WORKER PROTECTION (AMENDMENT OF EQUALITY ACT 2010) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Worker Protection (Amendment of Equality Act 2010) Bill as brought from the House of Commons on 6 February 2023 (HL Bill 101).

- These Explanatory Notes have been prepared by the Cabinet Office, on behalf of Baroness Burt of Solihull, the Peer in Charge of the Bill, in order to assist the reader of the Bill and help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Worker Protection (Amendment of Equality Act 2010) Bill

1 These notes relate to the Worker Protection (Amendment of Equality Act 2010) Bill. This Private Member's Bill was presented by Wera Hobhouse MP on 15 June 2022 and brought to the House of Lords on 6 February 2023. Baroness Burt of Solihull is the Peer in Charge of the Bill.

2 The Bill consists of 6 clauses:

- Clause 1 creates employers' liability for harassment of their employees by third parties and makes provision about applicability (or not) of the "all reasonable steps" defence in the Equality Act 2010 ("the 2010 Act");
- Clause 2 introduces a duty on employers to take all reasonable steps to prevent sexual harassment of their employees;
- Clause 3 makes provision about the enforcement of the employer duty;
- Clause 4 provides for a compensation uplift in sexual harassment cases where there has been a breach of the employer duty;
- Clause 5 makes consequential amendments to the Equality Act 2006 ("the 2006 Act")
- Clause 6 details the extent of the clauses and when the provisions will commence.

Policy background

3 The Equality Act 2010 provides for legal protections against sexual harassment in the workplace. Despite this, persistent reports and revelations that have emerged in recent years indicate that it remains a problem within the workplace.

4 In 2018, the Women and Equalities Select Committee ("WESC") held an inquiry on sexual harassment in the workplace. The WESC report highlighted a number of concerns with sexual harassment protections in the existing legislation. In response, the Government committed to consulting on the concerns raised with a view to ensuring that the legislation is operating effectively.

5 The Government consultation on Sexual Harassment in the Workplace ran in 2019.[1] The consultation considered the evidence in respect of, among other things, the introduction of a mandatory duty on employers to protect employees from harassment in the workplace and strengthening and clarifying the law in relation to third party harassment.

6 The consultation, which closed in October 2019, received 133 responses. Alongside the consultation, the Government also ran a public questionnaire inviting the views and experiences of members of the public, to help the Government understand people's lived reality of these issues. The questionnaire received 4,215 responses. Government Equalities Office officials (part of Cabinet Office), supported by lawyers, have continued to consult key stakeholders throughout the period of policy development.

[1] Government consultation on sexual harassment in the workplace (11 July 2019): https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace

7 The Consultation response was published on 21 July 2021.[2] The response committed to introducing two legislative measures when parliamentary time allowed: a duty on employers to take reasonable steps to prevent sexual harassment and explicit protections from harassment by third parties. The response also included other non-legislative commitments, e.g. supporting the Equality and Human Rights Commission ("EHRC") to produce a statutory code of practice on workplace harassment, alongside producing Government guidance for employers on sexual harassment. The legislative commitments and the commitment to support the EHRC on the Code of Practice were then also included in the Government's strategy for Tackling Violence Against Women and Girls, published on 21 July 2021.[3]

8 The Worker Protection (Amendment of Equality Act 2010) Bill will take forward the two legislative measures described above.

Third party harassment

9 Employer liability for third party harassment was originally introduced in 2008 by an amendment to the Sex Discrimination Act 1975, and later carried through into section 40 of the 2010 Act. In 2013, the provisions were repealed.

10 The Government's view was that they were unnecessary: at the time of review in 2013, the provisions were only known to have resulted in two employment tribunal rulings and, until 2018, the Government's position was that the 2010 Act continued to provide protection in cases of third party harassment under section 26. However, the 2018 ruling by the Court of Appeal in *Unite the Union v Nailard* clarified that the 2013 repeal of the employer liability for third party harassment provisions meant that the Equality 2010 no longer provided any protection in such cases.[4]

11 In addition, the Government considered that the provisions relating to third-party harassment were confusing. Significant criticism was made, including by employers and their representative bodies, of the provisions' design which required two occasions of known harassment to have occurred before liability was triggered - known as the 'three strikes' rule.

