Responses to submissions from the Public Consultation on the Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work

Submission 1

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The following is the entire submission made by Peninsula.

First and foremost, we would like to thank the HSA and WRC for preparing the draft Code of Practice. The jointly developed Code is to be welcomed as it made very little sense having the two separate codes of practice that are currently in existence.

Definition of Bullying

Notably, the Draft Code seeks to clearly differentiate the definition of bullying from the definition of harassment. This is an important distinction and given how the terms 'bullying' and 'harassment' are often used interchangeably and conjunctively, it is very much welcome that the Draft Code has clarified the two terms.

Following on from the Supreme Court's decision in Ruffley -v- The Board of Management of Saint Anne's School [2017] IESC 33, it is noted with approval that the Draft Code goes into detail as to what is bullying, but also what is **not** bullying at work. This is a welcome addition and is useful for employers and employees alike.

Balancing the Rights of the Alleged Victim and the Alleged Perpetrator

The Draft Code provides useful detail on the effects of bullying on the alleged victim of same, but also the impact to the alleged perpetrator when they have been accused of bullying. This is to be welcomed because the former assists with tackling actual bullying, and the latter assists in tackling the tendency of employees to utilise the terms "bullying and harassment" too easily and, indeed, incorrectly. Indeed, the Code goes into detail on "vexatious" complaints of bullying which is very useful for employers and employees.

Logical Structure

The Draft Code has a strong structure as it has put policy drafting, preventative measures, and how to resolve issues locally front-and-centre with the external claims process coming thereafter. This can be contrasted with the IHREC's draft Harassment Code of Practice which appears to put the external claims process front-and-centre before moving on to addressing such issues locally.

In this respect, it is also noted with approval that the Draft Code specifically notes the "role of employees" in addressing bullying at work. From both a health and safety perspective and a human resources perspective, the focus placed on what is expected of employees is very important for employers in managing such issues and in introducing preventative measures.

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Consultation with Employees?

We would note that the Draft Code states that "a proper workplace anti-bullying policy should be developed, in consultation with employees". Does this then mean that if an employer fails to consult with its employees on the drafting of an anti-bullying policy that it will not be considered "a proper workplace anti-bullying policy"? Is the employer in breach of the Code for not consulting? For example, would an employer's claim that they took all reasonable steps to prevent bullying in the workplace on the basis that they had an anti-bullying policy be weakened by the fact that they failed to consult with the employees on its content at the drafting stage?

Recommendation: It is our position that the words "in consultation with employees" should be removed from this Code of Practice. It is submitted that there is no requirement to consult with employees on the terms of the policy and to include this term unnecessarily introduces an obligation on employers to agree the terms of the policy with the employees.

Instead, employers should be able to draw instruction from the Code of Practice itself as to what should be included in the policy to prevent bullying at work. Indeed, the Draft Code even has a template policy and that should be sufficient as of itself without also needing to consult with employees. It should be sufficient for employers to draft a policy in keeping with the Code and to then communicate the anti-bullying policy to its employees once it has been finalised.

HSA RESPONSE

Consultation with employees is required by Section 26 of the 2005 Act, in addition to the requirements under S 8 and 9. Consultation thus remains within the Code and clarity has now been added to the text of the Code to reflect this requirement.

Secondary Informal Process

The Code has introduced a new middle ground means of resolving bullying complaints. Interestingly, this Secondary Informal Process does not give a right of representation for either employee. This is particularly noteworthy for the accused employee as the process could lead to the adverse conclusion that they had engaged in bullying. Additionally, this Secondary Informal Process does not prohibit the progression of the matter through formal disciplinary proceedings after the Secondary process has concluded.

Thus, if the employee was deprived of the right to be accompanied in the Secondary Informal Process, or was notified that representation would be permitted, and there is a finding against them of bullying at that stage, and they are subsequently disciplined (up to and including dismissal) then there may be an inherent procedural unfairness in this Draft Code.

This in turn could deny the employee of the right to natural justice during this procedure and could leave the employer exposed to an unfair dismissal finding or even an injunction notwithstanding the fact that they adhered to the Code of Practice.

