

Free Speech Union briefing

# Briefing Note on the Worker Protection (Amendment of Equality Act 2010) Bill

Dr Bryn Harris

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## WORKER PROTECTION BILL



### **What does clause 1 do?**

1. Clause 1 of the [Worker Protection \(Amendment of Equality Act 2010\) Bill](#) amends the Equality Act 2010 by reinstating employers' liability for harassment of their employees by third parties. The original 2010 Act had imposed this liability on employers, until it was removed by a 2013 amendment. The new duty is considerably more onerous than the original third-party duty in the 2010 legislation and is likely to cause significant problems for employers and to have a chilling effect on freedom of speech.

### **What does the Equality Act mean by 'harassment'?**

2. Harassment by third parties is the same as harassment under the Equality Act generally (note sexual harassment has a different definition). The definition of harassment at [section 26 of the Equality Act](#) can be summarised as follows:

unwanted conduct related to a relevant protected characteristic that has the purpose or effect of either violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

3. The 'protected characteristics' listed in the Act that relate to harassment are:

- age
- disability
- gender reassignment
- race
- religion or belief
- sex
- sexual orientation

4. 'Unwanted' conduct is extremely broad and means the same as 'unwelcome' or 'uninvited'. The EHRC Guidance on Harassment gives the following examples:

- spoken words

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- banter
  - written words & imagery
  - graffiti
  - physical gestures, facial expressions and mimicry
  - jokes and physical behaviour towards a person's property
  - social media posts
5. Conduct can have the 'effect' of harassment in a very broad range of circumstances. The conduct needs only to be 'related' to a protected characteristic such as race or sex. The victim does not have to possess that characteristic him or herself, nor does the conduct need to be directed at them – indeed, the victim can be absent (though note, all of these facts would go to the question of whether the conduct 'had the effect' of harassment).
6. Most harassment cases in the Employment Tribunal concern conduct having the 'effect' of harassment, rather than purposeful harassment. An employer can therefore be liable for *unintentional* harassment, whether its own harassment or employee-to-employee harassment, with only the following safeguard protecting innocuous conduct:
- In deciding whether conduct has the effect [of harassment], each of the following must be taken into account —
- (a) the perception of [the victim];
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.
7. While the law is clear that the Act is not intended to protect the hyper-sensitive, it does nevertheless allow employment tribunals considerable discretion in deciding whether subjective claims of offence constitute harassment. In the hands of risk-averse (and, at times, ideologically driven) human resources departments, the safeguards – that is, the need to take other circumstances into account and consider whether it is reasonable for the conduct to have given offence – are often of little value in defending free speech against claims of harassment.

*Findings of harassment by the Employment Tribunal*

8. The harassment provisions can lead to surprising findings in the Employment Tribunal.
9. In *Dawkins v Benham Publishing Ltd*, the Tribunal held that an employee does not need to be present when harassing conduct occurs. In that case, the Claimant had left the office following a dispute with her line manager, who then told other employees that the Claimant was suffering from hormonal or 'women's' problems. The tribunal upheld her harassment claim, even though the comments were made in her absence.
10. In *English v Thomas Sanderson Ltd* [2008] EWCA Civ 1421, the Court of Appeal held that an employee might be able to bring a claim regardless of whether they have the protected characteristic complained of:

Conduct, regardless of the reason for it, that is otherwise related to a protected characteristic because of the form it takes. For example, engaging in racist or homophobic 'banter' at work that might offend co-workers regardless of their race or sexual orientation. Such conduct might be directed at the claimant, or another person, or no-one in particular.

11. The consequences of this principle can be seen in *Morgan v Halls of Gloucester Ltd*, in which a black employee who overheard a colleague use the term 'golliwog' to describe a black colleague succeeded in his tribunal claim for racial harassment. Even if the claimant in this case had been white he would have succeeded in his claim.

#### Harassment by third parties

12. The Equality Act already makes employers liable for breaches of the Equality Act by employees (but not third parties). For the employer to be liable, the breach must be done in the course of the employee's employment and the employer must have failed to take 'all reasonable steps' to prevent the breach.
13. The leap made in clause 1 of the Bill is to apply this regime to harassment by third parties – employers will be vicariously liable for harassment that their employees suffer at the hands of third parties, i.e., members of the public, in the course of employment, unless the employer has taken all reasonable steps to prevent that harassment.

