PROFORMA FOR THIRD PARTY HARASSMENT CONSULTATION RESPONSES

The consultation closes on 07 August 2012. Please let us have your response by that date.

When responding, it would be helpful if you could provide the following information.

Please fill in your name and address, or that of your organisation if relevant. You may withhold this information if you wish, but we will be unable to add your details to our database for future consultation exercises.

Contact details:

Please supply details of who has completed this response.

Response completed by (name):	Leander Neckles
Position in organisation (if appropriate):	Board member
Name of organisation (if appropriate):	Equanomics-UK supported by Friends, Families and Travellers, Just West Yorkshire, the Race Equality Foundation and Race on the Agenda
Address:	137 Rosebery Avenue London N17 9SG
Contact phone number:	0208 801 2483
Contact e-mail address:	necko@necko.co.uk
Date:	7/8/12

Consultation confidentiality information

The information you send us may be passed to colleagues within the Home Office, the government or related agencies.

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes

(these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory code of practice with which public authorities must comply and which deals, among other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.

I would like my response to remain confidential (please tick if appropriate):

☐

Please say why

An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

<u>You or your organisation</u>

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

As an individual (if so, please go to Q1 in the main comments section)

☐

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

X

This submission from Equanomics-UK is endorsed by Friends, Families and Travellers, Just West Yorkshire, the Race Equality Foundation and Race on the Agenda

Other (please specify)

Q(ii) **Is your organisation**

(please tick the box that applies to your organisation) organisation

An equality lobby group or body

Q(iii) **If responding as an employer, how many people do you employ? (select one)**

N/A

Equanomics-UK does not have any employees.

Q(iv) **If responding as an employer please indicate which sector best describes you (select one):**

N/A

Equanomics-UK does not have any employees.

Note:

In addition to the completed proforma, you can also send other supporting information if you so wish.

Completed forms should be e-mailed to the following address:-

thirdpartyharassment@geo.gsi.gov.uk

If you are posting the form please send to:-

Third Party Harassment Consultation Responses
Government Equalities Office
Equality Law and Better Regulation Unit
Home Office
3rd Floor Fry, North East Quarter
2 Marsham Street
London SW1P 4DF

Thank you for completing this response form.

1 General comments and concerns

1.1 Opening comments

Equanomics-UK works to build awareness of structural and systemic racial disadvantage caused by an economic penalty associated with ethnicity, advocate for action and empower ordinary people to take action. Coalition and collaboration are central to our ways of working. We have a youth focus and a focus on building economic awareness through education, employment and benefits advice. We are concerned about any proposals that are likely to reduce, or remove, provisions that exist to prevent, challenge or reduce discrimination in work. **This submission from Equanomics-UK is endorsed by Friends, Families and Travellers, Just West Yorkshire, the Race Equality Foundation and Race on the Agenda.**

Before responding to the questions in the consultation pro-forma, we wish to raise a number of important and serious issues and concerns about this consultation. We have four overarching concerns, we believe that the Government/GEO have:

- failed to properly follow Coalition Government's own Consultation Principles;
- failed to properly consider the results from the Red Tape Challenge;
- failed to adopt an objective and unbiased approach - there are serious flaws in the conceptual and analytical approach adopted in the consultation document and there has been a failure to conduct a proper Equality Impact Assessment;
- failed to consider the cumulative impact of the proposed changes to the Equality Act 2010.

We have provided supporting evidence as an integral part of our submission. We ask the Government to properly consider our evidence and address our concerns.

1.2. Failure to properly follow the Government's own Consultation principles[1]

In 2012, the Coalition Government published new Consultation Principles noting the importance of:

- *'increasing the level of transparency'* in consultation processes;
- *improving 'the quality of policy-making'*;
- *'bringing to bear expertise and alternative perspectives'*;
- *'identifying unintended effects and practical problems'*;
- 'respecting '*the principles of the Compact between government and the voluntary and community sector'* in consultation processes[2];

[1] http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance

[2] The renewed Compact signed in December 2010 by the current Prime Minister and Deputy Prime Minister, states that *'An effective partnership between the government and CSOs will help achieve the following outcomes: 1. A strong, diverse and independent civil society. 2. Effective and transparent design and development of policies, programmes and public services 3. Responsive and high quality programmes and services. 4. Clear arrangements for managing changes to programmes and services. 5. An equal and fair society.'* http://www.compactvoice.org.uk/about-compact/about-renewal/compact-qa#comply

We believe that the consultation in relation to third-party harassment fails to comply with the Government's own consultation principles and the provisions in the Compact related to achieving an equal and fair society (see table 1).

