



STATUTORY INSTRUMENTS.

S.I. No. 208 of 2012



EMPLOYMENT EQUALITY ACT 1998 (CODE OF PRACTICE)
(HARASSMENT) ORDER 2012

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I, ALAN SHATTER, Minister for Justice and Equality, in exercise of the powers conferred on me by sections 56(3)(a) and 56(5) of the Employment Equality Act 1998 (No. 21 of 1998) (as adapted by the Justice and Law Reform (Alteration of Name of Department and Title of Minister) Order 2011 (S.I. No. 138 of 2011)), hereby order as follows:

1. This Order may be cited as the Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012.

2. The code of practice, which was prepared by the Authority and submitted to me, 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 (No. 21 of 1998).

3. The code of practice, declared to be an approved code of practice in Article 2 of the Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2002 (S.I. No. 78 of 2002), the text of which is set out in the Schedule to that Order, is revoked.

4. The Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2002 is revoked.

*Notice of the making of this Statutory Instrument was published in
"Iris Oifigiúil" of 19th June, 2012.*

SCHEDULE

CODE OF PRACTICE ON SEXUAL HARASSMENT AND
HARASSMENT AT WORK

S39 Employment Equality Act S39 Equal Status Act.	<p>The functions of the Equality Authority under the Employment Equality Act 1998 and the Equal Status Act 2000 include:</p> <ul style="list-style-type: none"> — Working towards the elimination of discrimination in employment and in relation to matters to which the Equal Status 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 Employment Equality Act and the Equal Status Act and whenever necessary to make proposals to the Minister for Justice and Equality for the amendment of those Acts.
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Certain provisions in the Employment Equality Act 1998 and the Equal Status Act 2000 were amended by the Equality Act 2004.

References in this code to the Employment Equality Act mean to the Employment Equality Acts 1998 to 2011. References to the Equal Status Act mean to the Equal Status Acts 2000 to 2011.

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

S56 Employment Equality Act Paragraph (g) of the Schedule to the Equal Status Act.	<p>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 Employment Equality Act as amended by paragraph (g) of the Schedule to the Equal Status Act provides that:</p>
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‘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 Equality Tribunal and a rights commissioner’.

What follows is a code of practice within the meaning of section 56(1) and (4) of the Employment Equality Act as amended by paragraph (g) of the Equal Status Act.

The impact of sexual harassment and harassment.

PART 1: Foreword

Sexual harassment, and harassment on the eight other non-gender discriminatory grounds, pollute the working environment and can have a devastating effect on 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, in addition, 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 an employee's perceived vulnerability — such as might be the case with new entrants to the labour market, those with irregular or precarious employment contracts and employees in non-traditional jobs.

PART 2: Introduction

This code has been prepared by the Equality Authority with the approval of the Minister for Justice and Equality 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 and under Part VII of the Employment Equality Act, and also in proceedings before the Labour Court, the Labour Relations Commission, the Employment Appeals Tribunal, the Equality Tribunal 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 Equality

Tribunal, the Labour Court and the courts. It is the employer's responsibility to ensure compliance with the Employment Equality Acts 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 Employment Equality 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 is legally responsible for the sexual harassment and harassment suffered by employees in the course of their work unless he/she took reasonably practicable steps to prevent sexual harassment and harassment from occurring, to reverse the effects of it and to prevent its recurrence. Employers who take the steps set out in the code to prevent sexual harassment or harassment, to reverse the effects of it and to prevent its recurrence, may avoid liability for 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.

The Law and
Employers'
Responsibilities: S8
Employment Equality
Act.

PART 3: Employment Equality Act 1998

The Employment Equality Act prohibits discrimination on nine specific grounds in all aspects of a person's employment, including:

- Access to employment
- Conditions of employment
- Training or experience
- Promotion or regrading
- 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.

Discriminatory grounds.

An employer must not treat an employee less favourably because of their:

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

Civil Status — single, married, separated, divorced, widowed, in a civil partnership within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 or being a former civil partner in a civil partnership that has ended by death or been dissolved.

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 section 2(1) of the Employment Equality Act and includes most 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, and includes a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person.

Age — the protection against age-related discrimination (including harassment) in employment applies only to employees over the maximum age at which a person is statutorily obliged to attend school. The minimum school leaving age is currently 16 years, or the completion of three years of post-primary education, whichever is the later.

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 Employment Equality Act.

Employers have obligations to reasonably accommodate employees with disabilities (unless such measures would impose a disproportionate burden). This obligation should be taken account of in the format and content of any policies or procedures on sexual harassment and harassment, and in their implementation.

Victimisation: S74(2) Employment Equality Act.

The Employment Equality Act protects employees who, for example, seek redress under the Act, support a complainant, or give evidence in proceedings, by prohibiting their being victimised by dismissal or other penalty for doing so.

Harassment and sexual harassment.

The Employment Equality Act protects employees from employment-related sexual harassment and harassment. It distinguishes between sexual harassment (sexual or gender-based) and harassment based on one or more of the other grounds.

