



The Royal College of
Midwives

Response

Response to The Government Equalities Office consultation on Equality Act 2010 – employer liability for harassment of employees by third parties: A consultation

August 2012

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The Royal College of Midwives' response to the Government Equalities Office consultation on Equality Act 2010 – employer liability for harassment of employees by third parties: A consultation.

The Royal College of Midwives (RCM) is the trade union and professional organisation that represents the vast majority of practising midwives in the UK. It is the only such organisation run by midwives for midwives. The RCM is the voice of midwifery, providing excellence in representation, professional leadership, education and influence for and on behalf of midwives. We actively support and campaign for improvements to maternity services and provide professional leadership for one of the most established clinical disciplines.

The RCM welcomes the opportunity to respond to this consultation and our answers to the consultation topics are set out below.

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General Comments

The Royal College of Midwives (RCM) is opposed to the Government's proposal to repeal the employer's liability for harassment of employees by third parties. We find it extremely concerning that the Government wishes to take a step backwards and repeal this important provision.

We are particularly concerned by the Government's comments in the consultation document. The Government's consultation document states that:

*"Across the country, businesses tell us that regulation is one of their key concerns, its complexity damages their competitiveness. This is why tackling regulations that serve no useful purpose is a key priority for the Government. We believe that the legal provisions are a case in point. They were introduced by the previous Government without any real or perceived need."*¹

For employees who have suffered discrimination in their workplace by a third party to hear the Government describe this provision as having no real need or serving no real purpose is extremely insulting and diminishes the very real impact that discrimination and harassment can have on people's lives.

It is worth reiterating that section 40 of the Equality Act provides that harassment occurs when a third party harasses an employee in the course of that employee's employment and the employer has 'failed to take such reasonable steps as would have been reasonably practicable to prevent the third party from doing so'. There is a limitation on the employer's liability as section 40 states that harassment will not be established unless the employer knows the employee has been harassed in the course of his or her employment on at least two occasions.

Therefore, it is not clear why Government asserts that *"the introduction has given rise to concern that business, especially small business, would find it difficult to comply with."*²

¹ Government Equalities Office Equality Act 2010 – employer liability for harassment of employees by third parties: A consultation 2012

² Government Equalities Office Equality Act 2010 – employer liability for harassment of employees by third parties: A consultation 2012

The RCM would like to see evidence to support this assertion rather than just reporting concerns and we would point out that the employer is only liable if they have failed to make reasonably practicable steps to prevent this harassment after they have been made aware of it, so it is unclear why there is concern over the difficulties of compliance.

The Government appears to believe that there isn't a problem with third party harassment as they state:

"As far as we are aware, an employment tribunal has ruled on only one case involving the third party harassment provisions since they were introduced in 2008."³

Under section 40 the employer is only liable when they know the harassment has taken place, when the harassment is repeated and when the employer can take reasonably practicable steps to prevent it. Therefore, the fact that there has only been one case involving third party harassment doesn't mean that harassment does not take place. It is far more likely that unfortunately harassment does take place but due to the provisions in the Equality Act employers take reasonable steps to prevent it happening again and avoid an employment tribunal.

For example, each year the RCM conducts a survey of all the Heads of Midwifery in the UK; the 2012 survey is currently still open, however out of the responses submitted so far over 30% of Heads of Midwifery report that there have been incidents of bullying, harassment, verbal and physical abuse reported from service users themselves and over 40% of Heads of Midwifery said that there have been incidents of bullying, harassment, verbal or physical abuse reported from the friends and family members of service users. They reported that nearly 25% of the incidents have arisen on the grounds of the protected characteristics of the Equality Act.

The RCM would argue that there are incidents of harassment but the provision has prevented cases being brought to tribunals as employers are able to comply with the regulations and take reasonable steps to prevent this happening again.

³ Government Equalities Office Equality Act 2010 – employer liability for harassment of employees by third parties: A consultation 2012

This Government repeats their common argument against employee protections in the consultation document by arguing they are burdensome on business and cost money to comply with:

“The plan for growth published by the Coalition in March 2011, announced that as part of its commitment to reduce the costs of regulation on all businesses, the Government would consult to remove the unworkable requirement in the Equality Act (2010) for businesses to take reasonable steps to prevent persistent harassment of their staff by third parties as they have no direct control over it, which would save £0.3 million.”⁴

As stated previously, under section 40 the employer is only liable when they know the harassment has taken place, when the harassment is repeated and when the employer can take reasonably practicable steps to prevent it. It is difficult to understand why the Government describes this as unworkable. We argue that there are incidents of harassment but employers are able to comply with the regulations and take reasonable steps to prevent this happening again. Moreover, while we do understand the needs for business to make efficiency savings, £0.3million across the whole of UK business does not seem a large amount of money or particularly burdensome.

The Government gives some alternative means of redress that are available under existing legislation and the common law such as duty of care, health and safety, general harassment provisions and constructive dismissal.

However, we would dispute that this gives the same level of protection as this is why the separate provisions for third party harassment were thought necessary in the first place. For example, if an employee were to use constructive dismissal as a means of redress as suggested by the Government in the consultation document it would require the harassment victim to resign.

⁴ Government Equalities Office Equality Act 2010 – employer liability for harassment of employees by third parties: A consultation 2012

Moreover, in the Government's impact assessment it states that *"the best estimate of the annual number of cases that would be brought under alternative forms of redress in place is zero."*⁵

Ultimately, we agree with the Government's statement in their consultation document that:

*"In the workplace, most businesses do everything they can to ensure that their employees can work in an environment free from harassment, whatever its source. As well as being the right thing to do, this is just good business sense as it leads to a happier, better motivated workforce."*⁶

The Royal College of Midwives (RCM) is opposed to the Government's proposal to repeal the employer's liability for harassment of employees by third parties. We find it extremely concerning that the Government wishes to take a step backwards and repeal this important provision.

The RCM has argued that the provision has prevented cases being brought to tribunals as when there are incidents of harassment employers are able to comply with the regulations and take reasonable steps to prevent this happening again.

The RCM has disputed that the alternatives suggested by the Government give the same level of protection as the provisions for third party harassment in the Equality Act and we are concerned that the Government's prediction that there will be zero cases brought under those alternatives will be correct.

We believe that the provisions for the third party harassment should remain as prevents unscrupulous employers from ignoring repeated harassment of their employees and shows that the Government takes harassment cases seriously and has a genuine desire to improve equality and fairness in the workplace.

⁵ Government Equalities Office Equality Act 2010 – employer liability for harassment of employees by third parties: A consultation 2012

⁶ Government Equalities Office Equality Act 2010 – employer liability for harassment of employees by third parties: A consultation 2012