Table 1: Failure to properly follow the Coalition Government's own Consultation Principles - the assessment by Equanomics-UK

1. Lack of transparency in the consultation process

- The consultation document states that the Government originally intended to publish the consultation in September 2011 but decided to *'postpone publication'* of the consultation document on third-party harassment (TPH) until *'we had completed our assessment of the spotlight on equality under the Red Tape Challenge which ran in June, and which looked at the provisions in the Equality Act 2010 more broadly. The outcome of the equalities spotlight, of which this consultation is part, is being announced today.'*
- The preceding statement gives the implies that:
    - the GEO has reviewed and taken account of account of the Red Tape Challenge Spotlight responses on Equalities in developing these proposals, hence the 9 month delay in the publication of the consultation;
    - feedback from the RTC Spotlight on Equalities supported the proposal to remove third-party harassment (section 40, 2 – 4) from the Equality Act 2010 because otherwise one would have expected the consultation paper to identify and address key alternative perspectives arguing against the removal of third-party harassment from the Equality Act 2010.
- We have reviewed the responses to the Red Tape Challenge Spotlight **and it is untrue to suggest that the majority** of responses to the Red Tape Challenge supported the removal of third-party harassment from the Equality Act 2010; **most respondents argued that the legislation should be left alone or strengthened, and where respondents specifically focused on third-party harassment they argued for the retention of the existing provisions (see table 2).**
- Paragraph 3.5 of the consultation refers to *'public concerns that have been expressed about the potential scope of the provisions'* but there has been a failure to evidence said concerns. Moreover there has been a failure to acknowledge or respond to the majority of RTC responses that argued for the retention of the existing legislation and specifically argued for the retention of the provisions on third-party harassment.

2: Failure in relation to *'bringing to bear expertise and alternative perspectives'* and *'identifying unintended effects and practical problems'*;

Table 1: Failure to properly follow the Coalition Government's own Consultation Principles - the assessment by Equanomics-UK

- The Coalition Government's consultation principles commit government to bringing to **bear expertise and alternative perspectives**. There has been a failure to consider either alternative perspectives or bring to bear alternative expertise in relation to section 40 (2-4) and removing third-party harassment from the Equality Act 2010.
- The Government included the Equality Act 2010 in the Red Tape Challenge. However the Government has ignored all alternative perspectives to its own and the fact that the majority of 5437 respondents to the first Red Tape Challenge on the Equality Act 2010, and over 1600, respondents to the Spotlight, have argued for the Act to be left alone[3].
- The Government decided to launch an 8 strand spotlight on equalities, which included asking about whether there should be changes to prohibited conduct which includes harassment and third-party harassment. The Government has failed to recognise that responses from expert respondents (including CSOs, lawyers and equalities agencies) and ordinary people argued against removing the new provisions on third party harassment and provided clear arguments supporting the retention of section 40 (2-4).
- We also note that no attempt has been made in the consultation document to engage with the many concerns identified by respondents to the Red Tape Challenge or to consider any potential unintended consequences (see table 3 and our responses to questions 6 - 8).

3. A failure to respect the principles of the Compact

- The Compact includes a number of undertakings for the Government, the voluntary sector and Civil Society Organisations (CSOs). While many CSOs, funded and not funded by government, have responded to the Red Tape Challenge[4], the Government has failed to comply with its own undertakings.
- Compact undertaking 5.1 commits the Government to: a) working with CSOs; b) taking account of the views of CSOs that represent underrepresented and disadvantaged groups; and c) taking account of the views and needs of underrepresented and disadvantaged groups, *'including assessing impact, when designing and implementing policies, programmes and services*.'
- Compact undertaking 5.3 commits the Government to taking *'practical action to eliminate unlawful discrimination, advancing equality and to ensure a voice for underrepresented and disadvantaged groups.'*
- The evidence in relation to the Red Tape Challenge, demonstrates a profound unwillingness by Government to even acknowledge the views expressed by a wide spectrum of CSOs, including many equality and diversity organisations, in relation to third-party harassment and proposals to remove third-party harassment from the Equality Act 2010. There has been no willingness to engage in any meaningful way with CSOs on this issue. Meaningful engagement would have been evidenced by:
    - acknowledging the dissenting views of the CSOs and equality and diversity specialists in relation to proposals to remove third-party harassment from the Equality Act 2010;
    - engaging with the dissenting views expressed by CSOs;
    - providing robust evidence to challenge these dissenting views;
    - providing a robust equality impact assessment.
- We believe that the consultation on third-party harassment comprehensively fails to:
    - acknowledge the dissenting views of the CSOs and equality and diversity specialists in relation to the proposals to remove third-party harassment from

[3] Source: The review by the BME VCS Coalition of the 5437 RTC responses and statements made by the GEO to the Senior Stakeholder Equalities Group. The BME VCS Coalition review of the RTC spotlight.

[4] CSOs shall take *'practical action... to eliminate unlawful discrimination, advance equality of opportunity and build stronger communities.'* [Compact: 5.5]

Table 1: Failure to properly follow the Coalition Government's own Consultation Principles - the assessment by Equanomics-UK
section 40 (2) - (4) of the Equality Act 2010; ○ engage with the dissenting views expressed by CSOs; ○ provide robust evidence to challenge these dissenting views; ○ provide a robust equality impact assessment.
We believe that we have presented evidence that demonstrates serious failures, on the part of the Government, in relation to complying with the letter and spirit of the Compact.

1.3 Failure to properly consider the results from the Red Tape Challenge

The Red Tape Challenge was launched on 7th April 2011 by the Government. In May 2011, Equanomics-UK, partners and many others identified concerns that the RTC framework was biased and flawed. Nevertheless, we and many others including CSOs, individuals, equality specialists, lawyers and businesses took the Government at its word, and participated in the RTC process. 5437 responses were submitted to the Red Tape Challenge on the Equality Act 2010 before it closed in June 2011. Between June 2011 and July 2012, nearly 1700 further responses were made to the 8 Spotlight themes on equalities[5]. The evidence suggests that that there has been a failure to recognise or respond to the RTC responses (see table 2).

