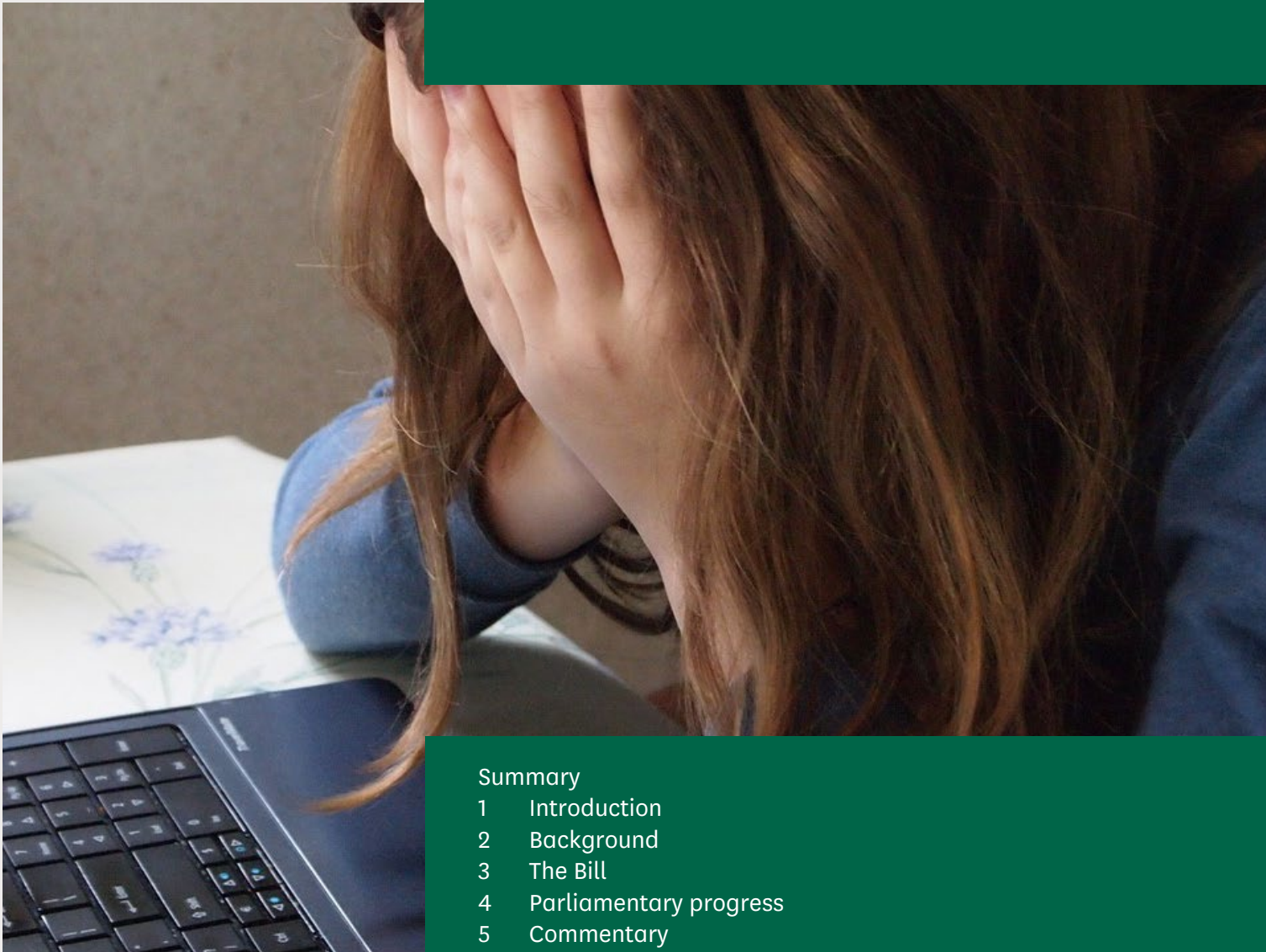


Research Briefing

By Patrick Brione

26 January 2023

Worker Protection (Amendment of Equality Act 2010) Bill 2022-23: Progress of the Bill



Summary

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Summary

The [Worker Protection \(Amendment of Equality Act 2010\) Bill 2022-23](#) is a Private Member's Bill, Bill 28 of the 2022-23 session, introduced on 15 June 2022 by Liberal Democrat MP Wera Hobhouse who came fifteenth in the [Private Members' Bill ballot for the 2022-23 session](#).

