

## **Equality Act 2010**

- Employer liability for harassment of employees by third parties: A consultation

## **Submission by Prospect**

**08 January 2013**

[www.prospect.org.uk](http://www.prospect.org.uk)

## INTRODUCTION & SUMMARY

Prospect is an independent trade union representing over 120,000 members in the public and private sectors. Our members work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, defence, education, energy, environment, heritage, industry, telecoms, and scientific research.

Prospect strongly opposes the proposal to repeal section 40 of the Equality Act 2010, which provides workers with a potential legal redress for harassment by a third party. In our experience there is a very real problem of third party harassment at work. In many organisations and companies employers have strong policies to deal with such matters and this is, of course, the best approach. However we feel strongly that section 40 needs to be retained to enable individual cases to be brought where necessary, and to ensure that employers take appropriate preventative action.

We have answered the questions in the consultation document which are relevant to those advising employees.

### Contact details:

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Date:	31 July 2012

### You or your organisation

#### Q(i) In what capacity are you responding?

On behalf of an organisation (if so, please go to Q(ii) below)

#### Q(ii) Is your organisation

✓ A trade union or staff association

## Section A: What are your experiences of third party harassment<sup>1</sup>

### 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

Prospect has advised a number of members about third party harassment that has arisen in the course of their employment in recent years. This has included a number of members in different areas who deal directly with service users, clients, and customers, such as Interviewers for the Office of National Statistics, Planning Inspectors and Vehicle Inspectors employed by Central Government Agencies, and technical sales staff working in private companies. Also we have had cases where members have been harassed by outside contractors working at their workplace.

Many Prospect members are in senior or managerial positions without direct interface with customers, but they have raised problems with the employees reporting to them having faced third party harassment.

The majority of these cases will be dealt with satisfactorily by the employer. In many of the workplaces where Prospect is recognised, including both large public and private sector employers, the employer has clear policies and procedures for dealing with such matters. These policies will have been negotiated with the unions and demonstrate a commitment to ensure that workers are not harassed whilst at work.

However not all employers have good policies on this issue, and of course even where there is a policy, there will still be cases (just as there are with harassment claims against other employees). Therefore Prospect believes it is essential to retain the existing provisions in section 40 of the Equality Act 2010.

We have not pursued any cases to the Employment Tribunal under section 40 of the Act. There are several likely reasons for this, firstly the Act has not been in place for very long, secondly in many of our well organised workplaces such matters are resolved internally with union representatives taking up issues with local management, and thirdly that the 'three strikes' rule in the Act means that it is extremely difficult for workers to bring claims.

**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

Prospect very strongly disagrees with the proposal to repeal section 40 of the Equality Act. We do not accept that it can be right for the Government to remove protection for employees facing discrimination at work.

We know that the issue of third party harassment is a real problem in the workplace, as referred to above, and we believe it is important to ensure that there is an effective legal redress. Section 40 provides some means of legal challenge when necessary, and provides a safeguard for workers.

The existence of a legal redress will also encourage all employers to ensure that they take effective action to protect staff.

The suggestion that the provisions are unworkable or create an unrealistic burden on employers is in our view completely misconceived. The provision simply requires the employer to take such steps that are 'reasonably practicable' to prevent the harassment by the third party. There are many such steps that can be taken, and are taken by good employers. The employer can warn customers and service users that they will not tolerate harassment of their staff, and can play an important role in preventing the harassment from occurring (such as warning, or introducing sanctions against, the perpetrator, reorganising work, or removing the employee from the situation whilst it is being resolved). The law currently provides for nothing more than that the employer should take action that is practicable for them to do so in order to protect their workers from harassment.

Tribunals will be able to use their experience to make reasoned judgments on what is actually practicable in these circumstances. There is no evidence to suggest that tribunals will not apply the provisions sensibly.

We believe that one of the reasons why there are so few cases that have reached the tribunal is likely to be that the section 40 provisions as they stand only provide a remedy where the worker can demonstrate that the employer has known of at least two previous incidents of the worker being harassed. This creates an unnecessary hurdle and we believe that the employer's obligation should arise in any

circumstances where they were in a position to prevent the harassment but failed to take reasonable steps to do so.

Additionally, as the paper recognises, the majority of tribunal claims settle prior to hearing, so it is almost certain that there will have been a number of other cases presented which have not reached the hearing stage.

The consultation paper recognises that some cases that could have been brought under section 40 may be possible to bring under the 'ordinary' harassment provisions in section 26. By repealing section 40 this is likely to create a further lack of clarity in the law which will not benefit employers or workers and is likely to increase litigation.

Lastly, the paper refers to other legal avenues for redress, however we do not believe these are necessarily appropriate. Duty of care or personal injury claims will only be possible where there has been a serious injury arising from the harassment and that it was foreseeable that this would occur, this means that it would rarely be a viable legal action in such a situation. Case law under the Protection from Harassment Act makes it clear that any harassment needs to be severe enough to amount to a criminal act, which means very few workplace cases could succeed. Constructive unfair dismissal is always an absolute last resort, as the employee has to resign in order to establish a repudiatory breach, we do not believe this is could be an appropriate replacement for the current section 40 provisions.

**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

Prospect strongly believes that the provision should not be removed, however if it was we consider there would be a need for clear guidance on best practice for employers to avoid harassment occurring.

**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

We do not believe that the assessment has fully recognised the costs of failing to protect against harassment in the workplace, in respect of issues such as increased turnover of staff, sickness absence, loss of motivation.

**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

**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

It is very difficult to estimate the number of cases. We would not anticipate a very large number of cases, but certainly more than the one so far that has reached the tribunal.

**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

We do not believe that the correct approach has been taken, as we consider that there should be a comparison between those with a certain protected characteristic and those without (as opposed to approaching the impact between different protected characteristics as the consultation document appears to have done).

**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