

HARASSMENT & BULLYING

IN THE WORKPLACE

Equality Commission

FOR NORTHERN IRELAND

Labour Relations
AGENCY
Improving Employment Relations

FOREWORD

Managing workplace relations in the context of ever changing and developing employment and equality law presents challenges for employers and employees alike. Employers, and indeed society, can ill afford the costs of workplace harassment and bullying in either human or financial terms.

The Equality Commission for Northern Ireland and the Labour Relations Agency receive numerous queries and complaints every year from both employers and employees who have experienced harassment or bullying at work or are looking for assistance in dealing with this stressful matter. Both organisations are committed to helping employers and employees comply with the law and to promote good practice within workplaces. Our two organisations are committed to working in partnership to address the issue of workplace harassment and bullying and regularly provide joint training sessions. Ultimately, we all benefit if every workplace is characterised by high levels of trust, fairness and work performance, and where conflicts arising from allegations of bullying and harassment are managed effectively.

This publication, we believe, will be of benefit to all those who have an interest in promoting positive and productive working environments.



Bob Collins
Chief Commissioner
Equality Commission for N Ireland



Pat McCartan
Chairman
Labour Relations Agency

ACKNOWLEDGEMENTS

The Equality Commission for Northern Ireland and the Labour Relations Agency would like to thank the authors for their contributions to successive drafts of this handbook -

Fiona Cassidy of Jones and Cassidy Solicitors

John Kremer of Queen's University

Mark McAllister of the Labour Relations Agency

Richard Steele.

HARASSMENT & BULLYING

IN THE WORKPLACE

CONTENTS

Part One: Introduction	4 - 15
Part Two: Policies and Formal Procedures	16 - 35
Part Three: Informal Procedures and Advisory Services	36 - 48
Part Four: The Legal Position	49 - 72
Appendix: 1 Model Policy and Procedure	I - XIV
2 Useful Websites	XV

Part One: Introduction

As anyone with experience of the world of work will know, harassment and bullying represent longstanding and difficult problems to resolve. This guide has been produced to help all those with an interest or involvement in the world of work to develop an understanding of the issues. More importantly, the handbook outlines positive steps that can be taken to help harassment and bullying become problems of the past rather than the present or the future.

The guide provides background on the problem and a steer towards effective remedies, both formal and informal. While these remedies are invaluable, no organisation should ever forget that so long as certain types of behaviours continue either to be overtly reinforced or tacitly rewarded then problems will continue to arise. In these circumstances harassment and bullying may represent symptoms of deeply embedded cultural values that no amount of training or policy development ('blaming and training') can hope to remedy. This handbook cannot address these cultural issues directly but they should never be ignored in the pursuit of best practice and ultimately the maintenance of an organisation where personal dignity is not only protected but valued.

Who?

Who bullies and harasses? Traditionally it was argued that there are certain types of people who are more inclined to engage in these behaviours, including those who abuse their power or those with more authoritarian personalities or masculine interpersonal styles. Early attempts to profile a typical offender often have been disappointing and this failure points to the complex interplay between personal and contextual factors in determining when and where harassment and bullying occur. They can represent either individual or group phenomena, they can appear up, down or across an organisation and they can be sporadic or serial.

Who are victims? Again, experience shows that they vary and any attempt at profiling a typical recipient is likely to be unprofitable. What is far more consistent is the statistic that around two-thirds of those who have suffered harassment at work will have left their employment as a direct result. Furthermore, those who raise complaints often tend to be people who are newly recruited to an organisation, perhaps giving a sign that the behaviour may have been disregarded or even condoned by other employees in the past.

Who brings complaints? Media reports of large compensation awards or of high profile employers being brought before an Industrial Tribunal may create an impression that the incidence of workplace harassment and bullying is burgeoning. Does this perceived increase reflect on the reality of a more litigious society, greater public awareness, or are employees simply more willing to assert their rights? There is little doubt that each answer is partially true. On the one hand there may be unduly sensitive or litigious employees while on the other hand there may be employers who either tacitly condone or ignore management styles that blatantly constitute harassment or bullying.

Irrespective of who, what, where and how, harassment and bullying are

unacceptable forms of behaviour in the workplace. What is more, these actions must be outlawed regardless of the motive or intent of the perpetrator – the why. Instead the onus must fall on each organisation to ensure that effective proactive and reactive measures are available to prevent and protect.

Remedying harassment and bullying

In the past, many organisations have adopted existing policies and procedures that, on paper, seem to offer reasonable remedies to harassment and bullying. In reality such organisations may have borrowed a policy without considering how it may operate in their particular environment. A practical and grounded approach requires that policy and associated procedures address the specific needs of an organisation, while also taking into account current legislation and case law, contemporary definitions and the interplay between policy and working practice.

To follow such an approach may appear daunting but it need not be. While case law will help determine how the courts interpret the bounds of acceptable behaviour at work, in many respects, sound judgment and reasonable common sense will be just as significant in determining whether conduct is or is not acceptable and appropriate.

This guide does not attempt to reinvent proven good practice principles that many organisations already have in place. Instead it seeks to put into context and to modernise the approach to harassment and bullying in the workplace from both the employer and the employee perspectives. Given that everyone in the workplace has the potential to bully or be bullied, or to harass or be harassed, then it is appropriate that this booklet is not solely a manager's guide nor an employee oriented publication but is for anyone with an interest or engagement with the world of work.

Recent developments

Obviously, any policies and procedures must reflect existing statutes, and must continue to be revised as new legislation unfolds. Generally this legislation has helped to clarify difficult issues but at the same time new legislation can often take time to become familiar and to translate into broadly accepted good practice.

The Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004 ('Dispute Resolution Regulations'), which came into effect on 3 April 2005, and the definition of harassment introduced by the Discrimination Regulations, represent new pieces of legislation that impact significantly on any harassment and bullying policy. At this time, the out-workings of some parts of this legislation have yet to be fully experienced although case law is already starting to accumulate. In the context of the statutory minimum requirements imposed by this legislation, at the time of writing there is no definitive guidance available as to the relationship between harassment/bullying procedures and general grievance and disciplinary procedures. As a result, anecdotal evidence suggests that two quite different approaches may be adopted:

Part One

1. Construct an harassment and bullying policy/procedure that incorporates and totally subsumes the minimum statutory requirements of both grievance and discipline procedures as defined in that legislation (ie, written statements, hold a meeting, provide an appeal). In effect this approach creates a statutorily compliant but subject-specific grievance and discipline procedure for harassment and bullying.
2. Construct an harassment and bullying policy/procedure that 'sits outside' both the grievance and disciplinary procedure. This approach assumes a form of in-house, relational resolution mechanism that, at appropriate junctures, will feed into the stand-alone and statutorily compliant grievance and disciplinary procedures.

The second approach may serve to highlight the issue but equally it raises the potential for duplication of effort. Furthermore, developments in case decisions in the latter weeks of 2005 suggest that what constitutes a grievance under the statutory dispute resolution legislation may be much more simplistic than previously thought (see Part 2), perhaps inclining organisations towards the first approach.

Suffice it to say that caution needs to be taken if adopting either of the above approaches to ensure that statutory requirements are met, that rights are not infringed and that penalties are not incurred.

In the absence of definitive guidance at this time, the relationship between subject-specific policies and general generic policies and associated procedures can be difficult to configure but due regard must be given to the need to balance both the needs of the individual and the needs of the organisation.

These issues aside, as with most employment-related matters, the word 'reasonable' will always feature prominently and will be given due consideration by bodies including tribunals. Hence a reasonable approach that upholds the legal rights of all individuals involved, whether employer or employee, victim or alleged perpetrator, should be strived for.

Constructing policies and procedures

Throughout this guide, a number of common and recurring themes appear (eg, dignity, perception, unwanted conduct, reasonableness, subjectivity, objectivity, impact and knowledge). While an understanding of these constructs is vital, each case of harassment and/or bullying ultimately will turn on its own facts, circumstances and context. To deal with the nuances of each situation, a structured approach must be adopted that can accommodate both overarching principles and the unique qualities of each case. This can present a challenge but it is hoped that a practical path towards effective remedies can be steered with the development of good policies, sound procedures and a modicum of common sense.

Managing harassment and bullying

With the benefit of hindsight, employers may stand accused of not providing a proportionate response to a problem that has arisen around harassment or bullying. On the one hand an employer may be guilty of downplaying or ignoring a major problem. On the other hand there may be incidences which involve minor misdemeanours where the response could be described as disproportionate. In the former case, experience suggests that trivialising or ignoring a problem is likely to make matters far worse. In the latter example, the new Dispute Resolution Regulations go a long way towards providing guidance on good practice procedures, for example by clarifying that internal remedies must, in general, be exhausted before any external remedy can be invoked.

The legislation around harassment and bullying is not straightforward. As one example, there is a common misconception that bullying can be subsumed under the broad anti-discrimination agenda although social identity is not relevant to the unwanted conduct (in other words, the bully is indiscriminate). However, it is becoming more apparent that although various forms of harassment are covered by relevant anti-discrimination legislation, bullying which is non-specific or 'social identity neutral' is not and this can create difficulties down the line should the case move towards a legal remedy.

Employees today are generally more aware of their rights and responsibilities than their predecessors and theoretically should feel more empowered to tackle unwanted conduct. However, in practice the ability to constructively confront a bully or harasser requires a degree of controlled assertiveness which not every employee will have; thus an alternative solution must be available through which the problem can be effectively managed.

In many instances a heavy burden is then placed on line managers within the organisation as those with frontline or primary responsibility for diagnosing and managing an emerging case. Quite often this responsibility may be shouldered unwillingly and especially where the line manager sees his or her responsibility falling outside HR or personnel matters. It is not uncommon for line managers at all levels to perceive an incidence of bullying or harassment as a 'human resources issue' and to abdicate responsibility accordingly.

The practice of line managers passing a complaint of harassment or bullying up or across the line, or an employee bypassing the procedure to pursue an intervention that involves a more senior member of staff, may only serve to compound problems. As a general rule, often it is more appropriate to work through procedures sequentially, beginning with the least obtrusive, with the assurance that more robust and formal mechanisms can be invoked at a later stage if necessary.

Defining harassment and bullying

Harassment

What is harassment? Prior to 2003 this question could only be answered with reference to separate pieces of Northern Ireland's anti-discrimination legislation

Part One

or various publications by lead organisations such as the Equality Commission for Northern Ireland and the Labour Relations Agency. The result was a mass of information which was 'similar but different', with generic themes but notable if subtle distinctions depending on which social identity was being addressed (eg, sex, marital status, race/ethnic origin, religion, political opinion, disability, dependancy, age).

The generic themes running through the earlier legislation, codes, and other publications are straightforward – unwanted conduct, unwelcome conduct, unacceptable behaviour and the underpinning concepts of unreasonable conduct, offensive conduct and the creation of a hostile working environment. However, earlier anti-discrimination legislation did not include a definition of harassment itself but instead tribunals made reference to codes and guidance documents that interpreted the relevant statutes. At this time, harassment was normally regarded as one form of direct discrimination where the person suffered a detriment or disadvantage based on that characteristic.

2003 saw the beginning of a process, driven by numerous EC Directives, whereby a single definition of harassment came into use and key pieces of anti-discrimination legislation were amended to reflect this development. However, at the time of writing not all social identity headings are covered by the new definition (see Part Four) and this should be borne in mind.

In simple terms the eventual position may be that all protected characteristics under the legislation will be covered by a unitary definition of harassment, namely:

'A person (A) subjects another person (B) to harassment where, on the grounds of (insert social identity basis), A engages in unwanted conduct which has the purpose or effect of (i) violating B's dignity or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.'

'The conduct shall be regarded as having this effect only if, having regard to all the circumstances and in particular the alleged victim's perception, it should be reasonably considered as having that effect.'

Bullying

At the time of writing there is still no consensual definition of bullying. This is primarily because there is no one piece of legislation which specifically defines and outlaws non-specific or 'social identity neutral' bullying (see Part Four). As a consequence, several self-appointed authorities have come up with a variety of definitions which, as with the pre-2003 definitions of harassment, are similar but contain subtle distinctions.

An existing definition often quoted, although somewhat dated, defines bullying as:

'persistent, offensive, abusive, intimidating, malicious or insulting behaviour, abuse of power or unfair penal sanctions, which makes the recipient feel upset, threatened, humiliated or vulnerable, which undermines their self-confidence and which may cause them to suffer stress'

Other definitions of bullying can be sourced which focus on issues including the psychological basis for the bullying behaviour, the tactics used by the bully and how bullying manifests itself in the workplace.

Harassment and Bullying

A more contemporary approach may be to take the basic essence of the new stand alone definition of harassment and remove the qualification of the protected characteristic/social identity component, thereby defining any incidence of unwanted conduct and including either harassment or bullying as:

‘Where one person or persons engage in unwanted conduct in relation to another person which has the purpose or effect of violating that person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person’

‘The conduct shall be regarded as having this effect only if, having regard to all the circumstances and in particular the alleged victim’s perception, it should be reasonably considered as having that effect.’

The same but different?

It is common for employers and employees alike to conjoin the two concepts of harassment and bullying. Although they may be similar in terms of impact and underlying principles (and often including an abuse of power), they are different in other respects. For example, the motives driving each form of behaviour may vary, as will the recipient’s perceptions, the effects of the alleged misconduct, the response of colleagues, trade unions and of management, and eventually, the form of legal redress.

Therefore, the practice of some organisations of having an harassment policy and simply adding the word bullying or subsuming bullying under harassment is likely to result in ineffective mechanisms for addressing the array of subtle, underlying concerns. For example, in some circumstances it is perhaps fair to say that harassment can be a more straightforward matter to address than bullying and in particular where bullying simply reflects established management styles or cultural values.

If the approach of the organisation is reactive and geared around minimal statutory compliance then invariably the organisation will continue to face difficulties. However, an organisation that has a proactive approach that moves beyond compliance and towards good employment practice will find that it can address the complex relational aspects of working life by having a simple yet comprehensive approach to protecting dignity in the workplace.

Practical issues: The do’s and don’ts

Without doubt harassment and bullying are not easy issues to address, not least because personal constructions of what does or does not constitute unwanted and

Part One

unreasonable conduct can vary so dramatically. One person's friendly banter can be another's verbal harassment, one person's assertive management style can be another's overt bullying.

To analyse any situation from the perspective of the objective and reasonable person is never straightforward as personal experience and judgments will inevitably taint perception. Hence, when dealing with harassment or bullying it can never be taken as, 'I perceive myself as harassed or bullied therefore I am' because although the impact on the recipient is a crucial component it is not the sole criterion.

Over recent years harassment and in particular bullying have become very popular topics and there is an extensive literature readily available for general consumption. Often this material tries to identify common themes, for example:

Types - the unwitting, the vicarious, the repeat offenders, the psychopaths, the sociopaths, the authoritarian, those prone to denial, the jealous, the inadequate, the controllers, those with low self-esteem, and those with low stress tolerance

Tactics – ignoring, isolating, ridiculing, belittling, shouting, undermining, humiliating, offending, intimidating, micro-managing

Effects – stress, sickness, absence, low productivity, weakened morale, dysfunctional conflict, damaged interpersonal relationships, litigation.

Furthermore, problems and issues that are often identified as being associated with bullying and harassment include:

- Failing to recognise or misdiagnosing inappropriate behaviours
- Not identifying 'snowballing' - small examples of misconduct that steadily escalate in seriousness over time
- Not making connections between various events until it is too late
- Allowing the complainant to 'pinball' within and without the organisation in an attempt to resolve matters by not having good advice immediately to hand
- Labelling genuine attempts at performance management as inappropriate and unreasonable
- Not dealing with fundamental clashes of personality appropriately
- Failing to separate the personal from the professional at work
- Allowing the heart to rule the head in determining resolution procedures
- Only accepting stereotypes of what counts (e.g. an abuse of power from management level down)
- Failing to be pro-active (e.g. allowing banter to go too far)
- Not recognising the dangers of teambuilding and the associated possibilities of exclusion
- Not recognising the dangers of exclusive cultures in certain locations
- Mismanaging by passing matters off as a 'storm in a teacup'
- Presuming certain behaviours are acceptable when judged against industry or cultural norms
- Abusing procedures for personal gain
- Engendering a counter-claim mentality seeking 'a pound of flesh'

- Failing to use the spectrum of procedures that are appropriate and including performance management techniques
- Not accepting that everyone has the potential to bully or harass.

These lists alone could provide the basis for a separate publication but it can be all too easy to become engaged in an academic exercise of matching behaviour with that listed in a policy to see if it does or does not 'count'. Although such lists are useful their status should not be over-emphasised nor detract from more pertinent issues and in particular how to resolve matters satisfactorily and with the minimum of hurt, preferably without the need to resort to formal proceedings within or beyond the organisation.

To this end, aspects of applied common sense in the forms of Do's and Don'ts may be useful to bear in mind:

EMPLOYEES – DO:

- pause and reflect before doing anything
- objectively assess what has happened
- discuss the matter with someone to assess the situation and the way forward
- avail of in-house specialists/systems at an early stage (e.g. advisors)
- be assertive but not aggressive in deciding how best to proceed
- remember that more formal approaches can always be invoked but it may be difficult to return to informal procedures
- use all available internal mechanisms
- remain patient and allow each procedure to run its course before moving forward
- choose your language carefully
- be clear about what will resolve the matter to your satisfaction.

EMPLOYEES - DON'T:

- suffer in silence
- submit to a 'knee jerk' reaction
- allow emotion to cloud your judgement
- retaliate by fighting fire with fire
- lose your temper or wait for the last straw incident to trigger action
- bypass approved in-house mechanisms
- engage in a whispering campaign
- try to dictate the sanction that should be taken
- go straight to Court/Industrial Tribunal
- ask for a transfer
- go 'straight to the top'
- leave.

EMPLOYERS – DO:

- draft a dignity at work or harassment and bullying policy and associated procedures
- tailor the policy to your organisation (and involve staff and trade unions in its formulation)

Part One

EMPLOYERS - **Do** *continued*:

- inform all staff about the existence of the policy
- cascade training, beginning with senior management and those with designated roles in the procedures
- engage in a tailored training programme with all staff
- ensure that all necessary services are available as listed in the procedures (eg, counselling services, advisors)
- allow the policy to bed-in and then evolve via periodic review
- assess the effectiveness of the policy through monitoring and feedback
- ensure staff are comfortable with the policy and how to access it
- ensure that policy and procedures are seen to be effective
- allow principles of commonsense, equity, reasonableness and natural justice to dictate the operation of the policy at all times.

EMPLOYERS - **DON'T**:

- adopt a totally defensive approach (ie, try to stop complaints in their tracks)
- be misled by misperceptions or worries about 'opening the floodgates'
- have a token policy that is not tailored to your organisation and its needs
- simply add the word bullying on to an existing harassment policy
- do nothing when a concern is raised
- assess an incident on who the complainant is known to be or what he/she is thought to be like
- cut corners or circumvent procedures as specified
- assume you know what the complainant wants
- tailor procedures to what the complainant wants rather than principles of natural justice
- forget to act or wait until a complaint has been made
- see harassment or bullying as just another policy issue when it may reflect a cultural malaise
- treat harassment or bullying as stand alone issues but link to other policies (eg, disciplinary procedures, exit interviewing and performance management systems).

Adopting good employment practice

Any policy and associated procedures must be tailored to suit the needs and characteristics of the relevant organisation by selecting components of good employment practice and constructing a policy (why you do it) and procedure (what you do).

For a small organisation it may be possible to address matters of harassment and bullying via existing disciplinary and grievance procedures but with due recognition that such 'labelled' behaviour is unacceptable (perhaps via a separate statement of intent) and will warrant an appropriate sanction up to and including dismissal.

For larger organisations it is recommended that consideration must be given to compiling a subject-specific dispute resolution mechanism that essentially begins

with a statement of intent, a policy summary and a resolution mechanism. From here it must be decided how the dispute resolution mechanism complements the disciplinary and grievance procedures (eg, does the organisation integrate harassment and bullying into the existing statutorily compliant procedures or does the organisation devise subject-specific protocols designed for dispute resolution that sit outside the discipline and grievance procedures but which provide for a linked mechanism for both the discipline and grievance procedures). The latter option may incur duplication of process where the grievance procedure becomes a de-facto appeal which may prove complicated and in some cases unworkable.

Within larger organisations, mechanisms for tackling workplace harassment and bullying can operate via a comprehensive package that incorporates policy and procedures designed to ensure the protection of dignity at work. This should be supported by a well resourced infrastructure that provides for features including confidential advisors, external counselling provision, mediation and alternative dispute resolution mechanisms.

Some example of the difficulties associated with policies and procedures designed to address bullying and harassment would include the following:

- not involving staff in the formulation of policy and procedure
- not getting all staff to 'buy in' to the policy
- failing to train middle managers in the policy and procedure
- not addressing skills gaps in areas such as investigatory interviews
- inappropriate deviations from policy and approved practice
- abuse of policy by individuals to achieve personal aims
- failing to allow policy to evolve via feedback and review
- not achieving the balance between prescription and flexibility
- inconsistent application of policy and sanctions
- failure to see problems in policy impact (eg, timescales, stress, absences)
- attempting to eliminate judgement from the policy.

Good employment practice components

The following are offered to show what each element of a policy and related procedures may contain.