The Bill had its first reading on 15 June 2022 and passed second reading on 21 October 2022. The Bill completed its committee stage on 23 November 2022 without amendment. In both cases MPs from all sides of the House spoke in favour of the Bill and no opposition was raised, meaning the stages were passed without division. It is listed for remaining stages on 3 February 2023.

Background

Currently, [section 40](#) of the Equality Act 2010 prohibits employers from harassing their staff and [section 109](#) states that employers may be vicariously liable for harassment carried out by their employees, unless they can show they took “all reasonable steps” to prevent it. However, employers are not currently liable where staff are harassed by third parties, since the 2013 repeal of subsections 40(2)-(4) of the 2010 Act. This was confirmed by the 2018 Court of Appeal ruling in [Unite the Union v Nailard](#) which found that, the absence of subsections 40(2)-(4), the Equality Act 2010 could no longer be treated as making employers liable for staff harassment by third parties.

In 2018 the House of Commons Women and Equalities Select Committee conducted an inquiry into [Sexual harassment in the workplace](#), which criticised the gaps in, and enforcement of, protections from workplace harassment. The committee recommended that legislation be introduced to impose new employer liabilities for third party harassment and general duties to prevent harassment that could be enforceable by the Equality and Human Rights Commission (EHRC), the statutory public body set up to monitor and uphold human rights and equalities law.

In 2019 the Government launched a [consultation on sexual harassment in the workplace](#). Among other measures, this consultation sought feedback on the potential introduction of a new mandatory preventative duty “that requires employers to protect workers from harassment in the workplace” and on the introduction of new explicit employer liabilities for third party harassment.

The [Government response to the consultation](#), published in July 2021, stated that the consultation findings were broadly supportive and committed to introduce the new measures, alongside a new EHRC statutory code of practice on workplace harassment.

What does the Bill do?

The Bill would create new legal liabilities for employers by treating an employer as harassing their employee if the employee is harassed in the course of their employment by third parties (such as customers or clients) and the employer fails “to take all reasonable steps to prevent the third party from doing so”.

The Bill would also create a new corresponding duty on employers to “take all reasonable steps to prevent sexual harassment” of their employees in the course of their employment. This duty would be enforced by the EHRC but employment tribunals would also be allowed to apply an uplift of up to 25% to employees’ compensation in sexual harassment cases where the employer had failed to uphold this duty.

1 Introduction

The [Worker Protection \(Amendment of Equality Act 2010\) Bill 2022-23](#), Bill 28 of the 2022-23 session, was introduced on 15 June 2022 by Liberal Democrat MP Wera Hobhouse as a Private Member's Bill, presented to Parliament through the ballot procedure.

The Bill extends to England, Scotland and Wales but not Northern Ireland where employment law is devolved.

The explanatory notes for the Bill were drafted by the Government Equalities Office, a unit of the Cabinet Office responsible for social equality.¹

The Bill would take effect one year after the it receives Royal Assent.

The explanatory notes suggest any financial implications are likely to be minimal and the Bill does not require a money resolution.²

¹ [Worker Protection \(Amendment of Equality Act 2010\) Bill 2022-23, Explanatory Notes](#)

² As above

2 Background

2.1 Current legal protections

Section 40 of the Equality Act 2010 prohibits employers from harassing their staff. Section 26 defines harassment covered by the Act, as “unwanted conduct” that violates a person’s dignity or creates an “intimidating, hostile, degrading, humiliating or offensive environment” and which falls into one of three categories:

- unwanted conduct related to a relevant protected characteristic
- unwanted conduct of a sexual nature
- unfavourable treatment due to submitting to or rejecting “unwanted conduct of a sexual nature or that is related to gender reassignment or sex”

Section 109 of the 2010 Act states that employers may be vicariously liable for harassment carried out by their employees – employers are therefore already liable where employees harass fellow staff, unless they can show they took “all reasonable steps” to prevent it. However, employers are not generally liable where staff are harassed by third parties outside of the employer’s direct control (see 2.2 below).

