Effective legal measures to combat harassment: the Irish experience [1]

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I have been asked to speak briefly at today's conference about Ireland's experience of measures to combat harassment[2], in the light of recent equality directives prohibiting harassment on different grounds as a form of discrimination. I should start by explaining what may be interesting in the Irish law on harassment to my colleagues in EWLA from other European countries.

Firstly, Ireland has *long experience* in this area: sex-based harassment has been treated as unlawful sex discrimination in Irish law since 1985. Secondly, recent Irish legislation has *specifically prohibited sex-based harassment in employment*, and extended that protection to include *harassment based on "new" grounds* such as race, disability, age, sexual orientation, marital status, family status, or religion. This may be of interest in the context of implementing the most recent Directives on employment discrimination [3]. Thirdly, a broad consensus has developed by now on a wide range of *preventative measures* which employers are expected by law to take, and failing which they will be legally liable for any harassment by their employees. Fourthly, recent Irish legislation also prohibits harassment on any of these grounds in a new field, that of the *provision of goods and services*. This may be of interest in the context of implementing the Race Directive, which covers harassment in the provision of goods and services. And fifthly, the *mechanisms provided in Ireland for enforcing redress against harassment* may be of interest, as the emphasis is on accessibility.

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[1] This paper is a slightly expanded version of one given at the EWLA Annual Conference at Paris, September 2002.

[2] Some confusion is likely to arise, as the Race Directive and the new Equal Treatment Directive (see following footnote) both use the term "harassment", but define it differently. In this paper, unless otherwise stated, "*sexual harassment*" refers to harassment of a sexual nature; "*gender –based harassment"* refers to harassment related to the sex of a person which is not sexual in nature; "*sex-based harassment"* covers sexual and gender-based harassment; "*harassment based on "new" grounds"* refers to harassment based on other grounds (race, religion, disability, age, or sexual orientation in EC Directives, the same grounds plus family status, marital status, and membership of the Traveller community, under present Irish equality law.); and "*harassment*" (*tout court*) includes all of these terms.

[3] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("*the Race Directive*"), Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [irrespective of religion, disability, age or sexual orientation] ("*the Framework Directive*"), and Directive 2002/73/EC of the European Parliament and Council of 27 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women. ("*the new Equal Treatment Directive").*

I should explain that while one would normally look to the decisions of the highest Courts for authoritative interpretation of the law, the decisions described in this paper are almost all from the lower echelons of the Irish legal system: ODEI/the equality tribunal, and the Labour Court, which deal with equality cases at first or second instance[4]. This is due partly to the newness of the recent equality legislation, which has not yet been the subject of any decisions by the higher courts. However, practitioners in this area will also be aware that harassment cases rarely reach the higher courts in any country, due perhaps to their stressful nature which tends to make extended appeals impracticable to the parties. (An example is the fact that no reference has ever been decided by the European Court of Justice on whether the prohibition on sex discrimination contained in the Equal Treatment Directive should be interpreted as prohibiting sex-based harassment, even though the Directive has already been in force for some 24 years.) This is another reason why it may be instructive to consider how the law operates in practice at the lowest level.

1. Harassment as sex discrimination in Irish law (1985 – 1999)

The prohibition of sex-based harassment as discrimination in Irish law originally arose from caselaw, rather than in legislation. Ireland is a common-law jurisdiction, unlike many continental European countries, meaning that the law attaches great importance to court decisions as a method of supplementing, explaining and expanding the law set out by legislation (similar to the practice in the UK, USA, Canada or Australia.). The Employment Equality Act 1977, which prohibited discrimination in employment based on sex or marital status, did not specifically refer to sex-based harassment. However, in 1985 the Irish Labour Court heard the first Irish case on this issue, in which a fifteen-year old female garage attendant was found to have resigned because of persistent sexual harassment by her employer. In a ground-breaking decision, the Court laid down the general principle that

> " *freedom from sexual harassment is a condition of work which an employee of either sex is entitled to expect. The Court will, accordingly, treat any denial of that freedom as discrimination within the meaning of the Employment Equality Act 1977*." [5]

The Court's reasoning is not set out in the decision, but it is thought that the Court was influenced by American jurisprudence on sexual harassment, notably the writings of Catharine MacKinnon, who had pioneered the concept of sexual harassment as discrimination in that jurisdiction[6]. (The Court was probably also influenced by the

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[4] The jurisdiction of ODEI and of the Labour Court is explained in part 5 of this paper. Decisions of ODEI (all those with a DEC- reference in this paper) are published on its website on www.odei.ie: decisions of the Labour Court (full text) are published on its website at www.labourcourt.ie. For an overview of recent decisions see ODEI, *Legal Review and Case Summaries*, 2001.