Statement of intent

_____ is committed to promoting and maintaining a good and harmonious working environment for all staff. Any form of unwanted conduct which has the purpose or effect violating an employees' dignity or that creates an intimidating, hostile, degrading, humiliating or offensive environment for employees is unacceptable and will not be tolerated or condoned.

The conduct shall be regarded as having this effect only if, taking into account all the circumstances and in particular the alleged victim's perception, it should be reasonably considered as having that effect.

Part One

Categorising behaviour

_____ recognise that it is impractical to compile a list of unacceptable behaviours that will constitute harassment and/or bullying. Therefore based upon the facts (eg, language, conduct, omission, exclusion, innuendo) the unwanted and unreasonable conduct itself will determine whether it is regarded as harassment or bullying. For example if the unwanted conduct or creation of hostile environment is established to be on the grounds, deliberately or not, of a protected characteristic/ specified aspect of social identity, then it will be categorised as harassment as defined within the relevant anti-discrimination legislation. If it is not then it may be categorised as either bullying (where social identity is irrelevant) or harassment (where some other aspect of social identity is salient).

Procedure (small organisations)

Given that _____ is a small organisation it is inappropriate to have a separate bullying and harassment procedure. However, in accordance with the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004, incidents of harassment and/or bullying shall be addressed via the Grievance and Discipline procedures as required under the above legislation. (see procedures – either existing or minimum statutorily compliant model as per Department for Employment and Learning Guidance)

Employees' and employers' duties and responsibilities

Everyone in this organisation should be individually aware of what constitutes behaviour that is hostile, intimidating, humiliating, degrading or offensive. Therefore there is a moral and legal expectation that everyone is responsible for his/ her own acts and or omissions. There is no requirement for a complaint to be made before appropriate action is taken in a proactive manner by management. Similarly, in some cases behaviour will be presumed to be offensive without the need for an affected employee to state that it is offensive.

In many instances commonsense will prevail and good practice will come naturally such as:

- ask someone to stop the offending behaviour
- recognise that everyone has the potential to bully or harass
- think before raising a 'sensitive' subject in casual discussions
- do not assume that labelling something as a 'joke' will lessen its impact
- try to think from an objective perspective and accept that there are various scales of perception
- attempt to resolve the matter in a way that enhances the possibilities of retaining the basis of a working relationship in the future
- be aware of concepts such as reasonableness, procedural compliance and alternatives to litigation.

Key issues when developing good employment practice

- Employees should always be conscious of reasonable boundaries regarding language, banter, symbolism and established taboos.

- The impact on the recipient is more important than the intention of the alleged harasser/bully. However, intentional harassment and/or bullying may be deemed a greater offence and as such the employer will have more latitude in dealing with the matter.
- Failing to act can be as much of an offence as actually saying or doing something that constitutes harassment and/or bullying. Management reserve the right to act in a proactive manner regarding instances of harassment and/or bullying, for example, management do not need to wait until an employee registers a formal grievance to begin investigations or take action.
- Some conduct can be assumed by management to be unwanted unless it can be proved to the contrary and it is recognised that there may be difficulties in knowing where to draw the line.
- A person's dignity can be violated without causing an harassing environment and an harassing environment may not necessarily violate an individual's dignity. Harassing in this context meaning – hostile, degrading, humiliating or offensive.
- Behaviour that may not constitute harassment may still be deemed to be causing an employee a detriment as defined in the anti-discrimination legislation.
- Protection from harassment and/or bullying extends beyond employees and covers job applicants and contract workers such as agency workers.
- Many instances of alleged harassment and/or bullying are less than straightforward. However, a case-by-case approach can be adopted to address problem scenarios such as quite serious but one-off incidents, second hand witness to words or actions, the employer being totally unaware of any incidents of bullying and/or harassment, unduly sensitive employees and problems associated with perception and misperception.

Part Two: Policies & Formal Procedures

To provide a robust response to harassment and bullying, a tailored approach is essential. While ready-made documents are available they should be amended, adapted and applied in a way that makes full provision for the specific needs and characteristics of the organisation, its employees, and its clients or customers.

The organisation must ensure that provision is made for dealing with any form of unwanted and unreasonable conduct whether it is based on social identity or not. The process of policy development can help to engender a genuine sense of ownership while at the same time proofing the emerging policy against existing legislation, related policies and procedures and the organisation's structure and culture. Ideally the policy will develop as a collaborative project between employer and employees, ensuring that the entire workforce becomes committed to a set of standards against which unwanted and unreasonable conduct is deemed unacceptable.

Where to begin?

Ideally the policy should start to impact from the time of appointment, with all new contracts of employment including reference to the rights and responsibilities of both the employee and fellow employees in relation to protection of dignity at work. In essence, an employment contract enshrines the power relationship between the employer and employee within terms and conditions of employment. As part of that contract it would seem sensible to make clear not only that the employee can expect that his/her employer will endeavour to respect his/her dignity but equally that the employee must strive to protect the dignity of others.

In this way, all new employees will have tangible evidence that the employer will endeavour to work within existing legislation to afford protection, whether that is on the grounds of social identity or not, and this message can then be reinforced through the adoption of appropriate corporate policies.

Can one policy deal with both harassment and bullying?

Understandably, given the statutory obligations of the Equality Commission for Northern Ireland, its model harassment policy (see Appendix 1) has been couched in the context of the anti-discrimination legislation and is primarily aimed to be applied to the various forms of harassment as defined in that legislation. This legislation has developed considerably over recent years, most recently taking on board definitions of harassment derived from various European directives (see Part Four).

While the model policy has been shown to be effective in dealing with harassment on grounds of specified characteristics, in its current form it does not address bullying or unwanted conduct which is not based on protected characteristics, ie, where harassment is social identity neutral. At the same time, a number of organisations have already recognised that an overarching policy that encompasses both harassment and bullying can operate successfully and can help to rationalise procedures which in the past may have been treated as separate.

This trend has been encouraged by the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004. These Regulations make provision, in certain circumstances, for an employee to avoid using statutory grievance procedures if they are subject to 'further harassment'. However, harassment, as defined in the above Order, is not set in an equality context but rather it has the potential to be 'social identity neutral' thus accommodating behaviours traditionally defined as bullying. Thus it would seem that addressing harassment and bullying jointly regardless of their standing in legislation is not only more popular but increasingly more sensible and straightforward in line with a good employment practice that moves beyond minimal legal compliance.

All these issues reinforce the need for a tailored and thoughtful approach as opposed to a cut and paste exercise. In some cases this may mean going beyond policy development issues and towards a root and branch review of the culture of the organisation and especially if there exists an institutionalised culture that rewards inappropriate behaviours including bullying. Once again the policy must fit the organisation rather than the organisation being made to fit the policy.

What should a policy contain?

Scene Setting

In many ways common sense dictates that a dignity at work or harassment and bullying policy should contain core components which are reflective of the ethos of the organisation and that overtly link the policy to its mission and values. Such elements could include statements of intent, definitions of key terms, protocols, modes of resolution and links with other policies (eg, discipline and grievance). A joint working approach involving employers, employees and their representatives will ensure that all these elements can be combined in a document that is truly reflective of the organisation and its circumstances. Furthermore, a collaborative, partnership approach will allow for all matters to be worked through via a series of meetings that will cement ownership and general acceptance.

Even the title of the policy is significant in this regard. An harassment and bullying policy may be perceived as reactive, dealing with problematic conduct after it has arisen. Alternatively, using the title of a dignity at work policy may foster the impression of an organisation that wishes proactively to promote a climate of respect and tolerance.

In the past, organisations have been tempted to reference long lists of unacceptable behaviour in their policies. Unfortunately these bodies were then faced with a quandary when a non-listed behaviour happened to arise. An effective policy must balance the need to be specific with the need to be responsive and flexible. There may be a temptation to simply list what the legislation outlaws with the net effect that inappropriate behaviours such as bullying are not properly addressed or become lost or subsumed. Instead it is important to be precise about the organisation's commitment to protect dignity and to have in place procedures that are responsive to the needs of those who feel that their dignity has been violated or who are working in an hostile environment.

Part Two

Statement of Intent

Good employment practice would dictate that a sound policy should not only allow managers to continue to manage in a defined framework, with the flexibility to accommodate appropriate management styles, but will also make employees feel confident that the policy is user-friendly, accessible and effective. The strength of the policy can be determined by how well it operates in terms of prompt resolution, perceived fairness, managers' capacity to manage, as well as the maintenance of good and stable working relationships throughout the organisation.

A policy statement should indicate that those found guilty will face disciplinary action that may extend up to and including dismissal depending on the seriousness of the conduct. Cross references should be made to extant discipline and grievance procedures and how the harassment and bullying procedure sits alongside those procedures. To demonstrate how these procedures operate it can be useful to include a flowchart describing the process from initial complaint to resolution.

Definitions

Ordinarily, the statement of commitment or intent should be followed by guidance on the forms of behaviour which are seen to constitute or define harassment and bullying. These should be presented not in a prescriptive way but rather via sample illustrations. One option may be to alter the generic definition of harassment to eliminate mention of specific protected characteristics or social identities. An example is given below:

'Unwanted conduct which has the purpose or effect of violating the person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment'

To allay an employer's fear that the definition is so wide that it could be subject to misinterpretation or abuse, the following qualification could be added

'Conduct shall be regarded as having this effect only if, having regard to all the circumstances and in particular the alleged victim's perception, it should be reasonably considered as having that effect.'

Responsibilities

The responsibility of employees in relation to the harassment and bullying policy should then be outlined. This could begin with a general statement that the organisation and all its employees have a responsibility for helping to create and sustain an environment free from bullying and harassment, and that employees have a duty to assist and support management in this regard. By inference, a duty is placed on managers and supervisors to ensure that all employees are aware of the policy and how to use it, and an assurance that complaints will be dealt with in a genuine, sympathetic and confidential manner.

Those in positions of responsibility and authority have a duty to ensure that bullying and harassment does not occur and where it does occur that it will not be ignored. Where a manager or supervisor becomes aware of such behaviour then

immediately that person is seen to be acting as agent on behalf of the organisation, and any actions that are taken (including no action) may either increase or decrease both personal and corporate liability.

Quite often senior managers may have concerns regarding issues such as the potential for the 'floodgates' to be opened in terms of complaints, the possible creation of a compensation culture within the organisation, and the costs associated with regard to training or indeed settling harassment or bullying related matters. The above factors often act as deterrents towards policy formulation and effective management, however, they need to be examined within the context of bigger problems such as potential deterioration of employee relations, negative impact on staff morale and the increased potential for collective unrest within the organisation.

Named Individuals

The duties associated with named individuals should also be made clear, that is who acts in which specific capacity within the organisational hierarchy. The key issue is clarity of roles among those with responsibility and those using the policy. These roles could include functions such as the investigating officer(s), presenting officer, confidential advisor and/or mediator and those involved with hearings and any subsequent appeals.

In reality the size of the organisation will dictate the need for or extent of the roles. Indeed, in some cases and in particular small organisations the line manager may be called on to act in a variety of roles, both informal and formal. In larger organisations it is important to ensure that different individuals fulfil different functions, and that senior managers are not compromised should they be called on to hear an appeal.

Procedures and Paperwork

The relationship between informality and formality will be addressed in greater detail in Part Three but good employment practice suggests that low level resolution via informal, alternative mechanisms is often preferable in order to limit hurt and damage - but this route is not mandatory. It is not always within the gift of management to dictate that the informal procedure must be exhausted before the formal procedure can be commenced and assumptions should not be made regarding the appropriateness of either informal or formal remedies. Furthermore, should an employee be prevented or actively discouraged from pursuing a formal case by management then this later could be construed as misleading, vexatious or an act of victimisation.

The primary focus of the Dispute Resolution Regulations is on the internal (ie, within the workplace) resolution of disciplinary and grievance matters. With this legislation in mind both employers and employees need to be aware of the legal implications associated with pursuing avenues of redress internally and externally via, for example, the Industrial or Fair Employment Tribunal where the claimant has the basis of an harassment case under the amended anti-discrimination legislation.

Part Two

It is quite commonplace for employees to receive a copy of the bullying and harassment policy along with information highlighting the difference between informal and formal internal procedures, a synopsis of those procedures, a flowchart dealing with the process and protocols, and details of potential rights of employees in an external forum such as a court or a tribunal.

The paperwork may be daunting for both the employer and employee alike. However, experience has shown that issues such as procedural correctness, flexibility of approach within limits, and early yet appropriate interventions provide stability of process and increase the potential for maintaining the fabric of working relationships.

Does an allegation of harassment or bullying constitute a grievance or a disciplinary matter?

A choice may be made by an employer as to whether an allegation made should be investigated as a grievance or as a disciplinary matter. In practice many employers investigate the allegation as a grievance and, where the grievance is upheld, use the information gleaned in the course of the investigation for the purpose of taking disciplinary action. A different approach may be adopted where, for example, the harassment was witnessed by a line manager and, rather than awaiting a grievance, a disciplinary investigation may be initiated.

It would be prudent for employers to ensure that their harassment and bullying procedures satisfy the statutory minimum procedures contained within the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004. Compliance with these requirements will avoid duplication and will protect the statutory rights of employees.

As with many things in the employment sphere, there may be circumstances where an employee does not need to go through the harassment and bullying policy and in other cases s/he may not need to go through the grievance procedure either. The above scenario will become relevant if an employee can demonstrate before an Industrial Tribunal that s/he circumvented the internal procedures (specific and general) because the person had been subject to harassment whether on specific equality grounds or not and had reasonable grounds to believe that invoking the statutorily compliant grievance procedure would result in further harassment. The extent of the impact of this provision of law remains to be tested in terms of proof required by the employee and ease of bypassing the statutorily compliant procedures.

It is often the case that an harassment and bullying case feeds into either the grievance or the disciplinary procedure as a matter of course given the overlap in terms of procedures including the parties involved, meetings, evidence etc. As a result there should be provision in the procedures and accompanying flowchart to demonstrate at which juncture either the grievance or disciplinary procedure apply.

Must a complainant have given a prior indication that the behaviour was unwanted?

No. Where the behaviour is unreasonable and unwanted to the extent that a reasonable person would feel affronted by that behaviour then a 'one-off' incidence has the potential to trigger a formal procedure. That said, once an organisation or any employee (and in particular those in positions of responsibility) have become aware that certain conduct is unwanted and unreasonable and have taken no action to remedy the situation then liability is likely to increase.

How should a formal complaint be processed?

The statutory dispute resolution procedures require complaints to be made in writing. In certain situations, it may be necessary to make a reasonable adjustment for a disabled person or for someone who is not fluent in English or sufficiently literate to do this. An adjustment could be providing assistance with writing the complaint.

When an alleged victim makes it clear that they wish to pursue a formal complaint then it is essential that the process is invoked promptly and according to set protocols regarding timescales, meetings and personnel involved.

There should be total clarity regarding who has responsibility for the initial handling of the complaint (including necessary investigations and the use of alternative managers) and provisions as to putting the nature, basis and details of the complaint in writing, and the timeframe for meetings including location, timing, changes and scope for decision-making.

As a corollary to the above, the line manager addressing the complaint must be trained in handling such matters, must not be the harasser/bully, must follow set procedure rigorously, should be chosen (when achievable) with due sensitivity to the alleged victim's social identity, and should treat the matter in a confidential manner.

Who should conduct the investigation?

The answer to this question is largely dependent on factors such as the size of the organisation and available resources. Ideally the investigation should be carried out by a designated officer with experience in both HR matters and information gathering, perhaps working in tandem with the appropriate line manager. This person should have no involvement in the case, have been trained in this area and, where appropriate, have the authority to make decisions as necessary. This approach addresses potential accusations of a line manager acting as the proverbial 'judge, jury and executioner'.

At times the size of the organisation may dictate that one person must play several roles. This is acceptable provided the procedure and its operation and subsequent decisions are fair and reasonable.

Part Two

Due regard should also be paid to matters such as who acts as scribe, from where the investigator is sourced (eg, from the HR dept), limitations on the investigator's powers, timing of meetings, potential prejudicial matters and/or conflicts of interest, the remit of the investigation (facts only; facts and recommendation; facts and decision), and the use of external individuals or bodies for assistance.

In order for the organisation to learn from the case and to facilitate policy review, when the case has been resolved it would be appropriate for those involved in the investigation to come together in a collaborative working party (i.e. the group that formulated the policy plus those involved informally and formally in the case). This review will help the policy and procedures evolve and more effectively address future problems should they arise.

How should the investigation be conducted?

The basic principles of fairness, promptness, consistency, reasonableness and objectivity should be observed, in conjunction with practical matters such as meeting locations, timings and duration. The approach of the investigators should be comprehensive and thorough but not quasi-judicial nor unduly lengthy. Provision should be made to ensure confidentiality during all proceedings and for the storing of all relevant data and paperwork for an appropriate time period following the resolution of the case (normally two years).

Due consideration should also be given towards issues that may not be immediately apparent such as the impact on direct or indirect witnesses to the harassment and bullying, dealing with third party complaints (i.e. employers who wish to be proactive about tackling a problem without having to wait for an employee to instigate a complaint), employees who withdraw their complaint prior to conclusion, and employees who demand a resolution to the matter but want total anonymity or refuse to use any internal mechanism.

How should the alleged perpetrator be treated during the investigation?

At an early stage in the investigation the alleged perpetrator must be made aware of the nature and substance of the complaint being made against him/her in a meeting either orally or in writing, and advised of the stages in the procedure. The alleged harasser/bully should, on good employment practice grounds, be afforded the right of accompaniment by a work colleague or trade union representative.

At the meeting with the alleged perpetrator it would be important to advise him/her not to approach the complainant directly, nor to attempt to influence the actions of others. Such behaviours could be construed as further acts of harassment, bullying or victimisation. At the conclusion of the investigation it would be appropriate to forward a copy of the report to the alleged perpetrator in advance of any future meetings or hearings.

As stated previously the size and resources of the organisation will determine matters such as internal access to support mechanisms, counselling services (internal/external), trained individuals who act as 'sign-posters', confidential advisors

well versed in procedures, trained internal mediators, and access to external services such as consultants, mediators and arbitrators.

Provision should be made for the possibility of an harassment or bullying incident being resolved via alternative dispute resolution such as mediation. This option should be made available on a purely voluntary basis where, for example, the alleged harasser/bully shows genuine remorse and wishes to explore the possibility of mediation, and the alleged victim voluntarily agrees that this is his or her chosen avenue of resolution and is aware of the right to refuse mediation. The Labour Relations Agency may be able to facilitate a mediation service in certain circumstances and as such this may be considered as an option. Alternatively, confidential advisors, with appropriate training, may be able to act as mediators. However, some cases will not be amenable to mediation for a variety of reasons and including where all parties are not in agreement.

It is important to note that whatever information, advice or support mechanisms are put in place within or outside the organisation, they are made equally available to the alleged victim and the alleged perpetrator, and that appropriate safeguards are in place to protect confidentiality and to avoid conflicts of interest. If it is clear that the unwanted conduct may have included criminal behaviour, then, normally with the alleged victim's consent, it would be appropriate to inform the relevant external authorities, including the PSNI. In such cases the alleged harasser/bully normally should be put on a precautionary suspension.

How should interviews be conducted?

The investigation must proceed with discretion and sensitivity. It will normally involve interviews with all those involved with the case. Interviews should be on a face-to-face basis where possible and comprehensive notes should be taken as an integral part of the process. The interview should be clearly structured and explained to the parties involved, with provisions in place regarding accompaniment. Those being interviewed should be reassured that the information will be treated in confidence and the data acquired will be retained in accordance with data protection principles and may be used if necessary in a subsequent disciplinary hearing.

If a witness becomes distressed then it may be appropriate to conduct the interview over more than one session or, in exceptional circumstances, to consider alternative means of gathering information. At all times it would be important to remain sensitive to the feelings of the interviewee and to conduct the interview accordingly. Issues that should be borne in mind that may trigger contingency arrangements include, for example, circumstances where witnesses wish to remain anonymous or where an alleged harasser/bully requests to question witnesses. Specific legal advice is recommended in relation to such issues (see Part Four hereof in relation to 'informant evidence' and also **Santamera –v- Express Cargo Forwarding t/a LEC Ltd** [2003] IRLR 273).

Part Two

At the end of the interview it may be appropriate to briefly summarise the information provided during the interview and to invite further comment. It would be important to advise the person about the subsequent steps in the procedure.

Typical questions which could be asked include:

Complainant/alleged victim

- Who was involved?
- When did the incident/s take place?
- Where did the incident/s take place?
- Did anyone witness the incident?
- What did the incident/s involve?
- Had there been a previous incident/s?
- Had there been any witnesses to previous incidents?
- How would you describe your working relationship with the alleged harasser/bully:
 - Before the incident/s?
 - After the incident/s?
- How did you react to the incident?
- How did the alleged bully/harasser react?
- Did anyone witness your reaction?
- Who did you first tell of the incident?
- How do you now feel about the incident/s?
- Have you spoken to the alleged bully/harasser about how you feel?
- What was his/her response?
- Are you aware if anyone else has experienced bullying/harassment from this person/s?
- Who have you spoken to about this or previous incidents?
- What support have you had either within or outside the organisation?
- How has the incident/s affected your work?
- Have you anything else that you would like to say?

