**Written evidence submitted by the Equality and Human Rights Commission (EHRC) (ERB80)**

## 1.0 Introduction

1.1 This briefing contains our advice on equality and human rights considerations raised by the Employment Rights Bill specifically in relation to:

- Part 1: provisions related to zero hours contracts (Clauses 1-6) and protections from harassment (Clauses 15-18)
- Part 2: duties of employers relating to equality (Clauses 26 – 27)
- Part 5: enforcement of labour market legislation

1.2 We note that other measures in the bill, including those relating to flexible working (clause 7), Statutory Sick Pay (clauses 8 and 9) and entitlement to leave (clauses 11 to 14) also engage equality and human rights considerations and may benefit workers at a disadvantage in the labour market.

1.3 This written evidence supplements the oral evidence provided by the Equality and Human Rights Commission (EHRC) to the Public Bill Committee on 28 November 2024.

1.4 In our capacity as a National Human Rights Institution and Great Britain's equality regulator, our work highlights the continuing labour market inequalities, particularly for women, young and older workers, disabled people and certain ethnic groups who are over-represented in low-paid, part-time or insecure work.

## 2.0 Executive summary

2.1 We note the UK government's ambition to address longstanding issues faced by workers who are at a disadvantage in the labour market. It is our view that many of the measures in the bill have the potential to reduce workplace inequalities and promote the right to work and to just and favourable conditions of work, as provided under Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which the UK government has committed to.

2.2 However, we note that much of the detail will be provided by secondary legislation. This could limit the ability of parliamentarians and stakeholders to understand its potential cumulative implications and to assess the risk of unintended consequences for some protected characteristic groups.

2.3 The UK government has acknowledged potential unintended consequences of the new workplace protections in its economic analysis and summary impact assessment. This

includes recognition that, if regulations such as those related to zero-hours contracts and protection against dismissal are not targeted and well defined, there could be risks of:

- higher labour costs impacting demand for workers and damaging employment prospects;
- costs being passed back onto workers in the form of worse terms and conditions; and
- employers recruiting workers on temporary contracts.

2.4 The UK government should fully consider the potential equality and other implications of the proposed measures separately and cumulatively. It should monitor their impact to ensure they have the intended effect and that any unintended negative consequences for workers are identified and addressed. Such cumulative equality impact assessments should be provided to parliamentarians at the earliest opportunity to aid scrutiny of the legislation and demonstrate compliance with the public sector equality duty (PSED) in policy development.

2.5 Furthermore, effective regulation is vital to supporting and enforcing compliance with the law and shifting the burden away from individuals who may otherwise need to enforce their rights through costly and complex litigation. The UK government's current ambitions for enforcement are unclear and it is important that these, and the role of regulators including the EHRC in achieving them, are clarified during the passage of the legislation. Any future additional responsibilities conferred on the EHRC must be met with sufficient funds to enable effective regulation.

## 3.0 Summary of advice

3.1 In summary, our view is that:

- Part 1: Clauses 1 to 14 have the potential to improve the enjoyment of the right to private and family life as protected by Article 8 of the European Convention on Human Rights (ECHR) and to promote the right to just and favourable conditions at work as protected by Article 7 of the International Covenant on Economic Social and Cultural Rights (ICESCR). The government needs to undertake rigorous impact assessment and monitor the effects of these provisions when implemented in order to comply with the public sector equality duty (PSED). Such monitoring should also seek to identity and mitigate any potential unintended impacts on employer behaviour.
- Part 1: Clauses 15-18 have the potential to strengthen protections against sexual harassment at work. Regulations made under the measures will require careful consideration and consultation, alongside greater clarity in relation to the UK government's ambitions for enforcement.
- Part 1: Clause 16 requires careful analysis to understand how to balance third parties' rights to freedom of expression under Article 10 and employees' protection from harassment and their right to private and family life as protected by Article 8 ECHR.