Table 2: Failure to properly respond to the Red Tape Challenge on the Equality Act 2010 or the spotlight on Equalities - the assessment by Equanomics-UK
1. The failure to address concerns about bias & flaws in the process

1. At work (228 responses responses); 2. Buying goods or using services (124 responses); 3. Enforcing equality law (172 responses); 4:In the public sector (212 responses); 5. Positive action (211 responses); 6. Prohibited conduct (213 responses); 7. Specific sectors - in housing, at school or college, on transport (124 responses; 8. Who is protected (413 responses).

Table 2: Failure to properly respond to the Red Tape Challenge on the Equality Act 2010 or the spotlight on Equalities - the assessment by Equanomics-UK

- In May 2011, Equanomics-UK, the BME VCS Coalition, a variety of CSOs and others expressed concerns about the inclusion of the Equality Act 2010 in the Red Tape Challenge. Our concerns have been echoed in many of the 7000 plus responses to the Red Tape Challenge on the Equality Act. Our early concerns have been repeated below:
- *'The Equality Act 2010 is one of the most consulted about and reviewed pieces of primary legislation subject to extensive and detailed deliberations outside and inside Parliament between 2005 and 2010[6]. It is particularly confusing to place the Equality Act 2010 on this website given that:*
    - *a primary purpose of this Act is to harmonise and simplify previous equality legislation – so the scope for such harmonisation and simplification has already been the subject of exhaustive discussions between 2005 and 2010;*
    - *many of the Act's provisions are required by EU laws;*
    - *the 2010 Act received cross-party support during, and on, its parliamentary passage;*
    - *the Coalition Government asserted its commitment to implementing the Equality Act 2010 in the Government's Equality Strategy published in December 2010;*
    - *the Coalition Government itself has decided, since May 2010, which aspects of the Equality Act 2010 to bring into force in October 2010 and April 2011.[7]'*
- Equanomics-UK and colleagues also argued that the process was flawed, crude and biased noting *that 'Many statutory regulations are complex. Simply placing the statutory regulations on a website, with series of leading and rather crude questions[8], from a methodological perspective, is inadequate because:*
    - *the process is not evenhanded instead it is biased and skewed towards the rejection of regulations;*
    - *some of the feedback arguing for the regulations to be amended or changed, is uninformed and inaccurate, for example, based on assumptions about what requirements are imposed by existing regulations;*
    - *even where there are higher response rates, many respondees argue for no change and question the Red Tape Challenge process.'*
- We are concerned that the despite the fact that many of the 7000 plus respondents to the Red Tape Challenge on the Equality Act 2010 and the Spotlight on the Equality Act 2010, echoed our concerns about bias and flaws in the RTC process, the Government/ GEO have made no attempt to acknowledge or respond to these concerns.

2: Failure to respond to the views expressed in the Red Tape Challenge

- Paragraphs. 2.5 and 2.6 of the consultation document make specific reference to the

[6] The Equalities Review and the Discrimination Law Review were set up in February 2005, the interim and final review reports were published in 2006 and 2007 culminating in the publication of the White Paper, Framework for a Fairer Future – the Equality Bill, in June 2008. The Equality Bill was considered by parliament between 2009 and April 2010, the Equality Act 2010 received Royal assent on 8th April 2010.

[7] Source: Equanomics-UK, Runnymede, Centre for Local Policy Studies AND Race on the Agenda Briefing Paper on the Red Tape Challenge website, May 2011 and evidence to the Home Affairs Select Committee in May 2011

[8] For example, "Tell us what you think should happen to these regulations and why, being specific where possible: a) Should they be scrapped altogether? c) Can they be merged with existing regulations? c) Can we simplify them – or reduce the bureaucracy associated with them? d) Have you got any ideas to make these regulations better? e) Do you think they should be left as they are?"

Table 2: Failure to properly respond to the Red Tape Challenge on the Equality Act 2010 or the spotlight on Equalities - the assessment by Equanomics-UK

Red Tape Challenge and state that this consultation on third-party harassment is part of the '*outcome of the equality spotlight*[9].' We have already commented (see table 1) on the impact of failing to properly consider the results of the general Red Tape Challenge and the spotlight. We focus, in this table, on summarising what the majority of respondents said in relation to harassment and third-party harassment.

- 2 of the 8 of the RTC spotlight areas contained the main responses on harassment and/or third-party harassment - at work and prohibited conduct.
- The spotlight called at work:
  - there were 228[10] responses[11],the overwhelming response from more than 95% of respondents was not to change the current provisions protecting people from discrimination at work;
  - many commented that if any change is made it should be to strengthen the legislation to protected people from discrimination and provide access to justice;
  - around 30 respondents commented on the importance of the provisions on third-party harassment and said why they thought these provisions are so important;
  - only 2 or 3 of the 210 separate respondents raised concerns about the provisions on harassment or third-party harassment or suggested scrapping provisions in relation to third-party harassment.
- The spotlight on prohibited conduct:
  - there were 213[12] responses[13], the overwhelming response from more than 95% of respondents was not to change the current provisions on prohibited conduct[14] - many commented that if any change is made it should be to strengthen the legislation on prohibited conduct;
  - many stated that they supported the proper enforcement of the legislation and they wanted greater access to justice for complainants;
  - nearly 30 respondents[15] specifically singled out the issue of harassment, all bar 2, argued for the need to retain the current provisions on harassment and around 75% of these respondents specifically commented on, and raised concerns about, the government's proposals to remove provisions on third-party harassment.
- We are concerned that the third-party harassment consultation paper fails to address or engage with the fact that the majority of respondents rejected and argued against any reduction in the protections covering prohibited conduct or individuals at work.
- We believe that objectivity demands and any proper consultative process should take account of the views expressed by respondents. Where overwhelming views are expressed, it is incumbent upon those assessing the responses to demonstrate, if the majority view is rejected, why the majority view has been rejected.

