

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 harassment¹

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

¹ 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

We act for a wide variety of employers from different sectors. We have experienced few actual tribunal claims, but we have regularly provided advice on third party harassment at a pre-tribunal stage. This includes providing advice to employers on what steps to take to prevent third-party harassment from re-occurring. Some specific examples include:

- Advice to a major retail organisation about an employee's tribunal claim based on racial harassment by a customer (the claim settled before reaching a hearing).
- Advice on handling a grievance about harassment of a technical employee based at a client's site, by the client's site manager.
- Advice on a grievance about harassment of an employee by third party occupational health providers.
- Advice to a professional services firm on how to deal with harassment of an employee by a member of the client's staff, while she was on secondment at the client's premises.
- Advice to a large manufacturing organisation about alleged sexual harassment of an employee by an agency worker.
- Advice to a school about the harassment of a member of staff by an ex-pupil.

It is also important to recognise the encouragement of good practice that is facilitated by the current law. Many employers who we act for have specifically covered third party harassment in their equal opportunities and anti-harassment policies and procedures, and in their training to managers and staff on these issues.

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

We have also advised employees on third party harassment issues, including issuing one actual tribunal claim on behalf of an individual. This claim was for race and sex harassment, based on the employer's failure to address the conduct of a client's employee. (The case settled before reaching a hearing).

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 X

Neither agree nor disagree

Don't know

Please use the space below to explain your answer

We disagree that they should be repealed, for the following reasons:

1. Protection from third-party harassment in its current form was introduced after the High Court decision in *EOC v Secretary of State for Trade and Industry* [2007] EWCA 483 (admin). The consultation paper is correct in stating that there was no finding in this case that vicarious liability of employers for acts of third parties was required by European law. However, the law was amended on the basis that the intended interpretation of the legislation was to impose liability if an employer knowingly fails to protect an employee from repetitive harassment. The then government chose to enact specific provisions in the Sex Discrimination Act 1975, which are now in the Equality Act for all protected characteristics.
2. The consultation paper takes the approach that this regulation is “unnecessary”, citing a lack of evidence that there is a need for the regulation and the lack of Employment Tribunal cases on the issue.

It is misleading to judge the effectiveness on the law based on the low number of tribunal cases so far. As rightly identified, the vast majority of cases do not reach a hearing, and there is no way of knowing how many third party harassment claims have settled. Cases under the Equality Act 2010 are only just beginning to be heard (due to the length of time it takes for a discrimination claim to reach a full hearing), so it is too early to assess how many claims there may be now that all protected characteristics are covered. Most importantly, as stated in the response to question 3a above, the existence of the law has helped to ensure that employers have good practices and training in place.

3. The alternative routes for protection of employees proposed in the consultation paper are inadequate and would represent a backwards step. Taking the proposed alternatives in turn:

- a. **Duty of care.** This relates to protection from physical or psychological injury, so would only apply to more extreme cases of third party harassment, where actual injury is caused. Much workplace harassment does not cause identifiable injury of this nature, and injury is not necessary under the current law. Even where injury is caused, the employee would need to bring a negligence claim in the civil courts, involving costs risks, and potentially complex legal issues of remoteness and causation.
- b. **Health and safety.** The employer's duties under the Health and Safety at Work Act, and obligations to undertake risk assessments, do not give employees rights that can be individually enforced. As with the duty of care, it is unclear that less extreme harassment which does not cause injury would be engaged by these provisions.
- c. **General harassment provisions in the 2010 Act.** The consultation says it is "possible" that claims for third party harassment can be brought under the general harassment provisions. However, it is far from clear whether such claims would be successful.

The relevant provision provides that "A person (**A**) harasses another (B) if **A** engages in unwanted conduct..." This requires the harasser (A) to engage in the unwanted conduct, which would not be the case where the actual act of harassment is committed by an external third party. Therefore, an employer only becomes liable if its own failure to protect the employee is in itself an act of harassment which "creates" the required type of environment.

The consultation response refers to three cases where claims have been made under the Race Relations Act. However, these certainly do not indicate that it would be easy for an employee to claim under the general harassment provisions.

Gravell v London Borough of Bexley – the EAT held that a long-standing **policy** of not challenging racist comments or behaviour by customers is **capable** of creating an offensive environment, if established on the facts – which is an extreme case of an alleged deliberate policy by the employer.

Conteh v Parking Partners Limited – the employee was unsuccessful, with the EAT commenting that: inaction could "create" a hostile environment, but this would require cogent evidence and be relatively rare; and they had "greater hesitation" in concluding that this could occur when all the employer had done was fail to remedy a situation created by third parties.

Sheffield City Council v Norouzi – the employee succeeded, but on the basis that the Race Directive (2000/43/EC) could be relied on directly as the employer was an emanation of the state – not on the basis of the domestic provisions. This decision also seems to accept that protection from third party harassment is required by EU law.

This approach would also potentially be more burdensome for employers, as liability may be imposed for the first act of harassment by a third party. The

current provisions only impose liability on the employer the third time harassment occurs.

- d. **Constructive dismissal.** Allowing an employee to be subjected to third party harassment may well amount to a breach of contract, giving the employee a claim for constructive dismissal. However, this requires the employee to resign in order to bring a claim for unfair dismissal, and does not provide protection which enables an employee to get the harassment stopped and remain in the workplace.
 - e. **Protection from Harassment Act 1997.** This does provide an alternative remedy for employees who are harassed at work by third parties. However, an employer is only vicariously liable for act of its employees under this Act, not for third parties. An employee's claim in this situation would be against the third party only. This provides the employer with no incentive to prevent harassment by third parties, as it is not liable in any event.
4. As stated in our response to question 3a above, we regularly advise employers on what to do in order to prevent third party harassment, including how to take reasonable steps to prevent it from re-occurring. A specific legal provision makes it fairly straightforward for an employer to address the issue with third parties, such as clients, as the clear legal provisions can be explained to them. It is clear why third party harassment is unlawful, and why the employer needs to raise it once it becomes aware of the situation. Alternatives such as those set out above are much less clear, and will make it more difficult for employers to address the issue in practice.

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

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

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

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

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

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

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.