



EQUALITY ACT 2010: EMPLOYER LIABILITY FOR HARASSMENT OF EMPLOYEES BY THIRD PARTIES

NUT RESPONSE

August 2012

1. The National Union of Teachers (NUT) welcomes the opportunity to respond to the above consultation. Its comments on the Government's proposal to repeal provisions in the Equality Act 2010 relating to employer liability for third party harassment are set out below.

Question 3: Have you ever advised or acted for b) an employee claiming to have been the subject of conduct which would count as third party harassment? If yes, give details.

2. Yes. The NUT has advised probably hundreds of employees who claim to have been the subject of conduct which would count as third party harassment. Discriminatory harassment of teachers by pupils is a daily occurrence.
3. In 2004, the Union supported a teacher in a claim to the Employment Tribunal under the former Employment Equality (Sexual Orientation) Regulations 2003 against an independent school and an employment agency. In addition to other claims, the teacher alleged that he was subjected to racist, sexist, homophobic and disablist language by pupils in nearly every lesson he taught. In one instance, a pupil wrote, "Mr X [naming the teacher] is a fucking batty boy" on his worksheet. The teacher was highly offended by this remark and other remarks that were made during his lessons and outside lessons. He raised concerns in writing and orally with the head teacher and the teacher in charge of pupil discipline. The discriminatory harassment continued until the teacher left the school. The claim to the Employment Tribunal was settled.
4. This is just one example of the type of discriminatory harassment that teachers are subjected to on a regular basis.

Question 4: Do you agree that the third party harassment provision should be repealed? Please explain your answer.

5. No, the third party harassment provision under section 40 of the Equality Act 2010 should not be repealed.
6. The NUT has evidence from our members that since 2010, employers have implemented robust measures for recording and tackling discriminatory harassment by pupils against employees. In one school in Westminster, discriminatory harassment of teachers and pupils was

rife. The school implemented a procedure whereby all incidents of discriminatory harassment were to be recorded by staff. The school analysed the recorded incidents and took steps to publicise and enforce the school's harassment and behaviour policies. As a consequence, harassment and bullying of teachers and pupils was reduced. Teachers reported a change in the culture of the school from one of intolerance and harassment, to one where teachers and pupils were more tolerant of difference and where pupils were less likely to subject their teachers and their fellow pupils to discriminatory harassment.

7. The NUT believes very strongly that section 40 is a preventative measure. The NUT has seen no evidence that the provision is "unworkable" as suggested in paragraph 3.1 of the consultation document. The key to the provision is that the steps required by employers must be "reasonable." If a step is reasonable, it is by implication "workable." Employers are sufficiently protected within the provision in circumstances where they "have no direct control" over persistent harassment of their staff by third parties. They need do no more than to take reasonable steps in order to protect themselves from any claims.
8. The other legal remedies for third party harassment failed to protect staff from persistent harassment by third parties. Section 40 filled a very obvious gap in statutory protection from, for example, racist harassment of staff. It is ludicrous to suggest that an employee must wait until the harassment has caused physical or psychological injury before he or she can seek redress from his or her employer for failing to tackle persistent harassment in the workplace by a third party. It is preferable for the issues to be raised at an early stage, for the employer to be notified of the concerns and for the matter to be tackled before any permanent or long-lasting injury is caused.
9. The three cases listed in the consultation document at paragraph 3.11 do not support the government's contention that section 40 should be removed from the statute books. In fact, they support the view that section 40 was a necessary addition to equality law in 2010.
10. It is offensive for the government to suggest that it is reasonable to expect an employee to resign and claim constructive dismissal, rather than to press his or her employer to take steps to prevent persistent harassment. Such a course of action would place further financial and administrative burdens on employers.

Question 5: If this provision were removed, is there any other action that the Government should take to address third party harassment at work? Please explain your answer.

11. The NUT reiterates its view that Section 40 should not be removed. It was a necessary addition to the Equality Act 2010 and the benefits of

the provision go beyond what any politician could have anticipated in terms of improving relationships between individuals within different protected groups.

Question 6: a) Can you provide any further data or examples of costs and benefits which have not already been included in the Impact Assessment? b) Do you have any comments on the assumptions, approach or estimates we have used?

12. The impact assessment does not appear to consider the following costs relative to the apparently reduced cost to employers of defending third party harassment claims:

In relation to employees

- Cost to health (both physical and psychological)
- Cost to family (i.e. children and other dependents)
- Cost to career progression (i.e. promotion prospects)
- Cost of relatively expensive alternatives to tribunal litigation (e.g. negligence, breach of contract claims etc.)

In relation to society

- Cost of health care (i.e. increased use of NHS by affected employee)
- Cost of benefits
- Cost of training (in the case of teachers and other skilled public servants, tax payers will have invested a considerable sum in their education and training to little or no benefit if their skills go unused).

In relation to employers

- Cost of relatively expensive alternatives to tribunal litigation (i.e. negligence, breach of contract claims etc.)
- Cost of losing and replacing workers
- Cost to job performance and productivity
- Cost to reputation.

Question 7: How many third party harassment cases would you expect to be brought each year if the third party harassment provisions were retained? Please explain your answer.

