

Impact Assessment of removing the provisions in the Equality Act 2010 which makes employers liable for persistent harassment of their employees by third parties over whom the employer has no direct control

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------|
| Title: Review of third party harassment provisions IA No: GEO 1030 Lead department or agency: Home Office (Government Equalities Office) | Impact Assessment (IA) |
| | Date: 16 August 2012 |
| | Stage: Final |
| | Source of intervention : Domestic |
| | Type of measure: Primary legislation |
| Contact for enquiries: Elizabeth Solowo-Coker 020 7035 8088 | |

Summary: Intervention and Options

Cost of Preferred (or more likely) Option

| Total Net Present Value | Business Net Present Value | Net cost to business per year (EANCB on 2009 prices) | In scope of One-In, One-Out? | Measure qualifies as One-Out? |
|-------------------------|----------------------------|------------------------------------------------------|------------------------------|-------------------------------|
| £3.1m | £-2.8m | £0.3m | Yes | IN |

What is the problem under consideration? Why is government intervention necessary?
 Sub-sections 40(2)-(4) of the Equality Act 2010 ("the 2010 Act") (the third party harassment provisions) have preserved, and extended to the other relevant protected characteristics, the pre-existing provisions in the Sex Discrimination Act 1975 which made employers liable for repeated harassment of their employees by third parties, such as a customer, in specified circumstances. We are aware of only one case of third party harassment having been ruled on by an employment tribunal since this protection was introduced in April 2008. In any event, and depending on the facts of the case, redress may still be available for employees under existing employment law breach of contract provisions or the Protection from Harassment Act 1997. We therefore consider that the 2010 Act is not an appropriate or proportionate manner of dealing with cases of third party harassment and should be removed.

What are the policy objectives and the intended effects?
 The policy objective is to reduce any regulatory burden on employers that the third party harassment provisions may impose. The intended effects are to ensure that, in line with our assessment of the outcome of our recent consultation, we remove these provisions from the legislation without affecting redress already potentially available by other means in the same circumstances.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
 Option 1 – **Do nothing.** Keep the third party harassment provisions in force.
 Option 2 – **Remove the provisions entirely** (preferred option).

 Option 2 is the preferred option as this will ensure a consistent approach across all relevant protected characteristics and will most effectively achieve the policy objective.

Will the policy be reviewed? It will not be reviewed. If applicable, set review date: N/A

| | | | | | |
|------------------------------------------------------------------------------------------------------------------------|---------------------|-----------------------|-----------------------|---------------------------|---------------------|
| Does implementation go beyond minimum EU requirements? | | | N/A | | |
| Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base. | Micro Yes | < 20 Yes | Small Yes | Medium Yes | Large Yes |
| What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent) | | | Traded: N/A | Non-traded: N/A | |

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister: _____ Date: August 2012

Summary: Analysis & Evidence

Policy Option 2

Description: Remove the provisions entirely

FULL ECONOMIC ASSESSMENT

| Price Base Year 2012 | PV Base Year 2012 | Time Period Years 10 | Net Benefit (Present Value (PV)) (£m) | | |
|-------------------------|----------------------|-------------------------|---------------------------------------|------------|----------------------|
| | | | Low: -4.3 | High: -1.2 | Best Estimate: --3.1 |

| COSTS (£m) | Total Transition (Constant Price) | Years | Average Annual (excl. Transition) (Constant Price) | Total Cost (Present Value) |
|---------------|--------------------------------------|-------|-------------------------------------------------------|-------------------------------|
| Low | 1.9 | 1 | N/A | 1.9 |
| High | 4.3 | | N/A | 4.3 |
| Best Estimate | 3.1 | | 0 | 3.1 |

Description and scale of key monetised costs by 'main affected groups'

There would be transitional familiarisation costs to employers concerning the removal of this provision of £1.9-4.3 million.

Other key non-monetised costs by 'main affected groups'

Provisions for third party harassment may have had a wider impact on reducing discrimination in the workplace, outside of specific third party harassment claims, so the repeal may lead to more instances of workplace discrimination. Using illustrative assumptions that there would be 0-160 more instances of workplace discrimination would imply costs to employers of £0-0.87 million per annum. These costs are considered as indirect and 'non-monetised' as the assumptions used provide insight into the scale of such costs only rather than any accurate assessment.

| BENEFITS (£m) | Total Transition (Constant Price) | Years | Average Annual (excl. Transition) (Constant Price) | Total Benefit (Present Value) |
|---------------|--------------------------------------|-------|-------------------------------------------------------|----------------------------------|
| Low | N/A | 1 | 0 | 0 |
| High | N/A | | 0.67 | 0.67 |
| Best Estimate | 0 | | 0.02* | 0.02* |

Description and scale of key monetised benefits by 'main affected groups'

Possible annually recurring benefits from reduction in 0-87 third party harassment cases brought to tribunal annually affecting private, public and voluntary sector employers. Our best estimate is based on an estimate of one case per year brought under the existing provisions, as we are currently aware of only one case having been ruled on by an employment tribunal since these provisions were introduced.