Harassment, sexual harassment and discrimination: S14A(1) Employment Equality Act.

Harassment that is based on the following grounds — civil status, family status, sexual orientation, religion, age, disability, race, or the Traveller community ground — is a form of discrimination in relation to conditions of employment.

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

What is harassment- S14A(7) Employment Equality Act.

Harassment is defined in section 14A(7) of the Employment Equality Act as any form of unwanted conduct related to any of the discriminatory grounds which has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. Bullying that is not linked to one of the discriminatory

grounds is not covered by the Employment Equality Act.

The protection of the Act extends to situations where the employee does not have the relevant characteristic related to the discriminatory ground but the perpetrator believes that he/she has that characteristic, for example, if the perpetrator believes the employee is gay and the employee is not.

Many forms of behaviour, including spoken words, gestures or the display/circulation of words, pictures or other material, may constitute harassment. A single incident may constitute harassment. The following list of examples is illustrative rather than exhaustive:

- 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
- Excessive monitoring of work
- Isolation or exclusion from social activities
- Unreasonably changing a person's job content or targets
- 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.

What is sexual harassment- S14A(7) Employment Equality Act.

Sexual harassment is defined in section 14A(7) of the Employment Equality Act as any form of unwanted verbal, non-verbal or physical conduct

of a sexual nature which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

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.

Gender-based conduct — This includes 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.

Unwelcome conduct.

The Employment Equality 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 become unwelcome. It is the unwanted nature of the conduct which distinguishes sexual harassment and harassment from behaviour which is welcome and mutual.

Violation of dignity.

In addition, to constitute sexual harassment or harassment under the Employment Equality Act the behaviour must have the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

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 relevant.

Sexual harassment and harassment by employers, employees and non-employees: S14A(1) and S14A(4) of the Employment Equality Act.

The Employment Equality 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: S14A(1) Employment Equality Act.

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 or rejection of sexual harassment or harassment: S14A(1) and S14A(3) of the Employment Equality Act.

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

Employment Agencies and Vocational Training: S14A(5) Employment Equality Act.

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

Obligations on Employers: S14A(2) Employment Equality Act.

The Employment Equality Act requires employers to act in a preventative and remedial way.

Defence of reasonably practicable steps: S14A(2) Employment Equality Act.

Employers are legally responsible for the sexual harassment and harassment of employees carried out by co-employees, clients, customers or other business contacts of the employer. It is a defence for the employer to prove that he/she 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 must show that they have comprehensive, accessible, effective policies that focus on prevention, best practice and remedial action, and also accessible effective complaints procedures. The measures taken to put the policies and procedures into practice will also be taken into account by courts and tribunals: employers will not be able to rely on an excellent policy if it has not been effectively implemented. The core elements of a policy and complaints procedure are outlined in Parts (4) and (5) of this code.

Time limits and Remedies under S74-93 Employment Equality Act.

A complaint of sexual harassment or harassment, including complaints relating to dismissal in circumstances amounting to discrimination or victimisation, may be made to the Director of the Equality Tribunal who may refer the complaint to an Equality Officer or, with the parties' agreement, for mediation.

In sexual harassment complaints (and all gender-based complaints) the employee may bypass the Tribunal and refer the matter to the Circuit Court.

A complaint must be made within 6 months of the alleged occurrence of sexual harassment or harassment or of the most recent occurrence of such harassment. The time limit of six months may be extended up to a maximum period of 12 months where reasonable cause is shown.

The maximum that can be awarded by the Equality Tribunal, and the Labour Court on appeal, is 104 weeks pay or €40,000, whichever is the greater. 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 Equality Tribunal, Labour Court or the Circuit Court may order re-instatement or re-engagement.

S98 Employment Equality Act.

To dismiss an employee for making a complaint of sexual harassment or harassment under the Employment Equality Act in good faith is an offence: an employer on conviction may be ordered to pay a fine and compensation, or the court may order re-instatement or re-engagement.

Right to seek information: S76 and S81 Employment Equality Act.

Prior to making a complaint under the Employment Equality Act an employee is entitled to seek "material information" from an employer about alleged acts of sexual harassment or harassment, the employer's failure to deal with them or about relevant procedures. There is no obligation on the employer to provide the information, but the Circuit Court, the Equality

Tribunal or the Labour Court, in subsequent proceedings, may draw such inferences as seem appropriate from the failure to supply the information.

PART 4: The Policy

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.

Core Elements and Implementation Steps.

(1) The policy should begin by declaring:

- (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) Definitions and Scope

- (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, for example, make a complaint, support a complainant, or who give evidence in proceedings, 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 will:

- 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 alleged perpetrator is treated fairly
- 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 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 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. The policy should also emphasise that employees must conduct themselves so as to respect the rights of others to dignity in the workplace.