- Part 2: Clauses 26-27 may encourage employers to address gender pay gaps and barriers to women's employment and progression in the workplace by requiring action plans setting out steps to address them. Regulations made under these measures will require careful consideration and consultation, alongside greater clarity on the UK government's ambitions for enforcement.
- Part 5: the UK government should ensure that the new Fair Work Agency complements the EHRC's regulatory role and does not duplicate or undermine it.
- The legislation and policy proposals that underpin it propose to confer significant additional regulatory responsibilities on the EHRC. Bodies charged with regulation and enforcement of the new requirements on employers, including the EHRC, will need to be adequately resourced if the legislation is to achieve its stated aims.

## 4.0 Clauses 1 to 6: Zero-hours workers

4.1 Clauses 1 to 6 propose reforms to rules around zero-hours contracts, including the introduction of rights to guaranteed hours (Clause 1), to a reasonable notice of shifts (Clause 2) and to payment for shifts that are cancelled or changed at short notice (Clause 3). Clause 4 creates provision to extend these new rights to agency workers, a proposal which is currently the subject of consultation.

4.2 Our Future of Work research (2023) showed over-representation of workers with certain protected characteristics, including disabled people, some ethnic minorities and younger workers, in this type of employment. The research found that, while flexibility around working hours can be an important pull factor into zero-hours work, relative lack of better alternatives and negative experiences as an employee can be push factors. In addition to job insecurity, the research highlighted how zero hours contract employment can raise questions around working conditions and career progression.

4.3 The UK government's human rights memorandum accompanying the bill indicates these measures are expected to positively impact the enjoyment of the right to private and family life as provided under Article 8 of the European Convention on Human Rights (ECHR), by improving workers' ability to organise their private and family life.

4.4 We agree that these measures have the potential to support Article 8 ECHR rights and promote the right to just and favourable conditions at work under Article 7 ICESCR. However, the potential unintended impacts of the measures, including on employer behaviour and availability of flexible work for those who need it, should be monitored closely to identify any potential negative implications.

**5.0 Clauses 15, 17 and 18: Protection from sexual harassment**

5.1 Clauses 15 and 17 make provision related to the sexual harassment preventative duty (the 'preventative duty') required of employers under the The Worker Protection (Amendment of Equality Act 2010) Act 2023. This legal duty, which came into effect on 26 October 2024, requires employers to take reasonable steps to prevent sexual harassment of their workers in the course of their employment including worker-on-worker and third party sexual harassment. We have the power to take enforcement action where there is evidence of organisations failing to take reasonable steps to prevent this.

5.2 Clause 15 adds the word 'all' to the preventative duty so that employers are required to take all reasonable steps (rather than reasonable steps) to protect their workers from sexual harassment. The change aligns the statutory wording of the preventative duty with that of Section 109(4) of the Equality Act 2010, which sets out an employer's statutory defence to discrimination. This states that employer liability may be avoided by showing 'all reasonable steps' have been taken to prevent discrimination. Aligning the statutory language in this way could provide greater clarity and consistency for employers.

5.3 Clause 17 further confers a power for ministers to specify reasonable steps through regulations (such as carrying out assessments, publishing action plans or policies). Such specification could provide greater clarity and certainty for employers, but the detail is left to regulations. The impact assessment for employers to take 'all reasonable steps' indicates that significant further policy development is required before introducing regulations and that consultation is anticipated. We welcome the commitment to consultation but note that the prospect of future prescribed reasonable steps could create current uncertainty for employers who have recently implemented policies and practices to support their compliance with the new duty.

5.4 Clause 18 enhances whistleblowing protections for those who make disclosures of workplace sexual harassment by clarifying that such disclosures attract rights under whistleblowing legislation, such as protection from unfair dismissal and detriment. Currently, an individual complaint of sexual harassment may not qualify for protection under whistleblowing law, because such a disclosure may not be in the public interest. However, a worker who is treated detrimentally after raising a concern about sexual harassment is already protected from victimisation under the Equality Act 2010. This additional protection, while potentially limited, may benefit those who feel unable to raise concerns with their employer (or are not satisfied with their employer's response) as they can report their concerns to the EHRC in our capacity as a prescribed person for the purposes of whistleblowing.

5.5 These measures aimed at improving protections from sexual harassment could have a positive impact for women, particularly younger women. ONS statistics (December 2023) indicate that 8% women and 3% men experienced sexual harassment in the last year, and the likelihood of experiencing sexual harassment was highest among younger age groups.