Other key non-monetised benefits by 'main affected groups'

Employers and employees will no longer be faced with the difficulty of correctly interpreting the purpose of these provisions.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

- The average annual number of discrimination jurisdiction (excl. equal pay) employment tribunal cases accepted is 21,800 per annum.
- The number of third party harassment claims per annum is represented 0-87 cases, in line with the Impact Assessment for the Equality Act 2010. To date, we are aware of only one case having been ruled on by an employment tribunal since these provisions were introduced and we therefore use one case per year as our best estimate of how many cases may be brought in the future.
- We consider any risk of successful judicial review of a Government decision to remove the third party harassment provisions from the 2010 Act would be extremely low.

BUSINESS ASSESSMENT (Option 2)

| | | | | |
|---------------------------------------------------|-------------|----------|-------------------|----------------------|
| Direct impact on business (Equivalent Annual) £m: | | | In scope of OIOO? | Measure qualifies as |
| Costs: 0.3 | Benefits: 0 | Net: 0.3 | Yes | IN |

Direct costs and benefits to business calculations (following OIOO methodology)

For the purposes of One-In-One-Out scoring we calculate the direct costs and benefits to business and voluntary sector organisations as a result of this proposal in 2009 prices. The figures here are deflated using HM Treasury GDP deflator series.¹

The best estimate of the Equivalent Annual Cost² to business and the voluntary sector of the preferred option are calculated as **-£0.3 million** in 2009 prices.

The direct costs to business from the change would be (see Table 6):

- Familiarisation costs of £1.63m to £3.92m. Our best estimate is a mid-point of £2.78m.

The direct benefits to business from the change would be (see Table 4):

- Benefit to business from no more cases brought under this provision. This is estimated to be between £0 and £671,000, with a best estimate of £21,000.

This measure is a de-regulatory measure and approved by the RRC through the Red Tape Challenge. However, due to the familiarisation costs associated with the change, the measure qualifies as an IN under OIOO.

¹ Consistent with series released 21st March 2012

² Equivalent Annual calculations use formula: $NPV / [1 + 1/r - 1/(r \times (1+r)^9)]$ for 10 year time period, where r is the standard social time preference discount factor (3.5%)

Evidence Base

Background

In October 2005, regulations implementing Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (“the Directive”) in Great Britain came into force. These regulations amended the Sex Discrimination Act 1975 (SDA) and inserted a new, freestanding right to be protected from harassment. In October 2006, the Women and Equality Unit of the Department of Communities and Local Government (now the Government Equalities Office) published a fact sheet, to explain the changes to the law on harassment in the SDA, which included a statement that “*on appropriate facts, the harassment provisions in the [SDA] might be interpreted so that where an employer knowingly fails to protect an employee from, for example, repetitive harassment by a customer or supplier, the employer is ‘subjecting the employee to harassment’.*”

This demonstrated that the Government considered employer liability for harassment of employees by third parties was **implicit** in the SDA.

The former Equal Opportunities Commission (“the EOC”), which was a predecessor to the Equality and Human Rights Commission, challenged the Government’s implementation of the Directive by way of a judicial review¹. This included a challenge to the definition of harassment in section 4A of the SDA on three grounds, one of which was that the legislation failed to implement the Directive in not introducing or enabling employer liability for harassment of employees by third parties. On this point, the Court ruled that the regulations which amended the SDA to implement the Directive did not adequately reflect the Government’s interpretation of section 4A set out in the fact sheet. But the Court judgment also records that both parties in the case agreed that employer liability for third party harassment is not required by the Directive (the point being that these provisions can be removed without reference to the EU).

To give effect to this element of the Court ruling, the Government subsequently made regulations² which defined the limits of protection from third-party harassment on the face of the legislation to reflect the position in the Women and Equality Unit’s fact sheet. However, the introduction of explicit provision on employer liability for third-party harassment, although important, was not expected to result in significant changes in practice.