Recommendation: The Draft Code needs to clarify in more detail the Secondary Informal Process. In this respect, the Draft Code should specify whether or not the Secondary Informal Process can definitively determine if someone has engaged in bullying. If such a finding can be made then consideration needs to be given to whether or not this process is compliant with the rules of natural justice, particularly in circumstances where the employee is subsequently invited to a disciplinary hearing and dismissed.

A solution may be for the Draft Code to clarify that the investigator's remit at this stage to recommend steps to resolve the issue (e.g. mediation) but that in the circumstance where such steps are deemed inappropriate or the parties are unwilling to engage that the investigator's remit is then simply to clarify whether or not the accused employee has a case to answer on the balance of probabilities and/or whether or not the Formal Process or internal disciplinary procedures should be invoked.

HSA RESPONSE
There is no investigator in the Secondary Informal Process. This is clearly stated within the Code and there is no finding or subsequent findings or disciplinary outcomes emanating from this phase. Any sanction of a person within the entire process is only after a **Forma**l investigation. No amendments to the Code required.

Formal Process
Under the current Bullying Code the investigator is encouraged to make "*findings*" and to identify if "*the complaint is well-founded*". As a general rule of thumb, this is inherently risky in terms of procedural fairness. This is very evident from the plethora of High Court case law including the decision in Lyons - v- Longford Westmeath ETB [2017] IEHC 272, but also in respect of decisions of the WRC, EAT and Labour Court.

For example, if you consider the Unfair Dismissal case of *Sheridan -v- Ampleforth Ltd*. (UD273/2010), the claimant here was a deputy general manager of a hotel who was subjected to allegations of "*harassment, including sexual harassment*" from a colleague. The hotel conducted an investigation which, from the details of the EAT's decision, appears to comply with the existing Harassment Code as the investigation concluded as follows: "*Following your recent complaint of sexual harassment and bullying against [the claimant] we have now completed our investigation. We have* **upheld** *your complaint of sexual harassment but not your complaint of bullying.*" The word "*upheld*" is used which complies with the Harassment Code. The claimant subsequently went through a disciplinary process and was dismissed. The claimant won his unfair dismissal claim, and was reinstated to his job by the Employment Appeals Tribunal notwithstanding a positive finding that he committed acts of sexual harassment, with one of the reasons being that "*[i]t is clear to the Tribunal from this statement … that the respondent had predetermined the outcome of the disciplinary such that the dismissal was procedurally unfair.*" The fact that an employer could comply with a Code of Practice, dismiss an employee for bullying or harassment, and be exposed to that employee winning compensation or even reinstatement due to a procedural flaw built in to the Code is not a satisfactory position and hardly assists the employer or the victim in preventing bullying or harassment in the workplace.

It is for the above reason that we welcome the fact that the Draft Code explicitly states that "*The outcome of an investigation may eventually, separately lead to a disciplinary process being instigated in respect of the person complained of, but the investigation itself will be a fact-finding one with the focus on what occurred or did not occur.*" This is a very important change which would bring the Bullying Code of Practice more into line with the Disciplinary Code of Practice and general rights to fair procedure.

A difficulty, however, is the following sentence in the Draft Code: "*The investigation will consider all material and evidence before it and a decision will be made on balance of probability, as to whether the complaint/s are* **upheld**." We appreciate that the alleged perpetrator is entitled to be accompanied during the Formal Process and this may mitigate any concerns about procedural fairness. However, the vast majority of Disciplinary Policies in operation throughout the country will cite that a finding that an allegation is upheld will not be made until after a disciplinary hearing and certainly not before one. To quote the EAT in Smith -v- RSA Insurance (UD1673/2013) "*One might expect to see such findings following the conclusion of the disciplinary process but most definitely not at the beginning of it*".

