



**Equality Act 2010
- employer liability for harassment of employees by third parties:**

A Consultation

**Response from the FDA, the union of choice for senior managers and
professionals in public service**

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Contact details:

Response completed by:

Position in organisation:

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Date:

Introduction

This response is written on behalf of the FDA which is a professional association and trade union representing senior public servants and professionals. The FDA represents a growing membership of more than 19,000 senior managers, government policy advisors, diplomats, tax professionals, economists, statisticians, lawyers and other professionals working across government and the NHS.

Q(i): In what capacity are you responding?

On behalf of an organisation

Q(ii): Is your organisation

A trade union or staff association

Q(iii): If responding as an employer, how many people do you employ?

N/A

Q(iv): If responding as an employer please indicate which sector best describes you

N/A

Section A: What are your experiences of third party harassment

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

Response: As the majority of the FDA's members are senior managers in the public sector, there have been many occasions when they have faced unacceptable behaviour from service users which could have been classified as third party harassment. This has been particularly true when the senior manager is dealing with the implementation of difficult and unpopular decisions, for example in the National Health Service. We have often been concerned at the lack of action from employers on this issue, and welcome the clarity provided by the provision within the Equality Act, to be able to draw attention to employers' responsibility to protect workers, including managers, from such behaviour.

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Question 4: Do you agree or disagree that the third party harassment provision should be repealed?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

Response: The FDA **strongly disagrees** that the provision should be repealed. The FDA represents senior managers and professionals in public service, many of whom engage directly with third parties and benefit from the protection in section 40 of the Equality Act 2010.

The specific provision (section 40) introduced in the Equality Act 2010, which makes clear that employers are liable for repeated harassment if they fail to take reasonably practicable steps to prevent it, was welcomed by the FDA, as we believe that it addresses a real issue and is workable. We also believe that it is necessary in order to clarify to employers and employees their obligations and rights.

This section of the Act provides valuable support as many employees, including senior managers, had previously struggled to persuade their employers to address harassment by service users, customers and clients, so we believe that many instances of such behaviour were not reported or dealt with. Section 40 provides greater clarity and certainty in the legal position, encourages employers to take third party harassment seriously and is a good basis for securing further action in the workplace including procedures for reporting incidents of third party harassment and consideration of measures to protect staff.

We do, however, believe that the element of this provision which states that action only needs to be taken after the third occasion of any harassment, is unjust and unnecessary and should be removed. The reasonable test is sufficient to ensure employers are not held liable for events that they could not have prevented.

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

Response: If the provision was removed, it would be essential to provide appropriate support to allow access to other avenues of redress including legal aid for proceedings and paid time off to conduct those proceedings. Section 40 of the Act addresses a real problem and we believe that the provisions are workable and necessary in order to make clear to employers and employees what their obligations and rights are.

In many circumstances, there are simple steps employers can take to show proper care for their employees. An example of this is notices displayed in workplaces stating that

harassment of staff will not be tolerated and that strong action will be taken against perpetrators of it

It has been recognised for some time that employers do have some control and responsibility for addressing abusive behaviour by third parties against their staff, including an agreement signed by the TUC and others on ‘Preventing workplace harassment and violence’, which covered harassment by third parties and provided guidance on what steps employers and employee representatives could take in response to it.

If the provision is removed from the Equality Act, the government must make clear that employers should still take steps to protect their staff from harassment by third parties related to protected characteristics.

Organisations such as the Health and Safety Executive, ACAS and the Equality and Human Rights Commission will need to update and strengthen their guidance immediately to cover legal liability for third party harassment in the absence of the specific provision in the Act, and offer good practice guidance, and to be provided with sufficient resources to offer such support.

Given the risk of third party harassment occurring in public-facing jobs, particularly delivery of frontline public services where staff can be put in vulnerable positions (e.g. working in high stress situations, entering people’s homes or working alone), government departments and public sector employer groups responsible for frontline service delivery should be provided with sufficient resources to be able to develop and provide clear guidance on steps organisations should take to protect their staff, in partnership with the relevant trade unions.

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

Response: It does not include the costs that will transfer and occur elsewhere for employers, individuals, and representative bodies assisting that individual in having to pursue a challenge to harassment through other means and the Government bodies that will have to deal with it.

It also does not include the costs of repealing section 40 in terms of the potential for increased discrimination in the workplace. The benefits that are identified under option 1,

in terms of creating greater clarity and certainty on liability for third party harassment and reducing workplace discrimination, should be included as costs under the repeal all option.

Failure by an employer to address third party harassment related to a protected characteristic potentially makes it difficult for people who have that protected characteristic to work in that environment and so all the costs associated with stress, absence and lack of engagement and trust will be incurred and should be taken into account.

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

Response: None

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

Response: The FDA is unable to comment on this.

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

Response: The impact assessment wrongly suggests that, because all protected characteristics will be treated the same if section 40 is repealed, there is no equality impact. The assessment of equality should focus on the impact the repeal of section 40 would have on those most likely to suffer third party harassment related to a protected characteristic (i.e. women, Black and Minority Ethnic staff, Lesbian, Gay, Bisexual and Trans staff, older and younger people, disabled staff etc.) when compared to others who do not share a protected characteristic with them. The impact assessment does not demonstrate that due regard has been had to the particular need to address the disadvantage certain groups suffer because of a protected characteristic nor does it address the under-representation of some groups in certain occupations or workplaces where they may be particularly vulnerable to harassment from third parties due to the kind of service users, customers or clients they deal with.

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

Response: The impact assessment fails to take account of the transfer to other parts of the justice system of issues that would otherwise have been dealt with by employment tribunals. It may lead to a reduction in the number of employment tribunals but the suggestions of other legal remedies means that there would be increased resource implications for those other tribunals. It also fails to assess the impact and effect on the individual and those representing them in pursuing a remedy via those other means.