14. A report stage amendment to the Bill has introduced a further exception to employers' liability. It is discussed below.
15. The 'course of employment' is another broad concept, extending beyond what happens on the employer's premises while the employee is carrying out his or her duties and encompassing any situation where there is a sufficiently close connection between the harassment and the employment relationship. In principle, therefore, the Bill could make an employer liable for harassment suffered by an employee while, for instance, performing errands outside of the place of employment, or while attending external training. This is in addition to making employers liable for harassment suffered by an employee in a public-facing role by a member of the public, e.g. a customer. More on that below.
16. It is important to note that clause 1 significantly expands the scope of employers' liability in comparison to the Equality Act as originally enacted. These innovations will make the Bill particularly detrimental to freedom of speech.

#### All reasonable steps

17. Under the Equality Act as originally enacted, employers had a defence against a claim of third-party harassment if they could show they had taken 'such steps as would have been reasonably practicable' to prevent the harassment. Under the proposed amendment, this defence would only apply if the employer can show it has taken 'all reasonable steps' – the same defence that applies in preventing harassment of employees by other employees. The distinction may seem semantic, but the recent appeal judgment in *Allay (UK) Ltd v Gehlen*, concerning employee-to-employee harassment confirmed that taking all reasonable steps sets a high threshold for employers.<sup>1</sup> To avail themselves of this defence, employers must ensure employees have understood and not ignored their harassment training. If the training has grown 'stale' – for instance, if there are signs of employees not understanding it, or if their memory of the training has faded – then the employer must hold refresher training. 'Thorough and forcefully presented training' is likely to be needed for an employer to benefit from the defence.

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<sup>1</sup> [https://assets.publishing.service.gov.uk/media/601bc9e3e90e07128691d2c2/Allay\\_UK\\_Ltd\\_v\\_Mr\\_S\\_Gehlen\\_UKEAT\\_0031\\_20\\_AT.pdf](https://assets.publishing.service.gov.uk/media/601bc9e3e90e07128691d2c2/Allay_UK_Ltd_v_Mr_S_Gehlen_UKEAT_0031_20_AT.pdf)

18. While an employment tribunal would, one hopes, acknowledge that the steps an employer can reasonably take in respect of conduct by third parties are more limited than in respect of the conduct of its own employees, the high threshold imposed by *all* reasonable steps will encourage businesses to err on the side of caution in regulating what their customers say and do while on the premises.

### *Single incident of harassment*

19. Under clause 1 of the new Bill, employers will be liable for *any* act of harassment by a third party (with a very narrow exception, discussed below) that they did not take all reasonable steps to prevent. This departs radically from the 2010 position, under which employers would only be liable the *third* time an employee was harassed, with the employer being aware of the previous two. Employers will therefore have the daunting and perhaps impossible task of predicting and preventing *in the abstract* all reasonably foreseeable forms of harassment that their employees might suffer at the hands of third parties.

### **The impact of clause 1**

20. The impact of clause 1 on the one-and-a-half million UK businesses that employ people is almost unfathomable.<sup>2</sup> This is part of the problem with the clause – parliamentarians simply cannot foresee the impact of imposing such a broad duty on such a vast range of organisations in an age where the taking of offence is so unpredictable and, at times, so irrational. The Government is asking parliament to reset the law back to 2010, while neglecting the considerable social changes that have happened since then, as well as setting a lower threshold for what will count as third party harassment. This recklessness of this approach is exacerbated by the Government's inadequate efforts to consult relevant stakeholders, as set out below.

21. Despite the opacity of clause 1's likely impact, key risk factors are clear and should alarm any parliamentarian concerned with free speech, regulatory over-reach and the spread of compliance culture.

22. Clause 1 replicates the liability employers already have towards their employees and imposes it on their relationship with third parties (e.g.

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<sup>2</sup> <https://www.gov.uk/government/statistics/business-population-estimates-2022/business-population-estimates-for-the-uk-and-regions-2022-statistical-release-html>

customers). It is certainly foreseeable, then, that as a result businesses will treat their customers, at least in some important aspects, in the same way they treat their employees. Just like employees, therefore, customers are likely to be bound by formal and binding HR-style rules that govern how they interact with employees – so that the employer can demonstrate it has taken ‘all reasonable steps’ to prevent third-party harassment and so the employer can begin to manage the multifarious risks that arise from a legal prohibition against unintentional offence.