Under the SDA, employer liability for third-party harassment applied not only to sex harassment but also to sexual harassment and gender reassignment harassment. The 2010 Act extended employer’s liability for sex harassment, sexual harassment and gender reassignment harassment of their employees by a third party, such as a customer or a supplier, to the other relevant protected characteristics (age, disability, race, religion or belief and sexual orientation) to harmonise discrimination law so that the same level of protection against third party harassment was provided to employees in respect of all relevant³ protected characteristics, and to reduce the scope for confusion about employers’ obligations and the protection for employees.

Problem under consideration and rationale for intervention

We are aware of only one case of third party harassment having been ruled on by an employment tribunal since this protection was introduced into the SDA in 2008⁴. Because it was not clear to us that the ‘third party harassment’ provisions are fit for purpose or that they are an appropriate or proportionate manner of dealing with the cases of third party harassment that they are intended to cover, we consulted on the case for removing these provisions. Very little quantifiable evidence was provided in responses to the consultation to support the views of either those who agreed or those who opposed our proposal for repeal. We therefore intend to repeal, the third party harassment provisions using the first available legislative vehicle.

¹ *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin).

² The Sex Discrimination Act 1975 (Amendment) Regulations 2008, SI 2008/656

³ For the purposes of harassment under the Equality Act 2010, the relevant protected characteristics are age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

⁴ *Blake v Pashun Care Homes Ltd* [2011] EqLR 1293

Other means of redress already available

Breach of Contract

It is already the case that employers who know that an employee is being subjected to harassment by a third party over whom they have no direct control, and which they effectively condone if they do not take reasonable steps to prevent it when it is clearly within their power to do so, could be in breach of the implied duty not to act in such a way which is likely to harm the relationship of trust and confidence between an employer and employee. This could lead to the employee claiming a breach of contract which is so serious that it entitles the employee to resign and claim constructive dismissal under employment legislation.

Protection from Harassment Act 1997

Furthermore, where the circumstances are sufficiently serious, redress is also available under the Protection from Harassment Act 1997, whereby employees can bring claims of harassment against a customer of their employer, as demonstrated in a High Court ruling⁵. Although employers cannot be liable for harassment of an employee by a third party under the Protection from Harassment Act, we consider that the provisions ensure that adequate protection does exist for employees who do experience harassment by a third party, such as a customer or a supplier. The Protection from Harassment Act creates both criminal and civil remedies. There are two types of criminal offences covered by the Act. One is pursuing a course of conduct amounting to harassment; the other is a more serious offence where the conduct puts the victim in fear of violence. In addition to the criminal sanction, a civil court can also impose civil injunctions in harassment cases as well as awarding damages to the victim of the harassment.

In our recent consultation, we asked for evidence of employees experiencing this form of harassment, and if so, whether they sought a legal remedy. No significant information was provided on this point. We are therefore still unable to estimate the exact likelihood of additional cases being brought under these means of redress if sub-sections 40(2)-(4) were to be removed from the 2010 Act.

Whilst some consultation responses agreed that these alternative avenues of redress are adequate, a greater number of people disagreed. Their reasons for disagreement were that these other legal remedies were not introduced to deal specifically with third party harassment.

POLICY OBJECTIVE

The policy objective is to reduce any potentially unnecessary regulatory burdens that the third party harassment provisions may impose on business.

OPTIONS

Option 1 – Do nothing. By leaving the provisions in force, this could leave the Government open to criticism for implementing legislative provisions with no practical purpose, thereby imposing unnecessary potential burdens on businesses.

Option 2 – Remove the provisions entirely. This is our preferred option as we do not believe that the third party harassment provisions are fit for purpose. The purpose of section 40(2)-(4) is to provide a legal remedy for an employee who is subjected to repeated harassment at work by third parties over whom the employer does not have direct control, such as a customer, by making the employer liable if that employer knows this conduct has happened to that employee on at least two prior occasions and fails to take action that would be reasonable in the circumstances. There is no evidence within the consultation responses to suggest that legislation is a proportionate way of tackling such conduct, whether it is related to sex harassment, sexual harassment, gender reassignment harassment, or harassment related to any other relevant protected characteristic.

We are aware of only one case having been ruled on by an employment tribunal under the previous sex discrimination legislation or sub-sections 40(2)-(4) of the 2010 Act. However, whilst these provisions

⁵ *Majrowski v Guys and St Thomas' NHS Trust* 2006] UKHL 34[2006] UKHL 34

remain in place, although the number of cases brought may be small, employers will have to live with the uncertainty that claims of third party harassment may be brought against them. We consider therefore that by removing these provisions we will reduce unnecessary burdens on business.