13. As we indicated at paragraph 7, the NUT believes section 40 currently acts as a deterrent against employer apathy. The question is not how many cases would be brought each year if it is retained, but rather, how many employers would take adequate steps to protect their workers from discriminatory harassment if it is not retained. The number of cases brought to Tribunal under section 40 should not be the sole indicator of the effectiveness or otherwise of the provision. After all, the purpose of discrimination legislation in recent years has been to prevent discrimination from arising in the first place. Although

we cannot indicate precisely the number of cases likely to be resolved without litigation each year if the provisions are retained, the NUT's own casework experience is that schools and colleges are now far more likely to take complaints of persistent discriminatory harassment/abuse by pupils and parents more seriously than they did under previous legislation and case law (i.e. *Burton and Pearce*).

14. In a 2008 survey with a sample of 2,575 teachers, across 13 LEAs selected to give a geographical and social spread, conducted by the University of Warwick for the NUT, many teachers reported being harassed by pupils, and some are harassed by parents. The section below summarises what this revealed about third party threats to teachers.
15. Threats from third parties (including parents, or former pupils) were less frequent than threats of pupil-pupil violence, being experienced by rather more than half the respondents (52.7%), but, where it did occur, third party threats to teachers appeared relatively frequently, with approaching a third of respondents experiencing these threats weekly (16.1%) or monthly (14.5%); it was less frequent for these threats to be an occasional (termly or annual) occurrence.

16. Offensive language

Approaching two-thirds of respondents (60.3%) reported offensive language from pupils at least weekly; a seventh (13.8%) reported it monthly, with a similar proportion not reporting it. Only a tenth of respondents (10.7% total) reported it infrequently (termly or annually). Again this behaviour was seen as part of the 'customary' experience of most teachers to which they had become conditioned. Abusive language used by pupils towards teachers is a significant issue.

17. Personal comments of an abusive or insulting nature / manner

Over a quarter of respondents (27.5%) received abusive or insulting comments weekly with another fifth (18.6%) receiving them monthly; thus for nearly half the respondents abuse and insults were a regular feature of working life. A third of respondents (31.2%) did not report them and for the remaining fifth they were relatively infrequent (termly or annual).

18. Threats to teachers of physical violence directly by pupil

Nearly two-thirds of respondents (65.5%) did not report this serious problem, and it was a weekly (4.6%) or monthly (4.9%) occurrence for only one twentieth of respondents respectively. However a quarter of respondents (25.0% total) encountered threats on a termly or annual basis; and for an individual teacher, a threat of violence, even if only once a year, is of course hugely significant and can be career ending.

Violent threats are a regular experience for a tenth of teachers and this cannot be a situation which is acceptable.

19. Threats to teachers of physical violence by third parties other than pupils e.g. parents

Violent threats from parents are even more serious than those from pupils, and nearly a tenth (7.9%) of respondents reported experiencing them more than annually - that is termly, or for some, monthly or weekly. Three-quarters of respondents (75.8%) did not report encountering threats of physical violence.

20. Some of the comments made by teachers in response to the survey included:

- I have the right to work without being abused - in industry it wouldn't be accepted yet day after day it's now just "part of the job!" How sad!! (Primary, female, 29-39)
- I find that working in so called "good schools" even those with a positive OFSTED report does not guarantee freedom from abusive and disruptive behaviour. (Secondary, female, 50-9)
- Malicious verbal threats and intimidation from past pupils, out on the streets, e.g. stole my car and taunted me with "What are you going to f***** do about it?" (Primary, male, 40-9)
- I'm quite big, so I'm not assaulted - I only get anonymous text messages on my mobile. (Secondary, male, 50-9)
- As a result of an incident with a student last November when I was physically and verbally abused and then was unsupported by management I, with Union help, took severance from the school in April. (Secondary, female, 40-9)
- I carry permanent scars from scratches, bites & kicks including a broken nose. I have never received any kind of compensation but I understand that Soc. Services workers do. (Secondary, female, 50-9).

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.

21. The impact assessment at Annex 2 is woefully inadequate. Since the impact of repealing the third party provisions is likely to be negative for workers with certain protected characteristics (i.e. women, BME, disabled, gay and lesbian, transgendered and older workers), it is unfortunate that the Government has chosen to rely on a previously published equality impact assessment (EIA), which on closer inspection bears no relation to the issue currently under review.
22. The previous government's primary objective was to extend the protection which already existed against gender harassment, sexual harassment and harassment on grounds of gender reassignment to all the other equality strands. The EIA was therefore appropriate for that

purpose, and identified the likely impact on protected groups of extending protection against third party harassment. The purported purpose of the EIA in this instance is to assess the likely impact of withdrawing protection from third party harassment across the protected strands, which requires the Government to consider issues not previously considered, e.g. which of the protected groups suffer most from workplace harassment and what steps, if any, may be taken to mitigate the likely adverse impact on such groups if employer liability for third party harassment is repealed? It is not sufficient to simply assert that *“we consider that the impact of repealing the provisions is the reverse of the potential impact identified by the earlier published Equality Impact assessment.”*