HSA RESPONSE
The word 'upheld' has now been removed as per submitter's suggestions and the word 'valid' inserted instead. "The investigation will consider all material and evidence before it and a decision will be made on balance of probability, as to whether the complaint/s are(input text - valid and the person complained against has a case to answer) and delete - **upheld.**

Additionally, the Draft Code is silent on the issue of cross-examining witnesses during the Formal Process and in light of the consistent judgements of the High Court in this area it would be extremely risky to uphold an allegation of bullying after an investigation process in circumstances where the alleged perpetrator did not have the right to cross-examine and challenge the evidence.

HSA RESPONSE
Following careful consideration during the drafting by the WRC and subsequently, it was agreed that it was not appropriate to reference for the following reasons.
1. Legal advice and the judgements reflected in many legal cases since, is contrary to this position in that the Accused person does not have a right, within the formal fact finding investigation, to cross examine the accuser.
2. This right comes later at disciplinary hearing which is outside the remit of the Authority.
3. The case law referenced by submitter has been overturned by a subsequent ruling.
No amendments to the draft Code required.

We would also note that the sentence that "*The investigation will consider all material and evidence before it and a decision will be made on balance of probability, as to whether the complaint/s are* **upheld**" is wholly inconsistent with other detail in the Draft Code, most notably:
"*The scope of the investigation should indicate that the investigator will decide based on the facts before them whether the behaviour complained of may, on the balance of probabilities have occurred. The investigator* **should not uphold** *or dismiss the allegations and/or suggest or impose sanctions*."

It is difficult to contemplate a circumstances where an investigator can comply with the requirement that they "*should not uphold*" the complaint in circumstances where they are required to determine "*whether the complaint/s are upheld*".

Recommendation: As such, it is submitted that compliance with the Draft Code could occasion serious difficulties for employers and employees in terms of procedural fairness. It is submitted that the sentence "*The investigation will consider all material and evidence before it and a decision will be made on balance of probability, as to whether the complaint/s are* **upheld**" should be removed and replaced with the following:
"*The investigation will consider all material and evidence before it and a decision will be made on balance of probability, as to whether the accused employee has a case to answer in respect of the complaint/s*"

In addition, it would be useful if the Draft Code specifically outlined that the Investigator has the right to recommend that the disciplinary procedure is invoked to consider the issue further. As such, the following sentence could also be added:
"*If the investigation concludes that the accused employee has a case to answer on the balance of probability then the investigator may recommend whether or not the organisation's disciplinary procedure should be invoked*".

It is submitted that the above proposed change is necessary for the Draft Code to be conversant with the rights to natural justice and procedural fairness and to ensure that the Draft Code is reflective of how issues like bullying are addressed in practice in the workplace through disciplinary proceedings.

HSA RESPONSE
The word 'upheld' has now been removed as per submitter's previous suggestion.

4.2.3 Appeals
The Draft Code introduces an Appeals Process after the Formal Process has concluded. It is submitted that this automatic right of appeal after the Formal Process should be removed/amended. As detailed above, if it is determined that the alleged perpetrator has a case to answer then this is most likely going to be progressed through a formal disciplinary process. If the Draft Code retains the Appeals Process in its current form then this would mean that there would be:
1. An Investigation in keeping with the Formal Process set out in the Draft Code.
2. A Right of Appeal in respect of any findings reached during the Formal Process.
3. A Disciplinary Hearing
4. A Right of Appeal of any findings and sanctions issued after the Disciplinary Hearing.

This clearly results in both the employer and the employee having to carry out a protracted process through at least four meetings to discuss exactly the same subject matter. In the context of SMEs, it is highly unlikely that many employers will have the layers of management required to ensure that an impartial is available to conduct the process internally. Additionally, the Code of Practice obliges the employer to ensure that whomever is dealing with a bullying complaint "*should have appropriate training and experience and be familiar with the procedures involved*". Even if an SME had the layers of management required to deal with each element of the process, it seems highly unlikely that each member of management would have the required level of training and experience. Thus, it is highly likely that the majority of SMEs would need the assistance of third parties to carry out the process and this adds an additional cost to the employer in circumstances where a three-stage process (as detailed below) would equally vindicate the accused employee's rights to natural justice.

