



STATUTORY INSTRUMENTS.

S.I. No. 78 of 2002 .

EMPLOYMENT EQUALITY ACT 1998 (CODE OF PRACTICE)
(HARASSMENT) ORDER 2002.

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(HARASSMENT) ORDER 2002.

WHEREAS the Equality Authority has prepared under sub-section (1) (as amended by paragraph (g) of the Schedule to the Equal Status Act 2000) of section 56 of the Employment Equality Act 1998 (No. 21 of 1998) a draft code of practice on sexual harassment and harassment at work;

AND WHEREAS the Equality Authority has complied with subsection (2) of that section and has submitted the draft code of practice to the Minister for Justice, Equality and Law Reform;

NOW THEREFORE, I, John O'Donoghue T.D., Minister for Justice, Equality and Law Reform, in exercise of the powers conferred on me by subsection (3) of that section, order as follows:

1. This Order may be cited as the Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2002.

2. The draft code of practice submitted by the Equality Authority, the text of which is set out in the Schedule to this order, is declared to be an approved code of practice for the purposes of the Employment Equality Act, 1998 .

SCHEDULE
CODE OF PRACTICE ON SEXUAL HARASSMENT AND
HARASSMENT AT WORK

S39 EE Act. S39
ES Act.

The functions of The Equality Authority under the Employment Equality Act 1998 (EE Act) and the Equal Status Act 2000 (ES Act) include:

- working towards the elimination of discrimination in employment and in relation to matters to which the ES Act applies
- the promotion of equality of opportunity
- the provision of information on the working of both Acts
- keeping under review the working of the EE Act and the ES Act and whenever necessary to make proposals to the Minister for Justice, Equality and Law Reform for the amendment of those Acts.

References in this code to the EE Act should be taken to mean the Employment Equality Act 1998.

References in this code to the ES Act should be taken to mean the Equal Status Act 2000.

References to the appropriate sections of these Acts are given in the margins.

S56 EE Act
Paragraph (g) of
the Schedule to
the ES Act.

Within these functions the Equality Authority may prepare codes of practice in furtherance of the elimination of discrimination and the promotion of equality of opportunity. Section 56(4) of the EE Act as amended by paragraph (g) of the Schedule to the ES Act provides that:

“An approved code of practice shall be admissible in evidence and, if any provision of the code appears to be relevant to any question arising in any criminal or other proceedings, it shall be taken into account in determining that question; and for this purpose “proceedings” includes, in addition to proceedings before a court and under Part VII or under Part III of the Equal Status Act 2000, proceedings before the Labour Court, the Labour Relations Commission, the Employment Appeals Tribunal, the Director and a rights commissioner”.

What follows is a code of practice within the meaning of section 56(1) and (4) of the EE Act as amended by paragraph (g) of the Schedule to the ES Act.

(1) FOREWORD

The impact of sexual harassment and harassment.

Sexual harassment, and harassment on the eight discriminatory grounds, pollutes the working environment and can have a devastating effect upon the health, confidence, morale and performance of those affected by it. The anxiety and stress produced by sexual harassment and harassment may lead to those subjected to it taking time off work due to sickness and stress, being less efficient at work or leaving their job to seek work elsewhere. Employees often suffer the adverse consequences of the harassment itself and the short and long term damage to their employment prospects if they are forced to forego promotion or to change jobs. Sexual harassment and harassment may also have a damaging impact on employees not themselves the object of unwanted behaviour but who are witness to it or have a knowledge of the unwanted behaviour.

There are also adverse consequences arising from sexual harassment and harassment for employers. It has a direct impact on the profitability of the enterprise where staff take sick leave or resign their posts because of sexual harassment or harassment. It can also have an impact on the economic efficiency of the enterprise where employees' productivity is reduced by having to work in a climate in which the individual's integrity is not respected.

Some specific groups are particularly vulnerable to sexual harassment and harassment as there may be a link between the risk of sexual harassment or harassment and the recipient's perceived vulnerability — such as new entrants to the labour market, those with irregular or precarious employment contracts and employees in non-traditional jobs.

