very difficult question to seek to address. Our membership survey has identified a limited number of actual/threatened claims. In order to place this in context though, the response rate to our survey is likely to have been influenced by the time of year and annual leave.

7.2 In the period between 1996 when the case of *Burton v de Vere Hotels Ltd* [1996] ICR 1 which held that third party harassment was actionable and the decision in *Pearce v Mayfield v Governing body of Mayfield School* [2001] IRLR 669 it appears that there were only two reported appellate cases in which the issue of whether the Burton principle could be relied on to establish liability was an issue in the appeal (*Willie v Companies House* [2001] All ER (D) 24 (Aug), *Ree v Redrow Homes (Yorkshire) Limited* [2003] All ER (D) 23 (May)). (*Burton* is mentioned in a number of other cases but the issue in those cases was not one of third party harassment*).* This figure is only for appellate cases and it is inevitable that some cases will have either been settled or have been decided in the Employment Tribunal. However it is illustrative of the fact that there are very few cases of this kind. It would be fair to say that, currently, experience among our members is of occasional cases rather than regular cases since the implementation of s.37 Equality Act.

QUESTION 8: Does the consideration of the impact on equality in the Impact Assessment properly assess the implication for people with each of the potential characteristics?

Our view is that there is an argument for additional data to be collated, as per paragraph 6.6.

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

In our view it does not. Please see paragraphs 4.7, 6.4 – 6.6 and 7.

Appendix of Working Party contributors

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