

## 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)

X

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

We are responding as a Voluntary and Community Organisation (VCO) but we do not currently employ any staff so the question is not applicable. **N/A**

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<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

We are responding as a Voluntary and Community Organisation (VCO) but we do not currently employ any staff so the question is not applicable. **N/A**

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

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



**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?**

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Yes

No

Prefer not to say

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

We are responding as a Voluntary and Community Organisation (VCO) so the question is not applicable. **N/A**

**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 are responding as a Voluntary and Community Organisation (VCO) so the question is not applicable. **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?**

Agree

Disagree

Neither agree nor disagree

Don't know

Please use the space below to explain your answer

We strongly disagree against removing the provisions afforded by section 40 (2)–(4) of the Equality Act 2010 which provides protection for employees and imposes a liability on employers for harassment of their employees by third parties over whom they do not have direct control, such as clients, customers and suppliers.

JUST West Yorkshire considers that people should be able to work in an environment in which they feel safe, and are free of harassment from customers, clients or other parties whilst protected adequately by the law.

As a racial justice, human rights and civil liberties organisation, we are well aware of the problems caused by third party harassment (customers and service users) that can impact on employees at work. Third party harassments affects many different professions including nurses, doctors, bus drivers and both the public and private sector employees.

Access to justice is a fundamental right. In the present climate cutbacks to legal aid and the decline of 'no win no fee' solicitors is impacting on people being able to access justice. Litigation is generally very costly and a stressful experience for the Claimant and is often brought about as a last resort. It is essential to have adequate provisions that protect workers in such cases. This not only offers the employee protection and reassurance but encourages the employer to act more responsibly and in the best interests of the workforce. Ultimately this encourages better work practices, ethics, accountability, fairness, protection, and transparency.

Third party harassment is not typical 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

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 in 1996** concerned two waitresses at a private function at their employer's hotel, where Bernard Manning was performing his stand-up routine. They successfully argued that the employer had directly discriminated against them by failing to protect them against Manning's racist gags.

By removing such provisions institutions will not remain vigilant about what goes on in (and outside) the workplace. They will not adhere to their policies that deal with harassment, dignity at work and equal opportunities.

Clearly, the Government accepts that it is 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), JUST West Yorkshire 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;
- 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?**

Yes

No

Don't know

Please use the space below to provide further details

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.

If the provisions were to be removed even though they ought not to be, then the Government should immediately implement new provisions, policies, and codes to afford immediate protection to employees from third party harassment.

**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       | <b>YES</b>               |
| Yes, I think there are further benefits to include    | <input type="checkbox"/> |
| No, I think all costs and benefits have been included | <input type="checkbox"/> |
| Don't know  | <input type="checkbox"/> |

If yes to further costs, 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 fundamentally flawed. 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. The estimates bear no relationship to what happens in the real world as cases can include more than one type of prohibited conduct and the type of financial calculation is therefore almost completely meaningless.

It is our evaluation 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
- challenge via judicial review;
- would seek to challenge the U.K.'s lack of compliance with relevant European directives.
- possibly discrimination claims under the Protection from Harassment Act 1997
- would seek to tread similar ground as pursued most recently in **Sheffield City Council versus Norouzi**; in which 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.*

Our evaluation 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 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'* (Guidance on 3<sup>rd</sup> party harassment provided in the 2<sup>nd</sup> edition of Blackstone's Guide to the Equality Act 2010);
- 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 further benefits, please use the space below to provide detail

We see no real, meaningful or positive benefits associated with the proposed repeal of section 40 (t2) – (4) which only offers less protection.

**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

We emphasize that in modern day practice harassment and third party harassment are often part of a wider claim of discrimination on the basis of one of the nine protected characteristics.

However we believe there will be adverse impacts which have not been properly assessed as follows;

- 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;
- 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;
- alternative avenues for making claims about third-party harassment - constructive dismissal, health and safety legislation, the protection from harassment legislation - might actually be used by individuals if redress under the Equality Act 2010 is reduced.



**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

Number of cases

**N/A**

Please use the space below to explain your answer

This question misses the basic and fundamental reasons as to why we have equality legislation in the UK. The whole purpose of having the legislation is to reduce the number of claims by affording adequate protection, policies and encouraging better working ethics.

(By way of example you would not remove the Theft Act or its provisions simply because there had been no crimes involving theft in recent years)

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

One of the reasons for having employment and equality legislation is to make it clear what the expectations are of employers. The expectation is that good employers follow the law, create good working environments and avoid ET cases.

**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

**No**

The Equality Impact Assessment is seriously and fundamentally flawed. The EIA does not take into account any adverse or detrimental impact.

The 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 evaluation is that the effect of repealing section 40 (2) – (4) would:

- do nothing to reduce unlawful discrimination and could encourage unlawful discrimination;
- do nothing to improve equality of opportunity
- do nothing to protect workers/employees
- do nothing to encourage best work practice and ethics
- do nothing to encourage accountability, fairness, equity or transparency
- do nothing to foster good relations.

Clearly there are no demonstrable benefits associated with the proposal, of 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 the three limbs of the PSED.

**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

**No**

We could not locate the Justice impact test in the impact assessment. We do not accept that the paper properly assesses the implications for the justice system.

In conclusion, our evaluation of the implications for the justice system are:

- offering less protection to employees
- increase in injustice
- encouraging a decline in work ethics and accountability
- potentially limiting an important avenue for securing redress in relation to third-party harassment by repealing section 40 (2 - 4).
- confusion about third-party harassment, leading to the potential of judicial review and legal challenge in the UK courts and Europe;
- increased 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);
- potential 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.

*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.*