1.4 Failures in analysis, objectivity and bias and the EIA

[9] Consultation document, paragraph 2.5 and 2.6, page 6.
[10] Again some respondents replied more than once so excluding people who made more than 1 response probably 210 – 215 separate responses were received.
[11] Responses received to this RTC spotlight on equalities between June 2011 and 26/7/12. The responses were checked again 7/8/12 and no additional responses had been posted
[12] Some respondents provided more than 1 response but most only responded once. 4 unnamed respondents did not respond to the consultation – so there were probably 200 separate responses.
[13] Responses received to this RTC spotlight on equalities between June 2011 and 26/7/12. The responses were checked again 7/8/12 and no additional responses had been posted
[14] Representative examples of comments: "As an absolute minimum, all the current prohibited conduct must be kept in place." "Please leave this law alone." "I see no reason whatsoever to change this." "No change is required."
[15] We have been careful not to double count anyone making more than 1 response

The review is seriously biased and flawed. We believe the flaws are so serious that if this approach is pursued judicial review would be warranted. The consultation document gives a partial and misleading impression of the position on third-party harassment providing a flawed and inadequate basis for consultation. The 2nd edition of Blackstone's Guide to the Equality Act 2010 provides an informed assessment of the legal position in relation to third party harassment (see box a). Our assessment is that the Government has decided to repeal section 40 (2) – (4):

- irrespective of any views or evidence presented by over 7000 dissenting voices including CSOs, equality organisations, legal experts and others that challenge the proposal to remove section 40 (2) – (4) (see 1.3 and table 2);
- without presenting clear evidence, in its consultation document, that repealing provisions on third party harassment has any significant or informed support;
- despite any meaningful examination of likely unintended consequences and evidence that repealing these provisions will have a negative impact (see table 3 and responses to questions 6 – 8).

Box a: Third Party Harassment [Source Blackstone's Guide to the Equality Act 2010]

- 4.23 A new aspect of the prohibition against harassment in employment is the liability of employers for third party harassment against employees in the course of employment. The provision applies to all the protected characteristics, where previously it only applied to the protected characteristic of sex.[16]
- 4.24 This provision closes the loop-hole created by the House of Lords judgment in Pearce v Governing Body of Mayfield School[17] in which the House decided that Burton v De Hotels[18] was wrongly decided. Burton had established the long-standing principle that employers could incur liability for discrimination against employees by a third party where the employer is in a position of control.
- 4.25 The EAT subsequently revived the principle established in Burton by holding that the harassment provisions contained in the Race Relations Act (Amendment) Regulations 1976 merited this outcome.[19] The High Court reached a similar conclusion in the Equal Opportunities Commission's challenge of the government's transposition of Directive 76/207/EEC (the Equal Treatment Directive).
- 4.26 Under the new provision, an employer will be liable for unlawful third party harassment of employees if (i) s/he knows that an employee has been harassed on two previous occasions by a third party, i.e. someone other than another employee or the employer whether it is the same third party or another third party; and (ii) s/he fails to take reasonable steps to prevent a further act of harassment by the same or another third party.[20] This means that an employer could be liable for acts of harassment against his employees on any of the protected characteristics by, for example, customers or contractors.
- 4.27 Employers should therefore take reasonable steps to ensure that they alert service-users, contractors, and others who might come into contact with their employees, of employer's policy on dignity in the workplace in order to avoid liability.

Table 3: Failures in analysis and objectivity - the assessment by Equanomics-UK

[16] In R (Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] EWHC 483 (Admin); [2007] IRLR 327 the High Court found that the wording of the SDA s. 4A did not comply with the requirements of the Equal Treatment Directive 2002/73/EC. This led to an amendment to the SDA by the Sec Discrimination Act 1975 (Amendment) Regulations 2008, SI 2008/656.
[17] [2003] ICR 937; [2003] IRLR 512.
[18] [1997] ICR 1.
[19] Gravell v London Borough of Bexley UKEAT/0587/06/CEA
[20] S. 40(2), (3), and (4).

1. The assessment of 3rd party harassment in the consultation document

- Paragraph 2.1 of the consultation document states that the legislation on *'third-party harassment has developed through the interaction of EU and UK law, government guidance and judicial review.'* The consultation document then takes the starting point for consideration of the legislative framework, as the then Labour Government's attempts to comply with the 2005 Equal Treatment Amendment Directive.
- Paragraph 3.3 of the consultation document also states that the *'Government is aware of only one case of third-party harassment, having been ruled on by an employment tribunal under the relevant provisions of the 2010 Act or those in the 1975 Act which they replaced, and extended.'* Chapter 3 of the consultation document makes reference to what it calls *'other remedies for third-party harassment',* which it indicates include:
    - the duty of care under common law;
    - health and safety provisions and the duty as far as it is reasonably practicable to maintain the health, safety and welfare at work of employees and requirements in relation to h&s risk assessments that could extend to third-party harassment;
    - general harassment provisions set out at section 26 of the Equality Act 2010;
    - constructive dismissal and the ability of employees to potentially claim constructive dismissal if subjected to third-party harassment;
    - the provisions contained within the Protection from Harassment Act 1997.