Simultaneously, we would ensure that information is provided to make the concept of third party harassment clear, explain how a complainant may be able to seek a remedy under alternative avenues, and clarify the responsibilities of employers in this regard to help them to discharge their duty of care to their staff.

COSTS AND BENEFITS

Option 1

Costs

In this Impact Assessment the costs and benefits of doing nothing are those which would be incurred were the provisions to remain in force, and the baseline against which the costs and benefits of other options are assessed. The Equality Act 2010 Impact Assessment, April 2010 assessed the impact of implementing additional protection against third party harassment before commencement. This assessment, and the consultation stage third party harassment Impact Assessment, have been used as the principal basis for estimates of the costs and benefits of doing nothing, with assumptions and figures updated as described below.

Number of cases brought per annum

The 2005 Impact Assessment for the Regulations,⁶ which introduced both a wider definition of harassment and employer liability for third party harassment in the workplace on grounds of sex, estimated that these provisions might result in a 0.5%-1% increase in harassment claims. Furthermore, it was estimated that only a fraction, 0.1% increase in claims, could be attributed to the introduction of employer liability for third party harassment, with the majority of extra claims being considered to arise because of the wider definition of harassment under these regulations.

The 2010 Act Impact Assessment took a similar approach to estimating costs for the extension to protection, and assumed an increase of between 0.1-0.4% of discrimination employment tribunal cases being brought as a result of introducing employer liability for third party harassment in the workplace related to race, disability, religion or belief, sexual orientation and age, as was the case for sex, sexual and gender reassignment harassment at the time.

For the three years between 2008/2009 and 2010/2011 there was an average of 37,520 discrimination jurisdiction claims per annum accepted (not including equal pay).⁷ However, to estimate the number of cases per annum which would have included a discrimination claim; it is necessary to adjust this figure by the average number of jurisdiction claims per case over the same period (1.72). Therefore, the estimate of the number of discrimination cases expected at employment tribunal per annum is **21,800**.

The assumptions relating to an increase in the annual number of discrimination cases accepted at employment tribunal have been altered to reflect the fact that since the 2010 Act Impact Assessment was published, one claim has been reported as having been brought under third party harassment provisions⁸. It is therefore assumed that the third party harassment provisions as brought into force by the 2010 Act would result in an increase in the annual number of discrimination cases accepted at employment tribunal by 0-0.4%, or 0-87 cases each year. The assumed number of new cases is in order of magnitude similar to that used in previous assessments, which was never disputed during previous consultations on those proposals⁹.

⁶ Employment Equality (Sex Discrimination) Regulations 2005 SI 2005/2467

⁷ Employment Tribunal Annual Statistics, 2008/2009-2010/2011; <http://www.redmans.co.uk/wp-content/uploads/2012/06/2008-2009-Employment-Tribunal-report.pdf>; <http://www.justice.gov.uk/downloads/statistics/mojstats/tribs-et-eat-annual-stats-april09-march10.pdf>; <http://www.justice.gov.uk/downloads/statistics/mojstats/employment-trib-stats-april-march-2010-11.pdf>

⁸ *Blake v Pashun Care Homes Ltd* [2011] EqLR 1293

⁹ See the Impact Assessment for the Sex Discrimination Act 1975 (Amendment) Regulations 2008, SI 2008/656 http://www.legislation.gov.uk/ukxi/2008/656/pdfs/ukxiem_20080656_en.pdf

Whilst we have assumed here that a positive number of cases would be brought under the third party harassment provisions to give a representation of possible benefits, our best estimate of the number of cases which would be brought each year is one, as we are only aware of one case being ruled on by an employment tribunal within the past year.

Using the breakdown by sector of respondents to discrimination cases from the Survey of Employment Tribunal Applications (SETA) 2008, table1 sets out the number of cases per annum by sector of employer.