2.2 Repeal of third party liability and *Unite the Union v Nailard* 2018

Prior to 2013, subsections 40(2)-(4) of the Equality Act 2010 had provided for circumstances where an employer could be liable for third party harassment if someone was harassed on at least three occasions, the employer knew about it and failed to take reasonable steps to prevent it. These provisions were repealed in 2013 with the passage of the Enterprise and Regulatory Reform Act 2013. The explanatory notes of the 2013 Act stated that, following a review and consultation, these provisions were removed as they were “considered to impose an unnecessary burden on business.”³

In 2018 a Court of Appeal ruling, *Unite the Union v Nailard*, made clear that, following repeal of these provisions, employers were not liable for third party

³ [Enterprise and Regulatory Reform Act 2013, Explanatory Notes, Para 442](#)

harassment of their staff. The Court of Appeal concluded that the remaining section 26 definitions of harassment could not be read as applying to third party liability given the existence of the separate section 40 provisions which had explicitly provided for this but were now repealed.⁴ Without these protections, the only way employers could still be considered liable under the Equality Act for failing to prevent third party harassment would be if such failure to act on their part was itself due to a protected characteristic of the employee, as stated in the judgement:

the repeal in 2013 of sub-sections (2)-(4) of section 40 means that the 2010 Act, for better or for worse, no longer contains any provision making employers liable for failing to protect employees against third party harassment as such, though they may of course remain liable if the proscribed factor forms part of the motivation for their inaction⁵

2.3

Women and Equalities Select Committee Inquiry 2018

In 2018 the House of Commons Women and Equalities Select Committee conducted an inquiry into [Sexual harassment in the workplace](#). Their report, published 25 July 2018, highlighted concerns about the widespread experiences of harassment and lack of effectiveness of existing protections, reporting that “A BBC survey in November 2017 found that 40 per cent of women and 18 per cent of men had experienced unwanted sexual behaviour in the workplace” and that “between five and 18 per cent of those who had experienced sexual harassment in the workplace said the initiator was a client or customer.”⁶⁷

Commenting on the *Nailard* case and the repeal of the section 40 protections, the committee concluded that new protections were needed:

If the judgment in the *Nailard* case stands, it would mean that the Equality Act can no longer be deemed sufficient to offer protection to employees against a failure to address third party harassment. None of the alternative legal routes cited by the Government when repealing section 40 offer a straightforward route to holding an employer to account for preventing this type of harassment. If the judgment stands, we believe that a new protection must be put in place, and this should not be restricted to cases where there were previous occurrences of harassment as was the case under the original section 40.⁸

⁴ [Unite the Union v Nailard \[2018\] EWCA Civ 1203](#)

⁵ [Unite the Union v Nailard \[2018\] EWCA Civ 1203](#), Para 99

⁶ Women and Equalities Select Committee, 5th Report, [Sexual harassment in the workplace](#), 25 July 2018, HC 725 2017-19

⁷ Data from [BBC – Sexual harassment in the work place 2017, survey by ComRes](#), November 2017

⁸ Women and Equalities Select Committee, 5th Report, [Sexual harassment in the workplace](#), 25 July 2018, HC 725 2017-19, Para 41

The report recommended that legislation should be brought in to impose positive duties to prevent third party harassment that were stronger than the previous section 40 provisions:

Government should bring forward legislation to place a positive duty on employers expressly to protect workers from harassment by third parties and to ensure that employers can be held liable for failure to take reasonable steps to protect staff from third party harassment. This must not be restricted to cases where there were previous occurrences of third party harassment.⁹

The report also recommended that a mandatory duty to prevent harassment be introduced, enforceable by the Equality and Human Rights Commission rather than relying on individuals to bring tribunal claims:

We support the recommendation of the Equality and Human Rights Commission that the Government should place a mandatory duty on employers to protect workers from harassment and victimisation in the workplace. Breach of the duty should be an unlawful act enforceable by the Commission and carrying substantial financial penalties. The duty should be supported by a statutory code of practice on sexual harassment and harassment at work which sets out what employers need to do to meet the duty.¹⁰

