This short, 10 paragraph, submission has been prepared by Dr James Hand, Reader in Law at Portsmouth Law School, University of Portsmouth and focuses on the following issue identified in the Women and Equalities Committee’s call for written evidence:

- how workers can be better protected from sexual harassment by clients, customers and other third parties

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In addressing this point, the second of the specific issues that the committee invites evidence on (‘who experiences sexual harassment in the workplace, who perpetrates it and what the impact is on different groups’) is briefly touched on. It is not just ‘workers’, however defined, who may experience harassment in the workplace. This point, combined with a number of others, underpins why the #bringbacksec40 campaign could be misguided and potentially damaging.

Section 40(1) of the Equality Act 2010 outlaws harassment of employees and applicants. Subsections 40(2) – (4) formerly provided expressly that harassment of employees (in the course of their employment) by third parties was included in that prohibition but only if the employer knew the employee had been harassed by a third party on at least two other occasions. This express third-party provision was incomplete, restricted and arguably superfluous.

The superfluity of it was one of the arguments put forward for its removal (and it is contended is a much stronger argument than reducing the regulatory burden as asserted by the then government). The provision was originally inserted into the Sex Discrimination Act 1975 as part of changes required by the judicial review in Equal Opportunities Commission v Secretary of State for Trade & Industry [2007] EWHC 483. However, a third-party liability provision was expressly not required by Burton J in that case. Furthermore, as he noted, the required changes would provide protection without a specific provision (at para 40). We now have the associative rather than the causative wording and the decision of the House of Lords in Pearce v Governing Body of Mayfield Secondary School [2003] ICR 937 is based on the old law.

The Fawcett Society’s recent report rightly notes that there are conflicting Employment Appeal Tribunal decisions. Consideration of two of those cases (discussed on pp 80-84 of the article referenced in footnote 1) will not be repeated here, other than to note that one
was decided without any reference to the decision in in Equal Opportunities Commission v Secretary of State for Trade & Industry [2007] EWHC 483. The case of Unite The Union v Nailard [2017] ICR 121 is on appeal – at time of writing the Court of Appeal judgment is pending – and in summary raises the distinction between exposing and thus creating an intimidating, hostile, degrading, humiliating or offensive environment and acting innocently following someone else’s behaviour. The EAT there appears to have considerably underplayed the EOC case. At para 99, HHJ Richardson writes ‘Burton J said that the wording of the legislation should be brought into line with the Directive and that this would “facilitate” an argument along the lines Ms Rose put forward. He did not reach any definite conclusion upon it.’ While para 63 of EOC does use the word ‘facilitate’ it is prefaced by Burton J saying he was ‘satisfied’ that it would which rather strengthens the point. More fundamentally para 40 of EOC contains the considered opinion that ‘the result of adopting the associative rather than causative approach to harassment, either by a purposive and transliterative construction such as is urged by Mr Pannick or by its replacement by wording more compatible with Article 1.2.2, as urged by Miss Rose, would resolve the problem’ (emphasis added). If the Court of Appeal were to restrict the interpretation, in contrast to the decision in EOC, then an amendment to the Equality Act 2010 may be required, but that is not to say that section 40(2)-(4) should be reinstated.

6. The #bringbacksec40 campaign suggests that there is no alternative remedy currently available – and suggests that it would afford protection to the workers involved in the Presidents Club scandal. Both suggestions are potentially misleading. If people have a viable section 40(1) (or other Equality Act 2010 unlawful act claim – see below – or indeed any other claim), they should not be put off by the absence of section 40(2)-(4). If section 40(2)-(4) were currently in force, the requirement for the employee to have been harassed by a third party on at least two previous occasions (and for the employer to have known about it) would limit the protection in a way that would not be limited under a claim brought under the general prohibitory provision. If an employee was subjected to a serious sexual assault – or a traumatic verbal onslaught related to a protected characteristic – and the employer knew that was likely in the circumstances, then there could be liability under the general provisions (as one instance may in certain circumstances be enough) but there categorically would not be liability under section 40(2)-(4).

7. The other major deficiency in section 40(2)-(4) is that it is within the unlawful act provision regarding employees and applicants. Accordingly, it would not apply to, for example, partners, barristers, contract workers, office-holders, local authority members or members of associations. If the law allows claims by third-parties where the body has unreasonably in the circumstances allowed the hostile, etc. atmosphere then the exclusion is of no matter and section 40(2)-(4) would only serve to highlight, regrettably to complicate and worryingly to undermine that protection. (The protection could be undermined as the argument could be made that if section 40(2)-(4) exists that suggests there should be no
other protection.) If the law was held to not allow reasonable claims by third parties outside of section 40(2)-(4), then to take two examples why should an officer of a trade union harassed alongside an employee have no claim when the employee would; why should of two waitresses at an event and subjected to the same horrific treatment one have a claim under the Act and the other not?

8. As a concept, it is not a case of extending vicarious or secondary liability to acts by third parties but whether the employer (or whoever if under the other sections) acted in a way that created (including helping to create or expose the complainant to) the environment in the knowledge of what may happen. Accordingly, the absence of a reasonable steps defence (as in section 109(4) and section 40(3)) need not be a concern for business (indeed, the presence of two similarly worded but necessarily different defences – given the difference in control over staff and customers – may serve to confuse). Harassment, within the Equality Act 2010, should only be found when each of the following has been taken into account: the perception of the complainant; the other circumstances of the case; and whether it is reasonable for the conduct to have the harassing effect. In current society, this should mean for example that exposure to boorish behaviour may not be reasonable whereas exposure of carers to those with behavioural difficulties may be reasonable (as long as other matters such as contractual and tortious protection are met).

9. If considered necessary, there could, as is common within the Equality Act 2010, be express disapplications to particular unlawful acts (for example, during the consultation ahead of the Equality Act 2010 the government noted that harassment provisions should not apply to service providers re guest on guest harassment). However, the test of reasonableness of exposing/creating the atmosphere should be a sufficient safeguard and would allow remedy in exceptional cases where it may be appropriate to hold the service provider liable for exposing guests to other guests (e.g. allowing severe harassment to take place).

10. In summary, the definition of harassment can and should be interpreted to allow third-party harassment claims where it is reasonable to consider that the complainant has been harassed due to an employer’s action or omission. Innocent peripheral participation by the employer would not be enough but complicit exposure to the harassment by others would be. If the Court of Appeal in *Nailard* takes the more restrictive line from *Conteh v Parking Partners Ltd* [2010] UKEAT 0288_10_1712 rather than the more liberal approach adopted by the then President of the EAT in *Sheffield City Council v Norouzi* [2011] IRLR 897 then a provision could be inserted into section 26 of the Act on the lines of ‘creating an intimidating, hostile, degrading, humiliating or offensive environment for B includes knowingly and unreasonably exposing B to that environment’.
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