Furthermore, the Draft Code specifically states that "*The investigator* **should not uphold** *or dismiss the allegations and/or suggest or impose sanctions*." Notwithstanding the point made above about the Draft Code being inconsistent on the issue of upholding the allegations, if the investigator does not uphold the allegations and/or simply makes findings of fact (as recommended by the Code) then there is no definitive finding of guilt at this point. If the employee is then progressing through disciplinary procedures they would have the right to challenge any findings of fact at that disciplinary hearing stage with a right of appeal thereafter. It is suggested that it is wholly unnecessary to have a formal investigation, then a right of appeal, then a disciplinary process, then another right of appeal. Instead, there should be a three-stage process:
1. An Investigation in keeping with the Formal Process set out in the Draft Code.
2. A Disciplinary Hearing
3. A Right of Appeal of any findings and sanctions issued after the Disciplinary Hearing.

However, in the event that the matter does not progress to a formal disciplinary hearing, it is acknowledged that there is merit in a right of appeal arising after the Formal Process, particularly if it is concluded that there is no case to answer and the alleged victim is unhappy with this outcome.
Recommendation Accordingly, it is submitted that this right of appeal should be amended along the following lines:
"*In the event that the Formal Process concludes that the person complained of has a case to answer, or that the complainant has made a vexatious complaint, and that the organisation's formal disciplinary procedures will be invoked as a consequence, the right to an appeals process will only come into effect at the conclusion of the disciplinary process*".

This amendment retains the right of appeal for both persons at the end of the Formal Process when the matter is concluded and there will be no further proceedings. However, it avoids an extra layer of unnecessary procedure in the event that the matter will be dealt with further through formal disciplinary proceedings.

HSA RESPONSE

Where a person feels/is wrongly accused and found with 'a case to answer', for him/her to go through the Grievance procedure (GP) before being allowed appeal the original finding for which the GP is put in place, would be structurally unfair and could be challenged in the courts through injunction, however compelling the point re long windedness of systems. No amendments to the draft Code.

Confidentiality

The Draft Code specifically states as follows: "*For the avoidance of doubt, specific details of disciplinary action to be taken against any party are confidential and other parties are not entitled as a matter of course to receive this information as part of the outcome*." This is to be welcomed as the complainant employee often demands to know what disciplinary action has been taken against the person complained of. The disclosure of such information clearly raises data protection concerns and it is very useful for the code to have clarified this.

Conclusion

Overall, the changes made in the Draft Code are positive and represents a step forward from the current codes of practice. However, as detailed above, we would have concerns with how some aspects of the Draft Code will interact with the rights to natural justice and fair procedures in the context of disciplinary sanctions. It is essential that employers should not be exposed to a finding that they breached an employee's right to natural justice simply because they complied with the Bullying Code of Practice.

Submission 2

Individual

Point 1 - Throughout the document, there are losses of consistency in definition gained through repetition, particularly in the definition of bullying and the explanation of the objective of the investigation.

Point 2 - 2.7 it states here that 'Factors which are known to be associated with a risk of bullying at work are:' .....'Gender/age/status imbalance'. The implications of including this area as a risk place an obligation on the employer to mitigate that risk which in the vast majority of employments will not be possible. A potential mitigation measure would be to introduce a discrimination option into recruitment processes, as standard, in order to address a gender/age/status imbalance. P33 bullet points 5, 6, 7 & 8 need to be indented.

Point 3 - The Secondary Informal Process (4.1.2), if following on from the first Informal process and leading to an investigation, contains inappropriate overlaps that would create difficulties, particularly for the investigation.

Point 4 - Last sentence of 4.2.2 is entirely incorrect and is inconsistent with the process wording set out before same.
There is a considerable gap in the process that's not referred to here.

Point 5 - Last sentence of 1st paragraph of 4.2.3 is inconsistent with 5.1. Right of appeal to a third party i.e. WRC remains available to the complainant and respondent upon the outcome of the internal process.