2. Flaws in the consultation document in the assessment of the assessment of the legal framework for third party harassment

- The impression given is that the issue of third-party harassment really arose as a result of trying to comply with the 2005 European Directive and that a flawed analysis was adopted in relation to compliance with the 2005 Directive.
- A proper review of the case law, in relation to third party harassment, should have been undertaken. In addition to Blake vs Pashun Care Homes [2011]. Consideration should have been given to two other EAT cases since Gravell vs London Borough of Bexley, Conteh vs Parking Partners Ltd [December 2010] and Sheffield City Council vs Norouzi [June 2011].
- The assessment provided in the consultation document fails to properly document the development of the UK case law in relation third-party harassment and the subsequent development of the overall legal framework (see box a). The landmark case in this area is the 1995/6 case of Burton and Rhule vs De Vere Hotels. Although this case of third-party sex and race discrimination was subsequently overruled by a superior court in 2003, a proper review of the case law would have also revealed that the position was effectively re-established in 2006 by the EAT in the case of Gravell v London Borough of Bexley UKEAT/0587/06/CEA[21] and reaffirmed in the case of Sheffield City Council vs Norouzi decided in June 2011 (see box a).
    - In Gravell, in 2007, the Claimant appealed against part of the judgment given by a Chairman sitting alone in 2006. The Chairman struck out two specific allegations of racial harassment (third party harassment). The EAT ruled that the claims of third party harassment should not have been struck out and remitted the case to another ET.
    - In Sheffield City Council vs Norouzi, at the EAT, the Council attempted to challenge a decision by the Employment Tribunal (ET) that had found in favour of Mr Norouzi.. The claimant in the ET case was social worker employed in a home for troubled children. The ET found that the employer liable for racial harassment and racial discrimination on basis that it had not done enough to protect the claimant from harassment and discrimination by one of the children. Sheffield City Council appealed the decision at the EAT. The EAT considered R (Equal Opportunities Commission) v Secretary of State for Trade and Industry

[21] Source: Blackstone's guide to the Equality Act 2010

Table 3: Failures in analysis and objectivity - the assessment by Equanomics-UK
[2007] ICR 1234 and Conteh v Parking Partners Ltd. [2011] ICR 341 and other case law. The EAT rejected the appeal from Sheffield City Council and found that the ET had been entitled to come to the conclusion that it did..
3. Additional flaws with the analysis in the consultation document
▪ The consultation document gives the impression that third party harassment is a non-issue by saying that none or only a few cases have been pursued under section 40 of the earlier sex discrimination provisions, this is misleading because: o there has been a failure to recognise the normative effective of the law in establishing the standards that should be followed by employers; o there has been a failure to recognise the deterrent effect of the law – employers that understand their legal obligation can and should take reasonable steps to prevent third party harassment and taking such steps prevent third party harassment and also will be a defence at ET; o it ignores the fact that majority of respondents to the Red Tape Challenge – over 7000 respondents – argued for no change to the Equality Act 2010 or for the legislation to be enforced and/or strengthened; o the last employment tribunal statistics available for England cover 1st April 2010 – 31st March 2011[22]; o it would have been surprising to see much on third party harassment in the figures available up to 31st March 2010 because: a) the provisions on third party harassment only came into force in October 2010; and b) there are significant time lags involved in listing and hearing ET cases; o there is a problem with statistics on prohibited conduct generally including harassment, and third party harassment, because the annual assessment by the Employment Tribunal Service does not include any analysis by reference to forms of prohibited conduct; o if one wanted to know how many ET case actually involved harassment and third party harassment, the Employment Tribunal Service should be asked to collect the figures; o the significance of the issue, is therefore not best assessed by reference to the number of ET cases, especially as this data does not exist, but by reference to the rulings of Employment Appeal Tribunals.

1.5 Failing to consider the cumulative impact of proposed changes

The Government has also announced proposals to repeal the new power for Employment Tribunals and the questionnaire procedure. The Enterprise and Regulatory Reform Bill includes changes to the remit of the EHRC and changes to the arrangements for employment tribunals. In addition, a review of the Public Sector Equality Duty (PSED) is proposed. The ministerial foreword to this consultation document[23] - rings very hollow. Moreover, the Coalition Government's commitment, made in 2010 repeated in 2011, not to repeal the Equality Act 2010, rings equally hollow. As respondent after respondent to the Red Tape Challenge made clear, none of the provisions under review are regulations, all are part of the primary legislation. It is therefore disingenuous for ministers to refer to **tackling regulations** when in fact they are proposing to repeal parts of the primary legislation. The impact of repealing each subsection of the Equality Act 2010 is serious, the cumulative impact of these

[22] Employment Tribunals and EAT statistics, 2010-11 {Published September 2011, Ministry of Justice and HM Courts & Tribunal Service]

[23] *This Government is committed to equal treatment equal opportunity, this means building a society where no one is held back because of who they are, or where they come from'*

proposals, the proposals in the Enterprise and Regulatory Reform Bill and the planned review of the PSED, is even more dangerous.