23. We set out below the forms those rules are likely to take in specific sectors. As a general point, it should be noted just how radically clause 1 will change the relationship between businesses and their customers. Employers in the retail, hospitality, entertainment and academic sectors will have a legitimate legal interest in policing what members of the public say – what we now think of as every day, casual and fundamentally private speech will in future be governed by formal codes of conduct and scrutinised for its potential legal consequences. This is an unacceptable bid to legalise the interactions of day-to-day life. It is inconsistent with the norms of our open, liberal society. It is hard to conceive how any government, least of all a Conservative one, could conclude that the compliance culture of HR departments – with their dogmatic rigidity, unreflective worship of fashionable orthodoxy, and complete deadness to nuance and complexity – should be expanded *beyond* the workplace and into pubs, shops, theatres and sports grounds.
24. Businesses small and large will have to seek legal advice on avoiding liability under clause 1, as it will require businesses to adopt new mechanisms for controlling and policing the acts of third parties. Whereas employers are already owed a duty of loyalty by their employees, third parties are under no such obligation and controlling their conduct so as to manage liability risk will require new legal relationships, and new risk-sharing mechanisms, between businesses and their customers.
25. We have three overarching concerns. First, taking and implementing legal advice will be costly for businesses. The Government risk assessment advises that the cost of familiarisation with the Bill and its ramifications will be £30 per medium/large business and only £19 for small and microbusinesses. This is a woeful underestimate and exemplifies the Government’s unserious and unthinking approach to the impact of the new duty. Clause 1 should not be allowed to proceed

until parliamentarians have been properly advised of the likely cost of the new duty, such that it can be weighed against the proposed benefits. We note in passing that the Minister responsible for this Bill – the Minister for Women and Equalities – is also the Business Secretary.

26. Second, the most sensible response to clause 1 will be, in many cases, extreme defensiveness. It is doubtful that any customer policy or code of conduct, no matter how skilfully drafted by lawyers, could target only genuine instances of harassment (which of course needn't be intentional on the part of the harasser), while leaving legitimate conduct alone. The prudent employer, rationally concluding that the potential for liability is boundless, will inevitably hit upon broad and sweeping rules for customers as the only way to avoid being sued. The safest course of action would be a management instruction that staff must not converse with customers except when strictly necessary.
27. Third, prudent employers will seek to minimise the risk of liability for harassment – which, note, entails liability for uncapped damages – by transferring the liability risk to their customers.

*Impact on hospitality and retail*

28. At the costlier end of the hospitality sector where parties agree written terms – for instance, the provision of conference venues – employers are likely to reduce the risk of employees complaining of harassment by attendees by requiring guest organisations to warrant or undertake not to harass employees, and to indemnify the host for any losses it suffers as a result of employees claiming third-party harassment. In such cases, the venue will be the stronger party in negotiating terms, if there even is any negotiation as opposed to imposition of standard terms by the venue. It is also reasonably likely that such indemnities will become the market standard.
29. The creation of this new risk under clause 1, and its transfer to third parties, is likely to have a disproportionate affect on groups in our society that hold dissenting views, the expression of which can easily be misrepresented by opponents as 'harassment' – Christian groups, for instance, and women who believe in the reality of biological sex. Exercise of the freedoms of association and speech by these groups, by holding conferences and lectures for instance, will become disproportionately risky and expensive.

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30. A concrete example is the 2021 dispute between Worcester College, Oxford and Christian Concern. Students complained that the college had hosted a Christian Concern conference during the summer vacation, thereby leading them to feel 'unsafe' because evangelical Christians hold different views to them. The College instantly sided with the students, apologised for its oversight and sought to avoid a repeat booking. It was only after concerted campaigning and legal action that the College conceded that Christian Concern had every right to book a room on its premises. The effect of clause 1 will be to weigh the scales decisively in favour of the intolerant and the hyper-sensitive from the start – the College would have had a cast-iron argument that bookings by evangelical Christians create a risk of third-party guests harassing non-heterosexual or trans staff simply by talking to staff about their Christian beliefs.
31. Note that clause 1 will also accelerate and exacerbate the practice of contractual prohibitions of 'offensive' speech in the entertainment industry. So-called 'behavioural agreement' clauses, which already exist, seek to prevent comedians and other performers from delivering 'offensive' content. Such agreements are the exception rather than the rule at the moment, but enacting clause 1 will make it commercially reasonable for all venues to make such demands in order to prevent harassment claims by staff. Some will simply play it safe by refusing to book any such performers
32. It should be noted too that while employers are likely to seek to transfer risk to third parties, the Equality Act does not permit employers to 'contract out' of the obligations they owe to employees. Therefore, employers will not be able to seek binding commitments from e.g. staff at late-night comedy venues by arguing that they accepted the job with their eyes open about the likelihood of harassment and will not bring a claim for harassment simply because they feel offended. The employee will always have the right to bring a claim. At best, the existence of some sort of trigger warning or disclaimer will constitute evidence that the perception of harassment was not reasonable as the claimant employee had been forewarned (although when staff at the Pleasance in Edinburgh complained that they'd found Jerry Sadowitz's performance the previous night offensive, the Pleasance cancelled his future bookings, even though the programme advertising the event had been festooned with trigger warnings). Parliamentarians should ask whether increasing the prevalence of trigger warnings beyond the confines of university campuses is desirable.