Table 1 – Breakdown of third party harassment cases by sector of employer, per annum

| | Percentage of Cases | Number of Cases | |
|------------------|---------------------|-----------------|-----------|
| | | Low | High |
| Private Sector | 52% | 0 | 45 |
| Public Sector | 36% | 0 | 31 |
| Voluntary Sector | 12% | 0 | 10 |
| Total | 100% | 0 | 87 |

Source: SETA 2008, GEO estimates

Table 2 – Estimated number of third party harassment cases per annum, by outcome

| | Percentage of Cases | Number of Cases | |
|------------------------------------|---------------------|-----------------|-----------|
| | | Low | High |
| Withdrawn | 21% | 0 | 19 |
| Privately settled | 20% | 0 | 18 |
| Acas conciliated | 33% | 0 | 29 |
| Struck out not at hearing | 11% | 0 | 10 |
| Successful at a hearing | 3% | 0 | 2 |
| Dismissed at a preliminary hearing | 3% | 0 | 2 |
| Unsuccessful at hearing | 8% | 0 | 7 |
| Default judgement | 1% | 0 | 1 |
| Total | 100% | 0 | 87 |

Note: Figures may not sum due to rounding

Source: Employment Tribunal Annual Statistics, 2008/09-2010/11, GEO estimates, SETA 2008¹⁰

Cost of third party harassment cases

Note: The cost estimates of discrimination cases used here have been updated and improved compared to the original 2010 Impact Assessment, using the available evidence.

Throughout this assessment all prices have been inflated to 2012 prices using HM Treasury GDP Deflator Series consistent with 21 March 2012 Budget Report unless stated otherwise

Exchequer

The average cost of an employment tribunal claim is given by the Ministry of Justice's 2011 Impact Assessment regarding *Introducing a fee charging regime into Employment Tribunals and the Employment Appeal Tribunal*.¹¹ Discrimination cases are termed as 'Open Track' cases for the purposes of administration by the tribunal service. The average cost of receipt and allocation of an open track claim is £420, and the average cost of a hearing is £6,170. These are the core mandatory stages in the

¹⁰ Estimate for the fraction of cases which privately settle is derived from SETA 2008 for discrimination claims

¹¹ <https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011>

employment tribunal process. Given that only 10.4% of claims proceed to a hearing,¹² the average cost of a third party harassment claim is **£1,062** in 2011/12 prices.

Employers

The average costs to employers are calculated using SETA 2008. This is calculated as the cost of advice and representation, time spent by chief executives and senior officials, and time spent by other employees, namely human resource managers and directors, on the case. The median hourly wage is assumed to be £44.48¹³ and £28.25¹⁴ respectively for these two roles. The overall average cost to an employer of a third party harassment case is **£5,417**.

Table 3 – Cost of a third party harassment case to the employer

| | |
|------------------------------------------------|---------------|
| Time spent on case by directors & senior staff | £2,868 |
| Time spent on case by other staff | £593 |
| Cost for advice and representation | £2,956 |
| Total | £5,417 |

Source: SETA 2008 adjusted for zero values, ASHE 2011

Settlements and compensation

The average compensation awarded in a discrimination case is **£14,545**.¹⁵ The annual cost to employers of the estimate 0-2 cases that might be successful at a hearing is **£0-30,000**.

The average settlement value in a discrimination employment tribunal case is estimated using SETA 2008 as **£4,387**. Therefore the annual cost to employers of making settlements in third party harassment cases is estimated at **£0-83,000**.

Table 4 – Summary of costs under option 1

| | Annually Recurring | | |
|----------------------------|--------------------|-----------------|----------------|
| | Low | High | Best Estimate* |
| Private Sector Employers | £0 | £303,000 | £7,000 |
| Public Sector Employers | £0 | £209,000 | £7,000 |
| Voluntary Sector Employers | £0 | £68,000 | £6,000 |
| Exchequer | £0 | £303,000 | £1,000 |
| Total | £0 | £671,000 | £21,000 |

*The best estimate is that 1 case of third party harassment would be brought per annum

Source: GEO estimates

In summary, the annually recurring costs of Option 1 and the baseline against which other options are assessed ranges between £0 and £0.67million.

Benefits

In ensuring that workplace claims of third party harassment can be brought, the 2010 Act makes clear that the protection that previously existed for employees in relation to sex harassment, sexual harassment and gender reassignment harassment also applies across the other relevant protected characteristics. This eliminates the potential for confusion amongst both employers and employees as to their respective responsibilities and rights where the conduct is related to different protected characteristics.

¹² Employment Tribunals and EAT Statistics, 2008/09-2010/11

¹³ ASHE 2011 –111 incl. 21% uplift for non-wage labour costs – Note: uplift derived from European Labour Costs Survey (2007)

¹⁴ ASHE 2011 –1135, incl. 21% uplift for non-wage labour costs

¹⁵ Employment Tribunal Statistics 2010/11

In making clear that employers may be liable for claims of third party harassment, these provisions provide employees with redress for such treatment. An indirect benefit is that these provisions may also encourage all employers to ensure that their staff are reasonably protected from such treatment.