If all of the proposals are implemented, there will be a serious and adverse impact on unlawful discrimination, the promotion of equality of opportunity and fostering good relations, the cumulative impact of the proposals could undermine the framework of the Equality Act 2010 itself. Whilst the disbenefits are clear, the actual benefits to business and all those that have to comply with the legislation, are unclear. Our assessment is that informing organisations about the changes will actually cost money and cause confusion. **These proposals are inconsistent with the Government's stated commitment to equal treatment, equal opportunity, the PSED and European and international equality obligations.**

Section A: What are your experiences of third party harassment?

Question for employees

Question 1: a) Have you experienced conduct that you consider would count as third party harassment at work? b) If you have, did you make a claim to an employment tribunal against the employer? If yes, please give details; if you did not, please say why.

We are responding as a Voluntary and Community Organisation (VCO)**.**

N/A

Question for employers

Question 2: Has an employee ever made a claim against you because they said they had experienced conduct which would count as third party harassment at work? If yes, please give details.

We are responding as a Voluntary and Community Organisation (VCO) but we do not currently employ any staff.

N/A

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.

We are responding as a Voluntary and Community Organisation (VCO) but we do not provide direct advice to employers or employees of the sort envisaged.

N/A

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.

We do not agree that the provisions on third party harassment, set out as section 40 (2) – (4) should be repealed.

People should be able to work in an environment in which they are free of harassment from customers, clients or other parties. As a race equality focused organisation, we are all too well aware of the type of racial abuse that transport staff (e.g. train and bus drivers and conductors), health and social care workers (e.g. care workers, doctors, nurses, social workers) and catering and cleaning staff can receive from customers and service-users. Third party harassment is not atypical for BME staff and some of the pivotal cases that have been considered by Employment Tribunals and EATs have involved BME workers. We also know that many BME staff put up with a lot and do not take cases to employment tribunals so long as they know that their employer is doing what they should do to protect them.

The provisions on third party harassment set out in section 40 (2) – (4) of the Equality Act 2010 seek to clarify the position in relation to employers, third party harassment and draw on case law that dates back to at least 1995/96 and the case of Burton vs De Vere Hotels (commonly known as the Bernard Manning case), and a number of key EAT decisions.

Removing the provisions set out in section 40 (2 -4) makes no sense whatsoever and will muddy the waters and clarity that that section 40 (2 - 4) was intended to provide. The Government appears to accept that it is necessary to provide protection from third party harassment as reference is made in the consultation document to section 26 of the Equality Act 2010 and to a range of other potential legal provisions. Removing section 40 (2) – (4) will sow confusion, cost money and not remove the need for employers to address third party harassment. Moreover some of the people who are most likely to be adversely affected by the abolition of this provision are some of the most vulnerable and poorly paid people in the workforce who are least able to defend themselves.

As to the legal reasons for not removing section 40 (2) (4), Equanomics UK shares the concerns expressed by EDF and we are concerned that the abolition of this provision would be in contravention of European law:

- there is no doubt that employees have a right to be protected from harassment in relation to the protected characteristics;
- the European Directives do not limit the persons in relation to whom that right exists to simply employers - the Directives speak of the contexts within which the protection is necessary - the Directives each have a scope provision such as Article 3 of the Race Directive which sets the context within which protections must be afforded to workers, this scope provision does not provide for any exclusion in relation to harassment by third parties;

- the Government has adopted an erroneous approach, workers are entitled to be protected from harassment by any one at all in those contexts which fall within the scope provisions of the relevant Directives[24];
- it would be no more permissible for a local authority to deny access to housing by permitting harassment of tenants by neighbours than it would be permissible for employers to deny safe and appropriate working conditions by permitting harassment of employees by third parties such as customers and clients.

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.

The Red Tape Challenge responses, case law and the Discrimination Law Review all demonstrate that there is a need for action to be taken to protect employees from third party harassment.

Whilst we support the suggestions made by EDF, we believe that the removal of section 40 (2) – (4) and the associated muddying of the waters, would make it harder rather than easier to provide clarity to employers, employment sectors, employees and those responsible for providing advice on employment matters.

The proposals on repealing key provisions on third party harassment are an example of a poorly considered, poorly informed, poorly thought through and, if implemented, poorly executed legislative change.

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**
Yes, I think there are further benefits to include	**None**
No, I think all costs and benefits have been included	
Don't know	☐

[24] Taking the Race Directive as an example – Article 3 Scope
1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay; (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; (e) social protection, including social security and healthcare; (f) social advantages; (g) education; (h) access to and supply of goods and services which are available to the public, including housing.

If yes to <u>further costs</u>, please use the space below to provide detail

The analysis provided under the heading costs and benefits between pages 23 - pages 36 of the consultation document are an example of statistical analysis gone mad. The first statement made on page 23 states that *'our best estimate of the number of cases which would be brought each year is 0, as no cases have been brought to date.'* A series of elaborate projections on possible savings associated with repealing the provisions on third party harassment in section 40(2-4) are then provided. Of course anyone who actually knows how employment tribunals work, would know that the estimates bear no relationship to what happens in the real world. In the real world, discrimination cases can include more than one type of prohibited conduct and the type of financial calculation attempted in the consultation document is therefore almost completely meaningless.