(2) INTRODUCTION

This code has been prepared by the Equality Authority with the approval of the Minister for Justice, Equality and Law Reform and after consultation with IBEC, ICTU and other relevant organisations representing equality interests.

Aim.

This code aims to give practical guidance to employers, employers' organisations, trade unions and employees on:

- what is meant by sexual harassment and harassment in the workplace
- how it may be prevented
- what steps to take if it does occur to ensure that adequate procedures are readily available to deal with the problem and to prevent its recurrence.

Status.

The code thus seeks to promote the development and implementation of policies and procedures which establish working environments free of sexual harassment and harassment and in which the dignity of everyone is respected.

The provisions of this code are admissible in evidence and if relevant may be taken into account in any criminal or other proceedings before a Court, under Part VII of the EE Act, proceedings before the Labour Court, the Labour Relations Commission, the Employment Appeals Tribunal, the Director of Equality Investigations and a rights commissioner.

This code does not impose any legal obligations in itself, nor is it an authoritative statement of the law — that can only be provided by the Office of the Director of Equality Investigations, the Labour Court and the Courts. It is the employer's responsibility to ensure compliance with the EE Act and European equality law.

Application and adaptation of the code.

The code is intended to be applicable to all employments, employment agencies and trade unions, employer bodies and professional bodies that are covered by the EE Act. Employers are encouraged to follow the recommendations in a way which is appropriate to the size and structure of their organisation. It may be relevant for small and medium sized enterprises to adapt some of the practical steps to their specific needs. Any adaptations that are made however, should be fully consistent with the code's general intention.

An employer shall be legally responsible for the sexual harassment and harassment suffered by employees in the course of their work unless the employer took reasonably practicable steps to prevent sexual harassment and harassment from occurring and to reverse the effects of it and to prevent its recurrence. Employers who take the steps that are set out in the code to prevent their employees from committing acts of unlawful sexual harassment or harassment or to reverse the effects of it and to prevent its recurrence, may avoid liability from such acts in any legal proceedings brought against them.

It is essential that employers have in place accessible and effective policies and procedures to deal with sexual harassment and harassment. These measures should be agreed by the employers with the relevant trade union or employee representatives. In so far as practicable, clients, customers and business contacts should also be consulted.

Equality of opportunity.

A policy on sexual harassment and harassment at work is an integral part of equal opportunities strategies in the workplace. Such policies will be more effective when operated in conjunction with similar policies on equal opportunities and health and safety.

(3) EMPLOYMENT EQUALITY ACT 1998

The Law and
Employers'
Responsibilities.
S8 EE Act.

The EE Act prohibits discrimination on the nine specific grounds set out below in all aspects of a person's employment from:

- Access to employment
- Conditions of employment
- Training or experience
- Promotion or regarding
- Classification of posts
- Vocational training
- Equal Pay
- (It may also apply in certain circumstances when the relationship has ended for example to references).

The Act applies to employers, employment agencies, trade unions, employer bodies and professional and trade organisations.

An employer must not treat an employee *less favourably* due to their:

Discriminatory
grounds.

Gender — man, woman (this also includes transgender).

Marital Status — single, married, separated, divorced or widowed.

Family Status — responsibility as a parent or as a person *in loco parentis* in relation to a person under 18, or as a parent or the resident primary carer of a person over 18 with a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis.

Sexual Orientation — heterosexual, bisexual or homosexual.

Disability — this is very broadly defined in the Act and will include the vast majority of disabilities.

“Disability” means—

- (a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,

- (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
- (c) the malfunction, malformation or disfigurement of a part of a person's body,
- (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
- (e) a condition, disease or illness which affects a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour.

Age — between the ages of 18 and 65 (or from 15 in relation to vocational training).

Race — race, colour, nationality or ethnic or national origins.

Religious Belief — includes different religious background or outlook, (including absence of religious belief).

Membership of the Traveller Community — “Traveller community” means the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland.