Benefits of reducing discrimination in the workplace

In response to a previous Regulatory Policy Committee (RPC) opinion regarding another work-related policy area that the benefits of reducing discrimination should be considered more generally, and monetised, where possible, when considering the impact of intervention, economic theory has been used to estimate the price of discrimination.

The benefits derived below should be considered as indicative only of scale, and treated as both indirect and 'non-monetised' in the context of this appraisal.

An assessment of the benefits requires not only an estimate of the price of discrimination but also of the reduction in the quantity of discrimination. Annex 1 to the consultation stage Impact Assessment fully describes the methodology and the results of the analysis adopted to assess these benefits. In line with the RPC's opinion, the benefits of reducing discrimination should not be those reflected in the number of cases or legal proceedings, but in the reduction in acts of discrimination more generally.

The scale of the benefits

Using modest estimates for the reduction in the number of annual instances of discrimination that may occur as a result of this government intervention, we are able to identify the potential scale of these benefits.

Table 5 below sets out benefits to employers of a 0% - 0.01% (0–160 individuals) reduction in annual workplace acts of discrimination of **£0 - £0.88million**, or **£0 – £7.61million** over a period of 10 years in 2012 prices.

Table 5: Estimated annual benefits of reducing instances of discrimination in the workplace by 0-0.01%

| Type of employer | Percentage of employees in this sector ¹⁶ | Reduction in instances of discrimination | | Average price of discrimination | Total benefits | |
|------------------|------------------------------------------------------|------------------------------------------|-------|---------------------------------|----------------|---------------------|
| | | 0% | 0.01% | | Low | High |
| Private Sector | 73.3 | 0 | 117 | £4,515 | £ 0 | £0.53million |
| Public Sector | 21.0 | 0 | 34 | £9,291 | £0 | £0.31million |
| Voluntary Sector | 5.7 | 0 | 9 | £4,614 | £0 | £0.04million |
| Total | | 0 | 160 | | £0 | £0.88million |

Source: Average price of discrimination, see Annex 1 of Consultation Stage Impact Assessment

Option 2

The costs and benefits of the option to remove the third party harassment provisions entirely from the 2010 Act for all the relevant protected characteristics have been assessed by using, as a baseline, the estimates of costs under option 1 above.

¹⁶ Estimated using BIS Business Population Estimates 2011

Transitional costs

Employers will need to familiarise themselves with the changes to the law brought about by the removal of the third party harassment provisions, and understand how this will affect them and their employees. The 2010 Act Impact Assessment originally assumed 100% compliance, and therefore information obligations falling on 100% of employers form the new strengthening measures to discrimination law.

However, following the commencement of the 2010 Act, the Government Equalities Office carried out a very brief survey of business representatives as to what the true proportion of small and medium employers that would actively seek to familiarise with changes to discrimination law was. This survey gave responses in the region of 20-50% of small and medium enterprises (and voluntary sector organisations)¹⁷. This fraction has been used to estimate the costs to employers of understanding the changes to the law a result of these proposals. Furthermore, it is also assumed the amount of time taken to understand the implications of removing these provisions will be significantly less than when they were implemented to begin with – an estimate of half this time has been used.

Also, responses to our consultation suggested that it is unrealistic to expect 100% of large firms and public sector organisations to familiarise themselves with this change, so we have reduced our low estimate of organisations affected to 70%.

Therefore, there will be total transitional costs to employers of **£1.9million - £4.3million**. (See table 6)

Table 6 – Transitional familiarisation costs of employers understanding the changes to third party harassment provisions

| | Number of Organisations | % of Organisations Affected | | Hours | Cost per Hour | Total Cost | |
|------------------|-------------------------|-----------------------------|------|-------|---------------|--------------------|--------------------|
| | | Low | High | | | Low | High |
| SMEs | 1138970 | 20% | 50% | 0.25 | £24.38 | £1.39million | £3.47million |
| Large Firms | 6185 | 70% | 100% | 1 | £28.25 | £0.12million | £0.17million |
| Public Sector | 27030 | 70% | 100% | 0.5 | £28.25 | £0.27million | £0.38million |
| Voluntary Sector | 186000 | 9% | 22% | 0.25 | £24.38 | £0.10million | £0.25million |
| Total | | | | | | £1.9million | £4.3million |

Source: ASHE 2011, BIS Business Population Estimates 2011, HMT Whole of Government Accounts, DFE, England and Wales Charity Commission, National Survey of Charities and Social Enterprise 2008, Office of the Scottish Charity Regulator

Annual costs

There are no significant direct burdens on employers from removing these provisions. The principal rationale for intervention is to remove the possibility of any disproportionate burdens that may have been caused for employers in the future.