Alleged harasser/bully

Initially, the complaint/s being made should be outlined and specific questions asked about the information given by the person making the complaint. The responses should be summarised and checked for concordance with the complainant's evidence. During the interview it would be important to explain that any subsequent approaches to the complainant may constitute further harassment and/or bullying. The following questions (or a subset) may then be appropriate.

- Is the description of the incident/s which I have outlined an accurate portrayal of what happened?
- If no, in your own words how would you describe the incident/s?
- Where did it/they take place?
- Were there any witnesses?
- Had there been a previous incident/s?
- Had there been any witnesses to previous incidents?

- How would you describe your working relationship with the complainant:
 - before the incident/s?
 - after the incident/s?
- Were you aware of the complainant's response at that time?
- If no, when did you become aware of his/her response?
- How do you now feel about the incident/s?
- Have you spoken to the complainant since the incident/s?
- What was his/her response?
- Who have you spoken to about this or previous incidents?
- What support have you had either within or outside the organisation?
- How has the incident/s affected your work?
- Have you anything else that you would like to say?

Others

Initially, the complaint/s being made should be outlined and the person's role in relation to the incident/s or those involved should be made clear. If the person has an involvement then the nature of the involvement should be clarified. Questions should then focus on this involvement, for example asking for detail of events, or describing disclosures. If the person maintains that they had been subjected to unwanted and unreasonable conduct by the alleged perpetrator then it would be appropriate to use questions as listed under **Complainant** above.

If the person has been nominated by either party primarily as a character witness, and that person had no involvement with the incident(s), whether before, during or after, then it may be appropriate to ask him/her to supply a written submission but not to carry out a face-to-face interview. It is worth reiterating that witnesses to the event or character witnesses may be uncomfortable with the process and request anonymity and this should be given consideration if there are exceptional grounds to do so (see Part Four hereof for guidance on the limited ability to protect informants).

It would be important to stress that the case is being dealt with in confidence, and mention of the need to report further acts of harassment/bullying or subsequent victimisation would be appropriate.

How long should the stages of the investigation take?

The Equality Commission's model policy and procedure does not set out a definite time frame but suggests that complaints should be investigated as quickly as possible. This is in keeping with the ethos of the Employment (Northern Ireland) Order 2003 Dispute Resolution Regulations (Northern Ireland) 2004 regarding procedures being taken without delay.

In certain circumstances, given difficulties in arranging suitable interview times and convening disciplinary panels, and perhaps an appeal, it may prove difficult to keep to a tight schedule. Nevertheless, it is in the best interests of all parties involved if a satisfactory conclusion can be reached speedily, the time frame being measured in days or weeks rather than months.

Part Two

Problems that may be encountered which may impinge on the investigation timetable include where one of the parties goes off work on long term sickness or resigns, witness unavailability or the complainant withdraws his or her complaint. In such instances a reasonable approach should be adopted by all those concerned. For example, it may not always be appropriate to wait until someone returns from long-term illness to resolve matters, or the employer may feel duty bound to proceed with an investigation even where the initial complaint has been withdrawn or the alleged harasser/bully has made an admission of wrongdoing, or has left work.

What role can trade union officials play?

Where an alleged harasser/bully is accompanied by a trade union official the role of the accompanying individual is set out in the context of the grievance procedure in the Employment Relations (Northern Ireland) Order 2004, i.e. address the hearing, confer with the person s/he is accompanying, and respond to views expressed by the panel but not answer questions directly on behalf of the person s/he is accompanying.

The situation is different if there is a contractual provision allowing the trade union official to represent the individual concerned. In this situation the role is more akin to that of an advocate who would be able to answer questions directly on behalf of the employee. In addition that person should be kept informed of all developments and would be entitled to attend all meetings.

Trade union representatives can find themselves in a dilemma if asked to represent an alleged harasser/bully, and particularly if another union member has raised the complaint of harassment or bullying. Local representatives should always clarify the union's central policy on this matter before proceeding and, if policy permits, then a representative may act on behalf of the alleged perpetrator throughout the procedure as either a representative or accompanier. Most unions sensibly recommend that separate representatives deal with the alleged harasser/bully and the complainant, and there should be no contact between the two accompaniers or representatives during the proceedings.

How should the complainant be treated during the investigation?

The employer has a duty to protect those bringing complaints of unwanted conduct. This will include avoiding contact between the complainant and alleged perpetrator and ensuring that the person is not subject to any further unwanted and unreasonable conduct or detriment during the course of the investigation. If transfers or precautionary suspensions are thought to be necessary and appropriate then it is good practice to transfer or suspend the alleged harasser/bully rather than the complainant. Again the size and resources of the organisation will determine what additional services may be available to the complainant in terms of counselling or advisory services.

In situations where the complainant has been traumatised or appears to be stressed or unwell because of the unwanted conduct then it would be appropriate

for the organisation to arrange professional counselling, either using in-house occupational health personnel or external counsellors.

How often should the complainant and witnesses be interviewed?

Employers have a duty to protect those bringing forward allegations during the course of an investigation and beyond. According to the Equality Commission's guidance, 'It must be recognised that recounting the experience of, for example, sexual harassment is difficult and can damage the employee's dignity. Therefore a complainant should not be required repeatedly to recount the events complained of where this is unnecessary.'

A complainant bringing a formal complaint could expect to be interviewed at most on three occasions. First, when the initial disclosure is made to the contact person; second, by the investigating officer(s) during the formal investigation (an interview which may have to be carried out over more than one session), and third, perhaps during the course of a disciplinary hearing, should there be a need to clarify the investigation report. Witnesses may expect to be interviewed at most twice, once during the course of the investigation and perhaps once during a disciplinary hearing, but only if they are required to clarify or elaborate on the evidence provided during interview. If an appeal, within the context of a Disciplinary or Grievance procedure, is lodged then there should be no expectation that the complainant or witnesses would be required to repeat their evidence, although in exceptional circumstances this may be necessary, for example *de novo* hearings.

The alleged perpetrator is likely to be interviewed up to four times. First, when s/he is informed of the allegations; second, during the course of the investigation; third, during any disciplinary hearing; and fourth, during any appeal.

What burden of proof is necessary?

In common with tribunals, the case must be proved on the balance of probability, namely was it more likely that the unwanted and unreasonable conduct occurred than it did not occur. In situations where a case is based on one person's word (for example, the complainant) against another (the alleged harasser/bully) then this balance can be poised delicately and in these situations any other salient information can carry considerable weight. For example, this may include any additional evidence of the complainant's dignity having been violated, or the creation and existence of an intimidating, hostile, degrading, humiliating or offensive environment. In addition some other factors that should be noted include those such as previous knowledge of the alleged perpetrator's behaviour, any previous incidents involving either or both parties, or the behaviour or demeanour of the complainant or the alleged harasser/bully before, during or after the incident is deemed to have taken place.

The above demonstrates the need to be prompt about reporting incidents and putting the policy and procedure into action while the facts are clear. At the same time it is important not to rush into the process as a knee-jerk reaction to an incident that may have been in essence trivial and thereby unreasonable to pursue on the grounds that perhaps someone was being unduly sensitive.

Part Two

What information should the report contain?

The report on the investigation should include a concise yet thorough summary of the investigation, including the evidence yielded by all interviews, ideally signed as an accurate record by the person interviewed. These summaries must strive to make clear the evidence brought forward by that witness, including the nature, basis and substance of any complaint(s) raised against the alleged perpetrator during the interview. In conclusion the report must list the allegations which have been identified according to the complainant. At this point the person investigating may have no other role but simply to present the information in a manner that will allow an appropriate manager to make a decision. However, in other organisations the role of the investigator may be extended to making a recommendation based on the facts to the appropriate manager and, exceptionally, s/he will also make a decision if it is within the scope of his/her powers.

It would not be necessary to include verbatim witness statements or transcripts as the investigation report should be made available to the alleged harasser/ bully prior to any disciplinary hearing. In certain circumstances it may even be appropriate to protect the identity of those who have been interviewed. However, as indicated previously, this would be exceptional and there would need to be substantiated grounds for granting anonymity with full credence being attached to the evidence.

The report must contain a decision or recommendation section, depending upon the remit of the investigation.

The investigation may reveal no evidence of harassment or bullying. If this is the case then the complainant and the alleged harasser/bully should be informed of this decision, and the appropriate line/recruitment manager(s). The complainant should be notified that s/he still has the right to pursue the case outside the organisation if s/he chooses, and that all information will be made freely available should s/he decide to follow this course of action.

Should the investigation reveal that the complaint was vexatious, malicious, misconceived or mischievous then it may be appropriate to consider disciplinary action against that person using normal disciplinary procedures.

The investigation may conclude that harassment and/or bullying did occur and the investigating officer may, depending on the extent of their remit, record the facts accordingly and submit them to the appropriate manager to decide whether the matter is one of minor, major or gross misconduct. This will set in motion the appropriate process under the disciplinary procedure.

In the words of the Labour Relations Agency's Code of Practice on Discipline and Grievance Procedures (2005), '...where, following a disciplinary meeting, an employee is found guilty of misconduct, a first step would be to give him/her a formal oral warning or a written warning depending on the seriousness of the misconduct. When issuing such warnings employees should be informed (either

orally where a formal oral warning is issued or in writing where a written warning has been given) that the action is part of the formal discipline procedure, the nature of the misconduct, the level of disciplinary action being taken, the change in behaviour required and the consequences of failing to correct the behaviour and his/her right of appeal against the disciplinary action. Where a formal oral warning has been given a note of the warning should be kept but disregarded after a specified period (eg, six months). Where a written warning has been issued a copy should be kept but disregarded for disciplinary purposes after a specified period (eg, 12 months) ...'

If the facts of the case determine that a breach of discipline has occurred, and the organisation's disciplinary code requires a formal disciplinary hearing, then the investigation officer, if appropriate, should hand the written report to the appropriate senior manager who will then set in motion a formal disciplinary hearing. The investigating officer may be required to give verbal evidence at such a hearing, either giving evidence based on the report or acting as a presenting officer at the hearing. It would be expected that the investigating officer should attend the disciplinary hearing and any subsequent appeal.

Should there be a right of appeal from a decision that harassment did not occur?

In order to comply with the Employment (Northern Ireland) Order 2003 Dispute Resolution Regulations 2004, it is essential to provide a right to appeal where the complainant is not satisfied with the decision reached. If the complainant informs the employer of his/her wish to appeal, then a further meeting must be arranged and the complainant must take all reasonable steps to attend the meeting. The appeal meeting should be conducted where possible by one or at most two members of more senior staff with no previous involvement with the case or the parties involved. The appeal panel should be asked to consider the grounds of the appeal (eg, specific grounds or based on the employee being unhappy with the original decision) with reference to the documentation and the procedures that had been followed. Following that meeting (at which the parties would continue to be entitled to accompaniment) the employer must inform the complainant of the final decision.

It is recommended that the procedure should provide the appeal panel with the right to conduct the appeal hearing in the manner which it deems fit depending upon the facts of each case. While it may be useful to set out the normal practice to be adopted at appeal meetings, it is important not to fetter the discretion of a panel to establish to the truth by whatever it deems to be the appropriate manner providing all parties receive a fair hearing.

How do the investigation and disciplinary procedures interact?

For many organisations it is this interaction which causes problems in the satisfactory resolution of cases. Having investigated a case thoroughly and having found evidence that unwanted and unreasonable conduct may have occurred, then the organisation's disciplinary procedure must be brought into play. However it is not sufficient for a policy or procedure merely to state that this will be the

Part Two

case. Instead it is necessary to consider the disciplinary procedure alongside the harassment and bullying procedure and identify clearly how the two will interact. This would include how a decision derived from an investigation is used to set in motion the disciplinary procedure and whether the investigation tallies with, and is complementary with, disciplinary procedures.

When drafting a policy it may be necessary to review existing disciplinary procedures to ensure that they are suited for dealing with harassment and bullying cases, for example by including mechanisms for protecting those raising allegations and giving evidence, during both investigations and hearings.

It may also be necessary to consider whether complaints of harassment and bullying which are proved should be left on file indefinitely or for a specified period of time. That is, are they able to become expunged or spent as is normally the case with other disciplinary offences? This issue causes difficulties between the need to, for example, track serial misconduct and the legal requirement to comply with the basic principles of data protection. In addition, if a complaint has been on file for a certain period of time, is it still able to be used in an aggregation or progression of disciplinary punishment, or is the previous offence merely taken into account in deliberations? If a previous case of harassment or bullying has been proved, a question mark remains over whether an employer should ever disregard that previous offence completely, irrespective of when it occurred. This would prompt the question, why is the record being kept if not for disciplinary purposes?

What forms of disciplinary procedure are appropriate?

There are likely to be a variety of forms of disciplinary proceedings, varying along a continuum from the adversarial (based on the principles of defence and prosecution as enacted in a tribunal or court) to the inquisitorial (where the objective is to consider all available evidence and argument but where 'sides' are less visible). Whichever is the case, in the past many hearings have shared a tendency to be over-cumbersome, over-staffed and over-long. Recent cases have drawn attention to the fact that procedures should not be quasi-judicial. At the same time, this needs to be balanced with the requirements of the Employment (Northern Ireland) Order 2003 Dispute Resolution Regulations (Northern Ireland) 2004 in terms of the statutory minimum requirements for discipline procedures. An organisation must query the cost-effectiveness of using several members of senior staff to hear lengthy cases and especially given the likelihood of an appeal should the decision go against the alleged perpetrator.

In large organisations it is quite common to have panels making decisions on matters of discipline as part of a multi-stage process with various levels of appeal, with reasoned decisions being delivered at the end of a lengthy process.

An internal disciplinary panel cannot hope to mimic the judicial process but should aim to be fair, reasonable and legally compliant. Hence there should be breadth of representation on the panel without it becoming too weighty or cumbersome. Normally, panel members should be supplied with all documentation, and

including the investigation report, prior to the meeting. Witnesses should be asked only to elaborate and clarify this information rather than recount all details again, and the process and protocols of the meeting should be closely controlled by the Chair of the panel. The role of the Chair is central to the success of a disciplinary hearing and appropriate training must be given to the Chair, along with all panel members and presenting officers.

It is imperative that notes are taken of this meeting and a record made of any decisions reached, countersigned by the members of the panel and stored in line with principles of data protection.

How should an appeal by an alleged harasser/bully be conducted?

Having received notification of the disciplinary panel's decision, the alleged harasser/bully must have a right to appeal the decision within a specified time that is consistent with the provisions of the Employment (Northern Ireland) Order 2003 Dispute Resolution Regulations 2004. The basis of the appeal (ie, that the employee is unhappy with the outcome) must be made clear and it is this which should direct the subsequent appeal hearing where the employee is invited to attend the appeal meeting (again, with the right of accompaniment) and hear a final decision after the meeting.

The guidance provided above in relation to appeals by complainants against unfavourable decisions applies equally to appeals against disciplinary action.

Should a complainant be required to attend a disciplinary hearing?

In certain circumstances the person bringing the complaint may be asked to give evidence in some form and at some juncture in a disciplinary hearing. However, given the employer's duty of care, the decision as to whether it is appropriate for him/her to be questioned directly by the alleged perpetrator may depend on the circumstances of a particular case. Current case law suggests that there is no implied right for the alleged harasser/bully to 'cross examine' his/her accuser in such an internal forum. Indeed, in certain circumstance, for example where the complainant has been traumatised by the unwanted behaviour or still feels threatened by the alleged bully/ harasser, then it may not even be appropriate for the two parties to be present simultaneously.

Where the alleged perpetrator has concerns over the evidence given by the complainant or witnesses (especially anonymous witnesses) then those concerns should be dealt with by the disciplinary panel. At all times caution must be exercised in placing the complainant under stress during this process and equally, due regard must be given to the rights of the alleged harasser/bully who must not be subject to a process which in essence represents a *fait accompli*. A balanced and 'felt fair' approach should ensure that both sides feel the process was administered equitably despite their personal feelings about the perceived offending incident(s).

What forms of discipline are appropriate?

As with any type of disciplinary action, an employer must act in a procedurally

Part Two

correct manner which is reasonable, prompt, and consistent, and within the statutory framework in determining the disciplinary sanction. Hence the context within which the unwanted conduct occurred, the history of previous proven or non-spent incidents, either involving the alleged victim or other employees, the response of the organisation, the degree of hurt suffered by the complainant and the general organisational culture within which the behaviour occurred may all be salient.

The disciplinary panel should naturally consider the full range of sanctions that are available, including dismissal, and choose the most appropriate. The Labour Relations Agency's Code of Practice on Discipline and Grievance (2005) gives excellent guidance on these matters within the context of the statutory framework.

The decision on the nature of the disciplinary sanction must be based on a principle of natural justice and with due cognisance and compliance with employment legislation. In addition, due regard should be paid to landmark superior court case decisions and not either what the complainant would like or indeed demands to happen, or what the organisation may feel is expedient.

If harassment or bullying is deemed to have occurred but the alleged perpetrator is disciplined but not dismissed, then positive actions for protecting the original complainant (eg, periodic meetings and assessments) should be considered and the employer should continue to monitor the situation to ensure that other employees are not put at risk.

What should happen after the formal resolution of the case?

The decision of the disciplinary hearing (and appeal) should be conveyed to the alleged harasser/bully in writing as soon as possible after the decision has been reached. It would also be important to inform the complainant of the decision (but not necessarily the specifics of the sanction) and preferably in person.

Too often, cases can become shrouded in unnecessary secrecy which fuels suspicion and rumour within organisations. While discretion over case details and confidentiality remain important during the processing of the case, it would be necessary to ensure that other affected employees are aware of the case but only after its resolution and including all appeals. Again the need to be reasonable, fair, procedurally correct and consistent are of paramount importance to ensure employees have confidence in the process and that potential harassers/bullies are aware of the consequences of such actions.

In addition, in order to learn from the experience, it would be important to convene a meeting of those who played a major role in the process in order to review the procedure and to identify any problem areas that arose and could be addressed more positively in the future. Key players could draw upon lessons learned in order to better inform decisions regarding policy and protocol when the harassment and bullying policy is due for review and amendment.

What about victimisation?

Throughout the case it is important to bear in mind possibilities of retaliation for bringing a complaint or indeed victimisation of the complainant/alleged victim. It is important to remember that victimisation is defined both in a broad, loose and general sense (ie, being picked on due to involvement in some capacity) and in a narrow, legally prescribed sense. Regarding the legal definition of victimisation, provision is made in anti-discrimination legislation for it to be a 'stand alone' offence as a distinct form of discrimination. An example would be under the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 (Part 1 (4)) – Discrimination by way of victimisation... a person ('A') discriminates against another person ('B') if he treats B less favourably than he treats others in the same circumstances and does so because B has... brought proceedings against A or any other person, given evidence/information in connection, alleged A has committed an act contravening the Regulations.....

Following the resolution of the case, the avoidance of victimisation should remain a priority. For example, it may be appropriate to inform employees who may be working with the complainant of the dangers and costs associated with victimisation. The complainant should be made aware that this is happening to ensure that they appreciate that management are acting with good intent. It would also be important to arrange regular meetings with the victim to monitor his/her situation and to demonstrate ongoing management support.

What if the alleged perpetrator is not an employee?

In these circumstances, the employee bringing the complaint should be protected from future harassment/bullying but at the same time must not be shown to suffer a detriment through these actions.

The issue of employees being subjected to harassment or bullying from third parties has been a matter of complex case decisions and especially regarding the extent of the employer's liability (see Part Four). Often it will be useful to liaise with the employer of the alleged harasser or bully, with an offer of co-operation should his/her employer choose to initiate an investigation or other procedures. If the alleged harasser or bully is a member of the public then, following an investigation, it may be appropriate to exclude that person from the premises and/or deny them access to goods, facilities or services, in recognition of the duty of care that the employer has towards all employees.

Where an employee must routinely engage with the public and the nature of those duties has been made clear at the time of appointment, then it may be considered unreasonable for the employee to subsequently make a complaint except where the unwanted behaviour is wholly unexpected and unreasonable.

What if the complainant is not an employee?

If a complaint is made against an employee by a member of the public, then the organisation must first determine if the alleged harasser or bully was acting as

Part Two

an employee or agent of the organisation at the time of the alleged misconduct or whether the behaviour was unrelated to his/her employment. Once again this can involve a complex legal argument in terms of the scope of the employee's employment and the scope of the duty of care owed by the employer in relation to the actions of an employee. Again the primary focus of such issues is often to determine where liability lies (ie, with the employer under the principle of vicarious liability or with the employee personally; see Part Four).

At the very least, it may be prudent to ensure that the alleged harasser or bully is unable to continue to have contact with other members of the public before an investigation can be carried out. An investigation and any subsequent disciplinary actions should be carried out as if the complainant was an employee, ensuring that this person is treated with the greatest respect and sensitivity during the investigation.

Will a formal complaint be prejudiced if a complainant did not attempt an informal resolution?

While there is widespread agreement that informal means of resolution should often be pursued initially, an employee who has suffered harassment or bullying may choose to seek immediate redress through a formal procedure. For example, the nature of the unwanted conduct may be such that it is appropriate that formal mechanisms are instigated without delay. Any complainant has every right to access the formal procedure without prejudice and should not be prevented from pursuing that course of action.