[5] *A Worker v a Garage Proprietor* (EE0/2/1985). The exact nature of the harassment is not clear from the decision, although the main claim appears to have been of unwelcome sexual advances made by the employer himself.

[6] Catharine MacKinnon, *Sexual Harassment of Working Women* (Yale, 1979), and US federal Court of Appeal judgements such as *Barnes v Castle* 561 F.2d 983 (D.C.Cir. 1977), *Barber v Saxon Business Products* , 552 F.2d 1032 (4th Cir, 1977) and *Tompkins v Public Service Electric and Gas Co*, 568 F.2d 1044 (3rd Cir. 1977). These were considered in the Irish context for example by Deirdre Curtin, *Sexual*

decision of an Industrial Tribunal in Northern Ireland two years earlier in a similar sexual harassment case, *Mortiboys v Crescent Garage Ltd* [7].)

This approach was then followed and expanded in a generally consistent series of decisions by Irish employment tribunals during 1985-date which treated sex-based harassment as direct discrimination based on sex [8]. This applied whether the harassment consisted of unwelcome physical advances, comments, suggestions, jokes and looks of a sexual nature, even where symbolic[9], or the display of offensive pictures [10], so long as the behaviour was unwelcome and such as to threaten or undermine the person's sense of security at work. The Labour Court clarified, in a subsequent decision, that whether the conduct is unwelcome must be judged from the perspective of the victim, not of other workers:

> *"Irrespective of the attitude of other workers to such matters, each employee has the right to a work environment free from sexual harassment and therefore has the individual right to decide from whom, if anybody, she will accept such conduct. To exercise this right, however, the worker must make known to the offender that his conduct is unwanted."*[11]

The only decision to date of the Irish High Court in this area[12] did not decide whether sex-based harassment was discrimination under the 1977 Act, but did define sexual harassment by reference to the European Commission's *Code of Practice on measures to combat sexual harassment at work* [13].

Harassment in Employment – developing a standard of employer liability", 1984 6 Dublin University Law Journal 75. For an analysis of influences on the Labour Court in this case, see Noel Harvey and Adrian Twomey, *Sexual Harassment in the Workplace*, Oak Tree Press, Ireland, 1995, p. 24-29.

[7] Northern Ireland Industrial Tribunal, reference no 34/83 SD, unreported.

[8] See Harvey and Twomey, op. cit. *Sexual Harassment in the Workplace*, Oak Tree Press, Ireland, 1995; Deirdre Curtin, *Irish Employment Equality Law*, Round Hall Press, 1989, p. 229-235..

[9] *A Limited Company v one female employee*, Labour Court, January 1989. This case concerned a female executive on a residential training course who found that her hotel room had been entered and her belongings rearranged in a disturbing and sexually suggestive way by senior male managers of her employer company.

[10] Labour Court, *A Company v a Worker*, EEO/4/92 (display by other workers of calendar with sexually suggestive pictures)

[11] *A Company v a Worker*, EEO 4/92, (though contrast the Court's decision in *A Company v a Worker*, EEO 8/92.)

[12] Costello J, High Court, *A Health Board v BC and the Labour Court*, 1994 Employment Law Reports 27.

[13] The Code (1990) defined sexual harassment as "unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of men and women at work. This can include unwelcome physical, verbal or non-verbal contact".