The Government response to the report was published on 18 December 2018. The Government did not support the introduction of a mandatory duty to prevent harassment but instead supported separate proposals to establish a statutory Code of Practice, saying:

We expect the statutory Code of Practice to significantly improve employers' ability to engage with their existing responsibility, and think that its introduction may, in effect, have the same impact as the proposed mandatory duty in placing more of an onus on employer, rather than individual, action.¹¹

In response to the specific recommendation on introducing a duty to prevent third party harassment, the Government stated they would consult on options related to this:

The Government agrees that employers should have a responsibility to take reasonable steps to protect their staff from third party harassment where they know that their staff are at risk. However, as the Committee notes, recent case law has challenged the potential avenues of legal redress. The Government proposes to consult on how best to strengthen and clarify the laws in relation to third party harassment.¹²

⁹ Women and Equalities Select Committee, 5th Report, [Sexual harassment in the workplace](#), 25 July 2018, HC 725 2017-19, Para 44

¹⁰ Women and Equalities Select Committee, Fifth Report, [Sexual harassment in the workplace](#), 25 July 2018, HC 725 2017-19, Para 32

¹¹ [Sexual harassment in the workplace: Government Response to the Committee's Fifth Report of Session 2017-19](#), 18 December 2018

¹² As above

2.4

Government consultation 2019

On 11 July 2019 the Government launched a [consultation on sexual harassment in the workplace](#). Among other measures, this consultation sought feedback on the potential introduction of a new mandatory preventative duty “that requires employers to protect workers from harassment in the workplace”, as put forward by the EHRC and recommended by the Women and Equalities Select Committee. The consultation explained the potential rationale for such a change, saying:

If introduced, a new duty would not require employers to take any practical steps they are not already expected to take. The rationale for a new duty is that the shift from employer liability after the incident of harassment, to a proactive duty before any unlawful conduct has taken place, would make it clearer to employers that they must play a role in prevention and encourage them to make more effort towards it.¹³

The consultation also sought feedback on the introduction of new explicit employer liabilities for third party harassment and, in particular, whether such liabilities should be “triggered without the need for an incident” and whether the “all reasonable steps” defence should apply.

The consultation ran until 2 October 2019. The Government published its response on 21 July 2021. The response stated that the consultation findings were broadly supportive of introducing a new duty to prevent harassment and of allowing a reasonable steps defence to any new third party liability, but also that “Consultees highlighted the complexity of introducing protections from third-party harassment without the need for an incident to have occurred”.¹⁴

In their response the Government committed to introduce new measures, including both a new preventative duty on employers to prevent sexual harassment at work and also workplace protections against third-party harassment, although on the latter the Government remained uncommitted on whether or not to require prior incidents to have occurred before employers should be held liable. The Government also committed to support a new EHRC statutory code of practice on workplace harassment.

¹³ Government Equalities Office, [Consultation on sexual harassment in the workplace](#), 11 July 2019, Para 1.9

¹⁴ Government Equalities Office, [Consultation on sexual harassment in the workplace: government response](#), 21 July 2021

2.5

Tackling Violence Against Women and Girls Government Strategy 2021

These Government commitments were also repeated separately in the Home Office policy paper on [Tackling violence against women and girls strategy](#) in July 2021, which said:

The Government response to the GEO consultation sets out that the Government will introduce a number of measures to ensure employees have adequate legal protections and to prompt employers to take action to prevent harassment. This includes introducing a new proactive duty on employers requiring them to take ‘all reasonable steps’ to prevent their employees from experiencing sexual harassment, explicit protections for employees from harassment by third parties (for example, customers or clients), looking closely at extending the time limit for bringing Equality Act 2010 based cases to the Employment Tribunal from three months to six months, and supporting the Equality and Human Rights Commission to produce a statutory Code of Practice.¹⁵

To date no new statutory code of practice on workplace harassment has been published by the EHRC on their list of Equality Act codes of practice.¹⁶ To date the Government has not introduced any legislation to meet these commitments, though this Private Member’s Bill is in line with Government commitments in this area.

