IRELAND

SEXUAL HARASSMENT
Questionnaire

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Note: the response to this questionnaire relates in the main to matters within the competence of Irish equality legislation

1 CONCEPT: THE SUBSTANTIVE NOTION OF SEXUAL HARASSEMENT

1.1 In your country is there a recognised concept of sexual harassment?

YES

1.2 If so, since when has this existed?

1985 when the Labour Court determined that freedom from sexual harassment is a condition of work which an employee of either sex is entitled to expect. The court will, accordingly, treat any denial of that freedom as discrimination within the meaning of the Employment Equality Act 1977 (A Worker v a Garage Proprietor EE 02/1985). Subsequent caselaw indicates that types of behaviour which constitute sexual harassment vary widely. The Labour Court stated that the key point is that the activity must be unwanted, unwelcome and unsolicited. It must undermine the person's job security and provide an intimidating work environment (A Limited Company v one female employee, 1989).

1.3 Is there in your country a legal definition for the notion of sexual harassment?

YES

1.4 If so, is that definition provided by statute, and/or through case-law development, and/or by reference to a relevant definition existing elsewhere (e.g. in a European Union or other international instrument)?

Apart from case law as indicated above, sexual harassment has now been defined in the Employment Equality Act, 1998.
1.5 Please state what is that definition:

*For the purposes of the 1998 Act, any act of physical intimacy by a person of one sex (B) towards a person of another sex (A), any request by B for sexual favours from A, or any other act or conduct of B (including spoken works, gestures or the production, display or circulation of written words, pictures or other material), provided that it is unwelcome to A and could reasonably regarded as sexually, or otherwise on the gender ground, offensive, humiliating or intimidating to A. Protection is given against sexual harassment during the course of A’s employment by someone employed at the same place as A or by the same employer, A’s employer, or a client customer or other business contact of A’s employer if the circumstances of the harassment are such that A’s employer ought reasonably to have taken steps to prevent it. (section 23 of 1998 Act)*

1.6 In your country is there any supplementary/complementary guidance as to what constitutes sexual harassment (e.g. A Code of Practice or other guidance on dignity at work)?

*A Code of Practice is envisaged for the future, to be developed by the Equality Authority.*

1.7 If so, what is the nature of that supplementary/complementary guidance?

*The Code of Practice will be admissible in proceedings before the Director of Equality Investigations (the relevant primary tribunal of first instance for complaints of discrimination under equality legislation).*

1.8 Are there any circumstances where sexual harassment (or could be) regarded as a matter falling within the regulation of health and safety at work in your country?

*Bullying, which could be construed as general harassment, is covered by Irish health and safety legislation. However sexual harassment is dealt with under the specific provisions indicated above.*

2. **CAUSE OF ACTION AND PROCEEDINGS IN RESPECT OF SEXUAL HARASSMENT**

2.1 In your country is it possible to bring proceedings before a court (a labour court or any other judicial instance) in respect of alleged employment-related sexual harassment?

*Yes*

2.2 Do proceedings in respect of sexual harassment stand as a cause of action in its own right, or do such proceedings fall within a broader category of dispute (e.g. in the guise of discrimination)?
Complaints of sexual harassment (or harassment on the other 8 protected grounds: marital and family status, sexual orientation, age, disability, religion, race or membership of the Traveller community) can be brought in their own right within the context of equality legislation.

2.3 Does there exist in your country any parallel or comparable form of action (e.g. a cause of action in respect of racial harassment)?

Yes, harassment on grounds of marital or family status, age, religion, sexual orientation, disability, race or membership of the Traveller community is also prohibited by the Employment Equality Act, 1998.

NB harassment in the provision of goods and services is prohibited on the same nine grounds by the Equal Status Act, 2000, which covers discrimination in non-employment areas.

2.4 Is there any significant difference in respect of the relevant cause of action or the procedures involved if the alleged harasser is a public body, as opposed to a private individual or body?

No

2.5 If so, what will be the applicable situation in relation to each of those?

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2.6 Against whom can an action be taken in relation to alleged employment-related sexual harassment?

Action is taken against the employer on the grounds of vicarious liability. It can also be taken against the individual harasser.

2.7 If action can be taken against the employer of an alleged harasser, please indicate in what circumstances that will be possible?

The 1998 Act provides that sexual harassment by a co-employee (or in some circumstances a client, customer, etc), which takes place in the workplace or otherwise in the course of an employee’s employment or which takes place elsewhere but results in an employee being differently treated in that context, or a reasonable anticipation that s/he would be so treated, constitutes discrimination by an employer on the gender ground, in relation to conditions of employment for the purposes of the Act.