2.a Legislation specifically defining sexual harassment as discrimination (1999)

In 1999, new legislation came into effect in Ireland which specifically defined sex-based harassment as discrimination. The Employment Equality Act 1998 [14] provides at section 23 (1) that:

> *"If, at a place where A is employed.. or otherwise in the course of A's employment, B sexually harasses A .....*
> *then, for the purposes of this Act, the sexual harassment constitutes discrimination by A's employer, on the gender ground, in relation to A's conditions of employment."*

Gender-based discrimination is thus deemed to occur where an employee[15] is sexually harassed in the course of his/her employment by their employer, by a fellow-employee, or by a "*client, customer or other business contact of*"[16] the employer. Sexual harassment is defined, in section 23(3), consistent with the Labour Court's earlier caselaw, as including any act of physical intimacy, any request for sexual favours, and any other act or conduct, (including spoken words, gestures, or the production, display or circulation of written words, pictures or other material). The claimant must also show that the act or conduct was unwelcome to them and that it "*could reasonably be regarded as sexually, or otherwise on the gender ground, offensive, humiliating or intimidating*" to them. The definition in section 23 also covers any adverse treatment of the complainant which resulted from her acceptance or rejection of previous sex-based harassment.

The 1998 Act does not use the terms "gender-based harassment" or "sex-based harassment", referring only to "sexual harassment". However, its requirement that the conduct "could reasonably be regarded as *sexually, or otherwise on the gender ground*, [emphasis added] offensive, humiliating or intimidating" has been interpreted as covering harassment which is gender-related, but not sexual[17]. An example is a recent decision [18] where the Equality Officer found that a female manager newly recruited to a small company had been systematically belittled and humiliated before other staff by a male manager who could not accept her role there. A typical public comment was that the female manager was "only a young fooling [foolish] girl". However, there was no

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[14] The Employment Equality Act 1998 entered into force on the 18th October 1999, replacing and repealing the Employment Equality Act 1977 and certain other previous equality legislation. The full text of the Act is available on www.odei.ie.

[15] As well as employees, the provision also covers agency workers and vocational training (section 23(6)).

[16] Including any other person with whom the employee could reasonably be expected to come in contact in the course of their employment (section 23 (4). The claimant must show that the circumstances of the harassment must be such that the employer "ought reasonably have taken steps to prevent it." (Section 23(1).) This provision reflects earlier caselaw, including *A Company v a Female Worker* (EEO 3/1991), where the entire female staff of a company had walked out in protest at continuing sexual harassment by a non-employee who used the company's premises with its agreement. The Labour Court found the company liable since it was "aware of the harassment and chose to ignore it ".

[17] See for example the Code of Practice on Sexual Harassment and Harassment at Work, discussed in part 3 of this paper, where sexual harassment under the Act is interpreted as covering "sex-based conduct" which is not sexual, such as denigrating or insulting comments which are gender-related.

[18] *A Complainant v a Company* DEC-E2002-014

allegation of sexual behaviour by the male manager towards the complainant. The Equality Officer held that his comments amounted to harassment based on her gender contrary to section 23 of the Employment Equality Act, awarding her €6,500 in compensation.

This distinction can be compared with Article 1.2 of the new Equal Treatment Directive[19], which prohibits as discrimination both gender-based harassment[20] and sexual harassment. Gender-based harassment is defined as occurring "*where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.*" Sexual harassment is defined as occurring where "*any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose of effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.*"

2.b Prohibition on harassment extended to new grounds

The Employment Equality Act 1998 also extends protection against harassment in employment to seven new grounds. Under section 32 of the Act, harassment based on any of these grounds constitutes discrimination, on the same terms as are applied to sexual harassment in section 23. Harassment is defined as "*any act or conduct …including…. spoken words, gestures, or the production, display or circulation of written words, pictures or other material*" which is unwelcome to the complainant, and could reasonably be regarded as offensive, humiliating or intimidating to them in relation to the relevant characteristic. The grounds are a person's race (including nationality, colour, and ethnic or national origins) disability, age, sexual orientation, marital status, family status, religion (including belief or lack of belief) or membership of the Traveller community[21].

A small number of cases have been decided so far in claims of harassment in employment under these new grounds. Two interesting examples are *Maguire v North Eastern Health Board*[22] and *A Complainant v a Company* [23] (the case involving a young female manager discussed in part 2a of this paper). In *A Complainant v a Company,* the Equality Officer held that persistent ridicule including public comments such as that the manager was "only a young fooling girl" constituted age-based harassment under section 32, as well as gender-based harassment under section 23. The *Maguire* case concerned a member of the Traveller community who was employed by a public health authority. The key facts found by the Equality Officer were that the (male) complainant had attended the office Christmas party, where a (female) co-worker invited other members of staff back to her house for a further party afterwards, but added, in his hearing, "The knacker's not