5.6 In addition, the government's 2020 Sexual Harassment Survey found that younger workers, workers from ethnic minority backgrounds, those with a 'highly limiting disability' and LGBT workers are more likely to experience workplace sexual harassment than older workers, White workers, non-disabled workers and heterosexual workers respectively.

5.7 Evidence also indicates that sexual harassment by third parties is a significant issue. Our report, Turning the Tables: ending sexual harassment at work (2018), found that a quarter of respondents who reported harassment had been sexually harassed by third parties and that this was a particular issue for people in customer facing roles. The 2020 UK government survey about sexual harassment at work also found that 14% of employees who experienced sexual harassment at work were harassed by a person who was not an employee. Younger people aged 16 to 24 were particularly likely to have been harassed by someone who was not an employee (26% compared to 14% overall).

5.8 These clauses have direct regulatory and therefore resource implications for the EHRC. Additional responsibilities have already been conferred on the EHRC in relation to new powers to enforce the preventative duty. In September 2024, we issued updated technical guidance on workplace sexual harassment in advance of the preventative duty coming into effect but we have not received any additional funding to support effective regulation of this new measure.

5.9 The government's impact assessment for Clause 17 indicates that if sexual harassment action plans are mandated through future regulations, they will be enforceable by the EHRC. Government should engage closely with us in developing any such regulations both in considering what provision will be made in relation to reasonable steps and ensuring sufficient funds are available for their regulation. Any future additional responsibilities conferred on EHRC must be met with sufficient funds to enable effective regulation.

5.10 The Clause 18 provision specifying that a complaint of sexual harassment will attract whistleblower protection may increase the number of concerns that the EHRC receives as a prescribed whistleblowing body. Again, we highlight the potentially significant resource implications for the EHRC and need for sufficient funding to ensure the measures are effective in practice.

**6.0 Clause 16: Protection from third party harassment**

6.1 Clause 16 introduces measures to protect employees from harassment by third parties on all grounds covered by the harassment provisions at Section 26 of the Equality Act 2010. These grounds are:

- age
- disability
- gender reassignment
- race
- religion or belief
- sex
- sexual orientation
- sexual harassment
- less favourable treatment for rejecting or submitting to sexual harassment or harassment that is related to sex or gender reassignment

It provides that an employer must not permit a third party (such as a customer or client) to harass an employee. It specifies that an employer permits a third party to harass an employee where an employee is harassed in the course of their employment, and the employer failed to take all reasonable steps to prevent the harassment. A failure to comply with this clause can therefore result in civil liability of the employer for harassment by a third party. This legal protection is additional to the specific measures to prevent sexual harassment that are already provided in law and strengthened at Clause 15 of the bill.

6.2 Evidence of the prevalence of third party harassment in the workplace, beyond sexual harassment, is limited. Further analysis would be helpful in understanding the issue. There is some evidence that it particularly affects certain groups. Our inquiry into the experiences of low-paid ethnic minority health and social care workers (2022) found substantial evidence of bullying, harassment and abuse, from both co-workers and patients. Our findings mirrored insights generated by NHS staff surveys in England and Wales, which found that ethnic minority staff were more likely to report experiencing harassment and abuse from patients, relatives or the public than White staff.

6.3 Third party harassment protections raise complex questions about the appropriate balance between third parties' rights to freedom of expression (as protected under Article 10 ECHR) and employees' protection from harassment and their right to private and family life (as protected under Article 8 ECHR).

6.4 When the Worker Protection (Amendment of the Equality Act 2010) Act 2023 was progressing through parliament, protections from third party harassment were removed due

to concerns that it could disproportionately curtail the right to freedom of expression under Article 10 ECHR. Particular concern was raised about potential interference in private or overheard conversations.

6.5 We note that the Regulatory Policy Committee (25 November 2024) has raised concerns about the sufficiency of evidence 'in relation to the prevalence of third-party harassment and its impact' and that the impact assessment accompanying the bill does not refer to freedom of expression challenges raised during the parliamentary passage of the Worker Protection (Amendment of the Equality Act 2010) Act 2023.