What training is necessary?

To ensure that the procedures are consistently and fairly applied all those involved in the processing of cases must have the necessary training. The Labour Relations Agency can assist in the identification of training needs in the context of this and other employment relations spheres. All key individuals involved in the process protocols and administration must have a good working knowledge and understanding of the legislation relating to workplace harassment and bullying, and the relevant internal policies and procedures. This is especially true for those who will be conducting investigations.

In addition, those appointed to investigate should be trained in what are seen to be the 'softer skills' underpinned by knowledge and understanding. Some examples would be handling sensitive matters, recognising symptoms and warning signs, and interviewing/listening skills in order to ensure that information is gathered sensitively and correctly. Likewise, disciplinary panels should be skilled in handling interview situations and witnesses. If the organisation is large enough to have presenting officers then they will require special training in how to present a case and interview witnesses.

Are there any alternatives to these procedures?

In recent years, many organisations have become concerned with the cost of

implementing formal procedures and particularly the number of person-hours that can be taken up. There is a trend towards the scaling-down of procedures and a movement away from quasi-judicial, adversarial hearings and towards less cumbersome proceedings in general.

However, due recognition must be paid to two relatively recent developments in this sphere. First, that harassment is now a 'stand alone' cause of action with a generic definition as enshrined in anti-discrimination legislation and second, that there are now statutory minimum procedures for grievance and discipline regardless of the size of the employer. The above recent developments have cast the entire issue of harassment and bullying in a new light and have brought back to the fore the importance of low level resolution via either informal procedures or alternative dispute resolution mechanisms (ADR).

One of the greatest difficulties associated with ADR has been the interpretation of terminology, including terms such as conciliation, mediation and arbitration. Employers and employees alike tend to shy away from the unknown or untested and in particular where the procedures may appear at first glance to be less rigorous and procedurally 'tight'. However, more and more employers and employees recognise that at the heart of the matter lie issues of an interpersonal or relational nature and that the best way of saving the fabric of the working relationship is to avail of an alternative such as workplace mediation.

Very often assumptions are made by both management and employees regarding which avenue of redress the other will want (for example, the employee assuming the employer will want to sweep it under the carpet and the employer assuming the employee will want a pound of flesh and a day in court). The practical reality may be that an apology, an explanation or a clarification of a misperception is what is required. However, because both parties are so far down a formal route they may feel they have passed the point of no return and in effect, the process has overtaken them. Workplace mediation, which is entirely voluntary, facilitated by either internal or external mediators and offered at an early stage in the process, can allow for a time-out and an opportunity to mend the working relationship before positions become entrenched and ultimately relationships are irreparably harmed (see Part Three).

The Labour Relations Agency can facilitate such workplace mediation by supplying mediators who are independent, impartial and experienced in resolving, via recommendation, workplace disputes involving harassment and bullying. Some organisations build in to their in-house procedures a 'mediation stage' which is a relatively low level in the process and allows for the matter to be addressed, providing both parties voluntarily agree, by an alternative mechanism with an external mediator.

Others rely on in-house procedures and it is towards such procedures that we now turn in Part Three.

Part 3: Informal Procedures & Advisory Services

Part Two may imply that any harassment and bullying case will inevitably ensnare an organisation in a procedural maze with no easy escape route. Without doubt many organisations have learned a very hard lesson of how damaging a formal case can be for all those involved - and how difficult it can be to mend relationships following the formal resolution of the case. At the same time, hindsight often shows that the overwhelming majority of cases could have been managed successfully if positive action had been taken quickly and normally when the complainant first registered that s/he found certain behaviours unacceptable. At this stage, the complainant often wants nothing more than for the behaviour to stop and for normal relations to be restored. Unfortunately experience shows that cries for help can be ignored as those who are first aware of problems may not necessarily be best equipped to deal with these issues effectively.

The role of line managers

Line managers and supervisors are often those who first become aware of emerging difficulties. From the outset it is vital that these individuals not only recognise the potential seriousness of issues that are presented to them but also have the necessary skills to be able to manage the situation sensitively and appropriately.

It cannot be assumed that these skills will already be well honed. Hence the first step in the development of effective procedures must involve training of front line managers in how to deal with harassment and bullying incidents. This could extend usefully to training in conflict management skills to ensure that issues are dealt with at the earliest possible stage and before they have an opportunity to escalate.

Ultimately line managers cannot and should not abdicate their responsibilities for managing their subordinates, and the tribunals have had little hesitation in defining the scope of these responsibilities (see Part Four). At the same time, there are situations that may require alternative resolution procedures and including circumstances where the manager or supervisor is implicated in some way or is seen already to have mismanaged the situation. Therefore line managers and supervisors should see themselves as one of many vital ingredients in the pool of resources, both formal and informal, that can be made available to those who experience either bullying or harassment.

Under the procedure for dealing with complaints informally, an employee may approach a line manager or supervisor. The employee may seek the manager's advice on approaching the alleged harasser and/or request the manager's presence at a meeting. As an alternative the manager may be asked to approach the alleged harasser on behalf of the employee. The advice provided below in relation to interventions and dealing with enquiries should be followed by managers/supervisors in these circumstances.

It is essential for the manager to inform the complainant that at the informal stage the role is only one of support and assistance. The complainant should be made aware that a formal investigation and possible disciplinary action would generally only take place if the complaint was investigated under the formal procedure. If the

matter raised with the manager is considered serious and inappropriate for informal resolution, the complainant is likely to be advised that this matter would require formal investigation.

In some instances where particularly serious allegations have been made, for example sexual assault, the manager may feel a formal investigation is necessary even if the complainant indicates that he/she will not participate with that investigation. A delicate balancing act will have to occur in relation to whether or not a complaint can be pursued in the absence of a co-operative witness. In these circumstances professional advice should always be obtained. The manager's objective, if a serious allegation is raised, should be to deal with the matter formally as the employer has a duty of care both to the individual and to other employees to prevent any recurrence.

Informal advisors

As an alternative means of resolution, organisations that have in place well defined yet informal procedures for dealing with harassment and bullying have found that these procedures can be remarkably successful in helping resolve problems sensitively. In particular, organisations with established advisory services have found them to be effective in either nipping problems in the bud or ensuring that correct advice is given at an early stage to those who have been subjected to unwanted and unreasonable conduct.

The important role that advisors can play in resolving cases of harassment or bullying has long been recognised. For example, the earliest Model Harassment Policy and Procedure, as issued by the Equality Commission, makes reference to the role of confidential counsellors or designated advisors, a service already highlighted by the document on the establishment of confidential counselling in the workplace by the European Parliament in 1991.

Over the last fifteen years, a number of types of workplace counselling or advisory services have been established in both the public and private sectors. Based on the authors' experiences in establishing and monitoring the effectiveness of these services, the following is offered as a guide to good employment practice.

Who should manage informal procedures?

Whatever title is attached to those who are approached for advice, it is important that the individual who is first confronted with an enquiry is equipped to offer expert opinion grounded in an awareness of employment law, the organisation's policy and procedures, as well as corporate and personal rights and responsibilities.

Some organisations have now outsourced this role to external bodies who provide advice and support to employees with personal problems. While there may be advantages to having this service available outside the organisation, its distance from day-to-day management may also create problems and especially in terms of low-key resolution techniques.

Part Three

Within the organisation itself, to assume that supervisors or line managers will always be those in the best position to offer advice may be dangerous. Often those close to situations are either compromised because of previous actions or believe that the most appropriate course of action may be to do nothing. In actual fact that is likely to be the most risky action of all. Problems associated with harassment and bullying do not go away, they become progressively worse, and if they are not dealt with positively then they may eventually cause untold damage to the well-being of the organisation and its employees. Such cases can cause considerable hurt to all those involved, and regrettably this often includes the person who originally raised the complaint.

What should the service be called?

When sexual harassment services were first established in the 1980s, a number of different titles were used but many later caused unforeseen difficulties. For example, those who were referred to as 'officers' found that because of the formality of the title, few employees were prepared to discuss other than the most serious of incidents. This was also true when services were located in personnel or human resource departments.

Since that time, concern also has been voiced about the use of the term 'counsellor'. This term may be a misnomer when those giving advice often have little or no formal training in counselling, nor are they expected to counsel as such. As a consequence, these individuals are now commonly referred to as advisors, staff advisors or confidential advisors.

What is the purpose of an advisory service?

As the name suggests, the primary role of advisors is to provide expert advice at an early stage in proceedings. Beyond this, the advisor may act under instruction in order to apply a remedy but outside formal procedures. This may include mediating between all parties where there is mutual agreement.

It is imperative that advisors operate entirely outwith formal investigatory or disciplinary procedures and have no power to sanction those who are accused of harassment or bullying. Instead they are concerned with the resolution of complaints, normally acting under instruction from the person who brings forward the initial complaint or enquiry.

For the organisation, this type of resolution can be extremely valuable, quickly dealing with problems at source, allowing those who have been subjected to unwanted conduct to continue in their place of work and eventually helping to foster an environment where unwanted and unreasonable conduct is not tolerated.

At first glance, the informal censures that advisors are able to deliver by confronting alleged harassers or bullies can appear light. However, it has to be remembered that the alternative to this form of intervention may not be a formal procedure but a victim who will remain silent or leave and hence an harasser or bully who can proceed completely unchecked.

At the very least an intervention by an advisor that involves working with the alleged harasser or bully may provide a very powerful warning shot. It is an indication to the individual that a third party, the advisor, now knows of wrongdoing and furthermore, that should any future actions occur then there may be serious consequences. In these circumstances all file notes held by the advisor may be discoverable but until such time as a formal case is brought forward then they remain the personal property of the advisor.

What are the terms of reference of an advisory service?

Advisors are available primarily to:

- provide expert advice and support to those who feel that they have been subjected to harassment and bullying
- explore the various options and forms of intervention which are available
- help the person reach a decision as to the most effective course of action to pursue
- take appropriate actions to effect a remedy outside formal procedures.

Without specialist training, advisors cannot be expected to play a professional, therapeutic role although simply by being a listening ear the advisor may begin to help the person deal with the experience and to allay fears that s/he bears responsibility.

In order to extend the scope of the service, it may be appropriate to consider specific counselling training for at least one member of an advisory team. An alternative would be to make available external counselling services for all employees who are dealing with personal problems of whatever sort.

An advisory service must balance the need to be lawful with the need to provide a service that employees will actually use. In the past advisors were often based in personnel or human resource departments but it was found that this location tended to inhibit enquiries as there was a concern that formal procedures may be invoked.

To encourage enquiries, the service has to be perceived to be removed from the management structure and has to be seen to be acting not in the interests of management but in the interests of the person bringing forward the enquiry. Fortunately, these two aspirations normally coincide.

The service should be available to all employees at whatever grade, and equally, interventions should be possible throughout the organisation, from the bottom to the top.

Given the existing legislation and the broad definitions that currently operate (see Parts One and Four), it is important that any employee with a concern should feel that an advisor will be willing to listen. While later the enquiry may be found not to constitute bullying or harassment, this judgment should take place after the approach and not before. Indeed the success of a service can often be gauged by the quantity of business that is generated, as a positive index of its user-friendliness.

Part Three

In certain circumstances, it may be determined that the issue can be dealt with effectively by external advisory and mediation services. This may be true where, for example, an organisation does not have existing service for whatever reason. The Labour Relations Agency is able to provide advice on the availability of these services, many of which are available through the Agency itself.

How should the advisory service be established?

An advisory service can only be established once all relevant policies and procedures are in place (see Part Two). Having either recruited or advertised and selected advisors, it is necessary to train these recruits before publicising the service. Publicity is vital and this material, including posters, presentations and handouts, must name the advisors, give brief details of the service and stress that it is available on a confidential basis and no action will normally be taken without the express consent of the person bringing forward the enquiry or complaint. Hence the service must be presented as offering independent advice which is seen to be in the best interests of the enquirer.

How should an advisory team be selected?

Two strategies are possible and each has inherent strengths and weaknesses. Some organisations publicise the launch of an advisory service and then call for volunteers. While this scheme will ensure that advisors are highly motivated there is a danger that those coming forward may have certain 'agenda' which may interfere with their effectiveness. If this strategy is adopted then a rigorous vetting or selection procedure must be put in place.

An alternative strategy may be to use a job description to identify or shortlist potential advisors, and to approach these named individuals to see if they are willing to take on the role. This approach ensures closer control over the pool of potentials but could lead to accusations of manipulation by management.

The decision as to which strategy to adopt must take into account the culture of the organisation but whichever strategy is adopted it would be advisable to discuss the means of selection with the workforce and trade union representatives and to maintain clear written records of the selection process.

What sort of person makes a good advisor?

In terms of personal, desirable qualities, the nature of the work determines that an advisor should be:

- discrete
- able to respect confidentiality
- a good listener
- sensitive and empathic to others feelings
- have a concern for the welfare of others
- respected by other employees
- prepared to take positive and often difficult action when necessary
- able to offer balanced opinion unclouded by personal prejudices or agenda.

How many advisors are necessary and who should they be?

The advisors must operate as a team and should be chosen with this in mind. There must be a sufficient number of advisors to shoulder the potential workload and to sustain a team identity yet few enough to be able to maintain consistency of response and teamwork.

In any organisation, it would be difficult to envisage an effective team comprising fewer than three people. Equally, large teams can create problems of co-ordination. Where there are split sites or shift arrangements then the size and make-up of the team or teams must take these factors into account to ensure adequate coverage.

It is important that the team is heterogeneous by at least gender and community background, and that various grades of staff are represented. While it would not be feasible for a team to include representation covering all dimensions of social identity, at the very least appropriate training should be offered to ensure sensitivity and awareness across all dimensions falling under the remit of the service and the anti-discrimination legislation.

Should advisors receive payment for their work?

While there is no intrinsic problem in rewarding advisors financially, in reality it is not normal practice for advisors to be given any remuneration, other than the necessary time from their normal duties in order to be able to fulfill their role. Where an organisation does decide to reward advisors there is a danger that this payment can be construed as prejudicing the independence of the service. It may also necessitate the selection process being subjected to the rigours of the anti-discrimination legislation in relation to selection and recruitment procedures

Regardless of the advice which they offer, it is likely that an advisor would be seen as acting in the context of his/her employment. Hence the decision to pay rests with the employer but at the very least advisors should be given due recognition for the valuable work which they carry out, by both local and senior management.

Should advisors play a role in formal procedures?

The simple yet emphatic answer is no. It is important that there is a very clear line of demarcation between the work of advisors and the formal processing of a case. If an employee makes a decision to bring forward a formal complaint then the advisor should hand the case to the appropriate officer. He or she should then play no further role in the case, except perhaps to offer support for the complainant if requested. This support should not extend to acting as advocate or representative.

What forms of intervention can advisors engage in directly?

Advisors can intervene in a variety of ways as outlined above and including liaising with line managers or supervisors, approaching the alleged harasser or bully directly, contacting outside agencies, or empowering the complainant in order that s/he can deal with the matter personally.

Part Three

Meeting with those accused of harassment or bullying in order to resolve matters, perhaps through mediation, is a common form of intervention but may raise concerns over legal liability or even personal safety. Experience has shown that these meetings are rarely traumatic and frequently the alleged perpetrator will come to see the intervention in a positive light. In particular, it can be viewed as a less visible and painful alternative to a formal procedure.

Experience would suggest that advisors normally should ensure that the nature of the complaint is conveyed to the alleged harasser or bully not in the form of an allegation, accusation or inquisition, but less emotively, as the relaying of information. The alleged perpetrator is then encouraged to respond to this information but the role of the advisor does not extend to determining whether or not the person is culpable.

To effect a remedy, it may be sufficient that the person knows that a third party is aware of the nature of the complaint but to prevent an escalation towards a formal procedure, s/he can be reassured that only the complainant and advisor know of the interview and that any file notes of the advisor are only discoverable should matters to be taken further through formal channels, either internally or externally.

What types of enquiry should advisors deal with?

The service should not aim to become either a quasi-personnel department or a welfare service for employees. Instead the brief is limited to harassment and bullying as previously outlined and guided by policy and relevant legislation. While common themes may link different forms of harassment and bullying it is also important to have due regard to differences in the legislation and how this may reflect in alternative intervention strategies (see Parts Two and Four).

At the beginning of any intervention, the following questions should be addressed.

- ***Is the person raising the enquiry an employee of the organisation or an individual with a bona fide involvement with the organisation?***

Only where there is clear responsibility and a duty of care towards the complainant should an advisor agree to take on an enquiry. Where an enquiry is brought forward by a third party who is not an employee then an advisor should proceed with due caution and following consultations with relevant parties and including human resource staff.

- ***Does this enquiry fall within the scope of the harassment and bullying policy?***

If Yes, proceed. If No, then (with the enquirer's permission) pass the enquiry on to the relevant manager, human resources staff or other employee. Beyond this transfer the advisor should play no role in the resolution of the complaint but may continue to offer support if requested.

- ***Is the person bringing the enquiry the complainant, the alleged perpetrator or a third party?***

If a complaint or enquiry is made by an employee, then the advisor should determine those actions that s/he is willing to sanction, and then work towards an appropriate intervention strategy. Under normal circumstances an advisor should not proceed without the express consent of the person who has raised the complaint. In exceptional circumstances, for example where there is perceived to be potential physical or psychological threat to either the complainant or others ('life or limb') then this tacit agreement may have to be broken. For example, the complainant may insist that no further action should be taken while the advisor feels that the potential risk is too great and hence an intervention must follow.

During formal procedures, representatives or colleagues are allowed to be in an attendance during interviews. In contrast, during interactions with advisors the presence of others may inhibit or distort the effective functioning of the confidential service. Hence complainants should be encouraged not to bring representatives, colleagues, relatives or friends but obviously this protocol should not be rigidly applied if the complainant insists otherwise.

If the enquiry comes from an alleged harasser or bully then the nature of the support will differ. Advice may be offered as to the person's rights, or the advisor may agree to attempt to act as a mediator if the complainant is also in agreement. However, the advisor should not act as a representative or advocate for an employee accused of harassment or bullying. If one advisor is already working with the complainant then another member of the advisory team should be assigned to the alleged harasser or bully, and the two should then operate independently.

If a 'third party' approaches an advisor, acting on behalf of someone who is said to have suffered harassment or bullying, but perhaps without his/her express consent, then the advisor should proceed with caution. In particular it is important to determine whether the enquiry was initiated by the alleged victim or whether the third party has taken this action independently. If the latter, then there will be a need for discrete investigations before proceeding. An intervention should be undertaken only when the advisors are completely satisfied that the organisation or its employees would be at risk if action was not taken. Wherever possible, an attempt should be made to bring the victim on board quickly to resolve any doubts as to the veracity of the claims.

Where it is determined that an enquiry has been brought forward vexatiously, mischievously or maliciously, then this should be brought to the attention of the appropriate manager.

How should advisors deal with those bringing forward enquiries?

The range of complaints and enquiries which an advisor is likely to deal with will be extremely varied. Therefore it is impossible to lay down hard and fast rules as to how to handle all situations. At the same time the following may be useful guidelines.

During the meeting with the complainant it is important to:

Part Three

Ensure Confidentiality

From the start, the person bringing the complaint/enquiry should know that under normal circumstances, whatever is being discussed will be treated in strictest confidence. An exception to this rule may be where information is divulged which suggests that either the person or others' well-being will be at risk unless certain actions are taken (see above).

Give Control

It is also important to emphasise that the complainant has primary control of events and that, in normal circumstances, no further action will be taken without his/her express consent. Without this guarantee the long-term credibility of an advisory service would be seriously compromised.

Listen

The advisor should not be too eager to offer advice until the experiences have been recounted in full. It may be necessary to ask for clarification along the way but assurance should be given that any notes will not be used to build up a record of the case but are merely an aide memoire. When the individual has presented all the information it is often useful to try to recap in order to outline a chronological summary of events. Listening is an active process and care must be taken to ensure that the complainant is not influenced so as to present material in a particular way, nor is the recall process distorted by the views, priorities or opinions of the advisor.

Protect

The person must be reassured that by having made this initial approach s/he has already helped to protect him/herself from further trouble because at the very least someone else now knows. Also reassure the complainant that if s/he decides that the bully or harasser should be made aware of the nature of the complaint then s/he will be protected from any further victimisation.

Be Non-judgmental

Individuals bringing complaints often feel themselves to be on trial and feel somehow responsible or guilty. It is important to stress that an advisor is not passing judgment nor is s/he acting as an investigative officer. Instead, the advisor's role is to listen to the story, to offer advice as to how to best move forward and then to help take positive steps towards a resolution. It is often important overtly to identify the fact that advisors are working in a unique role providing a confidential service for employees, perhaps irrespective of the short term interests of the organisation.

Empathise but Don't Sympathise

While it is appropriate for an advisor to empathise with the position of the complainant, there may be greater dangers associated with extending beyond empathy (understanding the person's feelings and response) to sympathy (emotional support for those feelings). It must be borne in mind that there will always be various perspectives on each case and an emotional engagement with any one perspective is not likely to facilitate a successful resolution.

Be Constructive

The person must be told that what s/he has done already has been a very positive step and must have taken a great deal of courage, not only helping him/herself but in the longer term, the organisation.