Moreover in the real world, when someone has been pushed too far by discrimination abuse and harassment, then they will seek whatever avenue is available for redress especially if they believe that their employer is at fault. Our assessment is that there will be no savings whatsoever from repealing these provisions on third-party harassment because individuals seeking to take an employment tribunal case:

- would rely the definition of harassment provided by section 26 of the Equality Act 2010 especially as the consultation document clearly states that *'it is possible that section 26 of the 2010 Act covers acts of conduct covered by section 40 (2) – (4) of the 2010 Act*'; or
- would seek to tread similar ground as pursued most recently in Sheffield City Council versus Norouzi[25]; and/or
- challenge via judicial review; and/or
- would seek to challenge the U.K.'s lack of compliance with relevant European directives.

Our assessment is that there could be a range of costs to organisations and to individuals facing discrimination in employment associated with the repeal of section 40 (2) – (4). The additional costs include:

- additional costs for those that advise businesses and other employers, in the private, public and voluntary sectors, who would have to explain that the removal of section 40 (2) – (4) does not in fact remove the ability of a claimant to challenge third-party harassment using the Equality Act 2010;
- confusion for employers - on the one hand, they will be told, or believe, that the provisions on third-party harassment have been removed, only to find that they may still be subject to legal challenge, in an employment tribunal, on the basis of third-party harassment under section 26 of the Equality Act 2010;
- uncertainty and confusion for employees who will feel that their right to be protected from facing third-party harassment have been reduced;

[25] Summary: The EAT found after an appeal by Sheffield City Council against a decision in favour of the claimant - a social worker, employed in the home for troubled children, that the employment tribunal had been '*entitled on the facts to find employer liable for racial harassment and racial discrimination on the basis that it had not done enough to protect Claimant from harassment discrimination by one of the children.' Appeal number UKEAT/0497/10/RN*

- confusion about the message to be given in the workplace which surely should be that *'Employers should ... take reasonable steps to ensure that they alert service- users, contractors, and others who might come into contact with their employees, of employer's policy on dignity in the workplace in order to avoid liability'*[26]*;*
- attempts to use the other legal provisions referred to in the consultation document – health and safety laws, the protection from harassment legislation, provisions on constructive dismissal - which could in fact mean that employers face legal challenges in court and new challenges in employment tribunal in relation to third-party harassment;
- the likely costs of judicial review as individuals and CSOs seek to challenge the proposed removal of the provisions on third party harassment;
- challenge at European level as the UK's compliance with relevant directives is challenged if judicial reviews fail.

If yes to <u>further benefits</u>, please use the space below to provide detail

We see no benefits associated with proposed repeal of section 40 (2) – (4).

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

Please see our response to question 6(a) and the analysis provided in our opening statements to this submission. We reiterate that in the real world harassment and third party harassment are often part of a wider claim of discrimination on the basis of one of the nine protected characteristics. We believe that the number of standalone claims of third party harassment should remain quite small. However the law of unintended consequences suggests the following:

- if the provisions on third-party harassment set out in section 40 (2) – (4) are repealed, employers may genuinely think that they cannot be subject to third-party harassment claims;
- if employers do not take proper steps to protect employees from third party harassment, then the number of claims of third-party harassment pursued may in fact increase;
- the helpful analysis provided in the consultation document, about the alternative avenues for making claims about third-party harassment - constructive dismissal, health and safety legislation, the protection from harassment legislation - might actually be employed by individuals if redress under the Equality Act 2010 is reduced.

[26] Guidance on 3rd party harassment provided in the 2nd edition of Blackstone's Guide to the Equality Act 2010

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

N/A We cannot answer the question about the number of cases in relation to third-party harassment and in any case it is an almost meaningless question.

Please use the space below to explain your answer

This question also misses the fundamental reason why we have equality legislation. One of the reasons for having employment and equality legislation is to make it clear what the expectations are of employers. The expectation is then that good employers follow the law, create good working environments and avoid ET cases. Many organisations, businesses, trade unions and individuals believe that good employment and equality practices are good for workers, managers, organisations and businesses.

Employers that actively seek to comply with equality legislation, and take reasonable steps to protect their employees, reduce their overall risk of facing an employment tribunal and reduce the likelihood of a claim on the basis of third-party harassment.

If the Government wants to know how many discrimination cases include a claim of harassment and /or third-party harassment, the simplest solution is to ask the Employment Tribunal Service to produce this data either as part of its annual report or on a one-off basis[27].

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?

No

If no, please use the space below to explain your answer

The Equality Impact Assessment is seriously flawed.

Annex 2: Equality Impact states that *'Without these provisions employers will no longer be liable under the Equality Act for harassment of an employee by third-party. However, there are alternative provisions in place which may be able to provide adequate legal protection for employees who experience harassment by third-party, such as a customer or supplier. Employees who experience this type of harassment will therefore be able to continue to be protected in relation to each of the relevant protected characteristics.'*

[27] However, consideration would then need to be given to whether to monitor the number of claims. In relation to direct discrimination, indirect discrimination, victimisation and harassment and/or any other area of prohibited conduct. At present employment tribunal service monitors jurisdictions by reference to the 9 protected characteristics in key areas of employment law.