12 This Bill reintroduces employer liability for the harassment of their employees by third parties. The 'three strikes' formulation will not be replicated and instead, liability will be triggered without there needing to be a prior incident. This will bring being harassed by a third party, for example a customer or client, in line with being harassed by a colleague.

"All reasonable steps" and free speech

13 Employers may already be vicariously liable for acts of harassment carried out by an employee against another employee. As set out above, Clause 1 of this Bill extends employer liability to cover acts of harassment committed by third parties, such as customers or clients, if the employer fails to take all reasonable steps to prevent the harassment.

14 As the Bill has progressed through Parliament, stakeholders raised concerns that the extension of these protections, whilst important and necessary, could inadvertently worsen the chilling effect that anti-harassment legislation could have on free speech.

15 New subsections (1C) and (1D) have been inserted into section 40 of the 2010 Act to address these concerns in relation to third-party harassment. New subsections (4A) and (4B) have been

[2] Government response to the consultation on sexual harassment in the workplace (21 July 2021): https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace
[3] Tackling Violence Against Women and Girls strategy (21 July 2021): https://www.gov.uk/government/publications/tackling-violence-against-women-and-girls-strategy
[4] Unite the Union v Nailard [2018] EWCA Civ 1203

inserted into section 109(4) of the 2010 Act to address these concerns in relation to employee-on-employee harassment. The provisions make clear to employers that, whilst the Government expects them to take action against workplace harassment, in certain cases this action should fall short of prohibiting the conversations of others.

16 The provisions apply only when certain conditions are met - for example, in cases of conversations overheard by employees. Employers will still be expected to take steps to prevent targeted, indecent or grossly offensive conversation in the workplace, such as racial slurs. Further, the provisions do not apply to cases of sexual harassment.

Legal background

17 The following notes give a brief overview of any significant existing legislation that is relevant to this Bill.

18 Harassment in the workplace is prohibited under the 2010 Act. Section 26 of the 2010 Act defines three types of harassment. The first type, set out in section 26(1) of the 2010 Act, which applies to all the protected characteristics apart from pregnancy and maternity, and marriage and civil partnership, involves unwanted conduct which is related to a relevant characteristic and which has the purpose or effect of violating the victim's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim.

19 The second type of harassment, set out in section 26(2) of the 2010 Act, is sexual harassment, which is defined as unwanted conduct of a sexual nature that has the purpose or effect of violating an individual's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim.

20 The third type, set out in section 26(3) of the 2010 Act, is treating someone less favourably than another because they have either submitted, or failed to submit, to sexual harassment or harassment related to sex or gender reassignment.

21 Section 40 of the 2010 Act prohibits employers from harassing their employees or job applicants. Under section 109 of the 2010 Act employers may be vicariously liable for acts of discrimination, harassment and victimisation carried out by their employees in the course of employment. The combined effect of these provisions means that an employer may be legally liable for sexual harassment carried out by their staff. This employer liability applies regardless of whether or not they have approved, or are even aware of, their employees' actions.

22 Section 109(4) of the 2010 Act provides that employers have a legal defence if they can show that they took 'all reasonable steps' to prevent their employee from acting unlawfully.

Territorial extent and application

23 Clause 6(1) sets out the territorial extent of the Bill. In line with the current extent and application of the 2010 Act, the Bill will extend to England and Wales and Scotland. It does not extend to Northern Ireland.

24 The devolution settlements for both Scotland and Wales provide that employment and industrial relations, as well as equal opportunities, are generally reserved to the UK Parliament. While there are exceptions to this, none are relevant here.

