

## 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):

Position in organisation (if appropriate):

Name of organisation (if appropriate):

Address:

Contact phone number:

Contact e-mail address:

Date:

### 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.

You or your organisation

**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)

Other (please specify)

**Q(ii) Is your organisation**  
(please tick the box that applies to your organisation)

A local authority (including health authority) or local authority organisation

An equality lobby group or body

A statutory body

An organisation representing employers

A professional organisation

A trade union or staff association

A legal organisation

Other (please tick box and specify)

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

Between 1 and 5 employees

Between 6 and 14 employees

Between 15 and 49 employees

Between 50 and 249 employees

250 employees or more

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

Legal services

Construction and/or building design

Communications

Wholesale and retail trade

Leisure – hotels, restaurants, pubs

Leisure – cinemas, theatres, museums

Leisure – other

Distribution/transport

Financial and/or business services

Electricity, gas and water supply

Advice and/or information services

Public administration

Education/training

Health and social work

Charity/voluntary work

Other (please tick box and specify)

**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.

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

**Question 1a: (Question for employees)**

**Have you experienced conduct that you consider would count as third party harassment at work?**

Yes

No

Don't know

Prefer not to say

If you have ticked yes, it would be helpful to understand more about what form of conduct you experienced. Please use the space below to provide further details and go to Question 1b

---

<sup>1</sup> See Annex 1 for the definition of 'third party harassment' in the 2010 Act

**Question 1b: (Question for employees)**

**You have stated that you have experienced conduct that you consider would count as third party harassment at work. Did you go on to make a claim to an employment tribunal against your employer?**

Yes

No

Prefer not to say

If yes, if you are happy to do so, please use the space below to outline what happened to your claim once you lodged it with the employment tribunal

If no, if you are happy to do so, please use the space below to outline your reason for deciding not to bring a claim against your employer

**Question 2: (Question for employers)**

**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?**

Yes

No

Prefer not to say

If yes, if you are happy to do so, please say what happened with the claim



**Question 3a: (Question for those advising or acting for employers)**  
**Have you ever advised or acted for an employer who has had an allegation of third party harassment brought against it?**

---

Yes

No

Prefer not to say

If yes, if you are happy to do so, please give details

**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**

As far as we are aware, our affiliated trade unions have not supported any formal cases of third party harassment. This, however, does not mean that the legislation is having no effect. The purpose of legislation is not simply to prosecute offenders, but to set out in a clear and concise way what is considered acceptable. Equally, one of the roles of trade unions is to support employees in raising and resolving issues before they become formal cases, thus avoiding the need to go to tribunal. We would, therefore, caution against any approach that considers the number of cases taken to be a reflection on the value of the law. Further, it is our view that the third party harassment regulations encourage employers to consider the wellbeing of their employees, while carrying out their work with third parties and, therefore, contribute positively to the promotion of equality in the workplace.

**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**

The main policy aim behind repealing this legislation is to reduce the regulation on business. The consultation paper, therefore, celebrates the reduction of regulation as an end in itself without a serious consideration of whether removing this provision makes the workplace function better, improves equality outcomes for workers or gives a clear steer to businesses around their responsibilities towards their employees.

Far from reducing the requirements that businesses face, removing this regulation simply creates confusion about how the law stands and the protection and support that an employer should offer their employees. In reality, if these regulations are repealed, the response of a good employer should be not to act, but to continue to try to create a workplace free from discrimination where employees feel supported and where harassment from customers, suppliers or other third parties is not tolerated.

By removing this regulation, the Government is, therefore, sending out a misleading message and, in general, this move is detrimental to the wider goal of achieving more equal workplaces in three ways:

- Firstly, it calls into question the Government's own commitment to equality, particularly given the bureaucratic approach taken to this consultation, seeing it simply as an exercise in counting the number of regulations that exist, rather than looking at the completeness or the coverage of the law.

- Secondly, repealing this legislation creates the impression that the employer is no longer liable for third party harassment which is clearly not the case, as there would potentially be other remedies open to the employees (although we contend that these are limited and more difficult to use than the third part harassment regulation as it currently stands).
- Finally, it raises issues of access to justice and removes the coherence that exists in the legislation at present, whereby an employee can seek remedy to harassment on the grounds of a protected characteristic by using equality legislation. It is our view that equality legislation should provide remedy for third party harassment and employees should not have to rely on an implied right within a contract of employment, health and safety legislation or legislation meant to combat stalking.

**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**

It should not be forgotten that third party harassment regulations were included in wider equality legislation, in order to provide protection from a specific form of discrimination. This is illustrated in the *Burton and another v De Vere Hotels Ltd* [1997] case, commonly known as the “Bernard Manning” case, where De Vere Hotels was found liable for the harassment of two of its staff, who became the subject of the comedian’s racist and sexist jokes during his performance. Despite the fact that he was not an employee of the hotel group, De Vere Hotels was held liable for failing to take steps to prevent the discrimination complained of from taking place.