Annex C page 15, states that the intended policy objective and the intended effects are to *'reduce any regulatory burden on employers that the third-party harassment provisions may impose, where that burden is deemed to be disproportionate. The intended effects are to ensure... that steps will be taken to remove these provisions from the legislation without affecting redress already potentially available by other means in the same circumstances.*'

These illogical statements appear to suggest that somehow the provisions on third-party harassment, set out in section 40 (2) – (4), can be removed without any detrimental impact. We believe that this assessment is fundamentally flawed for the reasons set out in our opening statements. Our response to question 6a is repeated here for the sake of clarity. The actual impact of the repealing section 40 (2) – (4) would be:

- additional costs for those that advise businesses and other employers, in the private, public and voluntary sectors, who would have to explain that the removal of section 40 (2) – (4) does not in fact remove the ability of the claimant to challenge third-party harassment using the Equality Act 2010;
- confusion for employers - on the one hand, they will be told, or believe, that the provisions on third-party harassment have been removed, only to find that they may still be subject to legal challenge, in an employment tribunal, on the basis of third-party harassment under section 26 of the Equality Act 2010;
- uncertainty and confusion for employees who will feel that their right to be protected from facing third-party harassment have been reduced;
- confusion about the message to be given in the workplace which surely should be that *'Employers should ... take reasonable steps to ensure that they alert service- users, contractors, and others who might come into contact with their employees, of employer's policy on dignity in the workplace in order to avoid liability'*[28]*;*
- attempts to use the other legal provisions referred to in the consultation document – health and safety laws, the protection from harassment legislation, provisions on constructive dismissal - which could in fact mean that employers face legal challenges in court and new challenges in employment tribunal in relation to third-party harassment;
- the likely costs of judicial review as individuals and CSOs seek to challenge the proposed removal of the provisions on third party harassment;
- challenge at European level as the UK's compliance with relevant directives is challenged if judicial reviews fail.

Furthermore feedback, from the Red Tape Challenge, suggests that many respondents believe that removing the provisions on third-party harassment set out in sections 40 (2) – (4) will worsen the position of those facing discrimination across the protected characteristics. Our assessment is that the effect of repealing section 40 (2) – (4) would:

- do nothing to reduce unlawful discrimination and could encourage unlawful discrimination;

[28] Guidance on 3rd party harassment provided in the 2nd edition of Blackstone's Guide to the Equality Act 2010

- do nothing to improve equality of opportunity and could reduce equality of opportunity;
- do nothing to foster good relations.

We are clear that there are no demonstrable benefits associated with this proposal, there are clear disbenefits associated removing section 40 (2) – (4). We therefore believe that the Equality Impact Assessment is woefully inadequate as it simply does not engage with whether or not this policy or proposal would contribute to, or undermine compliance with all three limbs of the PSED.

We note the inclusion of Annex 1 entitled the Economic Price of Discrimination. The paper states that it seeks to *'use the economic theory of discrimination, as pioneered by Becker to estimate the price of discrimination in the UK.'* A meaningful approach to seeking to estimate the economic cost of discrimination in the UK would have been welcomed. The Equalities Review published in 2007, the EHRC's Triennial Review published in 2010 plus an analysis of annual data on discrimination cases published by Employment Tribunal Service could provide useful and valid starting points for such an analysis. The approach adopted in annex 1 ignores all of the major research around equalities conducted in the last 10 years and most relevant datasets. Moreover, the financial or economic impact on individuals who have alleged that they have faced discrimination, or have won case demonstrating that they have faced discrimination, is noticeable by its absence from the paper.

Annex 1 says that *'In this paper we consider employer discrimination only. Therefore the costs and benefits of reducing discriminatory behaviour, as presented below, relate to employers only.'* The paper really should say we are disinterested in the economic consequences of discrimination for the employees who face discrimination because we are only interested if discrimination impacts on the competitive advantage of a business. We believe that adopting this approach is fundamentally flawed.

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

No

If no, please use the space below to explain your answer

The 6 line Justice Impact Test on page 29 of the consultation document was flawed and did not provide a proper assessment of the implications for the justice system. In summary, our assessment of the implications for the justice system are that removing the provisions on third party harassment set out in section 40 (2) – (4) would:

- result in more EAT cases, as the law would probably have to be tested in relation to section 26 and new case law established – potentially a costly exercise for some employers and a waste of time for the justice system;
- require additional training if courts are asked to consider more challenges using health and safety legislation and/or the Protection from Harassment Act – where such cases where taken this would probably be more expensive for

all the parties involved as the lawyers and courts would be entering new territory;

- lead to confusion about third-party harassment, leading to the potential of judicial review and legal challenge in the UK courts and Europe;
- increase confusion about the most appropriate legal avenues available to challenge third-party harassment rather than the clarity and harmonisation that the Equality Act 2010 was intended to bring about through section 40 (2) – (4);
- potentially increase confusion for both employers and employees about what action should be taken to prevent third-party harassment in the workplace and what the legal consequences will be of a failure to take appropriate action;
- potentially limit an important avenue for securing redress in relation to third-party harassment by repealing section 40 (2) – (4).

Thank you for completing this response form.

Responses will be used to help the Government assess your views on its proposal to repeal the employer liability for third party harassment of their employees provision – section 40(2)-(4) of the Equality Act 2010.