¹⁵ Home Office, [Tackling violence against women and girls strategy](#), 21 July 2021 p48

¹⁶ Equalities and Human Rights Commission, [Equality Act codes of practice](#), 19 February 2019

3 The Bill

3.1 Clause 1: Liability of employer for harassment of employee by third parties

Clause 1 would amend section 40 of the Equality Act 2010 (which states that an employer must not harass their employees or job applicants), by inserting new subsections 1A and 1B. These new subsections would expand the definition of an employer harassing their staff to include cases where a third party harasses someone in the course of their employment, providing the employer has failed to “take all reasonable steps to prevent the third party from doing so”.

A third party here is defined as someone other than a fellow employee (as employers are already liable for harassment committed by fellow employees under section 109).

There would be no other conditions attached to this third party liability – the “three strikes” requirement for there to have been previous incidents of harassment that appeared in the pre-2013 version of section 40 would not be reintroduced.

3.2 Clause 2: Employer duty to prevent sexual harassment of employees

Clause 2 would insert a new section 40A into the Equality Act 2010, creating a duty on employers to “take all reasonable steps to prevent sexual harassment” of their employees. This new duty would be made enforceable by the Equality and Human Rights Commission (EHRC), in the same way as the EHRC can enforce certain other provisions of the Equality Act 2010.

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

Clause 3 would amend section 120 of the Equality Act 2010. Section 120 outlines areas that employment tribunals have jurisdiction to determine complaints about. These amendments would make clear that tribunals do not

have jurisdiction to determine standalone complaints about a breach of the new statutory duty outlined in **clause 2** (that being a matter for the EHRC) but would not prevent tribunals from taking a contravention of such a duty into account when considering an uplift of compensation as outlined in **clause 4**.

3.4 **Clause 4: Sexual harassment of employees: compensation uplift**

Clause 4 would insert a new section 124A into the Equality Act 2010, allowing an employment tribunal to consider whether an employer has breached the new duty created by **clause 2**. This would only be in cases where the tribunal has already found the employer to have contravened section 40, prohibiting them from harassing their employees (as amended by **clause 1** this would include cases of third party harassment) and only in cases of sexual harassment (as opposed to other kinds of harassment).

In such cases where the employer is found to have breached their new duty to “take all reasonable steps to prevent sexual harassment”, the tribunal would be permitted to apply an uplift of up to 25% to the compensation the employee would otherwise receive for the section 40 claim.

3.5 **Clause 5: Consequential amendments to the Equality Act 2006**

Clause 5 makes some consequential amendments to the Equality Act 2006 which governs how the EHRC operates, to grant them the necessary powers to enforce the new statutory duty created by **clause 2**.

3.6 **Clause 6: Extent, commencement and short title**

Clause 6 sets out that the Bill would come into force one year from the day it was passed.

The Bill would extend to England, Wales and Scotland but not to Northern Ireland where employment law is devolved.

If passed the Bill would be known as the Worker Protection (Amendment of Equality Act 2010) Act 2022.

4 Parliamentary progress

First reading of the [Worker Protection \(Amendment of Equality Act 2010\) Bill 2022-23](#) was on 15 June 2022. The long title of the Bill is:

A Bill to make provision in relation to the duties of employers and the protection of workers under the Equality Act 2010

The Bill passed second reading on 21 October 2022 and completed its committee stage on 23 November 2022 without amendment. It is listed for remaining stages on 3 February 2023.

4.1 Second reading

The Bill received its second reading on Friday 21 October 2022. It was passed without division. Only four MPs spoke in the debate, including the Bill's sponsor and both frontbench spokespeople; all were supportive of the Bill. The Bill's sponsor, Liberal Democrat MP Wera Hobhouse, explained the purpose of the Bill as being to “protect not only women but all employees from sexual harassment in the workplace”, adding:

