Response to:

Equality Act 2010 – employer liability for harassment of employees by third parties: A consultation

6th August 2012

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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

6th August 2011

Dear Sir/Madam

We are writing to respond to your consultation about proposals to remove specific provisions within the Equality Act, relating to Third Party Harassment. We welcome this opportunity as the East Midlands Regional Equality and Diversity Partnership (REDP).

REDP is a partnership of Voluntary and Community Sector organisations working across the East Midlands, to ensure that equality, diversity and human rights are embedded in decision-making processes followed regionally, nationally and locally. We adopt a collective and collaborative approach to equality and diversity practice.

We have a successful track record of having worked widely with public bodies, voluntary sector organisations and businesses in the private and social enterprise sectors in the management of equality and diversity for more than 15 years. This submission is informed by our extensive experience of working in the field and by a survey conducted specifically for this purpose among organisations across the East Midlands. The survey results that are presented here are the summary of 171 views submitted to REDP between 27th July and 3rd August 2012.

1. Overall:

1.1 In the first instance, we wish to draw attention to the lack of public awareness of the proposal to repeal the provision in the Equality Act 2010 that places a responsibility on employers to protect employees from persistent harassment. The organisations and individuals that we have contact with are all committed to the development of a fair, just and equitable society. The respondents are within our network because of their desire to be fully informed of the latest developments in practice and thinking about the equality agenda. However our informal inquiries had indicated that very few individuals or organisations had been made aware of these significant proposals. Consequently, in our survey, we asked specifically if respondents were aware that it was being proposed that section 40(2)-(4) of the Equality Act 2010, providing protection from persistent harassment in the workplace, should be repealed.

1.2 The response, drawn from 171 respondents, indicates that only 20% of respondents were aware of the proposal. These low levels of awareness are disconcerting for a number of reasons – not least because we would have hoped that GEO would have taken steps in the light of the extremely low response to the Justice Department's consultation over tribunal fees (**140 respondent's nationally**) to seek to ensure that this consultation exercise was real and meaningful. Such aspirations are clearly undermined by any lack of effort to adequately inform those that might be affected (especially if the proposed impact has the potential to have a detrimental impact on an identifiable part of the population). It would be unfortunate if a body that wishes to be seen as committed to achieving equality was to continue the pattern of poor engagement in arriving at its decisions. We are pleased, therefore, to have had the opportunity to draw the attention of many more relevant organisations to the proposals outlined in the consultation.

2. Your rationale:

2.1 We have considered the reasons proffered for these proposals but find that we are unconvinced by the rationale presented. We are concerned that, rather than being developed as evidence supported policy, the government is conducting the consultation on the removal of this provision merely because it has committed itself to do so when stating in the "Plan for Growth" (March 2011) that it 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'.

2.2 There was no evidence in "Plan for Growth" to support the assertion that the provision is unworkable nor to support the calculation of the cost benefit of repealing the responsibility.

2.3 We also dispute that the repeal of this provision will reduce any regulatory burden on employers. Even with the section of the Act in place, the provision has no regulatory force, businesses can be established and employ people without evidence of having taken steps to put in place reasonable protections. The tort only becomes an issue after complaints are raised, at which time the onus begins to fall on the employer to take reasonable steps to prevent its repetition. These reasonable steps include working effectively with employees to establish a safe and harmonious working environment. **It would be a strange proposition if co-operating to create a safe working environment is perceived to be a regulatory burden on employers.**

2.4 We note that the Government states that it 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. However, we dispute that this supports either the assertion that the provision is unworkable or the perception that the provision acts as a regulatory burden on employers. We can think of numerous reasons why there may have been so few cases ruled on by the tribunal including, as your document has implied, the use of conciliatory and settlement procedures without the need for Tribunal ruling. Other reasons for the limited number of rulings include the possibility that it is a regulation that is working effectively in that, far from being unworkable, it is one of the easiest aspects of the Equality Act to introduce and carry out within the workplace.

