

Policy Response



equality • choice • control

Capability Scotland 6th August 2012

Capability Scotland campaigns with, and provides education, employment and care services, to disabled people across Scotland.

Capability Scotland Response to Equality Act 2010 – Employer Liability for Harassment of Employees by Third Parties: A Consultation

Summary

- Capability Scotland is deeply concerned by the UK Government's proposal to remove the provision on third party harassment from the Equality Act 2010. This provision, which has been in place for less than two years, provides important protection for employees and sends a clear message to employers that harassment of staff must not be tolerated.
- The proposed reduction in protection is particularly worrying at a time when disabled people feel attitudes towards them have significantly worsened and when around one in five disabled people (19%) in Great Britain report having been treated unfairly in their workplace. This compares to approximately one in eight non disabled people (13%)¹.
- We are also concerned that the removal of this provision is little more than a gesture on the part of the Government. The Government reiterates throughout the consultation document that third party harassment can still be challenged under other legislation and common law principles. If this is in fact the case, we fail to see the point in removing the provision from the Equality Act, a piece of legislation which was intended to simplify and unify existing legislation. Furthermore, we are concerned that even considering the removal of the provision sends a negative message to employees and employers alike regarding the Government's commitment to ending harassment at work.

¹ Inclusion London: Key Facts on Deafness and Disability; <http://www.inclusionlondon.co.uk/key-facts-deaf-and-disabled-people-in-london>

Do you agree or disagree that the third party harassment provision should be repealed? Please explain.

1. We are strongly against repeal of the third party harassment provision. We believe there is a real need to emphasize the message that the harassment of staff is completely unacceptable and that employers have a duty to take reasonable steps to prevent it. Research has found that the proportion of disabled people who experience discrimination in the workplace is nearly twice as high as non-disabled people, and the proportion of disabled people who report experiencing bullying or harassment in the workplace is more than twice as high.² This is in a context in which disabled people have a lower employment rate than non-disabled people.³
2. The fact that there has only been one case brought under the provision does not mean that the provision is not being used or that it is not useful. No doubt many employers will have complied with the legislation (as we would wish them to) and taken preventative steps to prevent harassment.
3. Furthermore, given ever growing barriers in the way of people challenging their employer, it is not surprising that the provision has been under-utilised. A reduction in the availability of advice and legal aid, the scarcity of jobs (particularly for disabled people) and the difficulty of gathering sufficient evidence would put many people off pursuing a claim. Indeed, the Equality and Human Rights Commission research paper, 'Hidden in Plain Sight' showed that in most cases, the victims of harassment are reluctant to challenge their treatment. The research found that,

"First reactions to harassment tend to be to keep a low profile and escape the situation, but some people were more assertive. Later, many told someone what had happened – usually a friend or trusted confidant – but often to 'unload' rather than in expectation of anything further being done."
4. It does not follow that rights which are difficult to enforce should be removed. Rather the UK Government has legal duties under international human rights convention's to take positive steps to ensure that individual rights are realized. These duties go beyond ensuring that rights are enshrined in law, they also entail a duty to ensure that rights are practically enforceable.
5. We are concerned about the underlying message being sent out by the removal of this provision. The suggestion appears to be that promoting equality and protecting individual rights is less important than turning a profit. This is particularly worrying at a time when there is a risk that economic pressure will make the British workplace a more competitive, less tolerant place. This is borne out in the 2010 Scottish Attitudes to Discrimination Survey which found that the proportion of people who regard positive action to improve the prospects of disabled people as 'unfair' increased slightly from

² Fevre, R., Nichols, T., Prior, G. and Rutherford, I., 2009, *Fair Treatment at Work Report 2009: Findings from the 2008 Survey*. Employment Relations Research Series 103. London: Department for Business, Innovation and Skills. Available from: <http://www.berr.gov.uk/files/file52809.pdf>

³ ODI. Disability Equality Indicators. Employment Rates. Labour Force Survey, quarter 2, 2010. Available from: <http://odi.dwp.gov.uk/roadmap-to-disability-equality/indicators.php>

57% to 63% between 2006 and 2010⁴. While this shift is small and it relates to the controversial area of positive action, it is still indicative of the need to continually address and tackle negative attitudes to disabled people in relation to employment.