33. In other parts of the retail and hospitality sectors, there will be no underlying contract between employer and third parties allowing for transfer of risk – for instance, shoppers or pubgoers. In those cases, businesses will have to resort to other means of controlling customers' conduct to reduce the risk of liability. Such means are likely to include prominent customer codes of conduct, with specific and onerous restrictions on how customers should address members of staff, with any customers assessed as posing a 'harassment' risk to staff being banned and placed on a blacklist.
34. Those employers with sufficient means may well feel that taking 'all reasonable steps' will require taking legal advice on whether customers' acceptance of and compliance with a code of conduct will be a condition of their invitation on to the business premises, such that breach of the code would constitute trespass by the customer.
35. In all cases, parliamentarians should consider carefully the likelihood that clause 1 will introduce a chilling and illiberal degree of legalism and control into daily life. Crucially, parliamentarians should also consider the extremes of defensiveness that employers may feasibly adopt to avoid crushing liability at the hands of the easily offended. The founder of the Leon food chain has informed us that clause 1 is likely to accelerate the adoption of automation in shops and restaurants, as robots cannot sue employers for harassment. (One unintended consequence of the Bill will be to accelerate the replacement of human beings in customer service roles in banks and utility companies dealing with inquiries by phone with chat bots, something that's already unpopular.)
36. We also ask parliamentarians whether the UK's under-threat pub sector will be able to shoulder the compliance costs and liability that clause 1 imposes.

#### *Impact on higher education*

37. Clause 1's impact on higher education will be particularly egregious. Under the Equality Act in its current form, students and visiting speakers are third parties and their conduct therefore triggers no obligations on the university, whether as an employer under part 5 or as a higher education institution under part 6.
38. While it is well-known that in practice UK universities regularly over-apply the Equality Act, the law can nevertheless be correctly applied.

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Earlier this year, the Free Speech Union initiated a legal challenge against the University of Essex because its policies, as is common in the higher education sector, purported to prohibit certain forms of speech by students on the grounds that said speech constituted harassment under the Equality Act, e.g. created a 'hostile environment' for members of staff with protected characteristics. The University conceded, without a fight, that the Equality Act does not give them such power, and that speech of the kind the University wanted to prohibit was not unlawful according to the Equality Act and was therefore protected (because universities aren't liable for the harassment of their employees by students).<sup>3</sup> If the Equality Act is reformed in the way proposed, such a defence would no longer be available to those who wanted to protect free speech on campus. In future, universities would legitimately be able to claim they have a legal obligation to force their students to comply with rigid speech codes.

39. The effect of clause 1 would be to legitimise and give force of law to some of the most egregious interferences with academic free speech, including that of gender-critical feminists. Three years ago, the University of Essex (again) rescinded invitations to the academics Rosa Freedman and Jo Phoenix following an extensive campaign of intimidation by students who objected to their gender-critical views. Barrister Akua Reindorf subsequently found in her investigation into the incident that the university had misapplied the Equality Act and had failed to comply with its obligations to secure free speech.<sup>4</sup>

40. In particular, Reindorf criticised the contention that Jo Phoenix's invitation could lawfully be rescinded on the ground that she 'intended deliberately to violate the dignity of trans and nonbinary people or to subject them to an intimidating (etc) environment'. Reindorf, at paragraph 243.12 of her report, was very clear:

as the law stands the University does not have a legal duty to protect students and staff members from harassment by a third party such as an external speaker.

41. Under clause 1 of the new Bill, the opposite would be the case – the University would have had a lawful reason to rescind the invitation.

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<sup>3</sup> <https://www.timeshighereducation.com/news/free-speech-union-legal-pressure-forces-essex-harassment-changes>

<sup>4</sup> <https://www.essex.ac.uk/-/media/documents/review/events-review-report-university-of-essex-september-2021.pdf>

That is, it would have been able to plausibly claim that the Equality Act required it to protect its employees from third-party harassment and that letting the invitation stand and allowing Jo Phoenix to come to the University and make a speech about why transwomen should not be admitted to women's prisons would have constituted harassment of its trans employees. Given the culture of risk-aversion and defensiveness at UK universities, clause 1 would regularly result in universities obstructing or cancelling any speaking engagement which might potentially result in an employee claiming that the speaker's appearance on campus and their expression of certain contentious views would constitute harassment under the Equality Act.