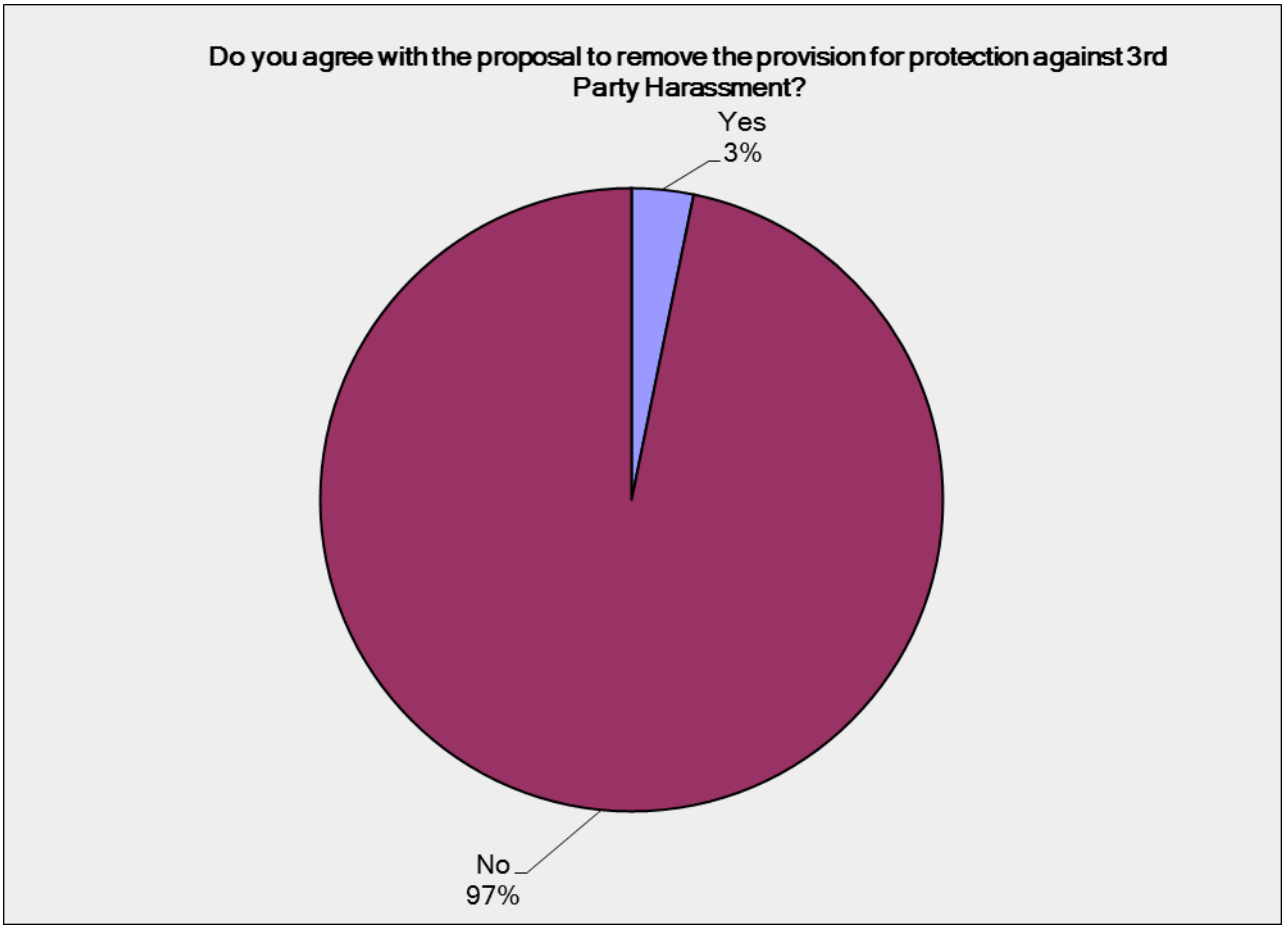
2.5 You refer to your awareness of public concerns that have been expressed about the potential scope of the provisions but, unfortunately, have failed to define what those concerns are or how widely they are held. We note that you have referred only to concern about the "potential" scope of the provisions which suggests that the concern is speculative rather than based on actual experiences. Indeed, the fear about the presumed, potential scope of the provisions appears to be at odds with your own indication of the limited number of cases that have emerged since the provision was first introduced within the Sex Discrimination legislation.

2.6 With respect to other available legal remedies that are listed, we note that the only one of these that has specific reference to the Equality Act (and therefore can be seen as supportive of equality practice rather than generic duty of care provisions) is that which highlights the general harassment provisions of the 2010 Act. We note, with interest, the cases that are cited and point out that each of these cases commenced prior to the passage of the 2010 Act. Each one required an interpretation of the existing legislation to incorporate the possibility of employer responsibility to protect employees from third party harassment. This interpretive requirement was removed by the inclusion of the specific tort within the Equality Act 2010, indicating Parliament's express intention that this provision and protection should exist. The effect of repealing this provision is not the same as returning us to the situation prior to the passing of the 2010 Act. Whether utilising a literal or purposive interpretation of the legislation, there is a

risk that Tribunals and Courts will consider the deliberate actions of Parliament in repealing this provision as a clear indication that Parliament does not wish to provide this protection for employees, and rule accordingly.

3. Survey Responses:

3.1 In our survey of 171 individuals and organisations, representing public, private and voluntary sector employers and service providers, we asked if respondents agreed with the proposal to remove the specific provision within the Equality Act requiring employers to take steps to protect employees from persistent harassment. Nearly 97% of those that responded stated that they did not agree with this proposal.



3.2 We also asked if the respondent's employers/organisations had provisions in place to protect employees from 3rd party harassment. Of the whole complement, nearly 18% indicated that their current employer does not have the provision in place. This demonstrates that the provision has not placed an undue regulatory burden on the employer of nearly 20% of our respondents.

3.3 When looking specifically at the responses of those whose employers do not provide specific measures to prevent 3rd party harassment, we still found that 92% of respondents disagreed with the proposal to repeal this provision.

4. Conclusion:

4.1 In conclusion, we feel that the current provision sets out a clear indication of Parliament's support for cooperative activity to establish safe working environments and makes a determined statement that Parliament expects employers to take proactive steps to make this so. We reject the notion that the provision in unworkable, especially as 82% of our respondents are working in establishments where the provision is working. We do not believe that any objective evidence has been presented to justify any need to consider repealing this provision. In particular, we dispute the assertion that this provision represents an undue regulatory burden on businesses. Conversely, repealing this provision runs the risk of being interpreted by employers as suggesting that they no longer need to feel responsible for the ethos of the working environment for which they are responsible. Finally, we would draw your attention to the fact that 92% of our 171 respondents are opposed to your proposals to repeal this provision.