Reasonable accommodation.
S16 EE Act.

Employers have additional obligations to reasonably accommodate employees with disabilities (to the extent that it does not cost more than nominal cost). This obligation should apply to the format and context of the policy, the procedures on sexual harassment and harassment and their implementation.

Victimisation.
S74(2) EE Act.

The EE Act protects employees who for example seek redress under the Act or give evidence in proceedings by prohibiting their being victimised by dismissal or other penalty for doing so.

Sexual harassment and harassment.

The EE Act protects employees from employment related sexual harassment and harassment. There are different definitions and provisions in the EE Act. It distinguishes between sexual harassment (on the gender ground) and harassment that is based on one of the other grounds.

Sexual harassment and discrimination.
S23 (1) EE Act.

Sexual harassment is a form of discrimination on the gender ground in relation to conditions of employment.

Harassment and discrimination.

Harassment that is based on the following grounds— marital status,

S32 EE Act. family status, sexual orientation, religion, age, disability, race, or Traveller community ground— is a form of discrimination in relation to conditions of employment.

What is sexual harassment? S23 EE Act.

The definition of sexual harassment includes any:

—act of physical intimacy

—request for sexual favours

—other act or conduct including spoken words, gestures or the production, display or circulation of written words, pictures or other material that is *unwelcome and* could reasonably be regarded as *sexually offensive, humiliating or intimidating*.

Many forms of behaviour can constitute sexual harassment. It includes examples like those contained in the following list although it must be emphasised that the list is illustrative rather than exhaustive. A single incident may constitute sexual harassment.

Physical conduct of a sexual nature — This may include unwanted physical contact such as unnecessary touching, patting or pinching or brushing against another employee's body, assault and coercive sexual intercourse.

Verbal conduct of a sexual nature — This includes unwelcome sexual advances, propositions or pressure for sexual activity, continued suggestions for social activity outside the work place after it has been made clear that such suggestions are unwelcome, unwanted or offensive flirtations, suggestive remarks, innuendos or lewd comments.

Non-verbal conduct of a sexual nature — This may include the display of pornographic or sexually suggestive pictures, objects, written materials, emails, text-messages or faxes. It may also include leering, whistling or making sexually suggestive gestures.

Sex-based conduct — This would include conduct that denigrates or ridicules or is intimidatory or physically abusive of an employee because of his or her sex such as derogatory or degrading abuse or insults which are gender-related.

What is harassment? S32(5) EE Act.

The definition of harassment contained in section 32(5) of the EE Act is similar to that of sexual harassment but without the sexual element. The harassment has to be based on the relevant characteristic of the employee whether it be the employee's marital status, family status, sexual orientation, religious belief (or none), age, disability, race, colour, nationality or ethnic or national origin or membership of the Traveller

community. Bullying that is not linked to one of the discriminatory grounds is not covered by the EE Act.

The protection of the Act extends to situations where the employee does not have the relevant characteristic but the harasser believes that he/she has that characteristic, for example, if the harasser thought the employee was gay and the employee wasn't.

Harassment is any act or conduct including spoken words, gestures or the production, display or circulation of written words, pictures or other material if the action or conduct is *unwelcome* to the employee and could reasonably be regarded as *offensive, humiliating or intimidating*.

Many forms of behaviour may constitute harassment including:

- Verbal harassment — jokes, comments, ridicule or songs
- Written harassment — including faxes, text messages, emails or notices
- Physical harassment — jostling, shoving or any form of assault
- Intimidatory harassment — gestures, posturing or threatening poses
- Visual displays such as posters, emblems or badges
- Isolation or exclusion from social activities
- Pressure to behave in a manner that the employee thinks is inappropriate, for example being required to dress in a manner unsuited to a person's ethnic or religious background.

Common element.

The definitions of sexual harassment and harassment have several common concepts. There is an objective and subjective element to the different parts of the definition.

(a) Unwelcome conduct.