Commentary on provisions of Bill

Clause 1: Employer liability for harassment of employee by third parties

25 This clause amends section 40 of the 2010 Act by inserting new subsections (1A) to (1D).

26 Section 40(1) of the 2010 Act currently makes it unlawful for an employer to harass employees and people applying for employment. New subsection (1A) provides that an employer is also to be treated as harassing an employee under section 40(1) in circumstances where an employee is harassed in the course of their employment by third parties, such as customers or clients, over whom the employer does not have direct control, and it is shown that the employer failed to take all reasonable steps to prevent that harassment.

27 New subsection (1B) provides that a third party is defined as a person other than the employer or a fellow employee. 'Harassment' is defined in section 26 of the 2010 Act, and encompasses all three types of harassment set out within that definition.

28 At present, by virtue of section 109(1) of the 2010 Act, employers may be vicariously liable for acts of harassment carried out by their employees against other employees. Section 109(4) of the 2010 Act provides a statutory defence for an employer in such cases, if they can show that they took "all reasonable steps" to prevent the harassment from occurring.

29 New subsections (1C) and (1D), which are inserted by Clause 1 into section 40 of the 2010 Act, and new subsections (4A) and (4B), which are inserted into section 109(4) of the 2010 Act, have the effect that, where relevant conditions are met, employers will not be expected to prevent the expression of opinions in order to avoid liability.

30 These provisions operate in exactly the same way in cases of employee-on-employee harassment and in cases of third-party harassment. They are designed to set a ceiling on what can be considered 'reasonable steps' for an employer to take to avoid legal liability for workplace harassment.

31 Subsections (1D) and (4B) apply in circumstances where: harassment related to a relevant protected characteristic (i.e. harassment within the meaning of section 26(1) of the 2010 Act) has taken place in the course of the claimant's employment; the harassment involves a conversation in which the claimant is not a participant, or a speech which is not aimed specifically at them; the conversation or speech contains the expression of an opinion on a political, moral, religious or social matter; the opinion expressed is not indecent or grossly offensive; and the harassment is not intentional.

32 Where the above conditions are met, an Employment Tribunal will not treat an employer as having failed to take "all reasonable steps" simply because they did not seek to prevent the expression of the opinion which formed part of the harassment.

33 *Examples:*

- The employment tribunal finds that harassment related to race has occurred where an employee overhears a conversation between two other employees concerning the treatment of immigrants. The employer can show that they have taken all reasonable steps to prevent the harassment by having in place an effective anti-harassment policy. The policy does not need to include the prohibition of conversations about controversial topics in order for the employer to avoid liability.

- The employment tribunal finds that harassment related to race has occurred where a black employee overhears a conversation between two customers which contains a

racial slur. The employer will be expected to take reasonable steps in relation to conversations which are indecent or grossly offensive in order to avoid liability. Such steps may include having a policy of zero tolerance of such conversations (including by third parties) in the workplace.

Clause 2: Employer duty to prevent sexual harassment of employees

34 This clause amends the 2010 Act by inserting new clause 40A. It creates a new duty on employers to prevent sexual harassment of their employees.

35 New section 40A(1) describes the new duty: employers must take all reasonable steps to prevent sexual harassment of their employees in the course of their employment.

36 The term 'all reasonable steps' is well-understood in the context of the statutory defence in section 109(4) of the 2010 Act. What constitutes 'all reasonable steps' will depend on the specific circumstances of the employer e.g. size and sector and other relevant facts. In most cases, the employer's practices and procedures (e.g. grievance and reporting procedures) for preventing and dealing with sexual harassment are likely to be relevant.

37 It is intended that the introduction of the employer duty will be supported by the EHRC's statutory code of practice on workplace harassment, which is due to be published in time for the Bill's implementation.

38 New section 40A(2) defines "sexual harassment" in the context of new subsection (1) as meaning harassment of the kind described in section 26(2) (unwanted conduct of a sexual nature).