Empower

The advisor should not say outright what should or should not be done but instead should present the various alternatives and talk through the likely consequences. These may range from the advisor or a colleague making an informal approach to the harasser or bully, to more formal actions involving a line manager, human resources, personnel or even external agencies should s/he wish. The way in which an interview with an alleged harasser or bully could be handled in order to protect the safety and/or identity of the complainant can usefully be outlined.

Support

Having already approached a third party (ie, the advisor) it is unlikely that the person will now want to be told how s/he should deal with the problem individually, although this may be what the person explicitly says s/he wants. If this is so then possible scenarios and how s/he can deal with situations more effectively in the future can be explored.

Look Forward

From a therapeutic perspective, the person is likely to feel better simply for having had the opportunity to talk about his or her problems. Perversely this may actually decrease the likelihood of further action being taken or endorsed, and hence the chances of a successful remedy based on a positive intervention are reduced. For this reason, before the person leaves the initial meeting a time and date for the next meeting should be arranged and a list of actions to take place before that meeting should be agreed. The person should be informed that if s/he needs to talk in the meanwhile then this will be made possible.

Record

It is vital that a record of this meeting is kept, should there be a subsequent and related action which makes the content of the original enquiry significant (see below).

What next?

Following the meeting with the complainant, if an advisor is unsure as to how best to proceed then it may be useful to call a meeting of one or more of the advisory team to discuss the case, with the understanding that rules of confidentiality apply to the team as a whole. Unless a case is absolutely clear cut then almost inevitably such a meeting will be helpful.

Further to this meeting, where there remains a degree of ambiguity over a complaint then it may be useful to try to find out more from others in the workplace, either directly or indirectly. However, this consultation must be carried out in a very 'softly softly' manner. The confidentiality of the client is of primary concern but additional information can be invaluable in deciding the merits of a case and in turn how it can be resolved. Wherever possible, the permission of the complainant should be sought before talking to others, however discretely.

How should advisors deal with those who have been complained of?

Those who are new to the role will often be apprehensive of making a direct

Part Three

approach to an alleged harasser or bully. Such meetings may be perceived as difficult but in reality they are rarely so and especially where the role of the advisor is made clear to the alleged perpetrator from the outset. On occasions advisors may be met with hostility but in these circumstances the advisor can simply terminate the meeting and report back to the person who raised the complaint.

In reality, almost invariably the person will come to realise that the intervention, while perhaps painful or embarrassing, has been helpful and constructive and has reduced the potential for further hurt or damage. The advisor can deliberately emphasise his or her non-adversarial role in this situation given that it is a confidential and informal service.

Following the initial meetings with the complainant and the alleged harasser or bully it may be appropriate to hold further meetings with both parties separately in order to move towards a resolution - otherwise known as shuttle mediation. Once common ground has been established then a face-to-face meeting with all parties may be used to confirm arrangements.

Can advisors be held personally liable for mishandling cases?

While theoretically it is possible for an advisor to be named as a party to an action, advisors can be assured that their designated role should offer protection from personal legal liability as they were appointed as advisors by the employer and are fulfilling this role at the employer's behest. Where there may be any ambiguity over the extent of either corporate or personal liability then this matter should be discussed with the employer at the time that the service is first put in place.

What information should be recorded and how should it be stored?

To ensure that the advisory service is able to continue to offer an informal and independent service to employees it is important that any documentation is not overly burdensome. At the same time, should the informal interventions prove to be unsuccessful then there must be some record of activity that could be referenced to indicate that positive steps had been taken to resolve the problem.

To meet these conflicting demands it is suggested that at the time of the first meeting with the complainant that a file note is made of the meeting and this is countersigned by the advisor and the person raising the enquiry. This should not be a detailed record of the meeting but should provide a brief outline of the nature of the complaint (including against whom it is made), and the agreed action. For subsequent meetings with either the complainant or the alleged perpetrator, a diary note of the time and place of the meeting may be sufficient to record the sequence of events that followed from the initial complaint, up to and including the conclusion of the informal intervention.

In the event of a formal complaint being made then any file notes would be discoverable by either party. In the meanwhile it is suggested that the advisor should retain a personal copy of the documentation and this material should be left with another member of the advisory team should s/he leave employment. This

information should not be stored electronically.

Can an advisor guarantee confidentiality?

As a legal principle, strictly speaking this guarantee cannot be given as all 'confidential' discussions may become the subject of court proceedings. The advisor can confirm that the allegations will be treated in confidence but should information be divulged which may have future consequences for the well-being or health of others, or the complainant, then that confidence may have to be broken. It will be a matter of judgment as to when the risk is sufficient to warrant breaking confidentiality but experience shows that a complainant can often be persuaded that to do so will be in her/his best long term interests or will protect others.

How should the work of the advisory team be monitored/recorded?

With an effective selection procedure and thorough training, the advisory team should not require close monitoring. At the same time there should be routine liaison between the team and human resource or personnel staff, and input into policy review. At these meetings it may be possible to establish if patterns of bullying or harassment are established in particular locations, at the same time ensuring that issues of confidentiality are respected.

Periodically it may be appropriate for the team to prepare a report detailing the number of cases which have come forward, the types of incident involved and the outcomes of the cases. Where either human resource staff or members of the advisory team have a concern that a complaint may be related to other incidents then it would be appropriate for those concerns to be voiced, protecting the identity of the complainant as necessary.

The individual case forms held by advisors should not be made available to management. However, should a case be formally investigated then any materials may be discoverable.

Should advisors be appointed on a permanent basis?

If new advisors are recruited on a rolling basis there is greater scope for spreading expertise throughout the organisation. Unfortunately this may be at the expense of losing valuable experience from within the team. A compromise may be to recruit new advisors periodically while ensuring that core expertise and experience is retained. Where experienced advisors are retained over long periods of time it may be necessary to put in place procedures to ensure that cases are distributed fairly across the team.

What forms of training are appropriate?

Advisors must be aware of the nature of harassment and bullying, the legislation and recent case law. Beyond this they must have developed competency in dealing with a variety of situations, perhaps introduced through case studies and role play. It would be important that the knowledge base is continually updated. At least one member of an advisory team could be offered more intensive counselling training,

Part Three

or an external body could be contracted to provide this service for employees.

It is essential that all managers and supervisors are made aware of the advisory team and how it operates, and should feel comfortable about referring cases to advisors for resolution when necessary.

Harassment under Anti-Discrimination Law

Harassment on the grounds of sex, sexual orientation, gender reassignment, marital or civil partnership status, religious belief, political opinion, race and disability is currently unlawful while harassment on grounds of age will be unlawful by October 2006. As a result of the EU Employment Framework Directive 2000/78/EC, amendments were made to existing discrimination statutes and new anti-discrimination measures were required to be introduced which specifically prohibited harassment. Under this Directive, harassment was deemed to be a form of discrimination 'when unwanted conduct... 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'.

The relevant clauses of the domestic provisions are as follows:

Fair Employment and Treatment (NI) Order 1998 (as amended)

3A. (1) A person ('A') subjects another person ('B') to harassment in any circumstances relevant for the purposes of any provision referred to in Article 3(2B) where, on the ground of religious belief or political opinion, A engages in unwanted conduct which has the purpose or effect of:

- (a) violating B's dignity; or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) Conduct shall be regarded as having the effect specified in subparagraphs (a) and (b) of paragraph (1) only if, having regard to all the circumstances, including, in particular, the perception of B, it should reasonably be considered as having that effect.

Race Relations (NI) Order 1997 (as amended)

4A. (1) A person ('A') subjects another person ('B') to harassment in any circumstances relevant for the purposes of any provision referred to in Article 3(1B) where, on grounds of race or ethnic or national origins, A engages in unwanted conduct which has the purpose or effect of:

- (a) violating B's dignity; or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) Conduct shall be regarded as having the effect specified (b) of in subparagraph (a) and paragraph (1) only if, having regard to all the circumstances including in particular, the perception of B, it should reasonably be considered as having that effect.

(The new definition of harassment does not cover colour or nationality which fall to be dealt with as a detriment under the direct discrimination provisions of the Race Relations Order).

Part Four

Disability Discrimination Act 1995 (as amended)

3B. (1) For the purposes of this Part, a person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of:

- (a) violating the disabled person's dignity; or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(2) Conduct shall be regarded as having the effect referred to in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should reasonably be considered as having that effect.

Employment Equality (Sexual Orientation) Regulations (NI) 2003

5. (1) For the purposes of these Regulations, a person ('A') subjects another person ('B') to harassment where, on grounds of sexual orientation. A engages in unwanted conduct which has the purpose or effect of:

- (a) violating B's dignity; or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) Conduct shall be regarded as having the effect specified in paragraph 1(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.

Sex Discrimination (NI) Order 1976 (as amended)

6(A)(1) For the purposes of this Order, a person subjects a woman to harassment if:

- (a) on the ground of her sex, he engages in unwanted conduct that has the purpose or effect:
 - (i) of violating her dignity; or
 - (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

- (b) he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect:
 - (i) of violating her dignity; or
 - (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

- (c) on the ground of her rejection of or submission to unwanted conduct of a kind mentioned in sub-paragraph (a) or (b), he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct.

(2) Conduct shall be regarded as having the effect mentioned in paragraph (1) (a) or (b) only if, having regard to all the circumstances, including in particular the perception of the woman, it should reasonably be considered as having that effect.

(3) For the purposes of this order, a person ('A') subjects another person ('B') to harassment if:

- (a) A, on the ground that B intends to undergo, is undergoing or has undergone gender reassignment, engages in unwanted conduct that has the purpose or effect:
 - (i) of violating B's dignity; or
 - (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (b) A, on the ground of B's rejection of or submission to unwanted conduct of a kind mentioned in subparagraph (a), treats B less favourably than A would treat B had B not rejected, or submitted to, the conduct.

(4) Conduct shall be regarded as having the effect mentioned in paragraph (3)(a) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.

(5) Paragraph (1) is to be read as applying equally to the harassment of men, and for that purpose shall have effect with such modifications as are requisite.

(6) For the purposes of paragraphs (1) and (3), a provision of Part III or IV framed with reference to harassment of women shall be treated as applying equally to the harassment of men and for that purpose will have effect with such modifications as are requisite.

(The new definition of harassment does not appear to govern married or civil partner status. The Civil Partnership Act 2004 amended the Sex Discrimination Order to prohibit discrimination in employment on the ground of civil partner status; however no specific provision on harassment was included. It could therefore be argued that harassment on these grounds would constitute a detriment under the direct discrimination provisions of the Sex Discrimination Order).

The slightly different wording of these provisions has not yet been the subject of binding case law. It should be noted that the definitions in relation to religious belief, political opinion, race, ethnic or national origin and sexual orientation are identical. Disability discrimination is covered where it 'relates to' the disabled person's disability and the gender reassignment definition is based on the grounds of 'B' intending to undergo or undergoing or having undergone reassignment. The sex discrimination definition is slightly different again in that the act is unlawful 'on grounds of her sex', not on grounds of sex. However Article 6A(1)(b) of the Sex Discrimination Order is broader than the other definitions in covering unwanted conduct without any requirement that it be 'on grounds of' either her sex or sex generally. The addition of clause 6A(1)(b) appears to make specific provision for hostile working environments in which both men and women have to work but which women in particular may find offensive. The comparative approach would appear not to be required in this particular provision thus it is suggested that pornographic displays will be specifically prohibited by Article 6(A) (1)(b).

Part Four

Codes and guidance

The predecessor statutory bodies to the Equality Commission had produced Codes of Practice and Guidance which cover harassment in the workplace. However these predate the new definition of harassment referred to above. The revised Model Harassment Policy as produced by the Equality Commission includes these new definitions and is included as an appendix to this document.

Burden of proof

The first step in proving a case of harassment requires the claimant to establish facts from which an inference of discrimination could be drawn. A claimant will have to show that the conduct was unwanted and had the purpose or effect of violating his/her dignity or creating a hostile, degrading humiliating or offensive environment. The burden then moves to the respondent(s) to prove, on the balance of probability, that the treatment was in no sense whatsoever discriminatory.

When deciding whether harassment has occurred the courts/tribunals will adopt an objective standard of whether a 'reasonable' person would consider the actions discriminatory. However, in reaching that objective conclusion the court/tribunal must also consider the perception of the alleged victim.

LESSONS FROM THE CASELAW

The existing harassment case law is, in the main, based upon a different 'definition' of harassment and on a burden of proof which remains with the claimant throughout. However, the case law provides some assistance in indicating how tribunals are likely to approach the new provisions.

Less Favourable Treatment

One of the questions which courts and tribunals will have to deal with is the issue of whether or not either less favourable treatment or a comparative approach will be required in order to establish harassment. While it is reasonably clear that a comparative approach is not required in the areas of sex and disability harassment (e.g. display of pornographic material), the position is not so clear in relation to the other categories of unlawful discrimination. The following are some of the leading cases under the old provisions.

The landmark decision in this regard was the case of ***Strathclyde Regional Council -v- Porcelli*** (1986) IRLR 134. Mrs Porcelli was employed by Strathclyde Council as a school technician. Two work colleagues ran a (successful) campaign to persuade her to leave the school, including sexual remarks and brushing up against her. At the original tribunal, the case was rejected on the grounds that although she had suffered this unwanted behaviour, it was felt that a man would have suffered equally if he had been disliked by his colleagues. The appeal court rejected this argument as it felt that the treatment contained a significant sexual element which was to be regarded as treatment on grounds of sex. In this way the court

emphasised that the sex discrimination legislation deals with treatment and not the motive of the discriminator, that is, outcome rather than intent.

In *Smyth -v- Croft Inns Ltd.* the Fair Employment Tribunal (FET) held that there was no essential difference between:

- 'a) an employer who terminated the contract of A, a protected person under discrimination legislation, not because he himself is biased but to avoid disruption to his business and;
- b) an employer who avoids any action which would protect A so that A leaves his/her employment on this account.'

This decision was subsequently upheld on appeal by the Court of Appeal. It found that Mr Smith was constructively dismissed and subjected to religious discrimination when he was threatened by a regular customer, being told that he should not continue to work in the bar because he was a Roman Catholic and the bar was in a loyalist area. The Court of Appeal followed the reasoning advanced in a line of cases addressing sex and racial discrimination, where it was held that customer preference which was prejudiced could not be relied upon where the employer took no action to show active concern and sympathy because of the threats. Applying the 'but for' test in *James -v- Eastleigh Borough Council* (that is, but for his religion would he have been treated more favourably), the Court was satisfied that but for his religion Mr Smith would not have felt obliged to leave his workplace. The Court made clear that if Croft Inns had two bars in Roman Catholic and Protestant areas respectively and then, because of threats, the company dismissed a Protestant and Roman Catholic barman, they would be guilty of discrimination in both cases.

In looking at the question of how it could be held that where third parties harass an employee this would contribute to a detriment, in an Employment Appeal Tribunal (EAT) decision two black hotel waitresses in Derby won their appeal against an Industrial Tribunal decision that their employer had not racially discriminated against them when the hotel management failed to stop the pair being exposed to racist abuse by the comedian Bernard Manning, who had been hired by a local Round Table as an after dinner speaker for a function in the hotel. In *Burton and Rhule -v- De Vere Hotels Ltd*, the EAT held -

'the problem is to decide what an applicant must prove in order to show that the employer 'subjected' the employee to the detriment of racial abuse or harassment, where the actual abuser or harasser is a third party and not a servant or agent of the employer for whose actions the employer would be vicariously liable. Put another way, the problem is to decide the extent of the duty of an employer to protect the employee from racial harassment from third parties.

The tribunal were at pains to make clear that in their view this section does not impose strict liability upon the employers. It is not enough that

Part Four

the appellants suffered racial harassment while in the course of their employment. Both parties accept that that is right. We agree.

We think that the statutory test is best understood by consideration of the true meaning of the word 'subjecting'. We do not think that 'subjecting' is a word which connotes action or decision, as Mr Wilkie submitted. Rather we think it connotes 'control'. A person 'subjects' another to something if he causes or allows that thing to happen in circumstances where he can control whether it happens or not. An employer subjects an employee to the detriment of racial harassment if he causes or permits the racial harassment to occur in circumstances which he can control whether it happens or not.'

This decision was criticised by the House of Lords in the case of **Pearce –v- Governing Body of Mayfield School** [2003] IRLR 512 as being wrongly decided. The House of Lords criticised Burton and Rhule because it treated the failure to protect employees against third party harassment as discrimination even though 'the failure had nothing to do with the sex or race of the employees'. Ms Pearce is a lesbian and was employed as a science teacher at Mayfield Secondary School. For a number of years she regularly experienced homophobic taunts and abuse by pupils at the school. This mainly took the form of oral abuse, including words such as 'lesbian', 'dyke', 'lesbian shit', 'lemon', 'lezzie' or 'lez'. These incidents were reported to the deputy head teacher, but the abuse continued and Ms Pearce took sick leave, having informed the school that she had become ill with stress because the school was not taking effective action to protect and support her. At a meeting arranged with the head teacher, he told her to 'grit your teeth' and that she could always 'run away again'. Ms Pearce returned to work but the harassment recommenced on a regular basis. Within a couple of days Ms Pearce went off sick again and took early retirement on health grounds a year later. She brought a complaint of unlawful sex discrimination. The House of Lords found that it could not be held that Ms Pearce was treated less favourably on the ground of her sex because she was subjected to a campaign of gender-specific harassment and there was no need to identify a male comparator:

'Sexual harassment is only prohibited by the Sex Discrimination Act if the claimant can show she was harassed because she was a woman. Section 1(1)(a) requires the employment tribunal to compare the way the alleged discriminator treats the woman with the way he treats or would treat a man. In any case where discrimination is established, this exercise must involve comparing two forms of treatment which are different, whether in kind or in degree. It also involves the tribunal in evaluating the differences and deciding which form of treatment is less favourable.

'The suggestion in some cases that if the form of the harassment is sexual or gender-specific, such as verbal abuse in explicitly sexual terms, that of itself constitutes less favourable treatment on the ground of sex, could not be reconciled with the language or the scheme of the statute. The fact

that harassment is gender-specific in form cannot be regarded as of itself establishing conclusively that the reason for the harassment is gender-based, 'on the ground of her sex'. It will be evidence, whose weight will depend on the circumstances, that the reason for the harassment was the sex of the victim, although in some circumstances, the inference may readily be drawn that the reason for the harassment was gender-based, as where a male employee subjects a female colleague to persistent, unwanted sexual overtures. In such a case, the male employee's treatment of the woman is compared with his treatment of men, even though the comparison may be self-evident. However, the observation of Lord Brand in *Strathclyde Regional Council -v- Porcelli* that if a form of unfavourable treatment is meted out to a woman to which a man would not have been vulnerable, she has been discriminated against, and the observation of Lord Grieve in the same case that treatment meted out to a woman on the ground of her sex would fail to be regarded as less favourable treatment simply because it was sexually oriented, could not be approved insofar as they were suggesting that it was not relevant whether the applicant was treated less favourably than a man where the harassment is sexually oriented. Similarly, Morison J read too much into *Porcelli* when he said in *British Telecommunications plc -v- Williams* that it would be no defence to a complaint of sexual harassment that a person of the other sex would have been similarly so treated.'

Therefore, prior to the legislative amendments, the House of Lords effectively disapproved the decisions in *Porcelli* and *Burton*. However it remains to be seen how the Courts will deal with the issue of comparators under the new definitions. It would appear that the new definitions of harassment in the areas of sex or disability discrimination do not require a comparison and *Burton* and *Porcelli* may represent the correct approach to be taken. The position is far from clear for the other categories. It could be argued that if a comparative approach such as that indicated by the House of Lords in *Pearce* is adopted in harassment cases on the other protected grounds that this would be contrary to the Framework Directive.

Number of incidents

Caselaw had confirmed that a single isolated incident, if it is serious, can amount to unlawful sex discrimination. In *Bracebride Engineering Ltd -v- Derby* (1990) IRLR 3 the EAT held:

'it seems to us that sexual harassment can embody a whole number of notions. It would seem that whether or not harassment is a continuing course of conduct, there was here an act which was an act of discrimination against a woman because she was a woman and it was a most unpleasant one and one which in our judgement clearly falls within the proper intention and meaning of the Act. We would deplore any argument that could be raised that merely because it was a single incident that it could not fall within the wording of the subsection.'

In *Monaghan -v- The Hitching Post Co Ltd* Case No 23/86 a single incident of serious

Part Four

sexual harassment constituted unlawful discrimination. Similarly in *Insitu Cleaning Company Ltd -v- Heads* [1995, IRLR 4) the EAT held that calling out to a woman, 'Hiya, big tits' constituted sexual harassment. The EAT rejected the argument that an act could not be 'unwanted' until it had first been done and rejected.

Banter

In *Grimes -v- Unipork* (Fair Employment Case Law 3rd Edition, p.10), Mr Grimes was informed of his lack of success for a post by an employee who pretended to play a flute with his hand to his mouth and also pretended to dig with a spade, saying 'hard luck, oul hand'. The Tribunal also found that there was another incident in which a number of men, with paper sashes and led by a person with an election poster of a well known politician, marched around the Applicant's table in the canteen. It also heard of a display on the notice board of a photograph of the Applicant wearing a bowler hat and sash which had been forcibly placed on him. It was encaptioned 'Grimes defects'. The Tribunal warned:

'banter, however innocent, has potential for mischief. What is 'banter' for some, may be intimidating or embarrassing to others. What is 'banter' today, may be dangerous tomorrow. There should be no place in the workforce for conduct that has the potential to disrupt the harmonious working environment or to intimidate or embarrass any worker because of his religious beliefs or political opinions.'