42. So while clause 1 would have protected Kathleen Stock from being harassed by trans rights activists at the university where she was employed, it would also hand trans rights activists a powerful tool for blocking her from speaking at any other university.
43. We also note in passing the growing phenomenon of universities imposing rigorous speech codes on the student body, in the form of harassment policies and 'dignity at work and study' policies. Earlier this year, the FSU challenged the harassment policy of the University of Oxford, which purports to restrict speech on the sole ground that it is 'offensive'.<sup>5</sup> Clause 1 would not merely justify such censorious policing of students' speech, but would in fact necessitate it – it would be remiss of any university not to take steps to minimise the liability risk of students offending academic staff or making them feel unsafe. Under the Equality Act as it stands, provided it's interpreted correctly, that is not a risk.
44. The above presumes that universities would only go as far as the law requires in applying the Equality Act as amended by clause 1. However, we know from the Reindorf review and from the FSU's own research that universities consistently gold-plate the Equality Act.<sup>6</sup> Professor Paul Yowell has written of universities' institutional culture of interpreting the Act far beyond the requirements of the law.<sup>7</sup> We suggest that, in its application, clause 1 would have a considerably more illiberal effect than was intended by Parliament or the Bill's sponsors.

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5 <https://www.telegraph.co.uk/news/2022/06/10/stupid-insulting-social-media-comments-should-not-cost-us-jobs/>

6 <https://freespeechunion.org/letter-to-russel-group-universities-about-reporting-websites/>

7 <https://policyexchange.org.uk/wp-content/uploads/2021/12/The-Future-of-Equality.pdf>

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### Impact on emergency services

45. A further concern is that extending liability under the Equality Act to third parties would make it difficult for the emergency services to perform their job. At present, police officers, firefighters and paramedics cannot sue their employers if a member of the public they come into contact with harasses them. Post-reform, they will be able to and, knowing that, their employers will be obliged to take 'all reasonable steps' to prevent such harassment. That will be a particular problem for emergency services employees because the people they come into contact with are often under extreme stress and therefore more likely to say 'offensive' things. We fear that because of this new liability, the emergency services will feel obliged to carry out risk assessments before dispatching any of their employees in response to a 999 call.

### **Conflict with existing law**

#### Conflict with the Equality Act

46. As set out below, clause 1 has been proposed by the Government with little serious reflection. This is particularly clear when one considers how clause 1 will interact with existing and forthcoming law.

47. In particular, clause 1 makes no provision at all for the fact that the third parties who will be newly policed under the Equality Act are simultaneously protected persons under the Act's protections for service-users. The clause therefore sets up difficult conflicts between preventing third-party customers from offending staff and, at the same time, protecting the right of those same customers to manifest their religious and philosophical beliefs without discrimination or harassment. In the absence of a meaningful definition of what 'all reasonable steps' means in this context, further costly litigation will be needed to determine the balance of rights and obligations.

48. It is true that the Equality Act already creates a similar conflict between, on the one hand, the need to prevent employees from harassing other employees and, on the other, the need to protect employees' beliefs. That conflict has itself proved complex and at times hard to navigate, particularly in relation to employees with gender-critical beliefs. It is undesirable to re-run that conflict anew in relation to third parties, *particularly* undesirable, in fact, as the line between preventing harassment and respecting belief will have to be drawn anew in very

different circumstances. Whereas employees already have contractual duties of obedience, and are governed by expectations of discipline and professionalism, the conduct of third-party customers is much harder to predict and thus regulate in a legally compliant way.

49. For instance, it would be a reasonable step for an employer to prevent the misgendering of its employees by customers by requiring staff to wear badges displaying the staff's preferred pronouns. Failing to take such a step could deprive the employer of a defence when a trans or non-binary employee claims to have been harassed. It is unclear what would happen, however, if a member of staff with gender-critical beliefs objected that wearing such a badge harassed them or led to them suffering a detriment. A legal claim brought by the gender-critical employee would be likely to come down to the reasonableness of the employer's name badge policy.
50. The outcome of this question is inscrutable – employers will have a justification for protecting employees from an unpredictably vast range of potentially harassing acts, and therefore will be justified if their preventative measures are commensurately broad. The same might apply, for instance, in the case of a customer who enters the employer's premises wearing an 'Adult Human Female' t-shirt. So long as the employer does not aim to single out people with gender-critical beliefs, it is a moot point whether a blanket 'no controversial t-shirts' policy would be a reasonable measure even if its effect was to muzzle virtually anyone with a contentious religious or philosophical belief.
51. What is certain, however, is that clause 1 would further the encroachment into our lives of a philosophy of mindless compliance, bringing joylessness to areas where we were once able to enjoy life.