There will be a cost to some individuals from not being able to bring claims under this provision. It is not possible to monetise this cost, as decisions of whether to bring a claim will depend on a number of factors, including non-financial concerns such as the unpleasant factors that may be associated with cases (e.g. stress) or positive feeling (e.g. a sense of achieving justice) as well as the financial decisions based on possible compensation or settlement. In any event, due to the small number of cases brought under this provision, these costs will be very small overall.

Furthermore, alternative protection for this type of harassment does to some extent already exist in law.

An employer who knows that an employee is being subjected to harassment by a third party over whom they have no direct control, could be in breach of the implied duty not to act in such a way which is likely to harm the relationship of trust and confidence between an employer and employee if that employer does not take reasonable steps to prevent it. This could lead to the employee claiming a breach of

¹⁷ See Annex 3 of Consultation Stage Impact Assessment

contract which may in turn lead to the employee resigning in circumstances where they have a right to claim constructive dismissal under employment legislation.

Some fraction of those individuals that would have brought a claim under the existing third party harassment provisions may choose this alternative form of redress, in which case, for those parties concerned, there would be no real cost reduction as a result of implementing option 2. However, it is considered that this alternative route being used by individuals is highly unlikely, as it could only be taken if the employee had decided to resign because of their employer's failure to address the third party harassment. Given the range of subjective reasons why an individual decides whether or not to bring a claim, it is not possible to estimate whether or not any additional cases of constructive dismissal might be brought.

Depending on the circumstances, employees could also bring claims of harassment against a customer of their employer under the Protection from Harassment Act 1997.

The scale of benefits to employers described under option 1 from a reduction in discrimination more generally in the workplace would not be realised where the alternative forms of redress are not used, and should subsequently be considered as an indirect cost of removing the third party harassment provisions.

Cost of producing information for individuals

Under option 2, the Government Equalities Office would produce information to explain the removal of the third party harassment provisions. This would also include information about the other alternative avenues of legal redress that employees could explore. The administrative cost to GEO of producing this information forms part of the implementation of the policy, and therefore is not considered part of the direct impact of this option. Any opportunity costs for individuals of referring to this information would be minimal, and we certainly expect there to be no implicit requirement for employers to refer to this.

Benefits (See table 4)

The principal benefits of option 2 would be the removal of the cost burdens described under option 1. 100% of these costs ought to be transferred as the benefits of removing these provisions, and there no longer being 0-87 third party harassment cases accepted by tribunals. There is no reason to suggest otherwise.

Non-monetised costs and benefits

This option will ensure a consistent approach across all the relevant protected characteristics helping to reduce the scope of confusion as to the rights of employees and responsibilities of employers.

Direct costs and benefits to business calculations (following OIOO methodology)

For the purposes of One-In-One-Out scoring we calculate the direct costs and benefits to business and voluntary sector organisations as a result of this proposal in 2009 prices. The figures here are deflated using HM Treasury GDP deflator series.¹⁸

The best estimate of the Equivalent Annual Cost¹⁹ to business and the voluntary sector of the preferred option are calculated as **-£0.3 million** in 2009 prices.

The direct costs to business from the change would be (see Table 6):

- Familiarisation costs of £1.63m to £3.92m. Our best estimate is a mid-point of £2.78m.

The direct benefits to business from the change would be (see Table 4):

¹⁸ Consistent with series released 21st March 2012

¹⁹ Equivalent Annual calculations use formula: $NPV / [1 + 1/r - 1/(r \times (1+r)^9)]$ for 10 year time period, where r is the standard social time preference discount factor (3.5%)

- Benefit to business from no more cases brought under this provision. This is estimated to be between £0 and £671,000, with a best estimate of £21,000.

Wider impacts

Equality Impact

A policy equality statement is set out in Annex 1.

Justice impact

We sought evidence through a recent consultation on our proposal to repeal the 2010 Act's third party harassment provisions of the potential for an increase in alternative and additional criminal and civil cases to be brought before the courts if the provisions were repealed. Consultation responses indicated that such an increase would be highly unlikely. Because this alternative protection already exists, we consider any impact on the justice system will be minimal.

Summary and details of implementation

The preferred option, to remove the third party harassment provisions entirely from the 2010 Act, would entail repeal of primary legislation. We have consulted on removing these provisions. Very little quantifiable evidence was provided by to support the views of those who agreed or opposed our proposal for repeal. We therefore intend to repeal, the third party harassment provisions using the first available legislative vehicle.