Connolly -v- Board of Governors, Stranmillis College was an unsuccessful claim of discrimination however the Fair Employment Tribunal made some significant observations regarding discussions in the workplace:

'In Northern Ireland it is dangerous, in a mixed workforce, to hold conversations which reflect the sectarian divisions which exist outside the workplace and without any forethought at all this must especially be so in the presence of new employees who have no experience of that particular background and employees which choose to use language which includes words with a sectarian significance - such as fenian - must be aware of the potential which such words hold for good relations and neutral environment.... Innocent remarks about past terrorist atrocities and the injuries that these inflicted must likewise be made with considerable caution in the workplace to ensure that no-one is made to feel uncomfortable about such atrocities simply because they hold religious beliefs which might also be attributed to the terrorist.'

The Tribunal also dealt with the issue of threats which would make any reasonable person fear for their life or safety. It held:

'We do not expect that any employer would be able to protect his employees fully from the threats or actions of the various varieties of sectarian terrorists operating in Northern Ireland. It is the duty of the security forces to do that and in particular the duty of the police in so far as it is within their capabilities.'

The Tribunal dealt with the role of employers in this context and held that they do, to a significant extent, perform their duty to protect their employee if they advise the police of the problem and carry out the advice which they are given. The Tribunal continued:

'There are steps which can be taken to assuage threats made to an employee by supporting him, seeking to place him where least at risk, investigating the possibilities of internal culpability and generally, as the code of practice has long provided for, promoting a good and harmonious working environment and atmosphere in which no worker feels under threat or intimidated because of his religious beliefs or political opinion and also making it clear that breaches of policy and practice will be regarded as misconduct which could lead to disciplinary proceedings.'

The new definitions of harassment require an objective test of whether the conduct complained of should reasonably be considered to violate dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. While the views of the victim must be taken into account, the stance to be taken is what would a reasonable person think in the circumstances.

Applicant's previous behaviour

In his report on the problem of sexual harassment in the Member States of the European Community, Michael Rubenstein devoted a chapter to the protection of dignity during judicial proceedings. He made a number of recommendations in relation to publicity but also dealt at some length with the extent to which courts and tribunals will allow the introduction of evidence concerning the claimant's sexual attitudes or behaviour with individuals other than the alleged perpetrator. He concluded:

'It is axiomatic that a woman should have a right to differentiate between the behaviour she will accept from one man and another. A woman's consensual sexual behaviour has no relevance whatsoever for determining whether she was the victim of unwanted sexual attentions. To suggest otherwise entails the offensive proposition that by her private and consensual sexual activities, a woman can waive her legal right to reject the unwelcome advances of others.'

In the case of *Snowball -v- Gardiner Merchant Ltd.* (1987; IRLR 397), the EAT admitted into evidence details of the claimant's general attitude to sexual matters and in particular the fact that she had talked freely to work colleagues about sexual matters. The EAT ruled that the evidence was admissible in order to challenge the alleged detriment and it was also relevant for the following reason:

'It is pertinent to enquire whether the Complainant is either unduly sensitive, or as in this case, if the proposed evidence is right, is unlikely to be very upset by a degree of familiarity with a sexual connotation.'

This case has been criticised by many commentators and indeed in the later EAT

Part Four

case of *Wileman -v- Minilec Engineering Ltd*, the Tribunal refused to admit evidence of the Complainant's previous conduct in posing for a national newspaper in a flimsy costume. This evidence was being submitted by the employer in relation to injury to feelings reductions but the Tribunal held:

'A person may be quite happy to accept the remarks of A or B in a sexual context and wholly upset by similar remarks made by C. The fact that the appellant was upset at the remarks of the director was notin any way or inconsistent with the fact that she was willing to pose for a newspaper.....'

However, the EAT went on to hold as follows:

'The Tribunal were entitled to take into account the fact that on occasion the Appellant wore clothes at work which were scanty and provocative as an element in deciding whether the harassment to which she was subjected constituted a detriment. If a girl on the shop floor goes around wearing provocative clothes and flaunting herself, it is not unlikely that other work people - particularly the men - will make remarks about it. It is an inevitable part of working life on the shop floor. If she then complains that she suffered a detriment, the Tribunal is entitled to look at the circumstances in which the remarks are made which are said to constitute that detriment..'

In the case of *Hodson -v- McCormick and McCormick* and (2) *Petch* the Tribunal held that the fact that the Complainant had enjoyed smutty jokes in the past and had herself used bad language was not a licence to sexually harass her in the future:

'You are entitled and normal life expects you to go along with certain things, but there comes a time, a sticking point for us all, where you are entitled to say whatever may have happened in the past this has now gone beyond the reasonable line of conduct.'

Evidence from informants

An issue of confidentiality regularly arises in the investigation of alleged harassment. Witnesses and on some occasions the only witness to an incident (i.e. the alleged victim) may insist upon remaining anonymous particularly where reprisals are feared. This poses a considerable difficulty for employers who should be in a position to let the alleged harasser know precisely what is deemed to have happened together with the names of all relevant witnesses and the details of what he/she claims to have witnessed. The alleged harasser has the right to a fair hearing which must be protected where possible.

This dilemma was considered in the case of *Linfood Cash and Carry Ltd v Thomson* [1989] IRLR 235. The EAT pointed out that a 'careful balance must be retained between the desirability to protect informants who are genuinely in fear, and

providing a fair hearing of issues for employees who are accused of misconduct.'

The EAT set out the following guidance which employers may wish to follow:

'Every case must depend upon its own facts, and circumstances may vary widely – indeed with further experience other aspects may demonstrate themselves – but we hope that the following comments may prove to be of assistance.

1. The information given by the informant should be reduced into writing in one or more statements. Initially these statements should be taken without regard to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others – in order to prevent identification.
2. In taking statements the following seems important:
 - (a) date, time and place of each or any observation or incident;
 - (b) the opportunity and ability to observe clearly and with accuracy;
 - (c) the circumstantial evidence such as knowledge of a system, or the reason for the presence of the informer and why certain small details are memorable;
 - (d) whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.
3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.
4. Tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add or detract from the value of the information.
5. If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is satisfied that the fear is genuine then a decision will need to be made whether or not to continue with the disciplinary process.
6. If it is to continue, then it seems to us desirable that at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself that weight is to be given to the information.
7. The written statement of the informant – if necessary with omissions to avoid identification – should be made available to the employee and his representatives.
8. If the employee or his representative raises any particular and relevant issue

Part Four

which should be put to the informant, then it may be desirable to adjourn for the chairman to make further inquiries of that informant.

9. Although it is always desirable for notes to be taken during disciplinary procedures, it seems to us to be particularly important that full and careful notes should be taken in these cases.
10. Although not peculiar to cases where informants have been the cause for the initiation of an investigation, it seems to us important that if evidence from an investigating officer is to be taken at a hearing it should, where possible, be prepared in a written form.'

The subsequent case of *Ramsey -v- Walkers Snack Foods Ltd* [2004] IRLR 754 held that an offer of anonymity was not unreasonable even though the statements could not contain the sort of detail recommended in *Linfood*.

'The present case raised two problems which were not apparent in *Linfood*: (1) the unwillingness of informants to sign a statement unless it had been sufficiently edited to remove any risk of identification; and (2) their unwillingness to be exposed to further questioning by other managers within the investigatory and/or disciplinary process for risk of their identities being revealed with the resulting reprisals that they feared.'

Employer's liability

A central question which arises in harassment cases is whether the employer is vicariously liable for acts of employees. The legislation provides that an employer will be liable for the acts or omissions of an employee during the course of their employment. The test appears to be outlined by the House of Lords in *Rhys-Harper -v- Relaxion Group plc* [2003] IRLR 484 in that liability will follow where there is a substantive connection between the discriminatory conduct and the employment relationship, whenever the discriminatory conduct arises.

In *Bhs Ltd and Hough -v- Walker and Premier Model Management Ltd* (11 May 2005) a model claimed she had been subjected to unwanted sexual advances from Ms Hough who was responsible for engaging models. She claimed harassment in relation to a number of events including an incident which occurred in her hotel room when she was on a photo shoot. This was held to be within the course of employment and relying on *Rhys-Harper* the EAT held that 'a sufficient nexus existed between the employment and the complaints upheld by the employment tribunal.'

The issue of whether an employee is acting in the course of their employment was considered by the Employment Appeal Tribunal in the case of *Tower Boot Co Ltd -v- Jones* [1995] IRLR 529. An industrial tribunal ruled that the racial harassment which the employee was subjected to, including burning his arms with a hot screwdriver, metal bolts being thrown at his head, whipping his legs and sticking a notice on

his back bearing the words 'chipmunks are go' and calling him socially offensive names amounted to unlawful discrimination. The tribunal held that the employer was vicariously liable for the harassment and that the acts were carried out in the course of employment. The tribunal took the view that if it accepted the employer's argument that these acts were outside the course of the employee's employment it would be reduced to accepting that no act carried out by an employee can become the liability of the employer unless it was expressly authorised by the employer.

The majority decision of the EAT overturned the tribunal's decision and the case proceeded to the Court of Appeal. The Court of Appeal accepted that a narrow reading of the term 'course of employment' would be that the more heinous the act of discrimination, the less likely it will be that the employer would be liable. That submission was rejected as cutting across the whole legislative scheme which is to:

'deter racial and sexual harassment in the workplace, through a widening of the net of responsibility beyond the guilty employees themselves, by making all employers additionally liable for such harassment and then supplying them with the reasonable steps defence which will exonerate the conscientious employer who has used his best endeavours to prevent such harassment and will encourage all employers who have not yet undertaken such endeavours, to take the steps necessary to make the same defence available in their own work place.'

Waite LJ held:

'Tribunals are free, and are indeed bound, to interpret the ordinary and readily understandable, words 'in the course of employment' in the sense in which every lay man would understand them. This is not to say when it comes to applying them to the infinite variety of circumstance which is liable to occur in particular instances within or without the work place, in or out of uniform, in or out of rest breaks - all lay men would necessarily agree as to the result. That is what makes their application so well suited to a decision by an industrial jury.'

This decision complements the attitude taken in Northern Ireland by the Industrial Tribunal. In the case of *O'Neill -v- Herbel Restaurants and Others*, Ms O'Neill alleged harassment by a trainee supervisor and co-worker in Kentucky Fried Chicken in Portrush. The incidents included physical harassment in the workplace and also an incident in a taxi provided by the Company to transport staff home after working in the evening. The Respondent argued that the employees were not acting in the course of their employment. The tribunal had:

'no hesitation in concluding that in law and in fact there is little doubt that both of them were acting in the course of their employment when the physical and verbal sexual harassment occurred in KFC Portrush.'

In relation to the incident on the taxi ride home, the tribunal noted that their

Part Four

employment was the reason why they were in each other's company:

'the employer is under a duty of care to ensure that an employee will suffer no harm because of his employment. The employer, by undertaking to provide transport home, extended the circumstances in which all three came together as employees. There was no evidence before the tribunal that but for the circumstances of her employment the Applicant would not have been in the company of the other two employees in that taxi on that evening.'

The tribunal held that the employer was responsible for the acts of their employees as the employee had carried out negligently that which he authorised to do carefully. In this case aggravated damages of £1,500 were awarded due to the handling of the complaint.

What defences are available to an employer?

The liability for acts of harassment arises whether or not the act/s were done with the employer's knowledge or approval. An employer has a defence if s/he can prove that such steps were taken as were reasonably practicable to prevent the employee from doing that act or from doing, in the course of his/her employment, acts of the same description. In Northern Ireland the case law has established that the clearest evidence will be required from the employer that he/she has done all in his/her power to prevent the harassment in order to avoid liability for the acts of employees.

In the case of *Green -v- F G Wilson (Engineering) Limited* (Case Ref 304/00 FET) the FET held that the claimant had been the victim of sectarian harassment with regard to graffiti which had been placed in a toilet cubicle in or about February 2000. This contained comments such as 'Up the RA' together with references to the claimant and his possible personal security. However, the Respondent was successful in defending the case as it was held that it had taken such steps as are reasonably practicable to prevent the culprit engaging in the harassment.

'This was an isolated incident, amongst a mixed workforce. All employees were inducted in relation to the company's Equal Opportunities policies and relevant disciplinary/ grievance and harassment complaint procedures. All employees were given copies of the employee handbook. Supervisors and managers were trained in such issues and the said issues were discussed, when appropriate and necessary, at monthly team briefs and weekly/ fortnightly toolbox meetings with the workforce. Use of football shirts/tops and flags was not allowed in the workplace. The company because of its position in an interface area, attracting a mixed workforce, was particularly conscious of ensuring the workplace was free from any sectarian influences and further the necessity to emphasise on a frequent basis this message to its workforce. Graffiti, written inside a cubicle, is for all practical purposes impossible to prevent and further to make persons amenable for such misconduct. The Respondent, in the view of the Tribunal, clearly took all steps to prevent it by use of frequent inspections and removal of graffiti, including

use of outside contractors and regular re-painting of the cubicles. Steps were taken to combat the graffiti which often occurred which consisted of lavatory humour/reference to sexual prowess and football clubs; apart from one other isolated incident there had never been any graffiti of the type, the subject matter of these proceedings, and which were specifically targeted against an employee. In the Tribunal's view it does not consider there were any further steps which were reasonably practicable for the respondent to have taken in the circumstances.'

In the case of *A -v- B & C* (Case Ref 1473/01) the Applicant complained that a worker, 'D', whilst at an office party pulled down her boob tube style top exposing her breasts. The parties accepted that the respondent would be liable for such unlawful sex discrimination unless they could avail of the statutory defence under Article 42(3) of the Sex Discrimination (Northern Ireland) Order 1976. The Tribunal held:

'Having regard to the steps taken by the Respondents to prevent D from doing the said acts complained of the tribunal noted in particular that D had been given training in Equal Opportunities in 1995 and had received his own personal copy of the EO circular 3/93 (revised) in May 1999 and that he had also received some additional training in 2000 in connection with the programme undertaken by B to achieve Charter Mark Status. The tribunal was particularly impressed by the specific focus of the Respondent on the issue of sexual harassment and in particular in the context of social functions such as the office party. The memorandum/circular sent to all staff on 18 August 1999, Circular 3/99 circulated to all staff but also the specific memorandum sent by E on 10 November 2000 to all members of the Section, including D, could not have set out more clearly, but also in a way that was readily understood by all staff, that actions such as the admitted actions of D at the office party would be unlawful and likely to be the subject of a claim. It was further clear to the Tribunal that these memoranda/circulars had been discussed both generally in D's workplace, but also specifically at staff meetings, many of which were attended by D and for which he received the minutes as part of the circulation procedures. E's memorandum, but also the circulation of the Core Brief could not have been more timely....In the tribunal's view the steps taken by the respondents to prevent D from doing the admitted acts complained of at the said office party were comprehensive and could not be faulted.'

Returning to the *Burton and Rhule -v- De Vere Hotels Ltd* case, the EAT held that:

'Where an employer is shown to have actual knowledge that racial harassment of an employee is taking place, or deliberately or recklessly closes his eyes to the fact that it is taking place, if he does not act reasonably to prevent it, he will readily be found to have subjected his employee to the detriment of racial harassment. However, we do not think that foresight and culpability are the means by which the employer's duty is to be defined. The duty is not to subject the employee to racial harassment.'

Part Four

The EAT believed that on occasions what the employer knew or foresaw might be relevant to the control which the employer could exercise. Lack of possible foresight and the unexpected nature of an event might be relevant to the question of whether the event was under the employer's control,

'But foresight of the events or the lack of it cannot be determinative of whether the events were under the employer's control. An employer might foresee that racial harassment is a real possibility and yet be able to do very little if anything to prevent it from happening or protect its employees from it. For example, the employer of a bus or train conductor may recognise that the employee will face a real risk of racial harassment at times. Yet the prevention of such an event will be largely beyond the control of the employer. All he will be able to do is make his attitude to such behaviour known to the public and to offer his employees appropriate support if harassment occurs. On the other hand, if the harassment occurs even quite unexpectedly, but in circumstances over which the employer has control, a tribunal may well find that he has subjected his employee to it.'

While *Burton and Rhule* has been disapproved by the House of Lords the control test may emerge again in arguments under the new definition of harassment.

Remedies

A Tribunal may make any of the following Orders which it considers just and equitable:

- a. An Order declaring rights.
- b. An Order requiring compensation.
- c. A recommendation that the Respondent take within a specified period action appearing to the Tribunal to be practicable for the purpose obviating or reducing the adverse effect on the complainant of any unlawful discrimination.

There is no ceiling to the awards of compensation which may be made by a tribunal. Not only may a tribunal award compensation for loss of earnings including future loss, it will normally in an harassment case award compensation for injury to feelings. In *Vento -v- Chief Constable of West Yorkshire Police Number 2* [2003] IRLR 102 the Court of Appeal set out three bands of awards for injury to feelings. At that time the Court of Appeal held that the most serious kind of injury to feelings would attract an award between £15,000 to £25,000. It held that sums in this range should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment. The middle band award of between £5,000 to £15,000 should be used for serious cases and awards of £500 to £5,000 are appropriate in less serious cases such as where the act of discrimination is an isolated or one off occurrence. Clearly these figures must change through time and are merely guidelines for tribunals to apply.

In addition to injury to feelings awards may be made for psychiatric damage. In the case of *Sheriff -v- Klyne Tuggs (Lowesstoft) Ltd* [1999] IRLR 481 an award of compensation for personal injury was upheld by the Court of Appeal. In that case an award of damages for personal injury was made as a result of the racial harassment and abuse the Appellant received during the course of his employment from the Master of the ship. It would appear that as long as there is a direct causal link between the act of discrimination and the consequences then the loss can be made out (*ESSA -v- LAING Ltd* [2004] IRLR 313).

An award of aggravated damages may also be made in the appropriate case. In *Scott -v- Commissioners of Inland Revenue* [2004] IRLR 713 aggravated damages were awarded to deal with the case where the injury was inflicted by conduct which was highhanded, malicious, insulting or oppressive. In this case an employee was accused of sexual harassment by a female colleague. The employer upheld her complaint, settled a claim and disciplined Mr Scott. He felt he had been treated unfairly and an Employment Tribunal agreed. It criticised in very strong terms how the matter had been dealt with by the Inland Revenue. The Court of Appeal commented,

‘sexual harassment is a serious matter in the workplace and needs always to be addressed where there is a complaint about it, but it does not have to become the subject of state trial every time it arises. Incidents trivial in themselves can acquire a measure of seriousness, or perceived seriousness, if they appear to be recurrent. That is one reason why they should be considered in isolation. The complaint against the Applicant in the present case is one which it would have wrong for management to trivialise or ignore. Nevertheless, it was the type of complaint which, if sensitively addressed, can be straight forwardly resolved ... this was exactly the kind of situation which, if management ignores or trivializes it, can make the workplace a source of tension and unhappiness and escalate into formal dispute. The problem was that, the disciplinary wheels having been set prematurely and unnecessarily in motion against the Applicant, nobody seemed willing or able to halt them.’

The harasser can also be personally liable to pay damages to the victim. For example in the case of *Yeboah -v- Crofton* [2002] IRLR 634 the harasser was ordered to pay Mr Yeboah £45,000 compensation for racial discrimination including £10,000 aggravated damages. It was held that even if the employer was not vicariously liable because it had taken such steps as were reasonably practicable to prevent the employee from doing the act in question the Tribunal was entitled to hold that the employee was personally liable for knowingly aiding the unlawful act by the employer.

Bullying and the Law

Currently an employee or employer is not able to point to a specific piece of legislation that prohibits bullying in the workplace. It is this singular fact that makes

Part Four

bullying a much more nebulous concept than harassment in terms of defining, tackling and eliminating it in the workplace. Many would argue that the lack of statutory provision increases the temptation to make bullying 'fit' into one of a vast array of other pieces of legislation or to ignore the issue altogether because it is not specifically outlawed.

To subsume bullying under harassment in general means that a crucial distinction between the two concepts is ignored and a potential hierarchy of unwanted conduct is created usually because there are no Acts, Orders or Regulations making provisions for bullying. Therefore more often than not the only points of legal reference regarding workplace bullying are Case Decisions from Superior courts and Acts of Parliament, Orders in Council and Statutory Instruments which are capable of being interpreted in the context of workplace bullying. The purpose of this approach is not necessarily to create the basis of an individual employee claim to an Industrial Tribunal, although that may occur, but rather to put the issue of bullying into some form of statutory context (see later examples).

The often cited 'Dignity at Work' Bill is regarded in some quarters as the panacea to the issue of workplace bullying and thereby negate the acts of legal contortion currently required to bring a case of bullying to court or Industrial Tribunal. However, the above Bill has been in existence for nearly a decade and seems unlikely to reach the statute books in its current guise. Until such specific legislation exists however, employers and employees alike are faced with the proverbial legal minefield if the issue of workplace bullying arises. As case law develops at a remarkable pace other alternative avenues of legal redress become more apparent and the boundaries of the law become subject to further testing with some surprising results.