6. We are also concerned that the removal of this provision is little more than a gesture on the part of the Government. The Government reiterates throughout the consultation document that third party harassment can still be challenged under other legislation and common law principles. If this is in fact the case, then we would question the point of removing it from the Equality Act. Surely the substance of the law will remain the same, it will just make it more opaque and difficult to enforce. While this may serve the Government's purpose, it will also make employment law less democratic and more difficult to apply, which goes against the spirit of the Equality Act.
7. The Government also states that it is unreasonable to expect employers to take action against harassment "*when employers have no direct control over it*". This is not what the provision asks the employer to do. Section 40 only requires action after there have been three incidences of harassment. Even then, the employer is only required to take steps where it is reasonably practicable to do so. It is difficult to imagine a tribunal finding an employer in breach of the Act if there was in fact nothing they could have done to prevent the harassment. This is scaremongering on the part of the Government.
8. It is also unacceptable to measure the value of this provision in purely monetary terms as the Government appears to do in this consultation document. The implication of this approach is that employees who are harassed at work should tolerate it because it would be too expensive and burdensome for their employer to do anything about it.
9. The Government references Becker's statement that the "*neoclassical approach to economics suggest that competitive market forces must eliminate employer discriminatory behavior*". As the Government acknowledges, there is often a need for legislation to speed this process along and smooth over 'market imperfections.' Furthermore, while the long term economic cost may well be borne by the discriminator (thereby disincentivising discriminatory behaviour), it is the person being discriminated against – in this case the employee – who bears the immediate cost. There is also a cost to society as people prevented from progressing in their careers because of a personal characteristic irrelevant to their work are excluded. The Government ought to give these costs more consideration in developing its policy. It should also consider how economic growth can be a *consequence* of equality and non-discrimination. The OECD has stated that, "*Well-being is increased by institutions that enable citizens to feel they control their own lives and that investment of their time and resources will be rewarded. In turn this will lead to higher incomes in a virtuous circle*"⁵

⁴ EHRC Scottish Social Attitudes to Discrimination Survey 2012

⁵ OECD 2006 Alternative Measures of Well-being; Economic Policy Reforms; Going for Growth 2006

If the provision were removed, is there any other action that the Government should take to address third party harassment at work? Please explain your answer.

10. We believe that the best way for the Government to address third party harassment at work would be to retain the provision which gives employers a duty to take reasonable steps to prevent it. This provision should be better publicised and supported by:
- accessible and appropriate information and advice
 - adequate availability of legal aid for those who wish to make a challenge
 - government commitment to addressing inequality, discrimination and harassment in the workplace.

Does the consideration of the impact on equality in the impact assessment properly assess the implications for people with each of the protected characteristics? If not, please explain why.

11. The removal of this provision will clearly have a negative impact on those people with protected characteristics who are no longer protected from third party harassment. We have highlighted throughout this response the particular negative impact this will have on disabled people.
12. Removal of the provision will also disproportionately affect those people who come into contact with the public through their work and therefore have a higher chance of experiencing third party harassment. This means those groups more likely to work in public facing industries such as tourism, retail, care and personal services. Groups over-represented in these sectors include younger people, women and those with fewer qualifications (likely to be lower socio-economic groups)⁶.

About Us

Capability Scotland campaigns with, and provides education, employment and care services for, disabled people across Scotland. The organisation aims to be a major ally in supporting disabled people to achieve full equality and to have choice and control of their lives by 2020. More information about Capability can be found at www.capability-scotland.org.uk.

Contact Us

Thank you for the opportunity to comment on this consultation. If you require more information on this response, please contact:

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⁶ See Employment by Occupation and Industry; N.Begum 2004 www.onstest.landmarkgovernment.co.uk