The third party harassment provisions are designed to ensure that employers consider the sort of working environment that is created for staff particularly, as in the “Bernard Manning” case, when the employer has agreed to allow their premises to be used by someone who is well known for a particular point of view.

A similar sort of situation could be created, for example, if a hotel allows its premises to be used by the BNP or the National Front. Since the employer is profiting from these sorts of bookings, it is reasonable that the right of staff not be subjected to harassment in the course of their work should also be considered.

If these provisions are repealed, it would be necessary for the Government to consider how employers are encouraged to take reasonable steps to ensure that harassment by third parties does not take place. The benefit of the Third Party Harassment regulations is that they encourage employers to be proactive in this regard and to consider how to prevent instances of harassment occurring. They, therefore, play a valuable role in promoting equality in the workplace and the Government would need to consider how these equality outcomes could still be achieved.

**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**

The analysis of the costs associated with repealing these provisions are limited, as they do not properly take into account the effect that facing harassment can have on employees in the workplace. Facing a negative working environment, particularly over a sustained period of time, where proper levels of support are not provided by the employer, can cause employees to suffer from stress and other health issues, potentially raising levels of absenteeism and staff turnover and could increase the number of disputes between employers and employees.

While this is difficult to quantify, the approach used in the consultation document does not even begin to try to understand the wider costs of repealing this legislation. There is some limited consideration given to the benefit of reducing discrimination in the workplace when analysing retaining the regulations, however, a similar exercise looking at the cost of discrimination is not undertaken when analysing the effect of repealing the legislation.

These costs are likely to be highest where employers take a compliance only approach to equality in the workplace and where they take the removal of these regulations by Government as a sign that they are no longer responsible for trying to prevent harassment from third parties. Ultimately, this misleading action by Government could create further costs associated with unequal and harmful working environments which have not been properly quantified.

If yes to further benefits, please use the space below to provide detail

**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**

The cost/benefit analysis in the consultation document estimates that the biggest single cost for employers is created by the need to “transition” to a new legislative requirement. It should be recognised, therefore, that removing these regulations imposes further costs on employers. The consultation document recognises that many employers have already got to grips with the provisions in the Equality Act 2010 and by changing how this Act applies, employers would be required to undertake some of this work for a second time, so as to understand how the changed legislative landscape affects them.

Given that these regulations are quite precise and deal with an area which does not give rise to many tribunal cases, but which does encourage employers to provide a positive working environment for employees, and that more costs are occurred by removing these regulations than leaving them in place, it is difficult to understand why the Government is in favour of repealing this provision.

Ultimately, these regulations are being removed to satisfy the Government's political commitment to reduce regulation. There has been no genuine consideration of the merits of these provisions in their own right, their contribution to positive working environments for employers and employees, and the general aim of promoting equality across all areas of public life.

**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**

We would not anticipate an increase in cases if the provisions are retained. It is our view that the regulations do, however, encourage employers to act in a way that promotes equality in the workplace by requiring them to take steps to ensure that employees are not subject to harassment by third parties. They are, therefore, providing a positive contribution to equality in the workplace which should not simply be measured by the number of formal cases taken.

**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**

The equality impact assessment does not properly assess the impact on equality of each of the policy options.

For example, it does not take into account the difficulty that exists in accessing justice, if employees have to rely on a range of different pieces of legislation – none of which are specifically designed to combat the issue of harassment on the grounds of a protected characteristic – in order to make a complaint about discrimination they have faced in the course of their work.

Further, the analysis does not take into account the positive contribution that this legislation can make to equality in the workplace by providing a clear steer to employers about their duty of care towards their employees.

Rather, the equality impact assessment focuses on whether there is equal treatment for each “equality group” under the law. The purpose of an equality impact assessment is not to assess whether the law treats each protected characteristic in the same way, rather it is designed to analyse how changes to legislation affect equality outcomes for different groups. The equality impact assessment has not done this and, therefore, no decisions should be made to repeal sections of legislation until the impact of this decision has been properly equality impact assessed.

**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**

The Justice Impact Test only considers the impact on the number of cases brought if the legislation is repealed. It seems reasonable that a Justice Impact Test should also consider the effect on natural justice, if there are particular situations where there will now be no protection under equality legislation for people facing harassment at work on equality grounds. Equally, it should consider the consequences for access to justice, if there is no single clear piece of legislation that can be used for redress by employees facing harassment.



While we understand the case the Government is making around using breach of contract rules, health and safety legislation or the Protection from Harassment Act 1997 as recourse for third party harassment, the argument seems unsatisfactory, given that we currently have a more precise regulation on the statute books that is clearer and simpler to use.

The Government should recognise that, if the third party harassment regulations are removed, there would be specific situations where harassment and discrimination take place in the workplace, but where it would be difficult to show employer liability or prosecute a case as a result.

*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.*