Act The EE Act does not prohibit all relations of a sexual or social nature at work. To constitute sexual harassment or harassment the behaviour complained of must firstly be *unwelcome*. It is up to each employee to decide (a) what behaviour is unwelcome, irrespective of the attitude of others to the matter and (b) from whom, if anybody, such behaviour is welcome or unwelcome, irrespective of the attitudes of others to the matter. The fact that an individual has previously agreed to the behaviour does not stop him/her from deciding that it has now become unwelcome. It is the unwanted nature of the conduct which distinguishes sexual harassment and harassment from friendly behaviour which is welcome and mutual.

(b) Sexually and/or otherwise offensive, humiliating or intimidating.

In addition, to constitute sexual harassment or harassment under the EE Act the behaviour must also *be reasonably regarded as offensive, humiliating or intimidating to the employee.*

Intention.

The intention of the perpetrator of the sexual harassment or harassment is irrelevant. The fact that the perpetrator has no intention of sexually harassing or harassing the employee is no defence. The effect of the behaviour on the employee is what is important.

Sexual harassment and harassment by employers, employees and non-employees. S23(1) S32(1) S23(4) S32(2) EE Act.

The EE Act protects employees from sexual harassment and harassment by:

—the employer

—fellow employees

—clients

—customers

—other business contacts including any person with whom the employer might reasonably expect the employee to come into contact in the workplace. This may include those who supply or deliver goods/services to the employer, maintenance and other types of professional contractors as well as volunteers.

Non workplace sexual harassment and harassment.

The scope of the sexual harassment and harassment provisions extend beyond the workplace for example to conferences and training that occur outside the workplace. It may also extend to work-related social events.

Different treatment because of acceptance of or rejection of sexual harassment or harassment. S 23(2)(b) S 32(2)(b) EE Act.

The protection extends to where the employee is treated differently in the workplace because he/she has rejected or accepted the sexual harassment or harassment for example in relation to decisions concerning access to training, promotion or salary.

Employment Agencies and Vocational Training. S23(6) S32(7) EE Act.

The provisions on sexual harassment and harassment also apply to employment agencies and vocational training.

Obligations on Employers.

The EE Act requires employers to act in a *preventative* and *remedial* way.

Reasonably practicable steps.

Employers are legally responsible for the sexual harassment and harassment directed at employees carried out by co-employees or clients, customers or other business contacts of the employer. It is a defence for the employer to prove that the employer took reasonably practicable steps to prevent:

—the employee from being harassed

—the employee from being treated differently in the workplace or in the course of employment and if and so far as any such treatment has occurred, to reverse the effects of it.

In order to rely on this defence employers would need to show that they have comprehensive, accessible, effective policies that focus on prevention and best practice and remedial action and an accessible effective complaints procedure. The steps taken to put the policies and procedures into practice will also be taken into account, as employers will not be able to rely on an excellent policy if it hasn't been effectively implemented. The core elements of a policy and complaints procedure will be dealt with below.

Time limits and Remedies under the EE Act S74-93.

A complaint of sexual harassment or harassment on any of the other grounds may be made to the Office of the Director of Equality Investigations who may refer the complaint to an Equality Officer or, with the parties agreement, for mediation.

All dismissal claims (including constructive dismissal) under the EE Act are heard by the Labour Court.

In sexual harassment claims (and all gender claims) the employee may bypass either of the above and refer the matter to the Circuit Court.

A complaint must be made within 6 months of the alleged incident of sexual harassment or harassment or the latest incident of such harassment. This may be extended to up to 12 months where exceptional circumstances prevented the making of the complaint within the 6 months.

The maximum that can be awarded by the Office of the Director of Equality Investigations and the Labour Court is 104 weeks pay. However, section 82(3) provides that no enactment relating to the jurisdiction of the Circuit Court shall be taken to limit the amount of compensation which may be awarded by the Circuit Court.

The Labour Court or the Circuit Court may order reinstatement or re-engagement.

S98 EE Act. To dismiss an employee for making a complaint of sexual harassment or harassment under the EE Act in good faith, is an offence and an employer may also be subject to an order for re-instatement or re-engagement or the payment of compensation to the employee.