6.6 The government's human rights memorandum accompanying the bill acknowledges that the third party's Article 10 rights are engaged, 'particularly in areas of legitimate debate which are carried out in a contentious manner'. However, the government considers that any interference with Article 10 is necessary for the protections of the rights of employees and is proportionate. It asserts that, by definition, the clause only applies where the third party's conduct amounts to harassment within the meaning of Section 26 of the Equality Act 2010, which the government considers a high threshold. Under Section 26, harassment means unwanted conduct that has the purpose or effect of violating the recipient's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

6.7 Article 10 is a qualified right and can be restricted where such restrictions are prescribed by law, necessary in a democratic society for a legitimate aim, and are proportionate. However, the government's human rights memorandum contains minimal proportionality analysis. It does not address the complexity that would be faced by employers in determining whether conduct has a harassing effect, particularly in the case of overheard conversations.

6.8 This difficulty can be compounded if the conduct by the third party is the expression of an opinion that may amount to a philosophical belief under the Equality Act 2010 and therefore attract protection from discrimination. The legal definition of what amounts to philosophical belief is complex and not well understood by employers. It is arguable that these difficulties may lead to disproportionate restriction of the right to freedom of expression under Article 10 ECHR.

6.9 As the human rights memorandum accompanying the bill indicates, 'Article 10 [ECHR] is much less likely to be engaged where the conduct is reprehensible and unacceptable in principle, such as sexual harassment or unwanted sexual conduct.' Therefore, while Article 10 is much less likely to be engaged in a case of third party sexual harassment (which

employers have an existing duty to prevent), the question of whether any interference with Article 10 rights is proportionate may be much more complex in cases on other grounds.

6.10 While we support the prohibition of third-party sexual harassment, we believe the UK government should undertake further analysis to understand how to balance third parties' rights to freedom of expression under Article 10 and employees' protection from harassment and right to private and family life provided under Article 8 of the European Convention on Human Rights. This should also take into account any additional complexity that may arise if the third party is expressing a philosophical or religious belief that is protected under the Equality Act 2010.

**7.0 Part Two. Clauses 26 and 27: Duties of employers relating to gender pay gap information**

7.1 Clause 26 adds new section 78A to the Equality Act 2010. Section 78A provides for regulations to require employers with more than 250 employees to publish 'equality action plans' setting out steps they are taking to address prescribed matters relating to gender equality. It further specifies that such matters include addressing the gender pay gap and supporting employees going through the menopause. Clause 27 provides a power to issue regulations requiring employers to publish information about the service providers that they contract with for outsourced services.

7.2 The proposal for action plans setting out steps to address the gender pay gap closely mirrors recommendations the EHRC made in our Fairer Opportunities for All Strategy (2017) and elsewhere. We advised that employers in scope of The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (GPG regulations 2017) should be required to publish time-bound and target-driven action plans.

7.3 The GPG Regulations 2017 require in-scope employers in the private, voluntary and public sector with 250 or more employees to publish gender pay gap data every year. The Commission is responsible for enforcing reporting by employers but there is currently no corresponding requirement for employers to take action to reduce any pay gaps they identify.

7.4 In 2021 we co-produced the Close Your Gender Pay Gap toolkit with the Chartered Institute of Management to support employers wishing to take action to address identified pay gaps. This sets out the benefits of action plans and provides useful case studies of employers already taking such action.

7.5 The Post-Implementation Review of the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 stated the objectives of the GPG regulations were to increase transparency around the gender pay gap through reporting, with the aim of prompting action to narrow

the gap, and ultimately leading to a reduction in the national GPG. This reporting was part of a range of government measures aimed at closing the gap.

7.6 The Post-Implementation Review stated that 'it was assumed that regular measurement would have the effect of triggering employers to make a concerted effort to narrow their gap, as they would want to show progress both internally and externally' and that in the longer term, 'the cumulative impact of actions taken by employers would result in a narrowing of the national GPG'.

7.7 However, despite gender pay gap reporting having been in place since 2017, evidence indicates that the gender pay gap persists across multiple sectors. For example, ONS statistics on the Gender Pay Gap in the UK (2024) indicate that the gap is particularly high in skilled trades occupations (15.7%), process plant and machine operatives (12.4%) and associate professional and technical occupations (12.3%).