*Conflict with the Higher Education (Freedom of Speech) Bill*

52. Perhaps the most dramatic 'collision course' set in motion by clause 1 is with the Government's Higher Education (Freedom of Speech) Bill, which aims to enhance protections for lawful freedom of speech at English universities and should soon receive royal assent.
53. Opponents and supporters of the Bill alike have repeatedly pointed out to the Government that the obligation to protect freedom of speech 'within the law' will leave universities with the difficult job of navigating the fine line between lawful robust debate and unlawful offensiveness

relating to a protected characteristic. The Government has not only rejected proposals to rein in the Equality Act on campus, so as to give greater scope for free speech and academic freedom on campus, but is now significantly *expanding* the scope of the Equality Act so as to make the speech protections in the Higher Education Bill altogether weaker and less meaningful. It is a senseless act of self-sabotage, and betrays a failure to reflect on the consequences of clause 1.

## **The Government amendments**

### **The third-party exception**

54. At report stage in the Commons, the Bill's sponsor Wera Hobhouse introduced and secured a narrow exemption to the new duty. Under the amendment, employers will not be liable for a failure to prevent harassment of an employee by a third party where the conduct is:

- merely overheard by the employee, and not directed at him or her;
- an opinion on a political, moral, religious or social matter;
- not an indecent or grossly offensive opinion; and
- unintentional, rather than intentional harassment.

55. Given that all four conditions will have to apply for the speech in question to be protected, this is an extremely narrow exemption, only likely to protect a small sub-set of speech. Humour and sports chat fall outside the exception, quite arbitrarily – so too will philosophy, academic discussion, artistic or literary or critical speech, unless these are caught by the mysterious term 'social matters'. The exception will also fail if the speech is 'indecent or grossly offensive' – a formulation which, in the opinion of the Law Commission of England and Wales, is unacceptably subjective and which, in our opinion, should not be disseminated more widely through the statute book.<sup>8</sup>

56. While the amendment is at least an improvement, and was doubtless proposed in good faith, it falls short of addressing the problems posed by clause 1 and suggests that the Government is too dismissive of the dangers it poses.

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<sup>8</sup> <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/07/Modernising-Communications-Offences-2021-Law-Com-No-399.pdf>

57. To give just one example of where the amendment fails to address our concerns, for the speech of a visiting speaker at a university to be protected it would have to satisfy all of those conditions including the first – the speech must be merely overheard by the employee, and not directed at him or her. So if a trans or non-binary university employee asked a question of, say, visiting speaker Kathleen Stock – ‘Should transwomen be admitted to women’s refuges?’ – and found the answer directed at them in response ‘offensive’, the employee could then legitimately bring a claim for ‘harassment’ against the university on the grounds that a third party had directed at them ‘offensive’ speech relating to gender reassignment.
58. It is strongly arguable that, in this situation, a court or tribunal would hold that it was not reasonable for the student to perceive harassment. However, this argument is unlikely to persuade universities which tend not only to be risk-averse but also to interpret the Equality Act as restrictively as possible. A university would therefore be likely to satisfy itself that the ‘reasonable steps’ it should take to protect its employees from being ‘harassed’ in this way would be to prohibit any Q&A following a visiting speaker’s talk – and, indeed, any contact at all between potentially controversial speakers and members of staff.

#### *The employee exception*

59. We must mention in passing a government amendment which, while not alleviating the effect of the third-party harassment provisions, is nevertheless a welcome change to the law. Sub-clause 1(3) applies the above exception to harassment by employees. Therefore an employer will not be liable for harassment of one employee by another where the conduct in question is (as per paragraph 54 above) merely overheard speech expressing an opinion on a political, moral, religious or social matter which is not indecent or grossly offensive opinion, nor intentionally harassing.
60. This is an unalloyed, if slender improvement on the current situation, as employers’ interest in regulating their employees’ speech will become a little narrower – avoiding vicarious liability will no longer be an excuse to restrict certain instances of important, controversial speech between employees. The exception is still narrow, and it should be noted that the Bill will not penalise an employer for restricting the exempted speech – it simply removes the incentive to restrict it.