39 New section 40A(3) is a "signpost" provision, which explains that a breach of the employer duty in new section 40A(1) is enforceable in two ways. First, a standalone breach (and a breach of section 111 or 112 that relates to a breach of the employer duty) may be enforced by the EHRC as an unlawful act under its existing enforcement powers in Part 1 of the 2006 Act. Second, a breach may also be enforced by an employment tribunal where it has first found a breach of section 40 which involved, to any extent, sexual harassment. Further provisions on the enforcement and remedy of the employer duty are provided in clauses 3 and 4.

Clause 3: Enforcement of duty to prevent sexual harassment of employees

40 This clause amends section 120(8) of and inserts new section 120(9) into the 2010 Act.

41 The amendment to section 120(8) carves out breaches of the employer duty from the employment tribunal's jurisdiction, meaning that standalone breaches of the employer duty can only be enforced by the EHRC.

42 New subsection (9) clarifies and puts beyond doubt the employment tribunal's role in enforcing a breach of the employer duty in relevant cases, as described in clause 4. This means that tribunals cannot consider individual claims for a breach of the employer duty other than in cases where a claim of sexual harassment has been upheld.

Clause 4: Sexual harassment of employees: compensation uplift

43 This clause inserts new section 124A into the 2010 Act. It provides for a new remedy in respect of breaches of the employer duty in sexual harassment cases.

44 New sections 124A(1) to (3) provide that where an employment tribunal finds that there has been a breach of section 40 of the 2010 Act which involved, to any extent, sexual harassment, the tribunal must consider whether and to what extent the employer has also breached the employer duty to take all reasonable steps to prevent the sexual harassment of their

employees. If the tribunal finds that the employer duty has been breached, then the tribunal may order an uplift to the compensation awarded in respect of the sexual harassment claim.

45 New section 124A(4) provides that the amount of the compensation uplift must reflect the extent to which, in the tribunal's opinion, the employer duty has been breached. The specific circumstances of each case will be considered as part of this. New subsection (4) also states that the compensation uplift may be no more than 25% of the amount awarded for the sexual harassment claim. A discretionary uplift to compensation is intended to allow the tribunal to take the specific circumstances of each workplace into account and avoid overall awards which may be disproportionate.

Clause 5: Consequential amendments to the Equality Act 2006

46 Clause 5 makes consequential amendments to Part 1 of the 2006 Act.

47 Clause 5(2) inserts new section 21(8) into the 2006 Act. It provides that an appeal in respect of an unlawful act notice which relates to a breach of the employer duty (or an alleged breach of section 111 or 112 of the 2010 Act which relates to a breach of the employer duty), lies with the employment tribunal.

48 Clause 5(3) inserts new paragraph (aa) into section 24A of the 2006 Act. It adds a breach of the employer duty to the list of provisions in respect of which it is immaterial whether the EHRC, when exercising its enforcement powers in section 20 to 24 of the 2006 Act, knows or suspects that a person has been or may be affected by the unlawful act or application (see section 24A(2) of the 2006 Act). The same applies to a breach of section 111 or 112 of the 2010 Act that relates to a breach of the employer duty.

Clause 6: Extent, commencement and short title

49 Subsection (1) provides that the Bill extends to England and Wales and Scotland.

50 Subsection (2) provides that clause 6 will commence on the day the Act is passed.

51 Subsection (3) provides that the provisions in clauses 1 to 5 will commence twelve months after the Bill receives Royal Assent.

52 Subsection (4) provides that the Bill may be cited as the Worker Protection (Amendment of Equality Act 2010) Act 2022.

Commencement

53 Clause 6 comes into force on the day the Bill is passed. Clauses 1 to 5 come into force one year after the day on which the Act receives Royal Assent.

Financial implications of the Bill

54 A Justice Impact Test was completed for the two measures in the Bill following the publication of the Government response. The Ministry of Justice assessed that they considered the impact on the justice system as likely to be minimal. As part of this, the Government Equalities Office committed to meeting the cost of any additional identified burdens on the justice system arising from these measures.