[19] Article 2 of the Directive provides that it shall be implemented by Member States by 5 October 2005.
[20] The Directive describes gender-based harassment as "harassment" but I have preferred the term "gender-based harassment" in this paper, to avoid confusion with harassment under the new grounds.
[21] The Traveller community is a group within Irish society, who are identified by themselves and by others as having a shared history, culture and traditions, including, historically, a nomadic lifestyle, and which experiences particular forms of prejudice. See *Report of the Task Force on the Traveller Community*, Government Publications Office, Dublin, 1995.
[22] *Maguire v North Eastern Health Board,* DEC-E2002-039.
[23] *A Complainant v a Company*, DEC-E2002-014.

coming". ("Knacker" is a derogatory term which would be understood as referring particularly to members of the Traveller community.) The complainant reported this incident to his superviser the following day, indicating that he was distressed by the comment and asking her to take measures against comments of this sort being made to him at work in future. The superviser however stated that she did not feel obliged to take any action about a comment made outside the workplace and subsequently the complainant's working hours were reduced. The Equality Officer held that the office Christmas party formed part of the worker's employment, that the comment amounted to harassment under section 32, and that the employer's failure to act appropriately to prevent recurrence made it vicariously liable for the harassment. She awarded compensation of €5,000 and ordered the employer to take specified measures to prevent future harassment. .

3. The standard required from employers under Irish legislation

Under the Employment Equality Act 1998, the employer is normally legally responsible (vicarious liability) for any harassment by its employees (whether sex-based or on a new ground) in the circumstances described in part 2 of this paper[24]. However, the Act provides a defence to employers who can show that they "took such steps as are reasonably practicable" to prevent the harasser from harassing the complainant ("or any class of persons of whom [s/he] is one") or to prevent them from being treated differently due to their rejection or acceptance of the harassment[25]. The Act does not set out explicitly what is meant by "such steps as are reasonably practicable". However, the Labour Court's caselaw under the 1977 Employment Equality Act had laid down a range of *preventative measures* which employers were expected by law to take, and failing which they could be legally liable for any harassment by their employees. A similar approach has been taken so far in interpreting the 1998 Act. A Code of Practice on harassment has also recently been adopted following consultation with the social partners[26]. It states that "the 1998 Act requires employers to act in a preventative and remedial way", and provides detailed guidance on what is required. As a result of the caselaw and the Code, it is fair to say that there is now considerable consensus in Irish law on what employers are generally expected to prove in order to defend themselves against liability for harassment[27]. The main elements are:

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[24] Sections 23(1) [gender] and 32(1) [other grounds]. The provisions of the 1998 Act are generally thought to resolve a major difficulty which had arisen in earlier caselaw as to whether an employer could be vicariously liable for sex-based harassment by an employee (in *A Health Board v BC and the Labour Court*, 1994 ELR 27).

[25] At sections 23(5) [gender] and 32(6) [other grounds].

[26] The Code of Practice on Sexual Harassment and Harassment at Work made under the Employment Equality Act 1998, contained in Statutory Instrument no 78 of 2002. Under section 56 of the Employment Equality Act as amended by section 39 of the Equal Status Act, this Code may be taken into account in deciding legal proceedings under either the Employment Equality Act 1998 or (despite its title) the Equal Status Act 2000. This has already been done in a number of cases (see e.g. *Maguire v NE Health Board*, Dec-E202-039.)

[27] The standard obviously depends to an extent on the size and resources of the employer.

- An accessible[28], specific policy of the employer, prohibiting harassment[29] on any of the nine grounds and making it clear that this can be a serious disciplinary offence
- Which is actively communicated to all staff [30]
- Immediate management vigilance when possible harassment comes to their notice[31]
- A confidential, neutral grievance procedure, including a chance to resolve the problem informally if the complainant prefers
- A quick, fair, and sensitive internal investigation[32]
- Effective, proportionate sanctions imposed by the employer for harassment [33]
- Effective management vigilance to prevent victimisation
- The effectiveness of the anti-harassment policy should be monitored[34]

Decided cases have also emphasised that the rights of the alleged harasser must also be fairly protected in any internal investigation.