The Government agree that more needs to be done to tackle sexual harassment in the workplace. In their 2021 response to a consultation on workplace sexual harassment, the Government committed to introduce a new preventative duty for employers, to provide more explicit protections from harassment by third parties, and to support the EHRC to develop a new statutory code of practice on workplace harassments. For things to improve, we need a shift in focus from redress to prevention. Currently the question of whether employers have taken adequate steps to prevent sexual harassment arises only as a defence if an incident of sexual harassment has already occurred. That means that employers are not required to take actions that prevent sexual harassment. Indeed, the EHRC found in 2018 that only a minority of employers had effective processes in place to prevent and address sexual harassment. The Bill would provide the shift in focus that is so desperately needed.¹⁷

Conservative MP Bob Blackman gave a speech in favour of the Bill. This was followed by Shadow Minister for Employment Rights Imran Hussain who supported the Bill while criticising the Government for having scrapped previous protections in the Equality Act 2010 and taking nine years to support their replacement, saying:

¹⁷ [HC Deb, 21 October](#) 2022 c1008

... by making employers liable for harassment committed by clients and customers, the Bill reintroduces the provisions that the last Labour Government introduced under the Equality Act 2010, but that the Tory-led coalition Government ditched in 2013, claiming that the protections imposed an unnecessary burden on business.

Let me be clear: protecting people from harassment, especially in the workplace, is never a burden; it is a responsibility. Nine years since the protections were first removed, it is welcome that the Government have finally realised the error of their decision. However, we should not have had to wait so long for them to do so, especially given that, like so many of this Government's initiatives, the consultation on strengthening protections against harassment in the workplace was launched back in 2019.

Labour supports the Bill, but I repeat that the Government should never have repealed those important protections for working people. We should be dramatically extending the protection already available, rather than having to reintroduce it.¹⁸

Responding for the Government then Parliamentary Under-Secretary of State for Women, Katherine Fletcher, outlined actions the Government had taken over the past five years to combat sexual workplace harassment and said that the Government strongly supports the current Bill, adding that it would build on existing protections:

It is important to recognise that, as we have heard, workplace harassment can affect anyone, regardless of industry, profession, age, race, sex, or sexuality. Anyone can be a victim, with men reporting almost similar levels of harassment, as highlighted in the debate. The Government are therefore pleased to share and support the Bill, and while the Equality Act 2010 already contains a robust legal framework against workplace harassment, the measures in the Bill provide an important strengthening of those protections and a renewed focus on prevention, which we hope will lead to a reduction in workplace harassment across the country.¹⁹

4.2 Committee stage

On 23 November 2022 the Bill was considered by a Public Bill Committee chaired by DUP MP Ian Paisley. See the Annex to this paper for the full membership. No amendments were tabled.

The Bill's sponsor, Liberal Democrat MP Wera Hobhouse, explained the purpose and function of the main clauses of the Bill, saying:

Clause 2 inserts new section 40A into the Equality Act to create a new duty on employers to take all reasonable steps to prevent sexual harassment of their employees. The phrase "all reasonable steps" is well understood as it is a statutory defence in section 109 of the Equality Act. Employers currently can show that they have taken all reasonable steps to prevent the harassment or

¹⁸ [HC Deb, 21 October 2022 c1011](#)

¹⁹ [HC Deb, 21 October 2022 c1012](#)

discrimination of their employees when defending such claims and will therefore be familiar with the concept. The provision is to make sure that employers will quickly get behind this legislation.

...

Clause 3 amends section 120 of the Equality Act, which sets out areas where employment tribunals have jurisdiction to determine when a complaint is made. The clause provides that a claim for a breach of the duty cannot be brought as a stand-alone claim to an employment tribunal. That means that tribunals cannot consider individual claims for a breach of the employer duty, other than in cases where a sexual harassment claim has been upheld. The rationale is that to allow otherwise would risk broadening and complicating the duty's scope beyond the intentions of the policy. For example, it might enable someone to bring a claim that simply challenges a company's perceived inadequate policy or training. This risks creating uncertainties for employers and undermining the policy aims.