2.8 Who is formally entitled to bring such an action?

Action can be taken by the individual, or by the Equality Authority in certain circumstances.
2.9 If a body other than an alleged victim of alleged employment-related sexual harassment (e.g. an equality commission or ombudsman or similar) is entitled to bring such an action, please indicate in what circumstances this will be permitted:

The Equality Authority (a state body set up with the functions inter alia of working to promote equality and prevent discrimination) may refer a complaint to the Director of Equality Investigations where it considers that there is general discrimination (including sexual harassment), where discrimination (including sexual harassment) has occurred and it is not reasonable to expect the individual concerned to make a complaint, or where there is procurement of discrimination (including sexual harassment).

2.10 Is public legal aid, advice, or other assistance available to a party who wishes to bring an action in relation to alleged employment-related sexual harassment?

Yes

2.11 If so, what is the nature of that legal aid, advice, or other assistance, and in what circumstances will it be available?

The Equality Authority provides information and advice and may represent individuals in complaints to the Director of Equality Investigations. Individuals may also seek assistance and representation from their trade union, other support group or a solicitor. Legal Aid is not generally available and the Director of Equality Investigations has no power to award costs. A significant number of individuals do not have any representation.

3. DISPUTE RESOLUTION FORUM AND STRUCTURES

3.1 In what forum can an action be brought in your country relating to alleged employment-related sexual harassment?

Under the Employment Equality Act, 1998 and the Equal Status Act, 2000, individuals may refer complaints of sexual (and other) harassment to the Director of Equality Investigations. This is an independent statutory Office, established under the aegis of the Department of Justice, Equality and Law Reform, which has quasi-judicial functions in relation to discrimination cases. In relation to gender only (including sexual harassment), the claimant also has the option of bringing an action before the Circuit Court which has unlimited jurisdiction in this area.

3.2 Where relevant, in what forum can an action be brought in your country relating to alleged non-employment-related sexual harassment?

as above (but not including the option of recourse to the civil courts).

3.3 Who will adjudicate on a complaint relating to alleged employment-related sexual harassment?
The Office of the Director of Equality Investigations is the primary forum for redress at first instance for all complaints of discrimination on the nine prohibited grounds, including gender. Decisions are legally binding. In the case of employment-related discrimination, appeal lies to the Labour Court (which is primarily an industrial relations body but which has the appellate jurisdiction for employment equality cases) and thence to the High Court on a point of law. In the case of non-employment related harassment, appeal lies to the civil courts (the Circuit Court) and thence to the High Court on a point of law.

Complaints are referred to the Director who may hear a case herself but who normally assigns cases to 13 specially-appointed Equality Officers. Equality Officers have quasi-judicial functions. They sit on their own in hearing cases and are statutorily independent in managing all aspects of the case, hearing the case and making the Decision.

Equality Officers are middle-to-senior level career civil servants. They are not required to have legal qualifications but are required to have experience inter alia of at least 3 years working in either drafting or interpreting complex legislation. The majority of them are recruited through a specific competition held by the independent Civil Service Commission.

3.4 Is any particular experience or qualification required of those who will adjudicate on a complaint relating to alleged employment-related sexual harassment?

No specific qualification but as indicated above they are required to have a minimum of 3 years experience in drafting or interpreting complex legislation.

3.5 If so, what is the nature of that requisite experience or qualification?

See 3.4 above

3.6 Is any special training provided for those who will adjudicate on a complaint relating to alleged employment-related sexual harassment?

The Office of the Director provides an extensive legal training programme, both in house and having recourse to external academic institutions. This includes extensive special training in discrimination law, including sexual harassment.

3.7 If so, what is the nature of that training?

See above.

4. PROCEDURE IN RELATION TO EVIDENCE AND THE ADJUDICATION OF COMPLAINTS OF EMPLOYMENT-RELATED SEXUAL HARASSMENT

4.1 In relation to the procedures which are adopted during the course of adjudicating upon a complaint of alleged employment related sexual harassment are there in your country any special rules relating to:

4.1.1 Anonymity of any or all of the parties? Yes
If so, what rules apply here?

*It is the practice of the Director of Equality Legislation and of the appellate Labour Court not to publish the names of any of the parties involved in sexual harassment claims. There are as yet no special rules in relation to appeals to the Circuit Court on non-employment related sexual harassment.*

4.1.2 Hearing some or all of the evidence in camera? Yes

If so, what rules apply here?