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61. In future it will be marginally less reasonable for an employer to dismiss someone for engaging in the exempted speech, simply because the employer won't have the compelling excuse of the need to avoid being sued. This is most welcome, though it is uncertain whether employment tribunals will as a result hold that dismissal for exempted speech is unfair in law.

### **Failure to consult**

62. Clause 1 of this Bill has been marked by a failure across the board to reflect and consult on the effect of reintroducing employers' liability for third-party harassment. The Coalition Government consulted on the matter in 2012 and was told by all the businesses that participated that the provision should be repealed. The Government therefore concluded that the duty imposed an unnecessary regulatory burden on business, and concerned a mischief that could be adequately dealt with under other existing law.

63. Section 65 of the Enterprise and Regulatory Reform Act 2013 was then enacted to repeal the Equality Act's third-party harassment provisions. No evidence has since been presented to the Government that rebuts the justifications for repeal.

64. The 25th July 2018 report of the House of Commons Women and Equalities Committee, *Sexual harassment in the workplace*, appears to form the basis of the Bill's provisions and little by way of reflection or consultation since has altered the Committee's recommendations.<sup>9</sup> The report was produced in the aftermath of the Presidents Club sexual harassment scandal, and understandably focused on unacceptable sexual misconduct towards women in the workplace, and evidence of such misconduct.

65. Unusually, however, the report also advised reinstatement of employers' liability for *all* third-party harassment, not just sexual harassment. In doing so it did not provide any plausible argument as to why the evidence it had gathered justified such a move, or how basic harassment was conceptually linked to the sexual harassment that the Committee overwhelmingly focused on (as the title of its report makes clear).

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<sup>9</sup> [https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72505.htm#\\_idTextAnchor019](https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72505.htm#_idTextAnchor019)

66. One justification proposed by the Committee was the 2018 Court of Appeal judgment in *Unite the Union v Nailard* [2018] EWCA Civ 1203, which held that in light of the 2013 repeal, liability for third-party harassment did indeed no longer apply.<sup>10</sup> The Committee seems to have supposed that, until this court judgment, the effect of the 2013 repeal was obscure or unconfirmed. This is a highly unconvincing position – it was entirely clear that Parliament had abolished the liability in 2013, and the effect of *Nailard* was merely to dismiss a tendentious legal argument to the contrary.
67. The Government then carried out its own consultation in response to the Committee’s report. The 2019 ‘technical consultation’ on third-party harassment (among other things) was aimed at organisations affected by the Equality Act, including employers.<sup>11</sup> Although it repeated the *Nailard* canard, the Government nevertheless accepted at this stage the difficulties with extending liability to third parties:

Evidence to the 2018 WESC inquiry suggested that in sexual harassment cases employers very rarely feel able to use the defence of having taken ‘all reasonable steps’ to prevent the harassment, **in part because lawyers feel uncertain about advising their client on this, and in part because employers themselves feel that they do not know what ‘all reasonable steps’ entails.** [...]

In light of the *Nailard* ruling, the WESC, EHRC and other stakeholders have recommended that the Government strengthen explicit legal protections against third party harassment to give unequivocal clarity on this question. **We are consulting with a view to delivering this clarity, in the form of explicit protections in the Equality Act.**

68. The consultation therefore asked respondents whether liability should be triggered by a prior incident, and whether there should be an ‘all reasonable steps’ defence. It asked no questions on the effect of liability for third parties on regulatory burden, defensiveness, customer experience, or freedom of speech.
69. On 21st July 2021, the Government published its response to the

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<sup>10</sup> <https://www.bailii.org/ew/cases/EWCA/Civ/2018/1203.html>

<sup>11</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/816116/Technical\\_consultation\\_-\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816116/Technical_consultation_-_FINAL.pdf)

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consultation.<sup>12</sup> 124 organisations had responded to a technical survey, of which 19 were employers (15%), 36 sectoral and professional bodies (29%), and 12 lobby groups (9.7%) – those groups making up 54% of the respondent organisations in total.

70. There was clear support for an ‘all reasonable steps’ defence. However, 39% of those in favour of it said the defence would need to be clearly defined. The consultation was inconclusive, however, on whether a single incident could constitute third-party harassment, with 34% saying a single incident would suffice, 33% saying a prior incident should be required, while 33% didn’t know or had no view. Similarly, some respondents said that in many workplace environments it was possible to be aware of a heightened risk of harassment without the need for an incident to have occurred. Others, however, noted the difficulty for an employer in foreseeing how third parties might behave given high levels of unpredictability.