Parliamentary approval for financial costs or for charges imposed

55 The Bill does not require a money resolution or a ways and means resolution. A money resolution is required where a bill authorises new charges on the public revenue – broadly speaking new expenditure. A ways and means resolution is required where a bill authorises new charges on people – broadly speaking, new taxation or other similar charges. Neither of these apply to this Bill.

Compatibility with the European Convention on Human Rights

56 As this is a Private Member's Bill, the Secretary of State is not required to make a statement under section 19 of the Human Rights Act 1998 and civil servants will engage as necessary with the Joint Committee on Human Rights.

57 It is the view of the Government Equalities Office that the provisions of the Bill are compatible with Convention rights.

58 The Bill engages rights under Article 8 and 14 but without interference with those rights.

Article 8

59 The right to family and private life guarantees "respect for" private life, family life, home and correspondence. The notion of "private life" does not exclude, in principle, activities of a professional or business nature.[5] Indeed, private life encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature.[6] It has been noted that it is in the course of their working lives that the majority of people have a significant opportunity of developing relationships with the outside world.[7]

60 Article 8 prohibits the state from unjustifiably interfering with these rights and imposes positive obligations on the state to adopt policies which are designed to secure these rights. These positive obligations may require the state to take action to stop interferences with the right caused by its own inaction, or to stop interferences caused by the actions of other private individuals.[8]

61 The Bill will enhance protections for employees by placing a positive duty on employers to prevent sexual harassment and creating employer liability for third party harassment.

62 Accordingly, the provisions of the Bill are considered fully compatible with Article 8.

Article 14 (Prohibition of discrimination), taken with Article 8

63 Article 14 provides that the enjoyment of the rights and freedoms set out in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

[5] Bărbulescu v. Romania [GC], § 71; Jankauskas v. Lithuania (no. 2), § 56-57; Fernández Martínez v. Spain [GC], §§ 109-110
[6] C. v. Belgium, § 25; Oleksandr Volkov v. Ukraine, § 165
[7] Niemietz v. Germany, § 29; Bărbulescu v. Romania [GC], § 71 and references cited therein; Antović and Mirković v. Montenegro, § 42
[8] *X v Netherlands* (1986) 8 EHRR 235 (App No 8978/80) at [23] and *Moldova v Romania (No 2)* (2007) 44 EHRR 16 (App Nos 41138/98 and 64320/01) at [93].

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

64 The application of Article 14, read in conjunction with a substantive provision, does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention.[9] Consequently, the Court recognised the applicability of Article 14 in cases where there had been no violation of the substantive right itself.[10] In the context of the Bill, the substantive right potentially within the ambit of Article 14 is Article 8.

65 Sexual harassment has long been recognised as a species of sex discrimination.[11] Anecdotal evidence suggests that women are disproportionately more likely to experience workplace sexual harassment, although it is hard to be definitive regarding the degree of this likelihood.[12] Nevertheless, it is clear is that all individuals, regardless of their sex, can experience sexual harassment.

66 While the duty is more likely to benefit women because they are more likely to experience sexual harassment, it would not put men at a particular disadvantage or constitute favourable treatment. The duty on employers to prevent sexual harassment applies to all employees regardless of their sex or other protected characteristics, and would not negatively interfere with the rights of others. The purpose of the duty is to encourage employers to prioritise prevention of sexual harassment in the workplace by ensuring that all reasonable steps (such as policies, training etc.) are put in place to comply with the duty and protect employees.

67 The provisions in the Bill do not create a hierarchy of rights or interests based on a prohibited ground. Rather they target discriminatory conduct in the form of sexual harassment. Accordingly, the provisions of the Bill are considered fully compatible with Article 14.