Clause 4 concerns the compensation awarded by an employment tribunal for a breach of the new employer duty. It inserts new section 124A into the Equality Act. It provides a new remedy for breaches of the employer duty in cases where the tribunal has upheld a claim involving sexual harassment and ordered compensation to be paid. The new section provides that the employment tribunal must consider whether and to what extent an employer has also breached the new duty created by clause 2. As a result, the duty will be considered automatically by an employment tribunal following any successful sexual harassment claim where compensation was awarded.²⁰

Conservative, Labour and Liberal Democrat MPs all spoke favourably of the Bill. Shadow Treasury Minister Tulip Siddiq stated that the Labour Party supported the Bill as a chance to make progress on tackling harassment now, while saying that the Labour Party was also working on more long term plans through their “new deal for working people”.²¹

Responding for the Government, Parliamentary Under-Secretary of State for Health and Social Care, Maria Caulfield, reiterated Government support for the Bill as a “significant step forward” on existing protections in the Equality Act 2010. She noted that the protections would extend beyond just sexual harassment, saying:

I want to point out that clauses 2 to 6 are about sexual harassment specifically, but I highlight the fact that clause 1—the employer liability for harassment—will require employers legally to consider harassment risks that third parties may pose. However, that will apply to all types of harassment, not just sexual harassment. It will include racial harassment, harassment in relation to disability or any other type. That is an important step forward as well.²²

²⁰ [Worker Protection \(Amendment of Equality Act 2010\) Bill Deb](#), 23 November 2022 cc4-6

²¹ [Worker Protection \(Amendment of Equality Act 2010\) Bill Deb](#), 23 November 2022 c9

²² [Worker Protection \(Amendment of Equality Act 2010\) Bill Deb](#), 23 November 2022 c10

It was proposed and agreed that all clauses stand part of the Bill, which was accordingly to be reported without amendment.²³

The remaining stages are listed for Friday 3 February 2023.

²³ [Worker Protection \(Amendment of Equality Act 2010\) Bill Deb](#), 23 November 2022 c12

5 Commentary

5.1 Political commentary

Commenting on the Bill ahead of its second reading, the Bill's sponsor Wera Hobhouse MP posted on Twitter:

On Friday my Private Members Bill has its second reading in Parliament. The bill will act to prevent workplace harassment. This Bill would be a monumental moment for Women's rights and shift the onus from the victim to the employer!²⁴

5.2 Other commentary

Gender equality and women's rights charity The Fawcett Society welcomed the introduction of the Bill, along with a selection of other Private Members' Bills touching on gender equality issues, with a press release saying that:

MP Wera Hobhouse's bill will implement a preventative duty and require employers to take all reasonable steps to stop workplace sexual harassment while also protecting women from sexual harassment from third parties including clients, customers and patients.

There is great reason to hope that many of these bills will become law... Government must commit to them as a matter of priority and support their passage through Parliament. Once again, we call for the Government to match their words with action and support women by addressing the barriers which women and girls face every day, at work and on the streets.²⁵

²⁴ Wera Hobhouse (@Wera_Hobhouse). (Twitter) 6 September 2022 [accessed 6 September 2022]. Available from: https://twitter.com/Wera_Hobhouse/status/1567139150700183553

²⁵ Fawcett Society, [Fawcett welcomes announcements on Private Members' Bills to advance gender equality](#), 15 June 2022

Annex

Composition of Public Bill Committee, Wednesday 23 November 2022

Chair: Ian Paisley

Baker, Duncan (North Norfolk) (Con)

† Blackman, Bob (Harrow East) (Con)

Blake, Olivia (Sheffield, Hallam) (Lab)

Britcliffe, Sara (Hyndburn) (Con)

† Caulfield, Maria (Parliamentary Under-Secretary of State for Health and Social Care)

Colburn, Elliot (Carshalton and Wallington) (Con)

† Drummond, Mrs Flick (Meon Valley) (Con)

† Hobhouse, Wera (Bath) (LD)

† Jardine, Christine (Edinburgh West) (LD)

† Johnston, David (Wantage) (Con)

† Mackrory, Cherilyn (Truro and Falmouth) (Con)

† Mortimer, Jill (Hartlepool) (Con)

Osborne, Kate (Jarrow) (Lab)

† Siddiq, Tulip (Hampstead and Kilburn) (Lab)

† Smyth, Karin (Bristol South) (Lab)

† Stafford, Alexander (Rother Valley) (Con)

† Whittome, Nadia (Nottingham East) (Lab)

Bradley Albrow, Committee Clerk

† attended the Committee

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