

LAW SOCIETY SUBMISSION



RESPONSE TO THE IHREC'S DRAFT CODE OF PRACTICE ON SEXUAL HARASSMENT AND HARASSMENT AT WORK

IRISH HUMAN RIGHTS & EQUALITY COMMISSION

JANUARY 2019

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1. Introduction

- 1.1. The Law Society of Ireland welcomes the invitation from the Irish Human Rights and Equality Commission (“IHREC”) to provide its observations on the draft revised Code of Practice on Sexual Harassment and Harassment at Work (the “Draft Code”).
- 1.2. The Society highly commends the work already undertaken by the IHREC in respect of the Draft Code. It is clear that it has entailed significant commitment in terms of leadership, management and resources.
- 1.3. The Society is keen to support the IHREC in progressing this piece of work and bringing it to conclusion. Our members, in particular the members of the Employment and Equality Law Committee, continue to be available to the IHREC to provide additional commentary and views as the matter is progressed.
- 1.4. Below we set out our response to certain questions in the consultation.

2. Response to IHREC questions on the Draft Code.

- 2.1. **Is the draft Code of Practice sufficiently accessible to its intended audiences including employers, employees, employers’ organisations and trade unions?**
 - 2.1.1. The Society considers that the Draft Code is sufficiently accessible to its intended audiences.
- 2.2. **Are concepts of harassment and sexual harassment and the duty of the employer (as per Section 14A(2) of the Employment Equality Acts, (the “EEA”)), sufficiently explored in the Draft Code of Practice?**
 - 2.2.1. The concepts of harassment and the duty of the employer are explored to a very significant degree.
 - 2.2.2. The Society recommends that the language used in the Draft Code should reflect that used in the legislation to the greatest extent possible and that, where alternative language is used, it accurately and appropriately reflects the meaning of the language used in the legislation. For example, at paragraphs 34 and 39 of the Draft Code the phrases “*a hostile work environment*” and “*an offensive impact*” are used which are not expressly used in the EEA. The definitions of harassment and sexual harassment in the EEA expressly specify that unwanted conduct must have the purpose or effect of “*violating a person’s dignity*” which is at a higher bar than having “*an offensive impact*”. The inclusion of this phraseology could thus create a misleading impression of the level of impact required for the unwanted conduct to come within the definition of harassment or sexual harassment.

2.2.3. In addition the EEA does not include a requirement that harassment or sexual harassment must interfere with the person's work in order to come within the relevant definitions and on this basis the Society recommends the deletion of the final part of paragraph 92 of the Draft Code "*and that it interferes with their work*".

2.3. Is there any aspect of harassment/sexual harassment and/or the duty of the employer (as per Section 14A(2) EEA) not sufficiently covered in the Draft Code of Practice?

2.3.1. The Society is of the view that paragraphs 41 and 42 of the Draft Code of Practice are not sufficiently comprehensive or explicit with regard to the scope of the EEA and in particular its potential application to other categories such as self-employed contractors or Partners in Partnership and this should be addressed.

2.3.2. The Society is in favour of the appointment of a 'Senior Level Champion' within organisations, referenced at paragraph 81 of the Draft Code, however it is necessary to give further consideration to how the Senior Level Champion would operate in practice. It would be helpful if the Draft Code expressly provided that a Senior Level Champion is an innovation that would be appropriate in organisations of sufficient size to merit such a champion. The stated aim of the appointment of a 'Senior Level Champion' is that "an organisation is more likely to be alerted to harassment at an early stage" however, there is no description of the interplay between the victim of the harassment and the Senior Level Champion. It appears from the Draft Code that the Senior Level Champion is intended to be a non - HR member of management.

2.3.3. On a practical level if an alert is made to the Senior Level Champion, the business is on notice of a case of harassment and has a duty of care to both the victim of harassment and the alleged harasser. It is therefore not clear how the Senior Level Champion would stand outside any prescribed process and be effective.

2.4. In terms of practice, is the policy and complaints mechanism as set out sufficiently explored and have you any observations regarding obstacles to its application?

2.4.1. Paragraph 53 of the Draft Code provides that, if an individual considers that s/he has experienced harassment, s/he should normally raise the matter informally with management through the Internal Grievance Procedure in the first instance. The Society recommends that the Draft Code would also provide that the individual should normally raise the matter through the internal Dignity at Work/Anti-Bullying and Harassment procedure.

2.4.2. The Society further recommends that there should be a greater emphasis on mediation as part of an informal grievance procedure and not just in the context of the WRC where proceedings have already issued. Mediation at

an earlier stage could resolve the issue and negate the necessity for proceedings.

- 2.4.3. At paragraph 59 of the Draft Code, there is a reference to both the Workplace Relations Commission (WRC) and the Labour Court having extensive powers on foot of a search warrant to enter “such premises”. As there has been no preceding mention of the premises being referred to, the Society recommends the addition of a paragraph beforehand, outlining the premises that may be entered or changing the wording of paragraph 59 to “an employer’s premises”.
 - 2.4.4. The sub-heading ‘Senior Level Champion’ encompasses paragraph 80 and 81 of the Draft Code, yet the content at paragraph 80 is unrelated to the topic of ‘Senior Level Champion’ and it is recommended that it is more appropriately included elsewhere in the Code.
 - 2.4.5. Having regard to the content of paragraph 80, which states “harassment which begins, for example as racist name-calling and racial slurs may quickly escalate to physical and psychological abuse of a very serious nature if not addressed properly.” The origin of this material is not clear and it is recommended that, if this statement has as its source a particular study, that study should be referred to in the Draft Code. The Society also questions why racial harassment has been specifically highlighted as opposed to any of the other protected categories. If the intention of this subsection is to demonstrate the need for prompt address of harassment, the Society recommends that it should be more general in nature, rather than focusing on the specific ground of race.
 - 2.4.6. Paragraph 60 of the Draft Code refers to the right to seek material information. As such we recommend that specific reference should be made at Paragraph 60 of the Draft Code to the statutory questionnaire (Form EE2) as a means of obtaining such information.
 - 2.4.7. As noted previously, greater explanation of the specific functions of the proposed ‘Senior Level Champion’ and “competent person” is required. As currently drafted there could be confusion in relation to the purpose of the individual functions and any interplay between them.
- 2.5. **Do you have any other comments or suggestions in respect of the content of the draft Code of Practice?**
- 2.5.1. In light of the decision of *Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission & Others*, paragraph 11 of the Draft Code requires updating to provide that the WRC now has the authority to dis-apply or ignore a rule of national law that is contrary to EU law.
 - 2.5.2. We believe that the contents of the Appendices could be deleted. The Workplace Relations Complaint form at Appendix 1 in particular is subject to periodic change by the WRC and it may be more practical to direct readers

to the up-to-date forms available on the WRC website than to reproduce a version of the form that may quickly become obsolete.

For further information please contact:

Cormac O Culain
Public Affairs Manager
Law Society of Ireland
Blackhall Place
Dublin 7
DX 79
Tel: 353 1 6724800
c.oculain@lawsociety.ie