Right to seek information. S76 EE Act S81 EE Act Prior to making a complaint under the EE Act an employee is entitled to seek material information” from an employer about alleged acts of sexual harassment or harassment or the employer's failure to deal with them or about the relevant procedures. There is no obligation on the employer to provide the information. However, the Circuit Court, the Director or the Labour Court in subsequent proceedings may draw such inferences as seem appropriate from the failure to supply the information.

(4) THE POLICY

Prevention. Prevention is the best way to minimise sexual harassment and harassment in the workplace. An effective policy, and a strong commitment to implementing it is required. The purpose of an effective policy is not simply to prevent unlawful behaviour but to encourage best practice and a safe and harmonious workplace where such behaviour is unlikely to occur. This policy is likely to be more effective when it is linked to a broader policy of promoting equality of opportunity.

Employers should adopt, implement and monitor a comprehensive, effective and accessible policy on sexual harassment and harassment.

Preparing the Policy. Strategies to create and maintain a working environment in which the dignity of employees is respected are most likely to be effective when they are jointly agreed. In this way, employers and other parties to the employment relationship can create an anti-harassment culture and share a sense of responsibility for that culture.

The policy and complaints procedure should be adopted, where appropriate, in so far as is practicable with clients, customers and other business contacts after consultation or negotiation with trade union or employee representatives, where possible, over its content and implementation.

Simple direct language should be used in the policy. It should be accessible to those with literacy problems and those who may not speak fluent English.

(1) *The policy should begin by declaring:*

Core Elements and Implementation Steps. (a) the organisation's commitment to ensuring that the workplace is free from sexual harassment and harassment

- (b) that all employees have the right to be treated with dignity and respect
- (c) that complaints by employees will be treated with fairness and sensitivity and in as confidential a manner as possible
- (d) that sexual harassment and harassment by employers, employees and non-employees such as clients, customers and business contacts will not be tolerated and could lead to disciplinary action (in the case of employees) and other sanctions for example the suspension of contracts or services or exclusions from premises (in the case of non-employees).

(2) Definition

- (a) the policy should set out definitions of sexual harassment and harassment which are simple, clear and practical;
- (b) a non-exhaustive list of examples should be provided;
- (c) the policy should state that the protection extends to:
 - sexual harassment and harassment by co-workers, clients, customers and other business contacts
 - beyond the workplace to conferences and training and may extend to work-related social events
 - different treatment of an employee because he/she has rejected or accepted the sexual harassment or harassment
 - employment agencies and vocational training;
- (d) the policy should emphasise that it is up to the employee to decide what behaviour is unwelcome irrespective of the attitude of others to the matter;
- (e) the policy should state that employees who make a complaint or who give evidence in proceedings etc. will not be victimised.

(3) Allocation of responsibilities under the Act

The policy should state that management and others in positions of authority have a particular responsibility to ensure that sexual harassment and harassment does not occur and that complaints are addressed speedily. The policy should state that in particular, management should:

- provide good example by treating all in the workplace with courtesy and respect
- promote awareness of the organisation's policy and complaints procedures
- be vigilant for signs of harassment and take action before a problem escalates
- respond sensitively to an employee who makes a complaint of harassment
- explain the procedures to be followed if a complaint of sexual harassment or harassment is made
- ensure that an employee making a complaint is not victimised for doing so
- monitor and follow up the situation after a complaint is made so that the sexual harassment or harassment does not recur.

(4) Trade Unions

The policy should address the contribution to be made by the trade union/s.

Trade unions can play a role in the prevention of sexual harassment and harassment in the workplace through their participation in the development and implementation of policies and procedures, through their information and training services, and through the collective bargaining process. Trade unions may also play a role in providing information, advice and representation to employees who have been sexually harassed or harassed, and to employees against whom allegations of sexual harassment and harassment have been made.