An example of the above is the **Protection from Harassment (Northern Ireland) Order 1997** which in essence was put in place to address the criminal offence of stalking. In principle, there is nothing to prevent the Order being examined in a civil context and further to this, an employment context provided the alleged victim can establish the necessary components of a case. Thus, for example, if a person (eg, an employee) pursues a course of conduct which amounts to harassment of another (eg, another employee) and the affected employee can reasonably demonstrate that s/he has been caused fear of violence on at least two occasions by the offending employee, then theoretically s/he has a legal avenue of redress. It is worth noting that the term harassment in the Protection from Harassment (Northern Ireland) Order 1997 is not couched in equality terms, that is, the harassment does not need to be 'on the grounds of' a protected characteristic under the anti-discrimination legislation. Indeed the Order does not define harassment but rather focuses on whether the perpetrator either knew or ought to have known that their behaviour amounted to harassment.

Although there are several superior court case decisions where bullying has been the central tenet, the issue was addressed in a broader context in the case of *Majrowski -v- Guy's and St Thomas NHS Trust*. This case is currently unique in

that the Court Of Appeal stated that under the 1997 Protection from Harassment legislation an employer could be held vicariously liable for a breach of a statutory duty by another employee in the course of his/her employment, even though the legislation did not specifically provide for vicarious liability. The central feature of the above case poses a series of intriguing issues and indeed there are some schools of thought that would see this case as providing a long awaited legal remedy for bullying at work cases albeit via a statutory route designed to counter stalking which has an inherent flexibility which allows it to be interpreted for all intents and purposes as the 'Anti-Bullying in the Workplace Act 2005'.

The Majrowski case centred around stereotypical bullying behaviour (ie, a series of behaviour/s, not a one-off incident - see case – *Banks -v- Ablex Ltd* 2005 IRLR 357) ranging from general abuse, isolation, excessive criticism, setting excessive targets and threatening disciplinary sanctions. The contemporary approach to tort law would seem to broaden the scope for an employer to be held vicariously liable (the work connection test) and the problems for employers in the context of bullying. The Majrowski case and the Protection from Harassment legislation seem to have exacerbated this. Examples of the previously mentioned problems include the following:

- a potentially lower 'bar' in regard to proof (ie, demonstrate anxiety/distress)
- provides a more user friendly route for contextualised stress litigation
- the provision in the legislation for the employer to be held 'strictly' liable
- the ineffectiveness of the 'took reasonable measures to prevent' defence
- the victim will not need to prove reasonable foreseeability
- the window for lodging a claim lasts six years.

It remains to be seen if this case stands the test of time but in the meantime it represents the most significant development to date in the area of bullying and harassment and as such could prove to 'trump' all other routes in relation to bringing a claim for bullying through the courts. However, other circuitous routes taken with regard 'taking a case for bullying' usually are taken after termination of the employment relationship by either the employer or the employee. Thus, legal avenues of redress while bullying at work is ongoing with the employment relationship intact are limited and invariably involve 'shoe-horning' a claim.

Other Acts or Orders where bullying may have an application could include the following:

- The **Health and Safety at Work (NI) Order 1978** (Art 4. (2) as amended) and the related Management of Health and Safety at Work Regulations (NI) 2000 (Art. 3). These relate respectively to the general to the need for a safe system of work (physically and psychologically) and specific requirements regarding risk assessments.
- The **Malicious Communications (NI) Order 1988** provides that a person commits an offence if he/she sends to another person a letter (or any other article, eg, e-mail) which conveys a message which is: indecent or grossly offensive, a threat,

Part Four

or information which is false and causes distress or anxiety to the recipient.

- The **Public Interest Disclosure (NI) Order 1998** makes provision for a person (eg, employee) to make a protected disclosure on the grounds that a person (eg, employer) has failed, is failing or is likely to fail with any legal obligation to which s/he is subject, or that the health and safety of any individual has been or is being or is likely to be endangered. Such a disclosure must be made for example to his/her employer in the genuine belief that it is substantially true and as such it is made in good faith.

From a contractual or tort based perspective there exist other potential avenues of redress including the following:

- **Breach of contract** – via fundamental breach of the implied duty of mutual trust and confidence. The industrial tribunal/court decisions in this field are wide and disparate in terms of the subjects that they cover, however the blatant failure of an employer to deal properly with a complaint/problem of bullying via internal dispute resolution machinery may constitute enough in terms of a fundamental breach of contract. The test applied in such cases would appear to be stringent and not based upon single incidents per se and should not be perceived as meaning an employer is contractually bound to act in a reasonable way. Cases such as *Waters -v- Commissioner of Police of the Metropolis* (2000) IRLR 720 demonstrate how the contractual route can be used in either a bullying or harassment case with a view to trying to find the employer vicariously liable for failing to act thereby allowing further acts of bullying/harassment.
- **Duty of care** – This is perhaps the most often quoted tort based duty in a variety of contexts such as health and safety in general or more specifically for reasonably foreseeable psychiatric injury that meets the court based tests regarding employer knowledge and action taken in relation to bullying. The three basic components are: duty of care owed, breach of duty of care and damage or injury caused as a direct result. The aforementioned three components provide the foundations of a civil case for negligence causing personal injury. Many cases taken before courts and tribunals refer to the ubiquitous duty of care but often in general terms and in the round, for example, an implied duty of care owed by the employer to the employee and vice versa. Inextricably linked with the concept of duty of care are matters relating to issues such as how reasonably foreseeable the injury was; what reasonably practicable measures did the employer take to counter the potential of instances of bullying occurring; how proactive or reactive was the employer in relation to policies, procedures, protocols and action taken as a result; what internal dispute resolution mechanisms were employed; and were they compliant with the minimal requirements of the statutory dispute resolution legislation?
- **Other statutory provisions** – As indicated earlier there may be a temptation to 'shoe-horn' bullying under the auspices of an Act of Parliament or Statutory Rule which were never devised to combat workplace bullying and thus the link will be tenuous at best and futile at worst. Examples may include a civil action

against a public sector body under Article 3 of the Human Rights Act (1998) (ie, the right not to be tortured or inhumanly or degradingly treated or punished). Also perhaps using the Management of Health and Safety at Work Regulations (Northern Ireland) 2000 under Article 3 – risk assessment. In such an instance an employer may be gauging/auditing stress levels in relation to bullying in the workplace and the question then becomes what is the employer duty bound to do when s/he comes into possession of the bullying related risk assessment information?

In the absence of specific legislation outlawing workplace bullying, the focus remains on courts and their decisions in order to identify the direction and development of case law. As identified earlier there is a wealth of established case law in relation to harassment in the workplace, however there has traditionally been a comparative dearth of workplace bullying cases. However, in recent years there has been an increased tendency for bullying to be appropriately distinguished from harassment and thus providing the central basis for a case as a stand alone concept. For example cases such as *Horkulak -v- Cantor Fitzgerald International* (2003). Although this case was sensationalised because of the sums involved it should not detract from the fact that as part of the judgement there was specific reference to the implied duty of mutual trust and confidence and how it was irrevocably harmed by the offending chief executive's behaviour.

The **implied duty of mutual trust and confidence** is a concept gaining momentum in cases of breach of contract. However the standard of proof would appear to be quite high and it is incumbent upon the employee to demonstrate that the contract has been fundamentally breached and is in essence irreparable. The case demonstrates that use of abusive language, despite a pressurised work environment, is recognised as an integral part of bullying and in this instance was deemed to be the key part of a premeditated campaign of bullying designed to destroy the employment relationship and thereby repudiating the employment contract. The court stated that by uttering intemperate, summary views in foul and abusive language, and to vent disapproval without giving the chance to re-establish trust and confidence, provided the basis for the contract breaking down.

Contemporary case law points to the need to resolve matters of bullying at an early stage before relationships are irreparably harmed by legal recourse which only serves to compound problems and entrench stances. One of the underpinning themes of the Dispute Resolution Regulations is to promote internal resolution of employment relations problems such as grievances about bullying at work. Indeed, taken a step further, the use of mediation can often preserve the fabric of the working relationship as many cases can be resolved amicably via apologies or clarification of misperceptions.

An interesting twist to the issue of bullying at work and dispute resolution relates to one unforeseen consequence of the Employment (Northern Ireland) Order 2003 Dispute Resolution (Northern Ireland) Regulations 2004, (hereinafter referred to as the Dispute Resolution Regulations), which came into effect in Northern Ireland

Part Four

on 3 April 2005. In general terms an employee with a grievance should exhaust the internal procedure within the organisation in accordance with at least the minimum statutorily compliant procedure. The underlying logic of this approach is to resolve more grievances 'in-house' thereby reducing the level of employment litigation. However, the employee needs to be aware that failure to raise a grievance (which could ultimately be taken to an Industrial Tribunal, a jurisdictional grievance) internally and exhaust the internal procedure could result in the Industrial Tribunal refusing to hear the claim.

That said, a relatively obscure exception to the above rule comes in the form of Article 11 of the above Regulations whereby an employee will be treated as having complied with the minimum legal requirements of the grievance procedure if s/he has reasonable grounds to believe that commencing the (Grievance) procedure or complying with a subsequent requirement would result in significant threat to him/herself or property or any other person or the property of any person. Thus, it is not beyond the bounds of reason to envisage a scenario where an employee is bullied, reasonably feels that invoking the grievance procedure would result in a significant threat and thus bypasses the in-house grievance procedure and instead proceeds directly to an Industrial Tribunal.

A further and indeed more relevant exception also exists under Article 11 in that an employee will be exempted from commencing or exhausting the internal grievance procedure if he or she has been subject to harassment and has reasonable grounds to believe that commencing the procedure or complying with the subsequent requirement would result in being subject to further harassment.

In common with emerging anti-discrimination legislation, under Article 11 (4), harassment is defined as conduct which has the purpose or effect of violating the person's dignity or creating an intimidating, degrading, humiliating or offensive environment for him/her. This objective component in the definition of harassment is not couched in any equality related or social identity related terminology or requirement, thus in effect an employee who has been bullied can use the statutory definition of harassment under the Dispute Resolution Regulations 2004 to acquire exemption from using the in-house grievance procedure (and presumably in-house bullying and harassment procedure) and proceed directly to an Industrial Tribunal and lodge a claim, for example, of constructive dismissal.

It should be noted that at this juncture this remains conjecture but given that there potentially exists a statutory provision for the above it is not beyond the realms of possibility and will require testing via litigation. The question of how high the bar of reasonableness will be set by Industrial Tribunals remains to be seen and how easily Industrial Tribunals will make it for employees to lawfully bypass in-house procedures also remains to be seen. However, the potential for the ethos of the Dispute Resolution Regulations 2004 to backfire in cases of bullying and/or harassment is clear and the problem is compounded by the existence of so many definitions of harassment and bullying in the public domain.

As indicated previously case developments in late 2005 seem to indicate that the statutory dispute resolution provisions are being given a broad interpretation by the Employment Appeals Tribunals with the result that such tribunals may well interpret the commencement of a bullying/harassment procedure as being legally tantamount to lodging a statutorily compliant Stage 1 grievance letter. With this in mind both employers and employees should not underestimate the legal complexities surrounding this subject.

Indeed legal quandaries surround and beset the concept of bullying in the workplace and can cause untold difficulties for the employer and employee alike. For example, in the case of *Brooks -v- Findlay Industries UK Ltd*, the issue of what to do when a victim (of harassment) asked the employer not to pursue the matter further. In this case the Tribunal was of the opinion that the employer should have taken action despite the victim's opposition. This could equally be applied to a bullying context and leave both the victim and the employer feeling aggrieved but with little option given the complexities of the requirements of law and good practice in this area.

Other problems regarding the law and bullying is the obvious overlap with harassment whereupon bullying behaviour was adopted within an harassment context or vice versa. In many instances it is tempting to say that bullying and harassment are 'the same but different' in that the tactics used by the bully/harasser may be the same but the grounds for meting out these behaviours is different. This is where theory and law part ways and where the facts of each case need to speak for themselves. It is at this juncture that problems, quandaries and jurisdictions arise regarding the following:

- How is treatment meted out on social identity grounds identified as such?
- How are perception and reasonableness measured objectively?
- How has the treatment been 'labelled' by parties involved?
- Existence of policy, training, support mechanisms?
- Is the matter a 'One-off' incident or on-going series?
- What are the cultural norms within the organisation in this context?
- Are unacceptable behaviours 'listed' as such?
- What has tipped the balance between right to manage and unacceptable behaviour?

To this extent arguments can range from the semantic to the pedantic and invariably the approach required is that of providing for each case turning on its own facts and applying the balance of flexibility and policy requirements. Given that the government actively promote Alternative Dispute Resolution (ADR) it is perhaps worthy to focus on the positive possibility of having the matter resolved without the need for litigation.

Part Four

Dealing with a tribunal case: some practical issues**Who is named in a case?**

In the past the employer was normally the only respondent named in tribunal. However over recent years there has been a growing tendency for the employee(s) accused of harassment to be named as co-respondents and in turn to become potentially liable for part-payment of the compensation.

Is it possible to settle out of tribunal?

Given the considerable legal costs associated with defending a tribunal case, employers have shown an inclination to settle out of tribunal. In some instances the employer may be able to link any settlement with a confidentiality clause. However, where the applicant is assisted by one of the statutory agencies then the agency may not agree to such terms.

How long does a hearing normally last?

While it was originally intended that tribunals would take a matter of hours to adjudicate, it would not be uncommon for cases to be scheduled for up to ten days, with the average being four to five days.

What does the process involve and is legal representation imperative?

An employer would be required to make available all relevant documentation and witnesses, who would be required to attend the tribunal until their evidence is heard. Those involved can often expect to be subjected to lengthy and vigorous examination and cross-examination. Given the complexities and intricacies of the legislation, and despite the original intention of the tribunal process, it would be risky to attempt to defend a case without legal representation.

Who bears the cost?

Those bringing a complaint before a tribunal would not be entitled to legal aid and would normally have to bear the costs personally or, in exceptional circumstances, may have their case supported by the Equality Commission. This would normally only apply where the case is of particular significance to the statutory agency in question. Employers must bear their own legal costs, irrespective of the outcome of the case, and must be prepared to pay compensation if the case is proven. Exceptionally, the applicant may be required to pay costs where the case is not proved but the sums involved are normally nominal.

Is there an alternative to a tribunal?

There is no legal alternative to lodging discrimination proceedings. However, the Labour Relations Agency makes itself available for conciliation, mediation and binding arbitration, and this route is being followed in a growing number of cases.

Are there other legal avenues?

As mentioned earlier, the Protection from Harassment (NI) Order 1997 makes harassment both a civil tort and criminal offence. Victims of harassment may seek both an injunction and damages through the criminal courts.

Is there an appeal process?

The decision may be appealed to the Court of Appeal on a point of law.

How significant is case law, both here and over the water?

While there is temptation to cite case law from tribunals in Great Britain, a more accurate guide to the operation of Northern Ireland tribunals is the decisions coming from those tribunals themselves.

Equality Commission for Northern Ireland: Model harassment policy

As part of its overall commitment to equality of opportunity, this organisation [specify name] aims to promote a good and harmonious working environment where every worker¹ is treated with respect and dignity and in which no worker feels threatened or intimidated because of his or her age², disability, marital or civil partnership status, political opinion, race, religious belief, sex (including gender reassignment) or sexual orientation. The aim of this policy is to prevent harassment by communicating clearly the type of behaviour that is not acceptable in our workplace and the action that will be taken should harassment occur.

Harassment at work in any form is unacceptable behaviour and will not be permitted or condoned. Sexual, sectarian and racial harassment, harassing a disabled person on account of disability or harassing someone on grounds of sexual orientation (or age) is unlawful under the sex discrimination, fair employment, race relations, disability and sexual orientation (and age) legislation. It may also be a civil offence, a criminal offence and it may contravene health and safety legislation.

Harassment detracts from a productive working environment and can affect the health, confidence, morale and performance of those affected by it, including anyone who witnesses or knows about the unwanted behaviour. This can have a direct impact on the employee relations climate and the profitability and efficiency of the organisation.

Harassment is inappropriate behaviour at work and may be unlawful conduct. It will be treated by this organisation as misconduct, up to and including gross misconduct warranting dismissal. All those who work for us must comply with this policy.

[If there is a recognised trade union or workplace representative, insert here:

This policy has been agreed with (name of trade union or workplace representative)]

What is harassment?

In general terms, harassment is unwanted conduct related to a particular characteristic (age, disability, marital or civil partnership status, sex, sexual orientation, race, religious belief or political opinion) which violates the dignity of women and men at work. This can include unwelcome physical, verbal or non-verbal conduct.

Harassment in the employment context has now been defined explicitly in key pieces of anti-discrimination legislation³. Under the legislation covering religious belief and political opinion, race, disability, sex and sexual orientation, harassment is defined as “unwanted conduct which has the purpose or effect” of “violating a person’s dignity” or “creating an intimidating, hostile, degrading, humiliating or offensive environment for that person”.

Appendix 1

¹ We have used the term worker and employee interchangeably in this document. Worker can include categories such as contract workers and agency staff who often have different workplace rights than those who meet the legal definition of employee. As a matter of good practice, the Commission recommends that employers strive to protect from harassment all those who work for them, whether those workers enjoy statutory protection or not. In the event of a complaint of harassment, however, the legal redress available to an individual may depend on their employment status.

² Please note that legislation to outlaw discrimination on grounds of age is expected to come into force in Northern Ireland in October 2006.

³ See list of relevant legislation at the end of this document. It should be noted that the definitions differ slightly in some of the statutory provisions. For further information on definitions of harassment and what the law says, contact the Equality Commission. The forthcoming age legislation will include a prohibition on harassment on grounds of age.

Appendix 1

Harassment as defined in the legislation will amount to unlawful discrimination. This organisation is committed, however, to discouraging all forms of harassment and discrimination, whether unlawful or not.

Many forms of behaviour can constitute harassment; these are just some examples:

- Physical conduct ranging from touching to serious assault
- Verbal and written harassment through jokes, racist, sexist or sectarian remarks, homophobic comments, comments about a person's disability, offensive language, gossip and slander, sectarian songs, mobile telephone ring tones, threats, letters, emails
- Visual displays of posters, computer screen savers, downloaded images, graffiti, obscene gestures, flags, bunting or emblems, or any other offensive material
- Isolation or non-co-operation at work, exclusion from social activities
- Coercion, including pressure for sexual favours, pressure to participate in political or religious groups
- Intrusion by pestering, spying, following, etc.

If any of the above behaviour is not related to an equality ground covered by anti-discrimination legislation, this could amount to bullying.

Employees' rights

All those who work for us have the right to work in an environment which is free from any form of harassment. This includes protection from harassment from work colleagues and clients/customers. This organisation ([specify name](#)) recognises fully the right of employees to complain about harassment should it occur. All complaints will be dealt with seriously, promptly and confidentially.

Individuals have the right to complain through our procedure. [\[specify here whether complaints of harassment will be dealt with under a specific harassment complaints procedure, the organisation's general grievance procedures or some other procedure. A copy of the relevant procedure may be attached to the policy or reference made to where it can be found, eg, in staff handbook, on intranet, etc. Any procedure for dealing with complaints must comply fully with the statutory grievance and disciplinary procedures - for further information see contact details at the end of this document.\]](#)

Our internal procedure does not prevent employees from pursuing a complaint of harassment under the sex/race relations/disability/sexual orientation legislation to an industrial tribunal and, under the fair employment legislation, for example, to the Fair Employment Tribunal, in the case of sectarian harassment. However,

there are strict time limits for making complaints to a tribunal and complainants **normally**⁴ will be expected to have raised their complaint under an employer's grievance procedures first. [\[Employers may wish to include contact details for further information at the end of this document.\]](#)

Every effort will be made to ensure that employees making complaints of harassment, and others who give evidence or information in connection with a complaint, will not be victimised. Victimisation is discrimination contrary to the anti-discrimination legislation. Any complaint of victimisation will be dealt with seriously, promptly and confidentially. Victimisation will result in disciplinary action and may warrant dismissal.

Employees' responsibilities

All those who work for this organisation have a responsibility to help ensure a working environment in which the dignity of all employees, clients and customers is respected. Everyone must comply with this policy and employees should ensure that their behaviour to colleagues, clients and customers does not cause offence and could not in any way be considered to be harassment.

Employees should discourage harassment by making it clear that they find such behaviour unacceptable and by supporting colleagues who suffer such treatment and are considering making a complaint. Any employee who is aware of any incident of harassment should alert a manager (or supervisor) to enable the organisation to deal with it.

Management's responsibilities

Managers (and supervisors, if relevant) have a duty to implement this policy and to make every effort to ensure that harassment does not occur, particularly in work areas for which they are responsible. Managers (and supervisors, if relevant) have responsibility for dealing appropriately with any incidents of harassment which they are aware of, or ought to be aware of. If harassment does occur, they must deal effectively with the situation.