Point 6 - 5.1 2nd paragraph - this ignores some of the current decision-making roles of the WRC Adjudicator particularly in relation to the severity of the sanction. 5.1 2nd paragraph - to re-hear an investigation is incorrect wording.

Point 7 - Overall: It would be essential for this document to be referred to the Chief State Solicitor's Office for the purposes of obtaining and taking full account of the legal advices of the Attorney General's Office before the policy is finalised.

HSA RESPONSE
Point 1 – not accepted that there is a loss in consistency, as all are consistent.
Point 2 - there is no onus to mitigate the risks highlighted as associated with bullying. They are merely referenced.
Point 3 - no investigation in this process (4.1.2) as it is the Secondary Informal Process, therefore submission point is redundant.
Point 4 - re 4.2.2. is accepted – concerning the word ‘uphold’ which has been removed and replaced with ‘valid’.
Point 5 - accepted. Text altered to ‘The outcome of the appeal shall be final’ **insofar as the employer duties under health and safety legislation is concerned.**
Point 6 - is a point for the WRC
Point 7 – not accepted.

Submission 3

Company Irish Business and Employers' Confederation (IBEC)

Address 84-86 Lower Baggot Street, Dublin 2

The following is the entire submission made by IBEC from start to finish.

29th November 2019

Re: Draft Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work

Dear Sirs

I am writing with regard to the draft code of practice published on the website of the Health and Safety Authority earlier this month.

Consultation with Ibec

As stated in the introduction section of the new draft, Ibec was consulted as part of the preparation of the newly consolidated code. A final draft version was presented to Ibec earlier this year following a consultation process coordinated jointly with the WRC and HSA. The next steps following that process were to process the code to conclusion by the WRC and the HSA respectively.

Most of the draft code as published on the HSA website is as was discussed with Ibec, but there are several key changes which are of some concern.

HSA RESPONSE

From the outset of the process it was outlined that the two agencies were working on the Code development. After the WRC phase of development, the code was then to be passed to the HSA to make its inputs and follow its process for the developmemt of a Code of Practice; there was never an understanding that the WRC phase was a 'joint' inputs phase.

Informal process

Ibec notes the additions made to section 4.1 of the new draft, addressing the informal process to be applied when dealing with a complaint of bullying. On page 18, reference is made to smaller organisations and their management of bullying complaints. It is recommended that the employer in that instance refer the matter to a senior manager (it should be noted that one may not exist in a small organisation, or may be otherwise compromised in the context of a specific complaint), *"or to such other persons as may be agreed".* In the context of bullying complaints, it can be a challenge at the best of times to "agree" an appropriate person to resolve or manage a complaint of bullying, even at the informal stage. The reference to "agreement" is unhelpful in this context, particularly as in small organisations, the number of people available to address the issue will also be very limited.

HSA Response - 'agreed' has been replaced with 'appropriate' as it is the employer's call.

Ibec respectfully submits that the idea proposed in the code that the above approach is suggested in order to avoid bias or an apprehension of bias is misplaced. The question of bias and where it might arise in a small organisation is one which must be judged on its own facts and is not appropriate for inclusion in a code of practice.

HSA Response – "bias" as a word has been removed.

There is further reference in the same section to using external expertise/an independent professional body to assist a small organisation with the process. This may be necessary in some cases, but this again is a question which must be judged on the individual facts. Ibec has no difficulty with the reference to the *possibility* of external assistance being needed in the context of complaints of bullying, but we are concerned that small to medium sized enterprises are being singled out in the code as particularly in need of professional assistance in such cases. The involvement of external bodies often adds considerably to the cost of resolving complaints – a cost which small employers may find particularly difficult to bear. It is unhelpful for the code to encourage the use of external practitioners in the context of an informal process to the extent outlined in the current draft. We are also concerned that the statutory code may be perceived as undermining the professionalism, trust and competence of small and medium size business to manage employment issues.

HSA RESPONSE

This submission point is not accepted as the text refers to **"it may"** be necessary and it points to a particular circumstance- **see text in bold in the paragraph below**. It also alludes to larger organisations. As this latter point above is not reasonable, therefore no changes are advised.

