

## 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) 

GIRES supports transgender people by educating all those able to improve their lives
--

**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

On several occasions, we have been approached by trans people working on the checkouts of large supermarket chains who have been harassed by customers. The local managers were not acting to prevent this harassment. Certainly, trans person did not wish to be moved to another job. Practical measures that the supermarket could have implemented included:

- Displaying a prominent poster that publicised its commitment to respect and protect the entitlements of its staff to equal treatment . We can provide an example of such a poster that we recommend to employers.
- Alerting its security staff to the need to be especially vigilant and to intervene immediately that any harassment occurred.
- Warning any customers engaged in harassment that a repeat of this behaviour would result in their being barred from the store.

In these cases, the head offices of the companies were mindful of their legal responsibilities and, on being alerted to the problem, intervened to prevent its recurrence. This demonstrates that the legislation is effective and that cases can be equitably resolved without recourse to a Tribunal.

**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

At present, the legislation serves as an effective deterrent. The GEO's impact assessment shows that a high proportion of employers understand their continuing obligations: 100% of large firms and 20-50% of SMEs. Now, as demonstrated above, they can and do act on individual cases of third party harassment before the employee has to seek redress via a Tribunal.

If the third party harassment provision were repealed:

- It is most likely that the savings would be zero
- Employers would bear a cost of £2.1 to £4.4 million in familiarising themselves with the change and its implications
- A highly negative message would be disseminated about the Government's commitment to safeguard people having the protected characteristics
- Other legal redress would be inadequate. It was already in place when the Equality Bill was drafted. Even so, it was seen to be necessary to include the third party harassment provision in the legislation. The subsections 2,3 and 4 of s.40 Equality Act 2010 were brought in to extend employers' liability for third party harassment to cover all protected categories rather than just some. That suggests that the initial protection was thought to be fit for purpose. Otherwise why extend it?
- By "fit for purpose" we mean that Employers are aware of the new responsibilities and such claims that have been made have been conciliated or settled and thus kept out of the Employment Tribunal. You refer to one reported case but in that the Claimant was successful. The Equality Act is not yet two years old.
- You assume that because there has been only one reported Tribunal case there have been no claims but accept that settlements are not recorded. How therefore do you know that the provision is underused? Upon what do you base your calculation that the anticipated use of the provision is zero. ? Would it not be better to review the situation in say late 2015 when the Equality Act

has been in force 5 years. Our view is that use of the provision as both a remedy and a deterrent will increase as individuals become more aware of it.

- Employers are able to insure against liability such as this.
- We do not consider that alternative remedies would be sufficient if the subsections were to be repealed. We deal with each individually:
  - ~ **Common Duty of Care in Tort** : This is not specific to the protected characteristics. It exists alongside statutory provision and the two complement each other. Here the statutory provision was brought in to define and broaden the Employer's duty to provide a safe system of work and prevent the Employee having to prove that his/her loss was "reasonably foreseeable". A tripartite civil action in Court involving the claimant, his/her employer and the alleged perpetrator would be expensive, slow and complicated. The Employment Tribunal procedure is simpler, cheaper and speedier
  - ~ **Health & Safety Act 1974**: This legislation is not specific to the protected characteristics. It confirms the duty of the Employer to provide a safe system of work but the Act is now approaching 40 years old and society has moved on. Risk assessments etc made under the Act are not enough.
  - ~ **General Harassment**: The general harassment provisions of the Equality Act 2010 are only argued to be a "possible" protection. There would be uncertainty until that was established. Case law will in due course indicate whether s.26 in fact covers s.40 as is suggested. As there is no reference to third party harassment in s.26 our view is that it does not. We are unable to comment on the racial harassment point.
  - ~ **Constructive Dismissal**: As is well known this is a "nuclear option" for the Employee as he or she has to resign his or employment before going to the Tribunal. The perpetrator thus in one sense "wins". Why should the employee who has been subjected to harassment have to give up his or her employment to seek a remedy? Claims relating to constructive dismissal can only occur after the fact and would leave open the question of whether or not the employer had any responsibility for harassment by third parties.
  - ~ **The Protection from Harassment Act 1997**: This Act does not make an employer liable for harassment by third parties. The onus should not be on an individual to seek redress against the perpetrators because legal action would be stressful, costly and time-consuming. The options under the Protection from Harassment Act are reporting the matter to the Police (who may or may not be willing to prosecute) or a civil action (see above). An Act originally brought in to cover stalking is not appropriate for workplace harassment.

The purpose of s.40 is to give the employee a cause of action against an employer who in fact may have a large amount of control over the third party and therefore be able to take preventative/remedial action. For example, the third party perpetrator may be a self employed individual also engaged by the employer, an employee of a company with whom the employer also has a contract (eg on a building site), or someone the employer has invited into the premises. The employee may not even know the name of the perpetrator. The employer, although

without direct legal control, has an influence not available to the employee, for instance in being able to institute and enforce contract terms that, inter alia, protect its employees from harassment by the third party.

**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  X

No

Don't know

Please use the space below to provide further details

We remain adamantly opposed to removing the provision.

We hope that the Government can see that its retention is essential. Otherwise, the Government would need to mount a wide ranging, and expensive, publicity campaign to (a) counteract the negative message given out by the repeal, (b) ensure that employers, employees and the general public were all aware of the other protections still available to those who experience harassment at work by third parties and (c) admit that these other protections are weaker than those in the rescinded legislation.

**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  X
- 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 study states that there remains a case for government to intervene to prevent discrimination. Otherwise, the economic benefits flowing from the Equality Act 2010 would be reduced.

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

There seems to have been an unwarranted degree of work done in pursuit of an aim which could have been foreseen to be of no benefit to employers and significantly harmful for employees. It is difficult to see any justification for the proposal to be put out for consultation, given the effort required to conduct the survey and analyse its results.

**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  Perhaps Zero

Please use the space below to explain your answer

The purpose of the legislation is to serve as a deterrent, which it is manifestly doing. Hence, we would expect there to be few cases, or even none. If cases were brought, the question would be whether or not they were successful. If they were, in the main successful, we would expect there to be fewer in future, as employers took anticipatory action. If they were in the main unsuccessful, we would expect employees to pursue fewer of them.

**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  X

If no, please use the space below to explain your answer

Transgender people are often unable to obtain work that is commensurate with their capabilities. So, they are forced to accept a lower paid job, such as checkout operator, where they are at increased risk of harassment.

We reject Option 2.

Although we represent the gender reassignment category we would prefer Option 1 to Option 3 as we agree that Option 3 (retaining the protection for harassment for gender and gender reassignment only) would cause confusion. Also we are concerned that if Option 3 was adopted the section could be repealed anyway as unfair to the other categories and illogical.

**Question 9: Does the Justice Impact Test in the impact assessment properly assess the implications for the justice system?**

Yes

No  X

If no, please use the space below to explain your answer

Se above.

We do not agree that the provision is Unnecessary, Ineffective and Unworkable. Our view is that it is Necessary, Effective and Workable.

*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.*