(5) Employees

The policy should make it clear that employees may contribute to achieving a sexual harassment and harassment free environment through co-operating with management and trade union strategies to eliminate sexual harassment and harassment and that sexual harassment and harassment by employees constitutes misconduct and may lead to disciplinary action.

(6) Non-Employees

The policy should point out that the sexual harassment and harassment

by non-employees such as clients, customers and business contacts will not be tolerated and may lead to termination of contracts or suspension of services, or the exclusion from a premises or the imposition of other sanctions (as appropriate).

(7) Communication of Policy

The policy should include a commitment to effective communication of the policy. The policy should be communicated effectively to all those potentially affected by it including management, employees, customers, clients and other business contacts, including those who supply and receive goods and services. This effective means of communicating a policy could include for example, newsletters, training manuals, training courses, leaflets, websites, emails and notice boards.

To Employees

Employees, including those in management and all other positions of responsibility, should be made aware of the policy as part of any formal induction process whereby new employees become familiar with their job and their working environment and rules and regulations that apply such as health and safety.

Employers should consider a staff handbook where practicable to be distributed to all employees as part of the induction process. This handbook will need to be updated to reflect relevant changes.

To Non-Employees

There may be some practical difficulties in ensuring that the policy is effectively communicated to every relevant person particularly where there is no ongoing relationship. Summaries of policies should be prominently displayed. This may not be feasible for retail outlets or pubs. These should prominently display a short statement confirming the policy's existence and the organisation's commitment to it, making it clear that the complete policy is available.

The effective communication of the policy should be easier where there is an ongoing relationship with clients and customers. This can be achieved by way of a combination of means such as:

- leaflets summarising the policy being prominently displayed where members of the public, clients, and customers attend such as receptions and waiting rooms
- including a leaflet or short written statement summarising the policy in any of the company written material such as appropriate brochures etc.

—it may be appropriate for the contracts of the employer with clients, customers and other business contacts to provide that sexual harassment or harassment of employees of the employer will constitute a repudiation of the contract and may be a ground for the employer to treat the contract at an end.

(8) Monitoring

The policy should include a commitment to monitoring incidents of sexual harassment and harassment.

The only way an organisation can know whether its policy and procedures are working is to keep careful track of all complaints of sexual harassment and harassment and how they are resolved. This monitoring information should be used to evaluate the policy and procedures at regular intervals, with changes recommended when something is not working well.

(9) *Training*

The policy should include commitments to training staff on issues of sexual harassment and harassment.

An important means of ensuring that sexual harassment or harassment does not occur is through the provision of training for managers, supervisors and all staff. This should happen for staff at induction or through appropriate awareness raising initiatives. Such training should aim to identify the factors which contribute to a working environment free of sexual harassment and harassment and to familiarise participants with their responsibilities under the employer's policy and any problem they are likely to encounter.

This is considered especially important for those members of staff responsible for implementing the policy and processing complaints.

(10) *Complaints Procedure*

The policy should set out a complaints procedure.

It is essential for employers to attach to their policy a detailed complaints procedure that will be available to employees to process their complaint where they allege they have been subjected to sexual harassment or harassment. Clients, customers and others who interact regularly with the organisation should be made aware of the employees' right to make a complaint and that they may be requested to participate in the process.

(11) *Reviews*

The policy should include a commitment to review on a regular basis in line with changes in the law, relevant caselaw or other developments.

A competent person should be designated to ensure that monitoring, training and reviews occur.

(5) THE COMPLAINTS PROCEDURE

The development of clear and precise procedures to deal with sexual harassment and harassment once it has occurred is of great importance. The procedure should ensure the resolution of problems in an effective and efficient manner. Practical guidance for employees on how to deal with sexual harassment and harassment when it occurs and with its aftermath, will make it more likely that it will be dealt with at an early stage.

The following are core elements which are relevant to any complaints procedure. They will need to be adapted and expanded upon to reflect the size and complexity of the employment.

(1) *Plain language*

Core Elements.

The procedures should be set out clearly, step by step in plain language and in relevant languages and formats so that a person making a complaint knows what to do and who to approach.