71. The Government’s response was, in turn, inconclusive:

Respondents highlighted several practical difficulties presented by introducing liability without an incident. Designing a system that would work across the full breadth of employment contexts would add an undesirable level of complexity. While there are certainly employment settings in which an employer should be expected to know that there is a higher likelihood of sexual harassment, for example in the hospitality industry, there are equally workplaces in which sexual harassment by third parties might reasonably come as quite unexpected to the employer, and would be difficult for them to anticipate.

The proposed way to balance this range of possibilities is the ‘all reasonable steps’ defence – a defence which is both flexible, and allows for proportionality. We have considered the view expressed by many respondents that all the steps themselves would need to be explicitly outlined. However this would remove that flexibility to take a proportional approach based on the individual circumstances of the workplace. The alternative would be to set out a list of ‘all reasonable steps’ by workplace context, which would mean creating

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<sup>12</sup> <https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace/outcome/consultation-on-sexual-harassment-in-the-workplace-government-response>

an extremely complex system that might still not account for every workplace context and certainly wouldn't be exhaustive. Either of these approaches risks creating a 'tick-box' approach among employers, who would likely only focus on establishing the defined 'all reasonable steps', without giving proper consideration to the specific needs of their workplace.

**Having carefully considered the responses received, we will continue to work with stakeholders to help shape the protection, particularly on whether it should only apply in situations in which an incident of harassment has already occurred.** We do intend to replicate the employer defence of having taken 'all reasonable steps' to prevent the harassment, as is currently the case under the Act. This is consistent with the wider approach to sexual harassment legislation and will provide clarity to all stakeholders.

72. To the best of our knowledge, further consultation did not take place, despite the Government's own admission that the consultation had not answered some of the knottiest questions at issue. The Government's subsequent impact assessment of October 2021 revealed a new policy of assessing the effect of the new duty, despite concerns about complexity and clarity *after* implementation of the Bill.<sup>13</sup>

73. Comments by the Bill's sponsor at second reading on 21st October 2022 seem to confirm a new policy of 'wait and see':

To ensure that employers are as informed as possible about the proposed changes, which will come into force 12 months after Royal Assent, the Government Equalities Office will support the Equality and Human Rights Commission in creating a statutory code of practice on sexual harassment and harassment in the workplace. This will be based on the technical guidance that the Equality and Human Rights Commission published in 2020 and will be introduced as the new legislation comes into force.<sup>14</sup>

74. Despite the clear problems and uncertainties surrounding the Bill, and the under-examined assumptions that underlie the bundling

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<sup>13</sup> <https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace/workplace-harassment-impact-assessment-final-stage-october-2021-part-2-of-2-evidence-base>

<sup>14</sup> [https://hansard.parliament.uk/commons/2022-10-21/debates/40CF6AF9-2FF6-4C79-8DE4-13FBA34E4231/WorkerProtection\(AmendmentOfEqualityAct2010\)Bill](https://hansard.parliament.uk/commons/2022-10-21/debates/40CF6AF9-2FF6-4C79-8DE4-13FBA34E4231/WorkerProtection(AmendmentOfEqualityAct2010)Bill)

together of basic harassment with sexual harassment, the Government nevertheless progressed even further with its policy on third-party harassment. On 7th March 2022 the UK Government ratified the International Labour Organisation's Violence and Harassment Convention 2019 (No. 190).<sup>15</sup> The treaty recognises 'everyone's right to a workplace free from violence and harassment'. The UK had played a lead role in negotiating the treaty. The ministerial speech announcing the ratification of the Convention mentioned forthcoming domestic law on third-party harassment, which the treaty itself addresses even though it does not expressly require implementation of national law addressing third party harassment.<sup>16</sup> The Violence and Harassment Convention 2019 (No. 190) will come into force on 7 Mar 2023.

75. The history of clause 1 shows a consistently premature and slipshod approach to a legislative provision that will have a dramatic impact on freedom of expression in the UK and on the regulatory burden facing the country's one-and-a-half million employers.

### **Next steps**

76. The absence of adequate consultation means there is an extraordinary lack of clarity as to the real-world effect of this Bill. The Government has not and cannot provide an accurate figure for the costs that businesses will incur as a consequence of the Bill's enactment. Before anything else, Parliament, which holds a constitutional duty to ensure that legislation is reasonable and well thought through, ought to seek and provide an answer to this question. It also ought to consider the wider consequences the Bill will have on businesses across the UK economy.

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<sup>15</sup> <https://www.gov.uk/government/news/uk-ratifies-treaty-tackling-violence-and-harassment-at-work>

<sup>16</sup> [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C190](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190)