(6) Non-Employees

The policy should point out that sexual harassment and harassment by non-employees such as clients, customers and business contacts will not be tolerated and may lead, for example, to termination of contracts, suspension of services, 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. It 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. 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 regularly 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 measures 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 as 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 where appropriate.

(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 problems 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. 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.

PART 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 timely manner. Practical guidance for employees on how to deal with sexual harassment and harassment will make it more likely that these problems 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.

Core Elements.

(1) Plain language

The procedures should be set out clearly, step by step, in plain language and, where appropriate, 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 Employment Equality 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 example, for making a complaint in good faith, supporting a complainant, giving evidence in proceedings, or by giving notice of an intention to do any of the foregoing.

The procedure should make clear that in the course of investigating the complaint the employer will make no assumptions about the culpability of the alleged perpetrator.

(5) Sanctions

Employees should be informed that, in the event of the complaint being upheld, 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, 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 extent consistent with the requirements of a fair investigation.

Resolving the problem informally.

Most of those who experience sexual harassment or harassment simply want the harassment to stop. The complaints procedure should provide for both 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 practicable. The complaints 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, designated person or trade union representative.

The informal process could provide for mediation.

Formal complaints procedure.

The complaints procedure should also 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 fairness, sensitivity and with due respect for the rights of both the complainant and the alleged perpetrator. The investigation should be, and be perceived as, independent and objective: to this end it is essential that the principles of natural justice be adhered to.

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. External assistance may be necessary to deal with complaints in some circumstances so as to ensure impartiality, objectivity and fairness in an investigation.

To ensure procedural fairness both the complainant and alleged perpetrator should be informed of the following:

- what the formal procedure entails and the relevant time frame
- that both parties have the right to be accompanied and/or represented, by a representative, trade union representative, a friend or colleague
- that the complaint should be in writing and that the alleged perpetrator will 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 perpetrator will 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 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 training, or more effective promotion of the organisation's policy on sexual harassment and harassment.
- if a right of appeal exists both parties should be informed of it and the time limits and procedures involved

Both parties to a complaint should receive support (for example, counselling or other intervention as appropriate) and regular review following the investigation as the process is likely to result in tension and disharmony between the parties, co-employees, teams, etc, at least in the short-term.

It is the responsibility of the employer to provide for proper notifications regarding the investigation process and for a 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.

PART 6: Reasonable Accommodation

The content, form and implementation of the policy and procedures should be accessible to all with adjustments made and steps taken to ensure accessibility in particular for people with disabilities. Examples would include the translation of policies and procedures into Braille or large print formats or the availability of signers.

PART 7: Accessibility

Certain measures may be necessary to ensure the accessibility of policies and procedures, for example, the translation of policies and procedures into languages other than English as appropriate or the provision of interpreters.

PART 8: Review of this Code

The Employment Equality Act has been in operation since October 1999. As case law and other developments occur in the area of sexual harassment and harassment, it will be necessary to further review and amend this code to reflect these changes.

PART 9: Sources of 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 Lower 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, Dublin 4
Tel: (01) 6609662; website: www.lrc.ie

Health and Safety Authority, 10 Hogan Place,
Dublin 2
Tel: (01) 6147000; website: www.hsa.ie

National Disability Authority, 25 Clyde Road,
Dublin 4
Tel: (01) 6080400; website: www.nda.ie

The following codes of practice may also be of
assistance:

- Code of Practice for Employers and
Employees on the Prevention and
Resolution of Bullying at Work, 2007,
prepared by the Health and Safety
Authority;
- Code of Practice on Victimisation (S.I. No.
139 of 2004) prepared by the Labour
Relations Commission;
- Procedures for Addressing Bullying in the
Workplace (S.I. No. 17 of 2002) prepared by
the Labour Relations Commission;
- Code of Practice on Grievance and
Disciplinary Procedures (S.I. No. 146 of
2000) prepared by the Labour Relations
Commission;
- Code of Practice on Accessibility of Public
Services and Information Provided by Public
Bodies, 2006, prepared by the National
Disability Authority.

Appendix 1 — EU Developments

European Commission Recommendation: definition of sexual harassment.

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”.

Framework and “Race” Directives: definitions of harassment.

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”.

Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

Directive 2006/54/EC of 5th July 2006 recast in a single text the main provisions in this area as well as including certain developments in the case law of the Court of Justice of the European Communities. Article 2(1)(c) and (d) respectively define gender-based harassment and sexual harassment:

- (c) “harassment”: where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

- (d) “sexual harassment”: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.....’



GIVEN under my Official Seal,
31 May 2012.

ALAN SHATTER,
Minister for Justice and Equality.

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. It reflects amendments to the Employment Equality Acts since 2002 and replaces the approved Code of Practice set out in the Schedule to the Employment Equality Act 1998 (Code of practice) (Harassment) Order 2002 (S.I. No. 78/2002), which is revoked by this Order.

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TEACH SUN ALLIANCE, SRÁID THEACH LAIGHEAN, BAILE ÁTHA CLIATH 2,
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