"In such organisations also, **where internal structures are limited**, if the complaint made is against a **senior person** within the enterprise, **it may** be necessary to use the expertise of an independent professional body to access mediation or conciliation or some other form of resolution. Such bodies may include the Mediation Services of the WRC. **Even in larger organisations**, external assistance may be required in order to initiate an effective early solution.

Secondary informal process

Ibec is also concerned at the inclusion in section 4.1.2 of a new two-tiered approach to resolution of complaints through a "secondary informal process". There follows a prescriptive set of steps which are advised. Among these steps (on page 18 of the draft code) there is reference to the specified person (someone other than the "contact person") "establishing facts" with regard to the complaint. This may present particular legal difficulties for the parties, relating to the right to representation and natural justice where findings of fact are to be made. This is particularly incongruous in a process which is described as "informal".

HSA RESPONSE

This submission point is not accepted. The wording used is following legal advice and should present no such difficulties – it is in keeping with the most recent most senior court ruling. The right to representation is clearly in the case where the disciplinary action is being taken, not at the fact finding phase. No change to the Code are advised.

There is a reference in the code to confidentiality (page 19) but also advice to inform line managers "as appropriate". Providing any such information to line managers may not be advisable depending on the context, and there may be some contradiction between the advice in the code to advise line managers but also maintain high levels of discretion.

HSA RESPONSE

This submission point is not accepted. 'As appropriate' means depending on the context, as IBEC states above – there is no conflict between 'as appropriate' and 'depending on context'. It shall be the employer's call. No change to the Code are advised.

There is a further recommendation to conclude a written proposal as part of this informal process, with an action and timeframe which is *"agreed, signed and dated".* Again, Ibec submits that this recommendation envisages a degree of formality which is not necessarily helpful in an informal process (even a secondary part of such a process).

HSA RESPONSE
This submission point is not accepted. This phase is to give the item more time and energy than the first phase of the informal process it is best practice to have some minor record of that, thus this advice. No change to the Code are advised.

Similarly, the separate recommendation to keep "a record of all stages" may impede the peaceful resolution of an issue at a low-grade level. Whereas it may be advisable for an organisation to keep limited notes of meetings which take place, or even restricted to the fact that they took place, it is our view that such prescriptiveness on process in a code of practice of this nature which will cover a vast range of different behaviours and disputes is not necessarily of assistance to employers or their employees.

HSA RESPONSE
The Code reflects IBEC's suggestion that limited notes should be kept. Courts and Coroners findings have also recommended this. No change to the Code are advised.

Ibec would respectfully suggest removing the additional secondary informal process from the draft on the basis that it is too prescriptive, contradictory in parts and risks undermining the value of what should be a low-key method of resolution.

HSA RESPONSE
This submission point is not accepted. Experience indicates employers actually want this secondary informal phase as a bridge between where minor actions are required for minor issues and doing substantial investigations. No change to the Code are advised.

Conclusion of formal process and follow up
Ibec notes page 25 of the draft which includes additional text relating to the conclusion of the formal process. It states: *"The employer should decide, in light of the investigator's report and the findings of fact therein, what action should be taken arising from that report".*
Ibec has a concern that some employers may misconstrue this wording, and may fail to appreciate that case law generally indicates that a second, disciplinary meeting may be necessary to determine what action should be taken.

HSA RESPONSE
This wording used was following legal advice. However, a line has been added to clarify possible need for a second meeting.

Ibec also notes the following reference:
"the employer shall then, in writing, inform both the complainant and the person complained against, of the ***next steps****."* It is not clear from the code what is included in those "next steps" and we are concerned that this particular wording may be at odds with the text included in the "communication of outcomes" section. Ibec suggests that the above wording be amended to reflect that as part of the conclusion of the formal process, the parties directly involved in the complaint are entitled to know whether the complaint was upheld or not upheld, or upheld in part.

HSA RESPONSE – see response point above.

We respectfully suggest that the draft code be amended with the above observations in mind. If necessary, I and other Ibec colleagues are happy to expand on any of the points raised.