7.8 Cabinet Office analysis in 2023 found that as of June 2019 only roughly half of in-scope employers had published an action plan detailing the concrete steps they are taking to narrow the gap and improve gender equality in their organisation.

7.9 There is also evidence that menopause symptoms can have a significant impact on women at work. Research published by the Chartered Institute of Personnel and Development (CIPD) in October 2023 found that over a quarter (27%) of working women between the ages of 40 and 60 with experience of menopausal symptoms said that menopause has had a negative impact on their career progression. Two thirds (67%) said the symptoms have had a mostly negative impact on them at work. Research published by the Fawcett Society in 2022 also found that one in ten women surveyed who were employed during the menopause left work due to menopause symptoms. In February 2024, we published information for employers on how they can support women experiencing menopause in recognition of these impacts.

7.10 The House of Commons Women and Equalities Committee inquiry on Menopause and the Workplace also heard evidence that women who reported at least one problematic menopausal symptom at the age of 50 were 43% more likely to have left their jobs by the age of 55 and 23% more likely to have reduced their hours, with implications for productivity and staff retention.

7.11 The proposed new pay gap action planning requirement has the potential to stimulate action to address gender pay gaps. Requiring employers to publish plans for supporting employees going through menopause could also help ensure women remain in and progress at work at all stages of their careers. However, the details anticipated through regulations will need careful consideration and consultation, including with employers in scope of the gender pay gap reporting regulations.

7.12 The government's plans for enforcement of these measures are not yet clear, but any regulations are likely to confer significant additional regulatory responsibilities on the EHRC.

7.13 Proposed new Section 78A of the Equality Act 2010 provides that regulations may make provision for enforcement of the duty to publish equality action plans and that we must be consulted in any regulations made on this issue. The government's impact assessment accompanying the bill indicates that the intention is to issue regulations prescribing the EHRC as the relevant enforcement body.

7.14 When considering regulations to implement action planning, the government will need to consider whether it intends enforcement of the proposed action plans to be on a binary basis (whether an employer has published an action plan, or not), or whether the ambition is also for monitoring and enforcement of the quality, implementation and impact of the plans.

7.15 A simple binary (yes / no) reporting requirement may have limited impact on employer behaviour, as compliance could be demonstrated without meaningful consideration or implementation. However, any more meaningful monitoring of the quality, implementation and impact of employers' equality action plans would require significantly more sophisticated regulatory activity with associated resource implications for the EHRC.

7.16 The proposed additional Clause 27 power to issue regulations requiring employers to publish information about the service providers that they contract for outsourced services is much more limited in scope. It may provide useful insights into whether an employer's pay gap is being artificially lowered by outsourcing. However, it will not provide data on pay gaps experienced by outsourced workers. Again, this measure would be enforceable by EHRC and so consideration would need to be given to any additional resourcing requirements.

**8.0 Part 5. Enforcement of labour market legislation**

8.1 Part 5 creates a new state labour market enforcement agency, bringing together existing state labour market enforcement functions.

8.2 Our response to the previous UK government's consultation on establishing a single enforcement body (2019) found that conditions at work had become less favourable for certain groups and that enforcement and awareness of rights was poor. Our inquiry into racial inequality in health and social care (2022) recommended that such a body be established to improve the treatment and experiences of workers.

8.3 Our inquiry further recommended that the government should ensure that such a body be sufficiently resourced to meaningfully monitor and enforce compliance with employment

rights and be subject to the public sector equality duty to support the development and implementation of its enforcement work.

8.4 However, we are concerned that Part 1 of Schedule 4 opens the possibility that the government could extend the remit of the Fair Work Agency to cover other issues, such as discrimination law, in the future. Extending the remit could create a fragmented and complex system of responsibility for enforcement and undermine our statutory role as enforcer of the Equality Act 2010. This may create gaps in enforcement and regulatory overlap.

8.5 The government should ensure that the new agency complements our regulatory role and does not duplicate or undermine it.

**Further information**

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. Find out more about the Commission's work on our website.
For more information, please contact:
**Parliamentary@equalityhumanrights.com**

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