*All cases before the Director of Equality Investigations are required to be heard in private.*

4.1.3 Placing restrictions upon the freedom of the Press to report such proceedings?

If so, what rules apply here?

*All Decisions by the Director of Equality Investigations or the Labour Court are required to be published. However names or other identifying factors are not published.*

4.1.4 The manner in which cross-examination (or questioning in general) of an alleged *victim* can take place (e.g. reflecting criminal procedure rules for sexual offences)?

   Yes  ✗  No  ✗

   If so, what rules apply here?

*The practice before the Director of Equality Investigations is not to permit cross examination as such, although either party may question the other through the Equality Officer, who may also ask questions him/herself.*

4.2 In terms of making out a case, what elements does a party who complains of employment-related *sexual harassment* in your country have to establish?

*Claimants have to establish a prima facie case that they were sexually harassed.*

4.3 What is the standard of proof required in such cases (e.g. shown *on a balance of probabilities* etc.)?

*On balance of probabilities*

4.4 What are the rules in your country concerning the burden of proof in such cases?

*Once the claimant has established a prima facie case, the burden of proof shifts to the employer (or service provider in non-employment cases) to show that they had taken reasonable steps to prevent such harassment.*

*This is now a legal requirement in gender discrimination cases following the transposition into Irish Law of the EU Burden of Proof Directive.*
4.5 Is this consistent with the normal rules in your country concerning the burden of proof in civil cases?

No

If not, in what way (s) do the rules differ here?

As above

4.6 Is there any right in your country for a witness or a party to refuse to answer a question during the course of proceedings relating to alleged employment-related sexual harassment on the ground that the answer given might be self-incriminating in respect of a criminal offence?

Yes

If so, what is the basis of that right to refuse an answer?

Constitutional case law.

4.7 Do witnesses in proceedings relating to alleged employment-related sexual harassment give evidence under oath?

No

4.8 Is this consistent with the normal situation for witnesses giving evidence in civil proceedings in your country?

It is consistent with the normal situation for witnesses giving evidence before an administrative tribunal.

4.9 Will any aspect of evidence be excluded in proceedings relating to alleged employment-related sexual harassment (e.g. the sexual history of the alleged victim or instances of previous allegations made against the alleged harasser)?

No specific exclusion but it would not normally be the practice for Equality Officers to investigate the sexual history of the alleged victim. Previous allegations against the alleged harasser could be raised but would have little probative value unless they had been upheld by an internal investigation, court or tribunal.

4.10 If so, what rules apply here?

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4.11 If there has been a criminal (e.g. by the police) or other investigation into the circumstances under adjudication in proceedings relating to alleged employment-related sexual harassment will statements or other evidence obtained in the course of that investigation be admissible in relation to the alleged employment-related sexual harassment proceedings?

Yes

4.12 If so, under what conditions will such evidence be admitted?

Objections could be raised to their probative value, depending on the circumstances in which they were obtained and the stage that criminal proceedings had reached. The Equality Officer will generally apply the principles of natural justice, in particular the requirement of a fair hearing, adequate opportunity to either party to present a case and adequate notice to the other party.

4.13 Will a failure by the employer of an alleged harasser to observe any guidance or Code of Practice provisions on dignity at work be taken into account during the course of adjudicating in proceedings relating to alleged employment-related sexual harassment?

Yes, when such Code has been drafted by the Equality Authority and the Minister has by order declared that the draft is an approved code of practice for the purposes of the equality legislation.

4.14 If so, in what way will this come about, and what might be the consequences of such non-observance?

It will be admissible in evidence. The Equality Officer will take it into account, along with all other relevant circumstances, in reaching his or her Decision.

1 ADJUDICATION, REMEDIES AND CONSEQUENTIAL MATTERS

5.1 In your country will the judgement/decision in relation to proceedings concerning alleged employment-related sexual harassment be given with a full statement of the reasons underlying the outcome of those proceedings?

Yes. The legislation provides for all Decisions to be given in writing and, if the Director sees fit or either party so requests, to include the reasons underlying the Decision. It is the practice of the Office of the Director to give a full statement of the reasons in all cases.

5.2 Is this consistent with the normal situation for judgments/decisions in civil proceedings in your country?

It is consistent with the normal situation for judgements/decisions in employment cases before the variety of tribunals which deal with labour law in Ireland. Decisions issued by the Office of the Director are generally more detailed than those issued by other employment tribunals. Civil Courts do not normally give any written judgements.
1.3 In your country will the judgement/decision in relation to proceedings concerning alleged employment-related sexual harassment be made public?