Managers (and supervisors, if relevant) should:

- Explain the organisation's policy to staff and take steps to promote awareness of the procedures for dealing with complaints. Ensure that each member of staff has been given a copy of the policy.
- Be responsive and supportive to any member of staff who makes an allegation of harassment, provide clear advice on the procedure to be adopted, maintain confidentiality and seek to ensure that there is no further problem of harassment or victimisation while a complaint is being dealt with or after it has been resolved
- Set a good example by treating all staff, clients and customers with dignity and respect

Appendix 1

⁴ Normally an individual will be expected to have lodged a complaint with their employer and have waited 28 days before the tribunal will accept their complaint. However, there are some important exceptions to this rule. Further information may be obtained from the sources quoted at the end of this document.

Appendix 1

- Be alert and proactive to unacceptable behaviour and take appropriate action in accordance with our policy and procedures
- Ensure that staff know how to raise harassment problems.

The organisation's responsibilities

This organisation (specify name) will ensure that adequate resources are made available to promote respect and dignity in the workplace and to deal effectively with complaints of harassment. This policy and our procedures for dealing with complaints will be communicated effectively to all employees and others who work for us. We will ensure that all employees and managers/supervisors are aware of their responsibilities. Harassment awareness training will be provided for all employees and specific training will be provided for those who have responsibility for implementing this policy and associated procedures.

All complaints of harassment will be dealt with promptly, seriously and confidentially.

[NOTE Some organisations, for example larger organisations, may wish to consider adding the following to their harassment policy:

- The appointment of designated individuals who can provide advice and assistance to employees who are subjected to harassment. The policy should explain clearly the role of such advisers (including the limitations of that role) and include a commitment to providing appropriate training for them.
- The option, where possible, for individuals to raise complaints of harassment with someone of their own identity or who is sensitive to issues relating to that identity.
- The option to avail of a confidential counselling service.]

Review

We will monitor all incidents of harassment and will review the effectiveness of this policy and associated procedures annually.

Date:

Signed:(on behalf of the organisation)

Signed:(recognised trade union or workplace
representative)

Model procedure for dealing with complaints of Harassment

Appendix 1

Explanatory note

These suggested procedures are intended to complement the Commission's model harassment policy. They are a guide to the critical elements that must be addressed in dealing effectively with complaints of harassment. Organisations need to implement procedures that are appropriate to their size, structure and resources. The most important thing is that the risk of incidents of harassment is minimised, complaints are investigated and dealt with appropriately, in the best interests of all concerned, and that all statutory requirements in relation to grievance and disciplinary procedures are complied with fully. We recognise that harassment may occur between employees and customers but these model procedures are intended to deal only with complaints against other workers.

Harassment is a complex subject. Some forms of harassment will constitute unlawful discrimination under the anti-discrimination legislation relating to sex (including gender reassignment), married or civil partnership status, sexual orientation, race, fair employment and treatment and disability⁵. If an individual is subjected to harassment that is defined as unlawful in the legislation, that person will have particular rights. There are many other forms of behaviour that may be perceived as 'harassment' which will not necessarily constitute unlawful harassment, as defined in the law. Bullying is a good example of behaviour which does not always come under the legal definition of 'harassment'.

⁵ Please note that legislation to prohibit discrimination, including harassment, on grounds of age is expected in October 2006.

Behaviour which is unreasonable and undesirable and which undermines a person's dignity at work but which is not based on a particular characteristic such as sex, sexual orientation, race, religious belief, political opinion or disability will not always offer the same rights of redress for the individual. Nevertheless, it is in an employer's interests to minimise the risk of such undesirable behaviour as it can have also have a negative effect on individuals and ultimately on the organisation's culture, productivity and reputation.

The Equality Commission has a responsibility to help employers comply fully with equality and anti-discrimination law. We are therefore keen to provide guidance for employers which will ensure that they take effective steps to minimise the risk of harassment and deal with any complaints effectively should harassment occur. We are aware that employers may wish to develop procedures which cover a comprehensive range of areas including all the equality grounds, bullying and diversity. Our model procedure, however, is designed to cover our legislative remit which is harassment as defined in the anti-discrimination legislation.

The task of providing simple guidelines for dealing with harassment that are easy to understand and implement is made more difficult by the complexity of the subject. Recent legislative changes that have defined harassment explicitly are helpful in that they clarify the type of actions or behaviour that could automatically give rise to a complaint of harassment. It is much easier for employers to see exactly what their legal responsibilities are and what legal rights their employees have. Case law has

Appendix 1

also developed which is helpful in letting employers see the kind of steps they are expected to take to prevent harassment. It has become well established, for example, that employers are vicariously liable for the discriminatory acts, including harassment, of their employees if the discriminatory act or harassment is closely connected to the employment. An employer may be able to defend themselves if they can prove that they 'took such steps as were reasonably practicable' to anticipate and avoid the harassment.

Statutory dispute resolution procedures

The introduction in April 2005 of new dispute resolution legislation (the Employment (NI) Order 2003 (Dispute Resolution) Regulations 2005) requires all employers to put in place systems and, at least minimum, procedures to deal with workplace grievance and disciplinary matters. These procedures must be set out in writing. The Regulations do not tell employers how they must act in every circumstance but they do set down a general framework as a minimum standard. Employers are free to adopt procedures which are more comprehensive so long as the minimum requirements are complied with. In dealing with complaints of harassment or bullying, employers (and employees alike) must ensure that they comply fully with the provisions of the statutory procedures. If particular procedures are already in place for dealing with complaints of harassment, these should be reviewed to ensure compliance with the statutory procedures.

For further information on the statutory disciplinary and grievance procedures, see the Labour Relations Agency's Code of Practice on Disciplinary and Grievance Procedures, available at www.lra.org.uk and the Department for Employment and Learning's guidance, Resolving Disputes at Work, available at www.delni.gov.uk.

Dealing with complaints of harassment in small organisations

We accept that in very small organisations it may not be appropriate to have separate procedures for dealing with different kinds of workplace complaints or disputes. For these employers, the same procedure may be able to deal with a complaint about harassment or discrimination, a complaint about a bullying colleague or boss, and a complaint about working hours or access to overtime. However, the small organisation needs to be alert to the particular sensitivity of complaints of harassment, the potential impact on the individual concerned, the potential for legal redress for the person complaining, the implications of having to defend a complaint and the implications for other staff/employees if a complaint arises.

Dealing with complaints in larger organisations

Medium sized and larger organisations should find it helpful to have separate procedures for dealing with complaints of harassment. The precise steps will vary according to the nature and resources of the organisation. For example, very large organisations may have individuals who are specially trained to deal with harassment complaints or who can act as confidential advisers to staff who experience problems. They should also provide training in harassment awareness and in the organisation's procedures. The larger organisation is more likely to have dedicated human resources staff who may play a key role in investigating complaints, etc. Again, the most important thing is to

ensure that policies and training are in place to minimise the risk of incidents in the first place, that appropriate action is taken should an incident occur and that all statutory requirements are complied with fully.

Our model procedure should be used as a guide that can be adapted and applied as appropriate.

Appendix 1

Appendix 1 Model procedure for dealing with complaints of harassment

Scope

Any employee who believes that s/he has suffered or is suffering any form of harassment is entitled to raise the matter through the following procedure.

This internal procedure does not prevent an individual from exercising their statutory right to pursue a complaint of harassment to an industrial tribunal or fair employment tribunal if the issue complained of is related to one of the grounds⁶ covered by legislation – race, disability, sex (including gender reassignment), married or civil partnership status, sexual orientation, religious belief or political opinion. However, employees should be aware that they will normally be expected to have raised their complaint under the employer's grievance procedures before it can be lodged with the industrial tribunal. [\[For further information on this issue and time limits for pursuing complaints to a tribunal, see contact details at the end of this document.\]](#)

⁶ It is expected that the legislation to prohibit discrimination and harassment on grounds of age will be implemented in Northern Ireland in October 2006.

Employers may become aware of an alleged incident of harassment from a third party. Inquiries should be made, respecting the rights of all involved, to ascertain whether the victim wishes to make a formal or informal complaint. If the victim does not wish to make a complaint, the employer still has an obligation to consider whether an investigation could be initiated without the co-operation of the victim or whether other forms of management action are required to ensure a good, harmonious working environment.

Dealing with complaints informally

While it is often desirable to attempt to deal with workplace situations informally in order to maintain good working relationships, harassment complaints need to be treated with caution. It is only appropriate to attempt to deal with a harassment situation informally, for example, where the harassing behaviour is not so serious (although its continuation presents a risk), there has only been a one-off incident which is not considered serious, or where the individual simply wants undesirable behaviour to stop. There may be occasions when an employee would prefer to deal with the situation informally but managers feel it would be more appropriate to deal with it formally. If there is a risk that the matter complained of will give rise to any kind of disciplinary response, then formal procedures (taking account of the statutory disciplinary and grievance requirements) should always be used and the employee should be made aware of this. Employees should also be made aware that, in most instances, they will be expected to have raised their complaint through their internal grievance procedure before a complaint is lodged with a tribunal.

Employees can seek to resolve matters informally by:

- Approaching the alleged harasser directly making it clear that the behaviour in question is offensive, is not welcome and should be stopped
- Approaching the alleged harasser with the support of a colleague, trade union representative or manager

- Asking a manager or supervisor (or designated harassment adviser if the organisation has appointed advisers) to approach the alleged harasser on his/her behalf.

Where an employee seeks the support of a supervisor or manager, he/she will be informed sensitively that their role in the informal process can only be one of support and assistance. The employee must be clear about the limitations of the manager's involvement in any informal intervention.

The employee will be advised that:

- (i) A formal investigation and possible disciplinary action can normally only take place if the complaint is investigated under the formal procedure
- (ii) Should an individual wish to bring a claim to an industrial tribunal, it is necessary (in most circumstances) to have raised it first through the organisation's internal grievance procedures in writing in accordance with the statutory procedures
- (iii) A written record of the complaint and any action taken will be made to assist in any formal proceedings that may arise if the behaviour does not stop/is repeated.

If the matter complained about is considered serious and inappropriate for informal resolution, the supervisor or manager will advise the individual that it warrants action under the formal procedure. The manager will explain that s/he is obliged to deal with the matter formally as the employer has a duty of care, both to the individual and to other employees, in relation to such a serious matter.

All reported complaints of harassment will be monitored and, in the event of any patterns emerging, management may initiate its own formal investigation and take remedial action where this proves necessary.

Dealing with complaints formally

The formal complaints procedure is appropriate if, for example, the harassment is serious, the person making the complaint prefers this, or if the harassment continues after the informal procedures have been unsuccessful in reaching a satisfactory resolution.

Making a complaint

A complaint of harassment should be raised through the Harassment complaints procedure/general grievance procedure [specify] as follows:

- A complaint should be raised in the first instance with [specify which manager or managers can deal with complaints. If the allegation is being

Appendix 1

made against the designated manager, specify an alternative].

- The complaint should be made as soon as possible after an act of harassment so that the matter can be dealt with quickly.
- The complaint should be set out in writing (step 1 of the statutory grievance procedure). [The statutory dispute resolution procedures require complaints to be made in writing. In certain situations, it may be necessary to make a reasonable adjustment for a disabled person or for someone who is not fluent in English or sufficiently literate to do this. An adjustment could be providing assistance with writing the complaint.]

Dealing with the complaint

Meeting to discuss the harassment complaint

- On receiving a formal complaint, the manager (or designated other) should invite the employee to a meeting as soon as possible and inform them that they may be accompanied. The individual should also be reassured that the matter will be dealt with confidentially and as quickly as possible.
- At the initial meeting, the manager should seek further information from the person making the complaint. S/he should be advised that the complaint will have to be investigated and any witnesses questioned. S/he should also be advised that the alleged harasser also has the right to a fair hearing, including the opportunity to defend the allegation.
- Depending on the nature of the harassment, the manager may discuss how to avoid further contact with the alleged harasser while the complaint is investigated.
- If the harassment complained of is of a serious nature that may amount to gross misconduct warranting severe disciplinary action, including possible dismissal, consideration may have to be given to precautionary suspension of the alleged harasser while the complaint is investigated. [Suspensions should normally be a last resort and advice provided in the LRA Code of Practice applies.] However, It should be noted that, in these circumstances, the employer must comply with the statutory dismissal and disciplinary procedures in relation to any action that may be taken against the alleged harasser.

Following the initial meeting with the complainant, the manager will meet with the alleged harasser to:

- Outline the nature of the complaint made against him/her
- Confirm that it is being handled as a formal harassment complaint under the organisation's harassment/grievance complaints procedure
- Give the alleged harasser the opportunity to answer the allegation
- Inform the alleged harasser that the matter will be investigated further and any witnesses spoken to

- Advise of the next steps under both the statutory grievance and disciplinary procedures and the possible disciplinary action that may be taken should the allegation be proven
- Advise that any finding against him/her, following investigation, which may warrant a disciplinary response will be notified in writing as part of the organisation's disciplinary procedures
- Advise that the individual has the right to be accompanied to any disciplinary meeting at which the matter will be discussed
- Advise of the need to avoid contact (or of any steps to be taken to avoid contact) with the person alleging harassment until the matter is resolved.

Investigating the complaint

Clear terms of reference must be established for those who investigate complaints of harassment. Where resources allow, it is desirable to have more than one person involved to ensure impartiality. Detailed and accurate records of all meetings, etc, must be made.

The investigating manager will meet with any known witnesses or anyone else who may be able to help establish the facts around the alleged harassment. All those who give information should do so privately and not in the presence of anyone involved in or present during the alleged harassment. Where appropriate, the investigating manager will also try to establish whether there has been any history of previous conflict between the complainant and the alleged harasser. All information or evidence provided should be treated as confidential to the investigation, subject to any statutory requirements.

Following the gathering of information, the investigating manager may need to meet again with the complainant, either to clarify or gain additional information.

Consideration of information

Having obtained all the information possible, the investigating manager will consider whether the facts support the complainant's case and, if so, what disciplinary action needs to be contemplated, based on the organisation's disciplinary policy, or whether other action is warranted. A written report of the investigation and its findings must be prepared.

Communicating the decision

(a) to the complainant

The outcome of the investigation should be communicated to the person who made the complaint. Although the statutory grievance procedures do not require a formal meeting to do this, a face-to-face meeting is recommended. There is no statutory right to be accompanied at such a meeting but it is good practice to allow it. Nor do the statutory procedures require a decision to be notified in writing but it is recommended as good practice. When communicating the decision, the complainant should be notified of his/her

Appendix 1

right to an appeal meeting, should he/she be dissatisfied with the outcome.

(b) to the alleged harasser

The outcome of the investigation should be communicated to the alleged harasser. Although the statutory grievance procedures do not require a formal meeting to do this, it is good practice. Likewise, there is no statutory right to be accompanied, but it is good practice to allow it. It is recommended that the decision be notified in writing.

Where an investigation produces a finding of harassment:

(a) the victim

Where there is a finding of harassment, the employer should take all reasonably practicable steps to reassure the victim and to protect him/her from further potential harassment or victimisation. This may mean offering specific support or counselling, redeployment or transfer of the harasser (if this is feasible and has not already been done), disciplinary action against the harasser under the organisation's disciplinary policy, training for staff and/or other management action.

(b) the harasser

If there is a finding of harassment and disciplinary action against the harasser is warranted under the organisation's disciplinary policy, the statutory disciplinary and dismissal procedures need to be put into effect. At this stage, the employer should set out in writing the case against the harasser and the disciplinary action (up to and including dismissal) that may result. A meeting should be arranged to discuss the matter and the individual advised that they have the right to be accompanied at this meeting.

Following the meeting, a decision should be communicated to the harasser with information about the right of appeal, if appropriate. The appeal steps of the statutory dismissal and disciplinary procedures should then be followed, if necessary. [\[For further information on appeals, refer to the LRA Code of Practice and other advice.\]](#)

Where an investigation does not produce a finding of harassment

The decision may be clear in stating that no harassment occurred or it may be that, due to the lack of clear evidence or conflicting evidence, the allegations cannot be proven on the balance of probabilities.

(a) the complainant

Where the alleged victim, however, is not satisfied with the outcome, provision needs to be made for an appeal. Any appeal should be heard by a more senior manager, if at all possible, to ensure the matter is dealt with impartially. The complainant will continue to have the right to be accompanied at the appeal

meeting. After the appeal meeting, the employer's final decision must be communicated as recommended above in relation to the initial decision which was the subject of the appeal.

(a) the employer

The management response will depend on the precise circumstances. Management need to be alert to the sensitivity of the situation. In particular, they need to ensure that neither the alleged victim nor alleged harasser suffer victimisation as a result of the complaint. They also need to be aware that, if the victim's complaint was genuine but just not proven because of a lack of witnesses or evidence, they may continue to feel aggrieved and there may be further repercussions. If an allegation of harassment was not made in good faith, this may require a disciplinary response.

Any complaint of harassment provides a timely reminder of the need to ensure that all staff are fully aware of the organisation's policies on equal opportunities and harassment and of the law relating to these matters.

Harassment procedures in larger organisations

Larger organisations that have a separate procedure for dealing with harassment complaints may have the resources and feel it is appropriate to introduce steps that go beyond the three step approach required by the statutory grievance procedures. Such organisations may be in a position to have designated advisers who can play a confidential support role to anyone who suffers harassment or who is making a complaint. The employer needs to consider carefully the role of such advisers and incorporate their involvement into their procedures as appropriate. The larger employer will also have personnel staff who can assist line or senior managers in investigating complaints of harassment. Personnel or other senior managers may also have a role in ensuring consistency in how complaints and investigations are handled and in dealing with any disciplinary action that is taken.

Relevant legislation referred to at footnote 3

Disability Discrimination Act 1995 (as amended)
Fair Employment & Treatment (NI) Order 1998 (as amended)
Race Relations (NI) Order 1997 (as amended)
Sex Discrimination (NI) Order 1976 (as amended)
Employment Equality (Sexual Orientation) Regulations (NI) 2003
Employment Equality Age Regulations (from 2006)

Appendix 1 Further information

The Equality Commission can provide advice and training on avoiding harassment and discrimination in the workplace – contact the Commission’s Promotion and Education Division – tel: 90 500 600 or see www.equalityni.org for relevant advisory publications. The Commission can also advise individuals who experience harassment or discrimination.

For further information about the statutory grievance, disciplinary and dismissal procedures or how to deal with harassment and bullying in the workplace, see the Labour Relations Agency’s Code of Practice – Disciplinary and Grievance Procedures and other guidance on www.lra.org.uk or contact the Labour Relations Agency advice service – tel: 90 321 442.

See also the guidance produced by the Department for Employment and Learning www.delni.gov.uk

Revised March 2006

Useful Websites

Statutory and Government Agencies

Equality Commission for Northern
Ireland: www.equalityni.org

Labour Relations Agency:
www.lra.org.uk

OFM/DFM Equality Unit:
www.ofmdfmi.gov.uk/equality

Health & Safety Executive:
www.hse.gov.uk

Business Link:
[www.businesslink.gov.uk/
bdotg/action/layer?topicId=10
74038578&r.li=1076216112&r.
pp=12&r.l1=1073858787&r.s=p&r.
pt=employingpeople](http://www.businesslink.gov.uk/bdotg/action/layer?topicId=1074038578&r.li=1076216112&r.pp=12&r.l1=1073858787&r.s=p&r.pt=employingpeople)

Equality Authority (Ireland):
www.equality.ie

Dispute Resolution

DEL Information page:
[www.delni.gov.uk/index.cfm/area/
information/page/RDResolvingDisputes](http://www.delni.gov.uk/index.cfm/area/information/page/RDResolvingDisputes)

Dispute Resolution Regulations:
[www.opsi.gov.uk/sr/sr2004/20040521.
htm](http://www.opsi.gov.uk/sr/sr2004/20040521.htm)

LRA Code of Practice on Disciplinary and
Grievance Procedures:
[www.lra.org.uk/PubDownloads/
Disciplinary-1.pdf](http://www.lra.org.uk/PubDownloads/Disciplinary-1.pdf)

Guidance for legal professionals:

[www.delni.gov.uk/docs/pdf/DR%20Guid
ance%20for%20Legal%20&%20HR%20P
rofessionals.pdf](http://www.delni.gov.uk/docs/pdf/DR%20Guidance%20for%20Legal%20&%20HR%20Professionals.pdf)

Guidance for Employees:

www.delni.gov.uk/docs/pdf/ACF65C.pdf

Guidance for Employers:

www.delni.gov.uk/docs/pdf/ACF65E.pdf

Case Law

British and Irish Legal Information
Institute:
www.bailii.org

Other Sites

Andrea Adams Trust:
www.andreaadamstrust.org

Tim Field / Bully Online:
[www.bullyonline.org/workbully/worbal.
htm](http://www.bullyonline.org/workbully/worbal.htm)

Legal Island:
www.legal-island.com

Butterworths:
www.butterworths.com

Discrimination Law Association:
www.discrimination-law.org.uk

Harassment and Bullying in the Workplace

Dealing with harassment and bullying at work is far from easy. Both represent significant problems where the law and good business demand careful handling. This handbook has been brought together to provide guidance towards best practice, acknowledging the demands made by the legislation yet at the same time offering practical suggestions for the development of workable policies and procedures. The handbook begins by outlining and defining workplace bullying and harassment before considering both formal and informal procedures which should help steer a path towards effective solutions. An overview of recent legislation and case law is also provided so completing a comprehensive and up-to-date guide to the topic.

ISBN 1-903941-84-9

March 2006

A joint publication by
the Equality Commission for Northern Ireland
and the Labour Relations Agency