Other international obligations

68 The provisions of the Bill are in keeping with the UK's obligations under the UN Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW") by introducing sanctions on employers who are found in breach of duty to take all reasonable steps to prevent sexual harassment. In addition, the Bill will introduce liability on employers who fail to take all reasonable steps to prevent harassment of their employees by third parties, such as customers and clients. Both measures thereby enhance protections for all employees, including women, and support the UK's obligations under Article 11 of CEDAW, in particular.

69 The provisions of this Bill will also enhance employee protection as envisaged by the International Labour Organisation's Violence and Harassment Convention 2019 (No. 190), by introducing explicit third-party harassment protections (Article 4(2) of the Convention) and prioritising prevention (Article 8 and 9). Accordingly, the Bill supports the UK's compliance with that Convention.

[9] JD & A v UK ECtHR 2019, Cam v Turkey ECtHR 2016

[10] Carson and Others v. the United Kingdom [GC], 2010

[11] See *Porcelli v Strathclyde RC* 1986 S.C. 137; [1986] 1 WLUK 1004 (IH (1 Div)) and Article 2(1)(d) of EU Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

[12] A 2020 CIPD report found that women are significantly more likely than men to report they have experienced bullying and sexual harassment in the workplace (17% versus 13% and 7% versus 2%, respectively). In comparison, a government survey found that women were only slightly more likely than men to experience sexual harassment in the workplace (30% compared with 27% in the last 12 months).

Related documents

70 The following documents are relevant to the Bill and can be read at the stated locations:

- Women and Equalities Select Committee report: Sexual Harassment in the Workplace (25 July 2018):

  https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm

- Government response to the Women and Equalities Select Committee report on Sexual Harassment in the Workplace (28 November 2018):

  https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1801/180102.htm

- Government consultation and response on sexual harassment in the workplace (21 July 2021):
  https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace

- The Equality Act 2010:
  https://www.legislation.gov.uk/ukpga/2010/15/contents

Annex A – Territorial extent and application in the United Kingdom

71 The Bill will extend to England and Wales and Scotland. It does not extend to Northern Ireland.

Subject matter and legislative competence of devolved legislatures

72 In relation to Scotland and Wales, the Bill has two main purposes (employment and industrial relations, and equal opportunities) which are reserved to the UK Parliament. Consequently, the Legislative Consent Motion process is not engaged.

73 The Bill makes provision in relation to employment rights and duties, which is central to what it seeks to achieve. The amendments to the Equality Act 2010 made by the Bill are to Part 5 of that Act, which concerns Work. The amendments aim to enhance employees' rights not to be harassed at work. We therefore consider that the subject matter of the Bill is reserved by the employment and industrial relations reservation at paragraph H1 of Schedule 5 to the Scotland Act 1998, as it concerns employment rights and duties. There are no relevant exceptions. Section H1 of Schedule 7A to the Government of Wales Act 2006 makes similar provision for Wales, and there are no exceptions which are relevant to this Bill.

The equal opportunities reservation is also relevant. "Equal opportunities" means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions. The Bill aims to tackle sexual harassment, which is a species of sex discrimination against women, and also third party harassment in the workplace, which could lead to indirect discrimination against employees more generally.

There are exceptions to the equal opportunities reservation. In Scotland, paragraph L2 of Schedule 5 to the Scotland Act 1998 provides that the following matters are excepted from the reservation, and therefore devolved: "the encouragement (other than by prohibition or regulation) of equal opportunities" and "Imposing duties on any cross-border public authority to make arrangements with a view to securing that its Scottish functions are carried out with due regard to the need to meet the equal opportunity. Section N1 of Schedule 7A to the Government of Wales Act 2006 makes similar provision for Wales.

Broadly speaking, the effect of the above is to allow devolved Great Britain authorities to deal with the promotion of equality-related programmes and projects, but to ensure that the existing GB-wide anti-discrimination framework (the Equality Act 2010) is reserved to the UK Parliament. Accordingly. It is considered that the measures contained in the Bill would not encroach into devolved matters.

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