Post Implementation Review (PIR) Plan

As the preferred option is to remove the third party harassment provisions, which ensures a consistent approach across all relevant protected characteristics, there will not be a dedicated review of this action. However the GEO will monitor for any significant changes in harassment cases relating to the removal of third party harassment provisions and through existing channels of research and monitoring case trends seek to understand where alternative means of redress occur. GEO is also committed to reviewing the 2010 Act as a whole, for a Post Implementation Review in 2015. Part of this review will aim to establish if individuals are protected by the Act, and whether organisations feel that the Act has helped to simplify legislation and it is more consistent. As part of the wider evidence on the 2010 Act, where it is available, we will aim to collect evidence relating to experiences of third party harassment, on how redress is sought once this provisions is repealed, and on organisations' experiences in this area .

Policy equality statement

Review of employer liability for third party harassment at work

Introduction

This assessment considers the impact for equality of the provisions in the 2010 Act relating to employer liability for third party harassment at work on, age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

The aim is to ensure that the implications for equality for all the protected characteristics have been properly assessed during the development of the review, taking account of views expressed, and to provide assurance that changes needed to mitigate any potential adverse impacts have been identified. This Annex considers the impacts on age, disability, gender reassignment, race, religion or belief and sexual orientation in line with the integrating policy of the 2010 Act.

We want the law to provide appropriate protection against the harmful discrimination people experience. We are aware of only one case of third party harassment having been ruled on by an employment tribunal since this protection was introduced in relation to sex harassment, sexual harassment and harassment on grounds of gender reassignment in 2008. It is not clear, therefore, whether the 'third party harassment' provisions are fit for purpose or if they are an appropriate or proportionate manner of dealing with the cases of third party harassment that they are intended to cover.

Methodology

A full Equality Impact Assessment, for House of Lords introduction, was published in December 2009²² covering the impact of the employer liability for third party harassment at work provisions in the 2010 Act in respect of the relevant protected characteristics, (age, disability, gender reassignment, race, religion or belief, sex and sexual orientation). We consider that the impact of repealing the provisions is the reverse of the potential impact identified by the earlier published Equality Impact assessment.

Without these provisions employers will no longer be liable under the 2010 Act for harassment of an employee by a third party. However, there are alternative provisions in place which may be able to provide adequate legal protection for employees who experience harassment by a third party, such as a customer or a supplier. Employees who experience this type of harassment will therefore be able to continue to be protected in relation to each of the relevant protected characteristics.

To help us assess the impact of removing the provision, through our recent consultation on the third party harassment provisions, we asked for evidence of instances of third party harassment and of the likelihood that employees experiencing such conduct would seek to use an alternative means of legal redress. Very little quantifiable evidence was provided by to support the views of those who agreed or opposed our proposal for repeal.

²² Equality Bill – equality impact assessment: December 2009 – ISBN: 9780108508714

The Provision

Sub-sections 40(2)-(4) of the 2010 Act extended employer liability for third party harassment of their employees in the workplace where the harassment is related to age, disability, race, religion or belief or sexual orientation.

Such protection already existed in relation to sex harassment, sexual harassment and harassment on grounds of gender reassignment.

OPTION 1 – do nothing

General impact

Retaining the existing employer liability in the 2010 Act for harassment of their employees by third parties such as customers or suppliers provides a consistent level of protection for employees in relation to the protected characteristics of age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

So if an employee were to be subjected repeatedly to third party harassment in respect of any of these protected grounds, and if the employer knew this was happening and failed to take reasonable steps to stop it happening to that employee again, the employee would still be able to bring a claim against the employer.

It is clear that employees have the same rights in this respect for all the relevant protected characteristics.

OPTION 2 – remove the employer liability for third party harassment at work entirely

General impact

Removing employer liability for harassment of their employees by third parties over whom the employer does not have direct control means that if an employee were to be subjected repeatedly to third party harassment related to any of the protected characteristics, and if the employer knew this was happening and failed to take reasonable steps to stop it happening to that employee again, the employee would no longer be able to bring a claim under this provision against the employer.

The consultation responses provided some limited views that women and disabled, black and LGB&T employees would be more likely to encounter third party harassment than others. Even if there was evidence to support this assertion, the alternative provisions in place which may be able to provide adequate legal protection for employees who experience harassment by a third party are available equally to employees in respect of harassment related to all relevant protected characteristics, and to sexual harassment.