Yes

5.4 If so, will the whole of the judgment/decision be made public, or may portions of it not be made available (e.g. the names of parties)?

Names of parties and other material or information which might identify the parties are not included.

5.5 What remedies are available to a successful party who has complained of employment-related sexual harassment?

From the Office of the Director of Equality Investigations: Compensation of up to two years pay and/or a legally-binding direction to the employer by the Equality Officer to take specific action, e.g. to put in place proper preventative procedures
From the Circuit Court: unlimited compensation (see 3.1 above)

5.6 In addition to direct remedies for a successful party in such proceedings, is it possible for the adjudicating body to make recommendations or similar (e.g. to bring about an investigation into, or monitoring of, an employer’s practices)?

See above re the power to direct specific action. Note that this is also legally binding.

5.7 If so, what is the potential scope of any such recommendations (or the like)?

There is no statutory limitation on the direction but precedent and persuasive case law would indicate that it must be appropriate.

5.8 Is there a recognized cause of action in your country for victimization in relation to a person who has brought a complaint concerning, assisted a person who has made a complaint, or been involved with proceedings concerning alleged employment-related sexual harassment?

Yes

5.9 If so, what conditions must be satisfied in order to succeed in a claim alleging such victimization?

The process is the same as a claim of discrimination or sexual harassment: the complainant must establish a prima facie case after which the burden of proof shifts to the employer to rebut the accusation of victimisation.
5.10 What remedies are available to a successful party who has complained of A victimization@ relating to alleged employment-related A sexual harassment@

*Same as 5.5*

1.4 Is it possible in your country to appeal against a judgment/decision in proceedings relating to alleged employment-related A sexual harassment@ or alleged A victimization@ arising out of any such allegation?

*Yes*

5.12 If so, to whom does any such appeal lie, and on what grounds can such an appeal be made?

*Appeal lies to the Labour Court (with no restriction on grounds) and thence to the High Court on a point of law.*

5.13 Is it possible in your country for a party who has brought proceedings relating to alleged employment-related A sexual harassment@ or alleged A victimization@ to be open to litigation in respect of (e.g.) defamation, perjury, or the like?

*No*

5.14 If so, in what circumstances might this arise?

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SUPPLEMENTARY

6.1 Please indicate your (personal) impression of the extent to which the notion of sexual harassment in your country depends upon the subjective response of the alleged victim and to what extent it has proved possible in your country to develop objective criteria for identifying action or circumstances which can be said to amount to sexual harassment.

The tests are mixed: the sexual harassment must be unwelcome to A (subjective test) and could reasonably be regarded as sexually, or otherwise on the gender ground, offensive, humiliating or intimidating to A (mixed objective/subjective test).

6.2 Please provide any available data relating to statistics for cases involving allegations of employment-related sexual harassment in your country.

Complaints of sexual harassment at work comprised 10% of all complaints of discrimination at work in 1999, 8% of complaints in 2000 and 4% of cases in the period to end October 2001.

6.3 Please furnish a copy of any legislative provisions in your country which deal specifically with the phenomenon of sexual harassment.

Copies being sent to ILO by post

6.4 Please furnish a copy of any guidance or Code of Practice in relation to dignity at work which touch upon the phenomenon of sexual harassment.

6.5 Is there in your country any experience in the use of alternative dispute resolution mechanisms in relation to circumstance in which allegations of employment-related sexual harassment have been made?

Yes

6.6 If so, please indicate the nature of the alternative dispute resolution mechanism(s) and give a brief description of its (their) operation:

As an alternative to a formal investigation and Decision, the Director of Equality Investigations provides a statutory alternative through referral of a case to mediation. This can be done where neither party objects and where the Director considers the case may be so resolvable.
Mediation is an internationally recognised process (Alternative Dispute Resolution) seeking to arrive at a solution through an agreement between the parties, rather than through an investigation and decision. Settlements mediated under the Acts are legally binding and enforceable through the civil courts.

Mediators are appointed by the Director of Equality Investigations from among her staff and are professionally trained to international standards. At present all mediators are also Equality Officers.

The mediation service has been in operation for 6 months and to date has not dealt with any case of sexual harassment.

6.7 Have there been developments in your country in the direction of applying any of the provisions dealt with in this questionnaire to alleged same sex harassment?

No, it is not covered under the Employment Equality Act, 1998, although it is arguable that same sex harassment may have been covered by the previous Employment Equality Act, 1977, now repealed.

6.8 If so, please indicate how these developments have progressed to date:

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