

Equality Act 2010: consultation on employer liability for harassment of employees by third parties – National LGB&T Partnership response

Introduction

This document provides feedback from the National LGB&T (lesbian, gay, bisexual and trans) Partnership, a member of the Department of Health Strategic Partner Programme. The National LGB&T Partnership is an England-wide group of LGB&T voluntary and community service delivery organisations (see below for members of the Partnership) that are committed to reducing health inequalities and challenging homophobia, biphobia and transphobia within public services

The National LGB&T Partnership members intend to positively influence the policy, practice and actions of Government and statutory bodies, in particular the Department of Health, for the benefit of all LGB&T people and communities across England. The member organisations of the National LGB&T Partnership are:

- The Lesbian & Gay Foundation (LGF)
- East London Out Project (ELOP)
- Gay Advice Darlington and Durham (GADD)
- Gender Identity Research and Education Society (GIRES)
- GMFA
- Consortium of LGB&T Voluntary and Community Organisations
- London Friend
- PACE
- Stonewall Housing
- Trans Resource and Empowerment Centre (TREC)
- Yorkshire MESMAC

The National LGB&T Partnership will ensure that health inequalities experienced by LGB&T people are kept high on the Government's agenda and that best use is made of the experience and expertise found within the LGB&T voluntary and community sector. The National LGB&T Partnership is also establishing a National LGB&T Stakeholder Group which is open to interested groups, organisations, service providers and individuals, giving a direct voice to the LGB&T sector. See <http://www.lgf.org.uk/Your-rights/The-National-LGB-T-Partnership> for more information.

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Question 4: Do you agree or disagree that the third party harassment provision should be repealed?

We believe that third party harassment provision should not be repealed. The lack of evidence about the effectiveness of the provision is entirely due to the fact it is so new. The lack of evidence cannot be used to justify repealing this important protection. ACAS have stated that the use of the provision is commensurate with the time the provision has been in place.

Constantly amending these laws creates uncertainty for business and extra costs in terms of re-training HR and other professionals in the changed rules. All businesses will have costs imposed on them in the way because of this proposed change instead of the costs only falling on businesses which have claims made against them. This is precisely the worst time to be making these changes – after most businesses have re-trained on the existing provision but before their effectiveness can be judged (few/no claims have been made). It is also unclear whether business would be able to save money through this change, as their existing insurance for such claims would still have to be kept in place for the other provisions listed in the consultation document.

The other legal provisions listed in the consultation document are not appropriate for lesbian, gay, bisexual and trans people for a number of reasons:

- Harassment needs to be viewed through the lens of the protected characteristics because much of what LGB&T people face in terms of harassment is directly attributable to their sexual orientation and/or gender identity.
- The burden of proof is much higher and falls more on the victim for some of the other legal provisions on harassment. Given the broader societal context of generalised discrimination against LGB&T people (see some of the comments around equal civil marriage); they need this provision to give them the support they might need to pursue a case. There are also different rules on the damages that can be awarded.
- Third party contact needs specific protections because in some instances such contact is prolonged or repeating.

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.

In terms of the individual other forms of redress:

- **Common Duty of Care in Tort**
The common law duty of care 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 perpetrator would be expensive, slow and complicated. The Employment Tribunal procedure is simpler, cheaper and speedier
- **Health & Safety Act 1974**
This legislation 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**
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 employment to seek a remedy?
- **Protection from Harassment Act 1997**
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 course 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 has also a contract (e.g. 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.

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? If not, please explain why.

Unfortunately, the impact assessment does not consider different types of evidence. If one only considers academic-quality quantitative evidence, matters relating to sexual orientation or gender identity will never be properly considered because the LGBT&T evidence base is relatively underdeveloped.

A more common sense approach to looking at these communities' needs is more appropriate. For example, we know that LGBT&T hate crimes remain under-reported because of the time it takes to build up community confidence. The unequal age of consent, section 28 and the ban on LGB people serving in the armed forces are all well with the living memories of the vast majority of LGBT&T adults alive today. Therefore for LGBT&T communities especially, repealing the third party harassment protections is completely inappropriate; the LGBT&T communities will need decades to become fully confident in using the protections we now enjoy.