(2) *Time limits*

Time limits should be set for every stage of the investigation.

(3) *Statutory rights*

The procedure should make it clear that using the complaints procedure will not affect the complainant's right to make a complaint under the EE Act and should point out the statutory time limits.

(4) *Victimisation*

The complaints procedure should make clear that an employee will not be victimised or subject to sanction for making a complaint in good faith, or for giving evidence in proceedings, or by giving notice of intention to do so.

The procedure should make clear that in the course of investigating the

complaint the employer will make no assumptions about the guilt of the alleged harasser.

(5) Sanctions

Employees should be informed that in the event of the complaint being upheld that the disciplinary process will be invoked which may lead to disciplinary sanctions up to and including dismissal. Non-employees should be informed that in the event of the complaint being upheld that appropriate sanctions may be imposed which could in particular circumstances include termination of contract, suspension of service, exclusion from premises etc. as appropriate.

(6) Confidentiality

The procedure should make clear that confidentiality will be maintained throughout any investigation to the greatest effort consistent with the requirements of a fair investigation.

Resolving the
problem
informally.

Most recipients of sexual harassment or harassment simply want the harassment to stop. The complaints procedure should provide for informal and formal methods of resolving problems.

The procedure should provide for a competent named person to be available to assist in the resolution of any problems through informal means and to provide information to both employees and non-employees on the procedure and on the policy in general.

The employee who is being sexually harassed or harassed should object to the conduct where this is possible and appropriate. The informal procedure should provide that employees should attempt to resolve the problem informally in the first instance. In some cases it may be possible and sufficient for the employee to explain clearly to the person engaging in the unwanted conduct that the behaviour in question is not welcome, that it offends them or makes them uncomfortable and that it interferes with their work.

In circumstances where it is too difficult for an individual to do this on his/her own, an alternative approach would be to seek support from, or for an initial approach to be made by, a sympathetic friend or designated person or trade union representative.

The informal process could provide for mediation.

Formal
complaints
procedure.

The complaints procedure should provide for a formal complaints procedure where:

—the employee making the complaint wishes it to be treated formally

or

- the alleged sexual harassment or harassment is too serious to be treated under the informal procedure or
- informal attempts at resolution have been unsatisfactory or
- the sexual harassment or harassment continues after the informal procedure has been followed.

Investigation of the complaint

The procedure should provide that investigation of any complaint will be handled with sensitivity and with due respect for the rights of both the complainant and the alleged harasser. The investigation should be, and be perceived to be, independent and objective. The purpose of the investigation is to investigate the allegations and will focus on the complaint.

Those carrying out the investigation should not be connected with the allegation in any way. It is preferable that at least two people should investigate a complaint but it is acknowledged that this may not always be practicable. Such an investigation team should have gender balance and ideally should seek to ensure diversity across the other eight grounds. All of those on the investigation team should have received appropriate training. Every effort should be made to resolve the complaint speedily.

The procedure should provide that both the complainant and alleged harasser should be informed of the following:

- what the formal procedure entails and the relevant time limits
- that both parties have the right to be accompanied and/or represented, by a representative, trade union representative or a friend or colleague
- that the complaint should be in writing and that the alleged harasser be given full details in writing of the nature of the complaint including written statements and any other documentation or evidence including witness statements, interview notes or records of meetings held with the witnesses
- that the alleged harasser be given time to consider the documentation and an opportunity to respond
- that confidentiality will be maintained throughout any investigation to the greatest extent consistent with the requirements of a fair investigation

- that a written record will be kept of all meetings and investigations
- that the investigation having considered all of the evidence before it and the representations made to it will produce a written report to both parties outlining its findings and the reasons for its final decision
- if the complaint is upheld against an employee the report will recommend whether the organisation's disciplinary procedure should be invoked
- if the complaint is upheld against a non-employee the report should recommend appropriate sanctions against the non-employee or his/her employer which could extend where appropriate in the circumstances to
 - exclusion of the individual from premises
 - suspension or termination of service
 - suspension or termination of a supply service or other contract
- the report may also, or as an alternative, recommend other actions such as the more effective promotion of the organisation's policy on sexual harassment and harassment or training
- if a right of appeal exists both parties should be informed of it and the time limits and procedures involved.

It is the responsibility of the employer to provide for proper notification of the complaint and fair determination of the complaint. What is required in any particular instance will depend on the circumstances and/or complexity of the case and may require the adaptation of the procedures.

Non-Employees

It is possible that if the person accused of sexual harassment or harassment is not an employee, he/she will not wish to participate in the formal procedure, and it will not be possible to secure their participation. Nonetheless a non-employee must be kept informed of all developments and given an opportunity to respond to them. The outcome of the investigation and any potential sanctions must also be explained to the non-employee and/or any person or company for whom he/she works.

(6) REASONABLE ACCOMMODATION

The context, form and implementation of the policy and procedures should be accessible to all with adjustments made and steps taken to ensure accessibility for people with disabilities and across the other

grounds. Examples would include use of other languages in policy and procedure, availability of interpreters or signers and use of braille or large print formats etc.

(7) REVIEW OF THIS CODE

The EE Act has been in operation since October 1999. As caselaw emerges and as developments occur in the area of sexual harassment and harassment policies, it will be necessary to review and amend this code to reflect these changes.

(8) SOURCES FOR OTHER INFORMATION AND ADVICE

Equality Authority
Clonmel Street
Dublin 2
Tel: (01) 4173336; Lo-Call: 1890 245545;
e-mail: info@equality.ie; website: www.equality.ie

ICTU
31/32 Parnell Square
Dublin 1
Tel: (01) 8897777; website: www.ictu.ie

IBEC
84/86 Lwr. Baggot Street
Dublin 2
Tel: (01) 6601011; website: www.ibec.ie

Rape Crisis Centre
70 Lwr. Leeson Street
Dublin 2
Tel: (01) 6614911; (01) 6614564 (after 5.30 pm and weekends); Freefone: 1800 77 88 88

Labour Relations Commission
Tom Johnson House
Haddington Road
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The codes on bullying prepared by the Health and Safety Authority (Code of Practice on the Prevention of Workplace Bullying) and the Labour Relations Commission (S.I. No. 17 of 2002) may also be of assistance.

The Labour Court code of practice in relation to discipline should also be consulted (S.I. No. 321 of 1999).

Appendix I — EU Developments

European
Commission
Recommendation.

The European Commission's code of practice annexed to its Recommendation of 27th November, 1991 on the protection of the dignity of women and men at work (92/131/EEC) provides the following definition:

“Sexual harassment means unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work”.

Future
Development.

It is likely that there will be a new Gender Employment Directive which will contain a definition of sexual harassment.

Framework
Directive and
“Race” Directive
definitions.

Council Directive 2000/78/EC of 27th November, 2000 establishing a general framework for equal treatment in employment and occupation and Council Directive 2000/43/EC of 29th June, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, contain definitions of harassment referable to religion or belief, disability, age or sexual orientation (Framework Directive) and racial or ethnic origin (“Race” Directive).

These Directives define harassment as follows:

“When unwanted conduct (related to membership of a particular group) (.....) takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.

Both Directives have to be implemented in Ireland by 2003 (Race Directive — 19 July, 2003; Employment Directive — 2 December, 2003 — however, in order to take account of particular conditions, Member States, may, if necessary, have an additional period of 3 years from 2 December, 2003, that is a total of 6 years to implement the provisions of the Directive on age and disability discrimination) and the definitions contained in the EE Act may require amendment.

⑤ GIVEN under my Official Seal, this 8th day of March, 2002.

JOHN O'DONOGHUE,

Minister for Justice, Equality and Law Reform.

EXPLANATORY NOTE.

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

This Order declares that the Code of Practice set out in the Schedule to this Order is an approved code of practice for the purposes of the Employment Equality Act 1998 .