The fact that precise and detailed preventative measures are required of employers by Irish law in order to avoid liability for harassment by employees, contrasts with the much looser standard seen in the new Equal Treatment Directive, which merely provides at Article 1.2 that "*Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take measures to prevent all forms of discrimination on grounds of sex, in particular [gender-based] harassment and sexual harassment at the workplace*".

4. Prohibition on harassment extended to provision of goods and services

Fourthly, the most recent Irish legislation prohibits harassment on any of these grounds in a new field, that of the *provision of goods and services*.

The Equal Status Act 2000[35] prohibits discrimination on any of the nine grounds (gender, marital status, family status, sexual orientation, religious belief, age, disability, race, or membership of the Traveller community) in the provision of goods or services. The material scope of the Act is very wide, including "*a service or facility of any nature which is available to the public generally or a section of the public*" and includes

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[28] The Code points out that the policy needs to be understood by staff with literacy problems and those who may not speak fluent English.

[29] The policy must be directed to non-employees such as clients, customers and business contacts, not just to employees, and trade unions should be involved and consulted (Code of Practice, para 4(1)(d)).

[30] The High Court emphasised in *A Health Board v BC and the Labour Court* (above) that merely instructing top management in how to deal with complaints of harassment was not sufficient. On the present caselaw, it seems that the employer would have to show at least that all relevant staff were aware of the policy. Depending on its size and resources, it might also have to show that it had provided training and sensitisation to key personnel such as the managers responsible for dealing with complaints, or even, in some circumstances, to all relevant staff.

[31] See for example Code, para 4(3).

[32] *A Worker v AIB*, DEP 4/93

[33] *A Worker v AIB*, DEP 4/93: *Allen v Dunnes Stores*, 1996 ELR 203

[34] Code of Practice.

[35] The Equal Status Act 2000 came into effect on the 25 October 2000. The full text is available on www.odei.ie.

provision of education, private clubs, accommodation, public services[36], professional services, banking, entertainment, transport, and cultural activities.

Although harassment is not defined as discrimination by the Equal Status Act, it is prohibited alongside discrimination. Section 11 prohibits sexual harassment or harassment on the new grounds (both defined as in the 1998 Act) of any person who is a student or is seeking to avail of goods, services or accommodation. Any person who is responsible for the operation of an educational establishment or of a place where goods, services or accommodation facilities are offered, is responsible under the Act for not permitting harassment of any person who has a right to be present there or to avail of the goods, services or facilities provided. As in the 1998 Act, it is a defence for the responsible person to show that they took "such steps as are reasonably practicable" to prevent the harassment.

This provision may obviously have some relevance for colleagues in other EU Member States since the Race Directive will require national measures to protect against race-based harassment in the provision of healthcare, education, and "access to and supply of goods and services which are available to the public, including housing."[37] It is also understood that a proposal for a new Directive from the Commission, under Article 13 ECT, is likely to propose extending similar protection against discrimination and harassment in the field of goods and services, to the gender ground.

The provision in the Equal Status Act has not arisen in many Irish cases to date, although clearly it could be significant in cases of harassment in schools or in the provision of health services. It was applied in one recent decision, where a shop owner was held to have verbally harassed two female customers who made a legitimate complaint to him about a defective product. The comments were not sexual, but the Equality Officer considered that they were abusive, based on sex, and that male customers would not have been treated in the same way. [38]

5. Mechanisms for enforcing redress against harassment in Ireland

The procedures for enforcing redress against discrimination and harassment in Ireland may also be of interest, as they are of an unusual design aimed at making them accessible. Clearly, cases of harassment can be very stressful and difficult for everyone involved, and no procedures can wholly remove this factor. However, the Irish model offers some features which may be particularly relevant in harassment cases:

- a specialised lay tribunal
- hearings are held in private[39]
- parties' identities may be concealed in published decisions where appropriate [40]

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[36] *Donovan v Garda Donnellan*, DEC-S2001-011.
[37] Race Directive, above, Articles 2.1, 2.3 and 3.1. The Directive requires implementation, under Article 16, by 19 July 2003.
[38] *Two Customers v a Retail Outlet* DEC-S2002-008/9
[39] Under s. 79(2) of the 1998 Act and s. 25(2) of the 2000 Act.

- professional mediation is available as an alternative to investigation[41]
- tribunal decisions are legally binding and appropriate redress can be ordered
- the tribunal has an impartial investigative function and may order production of relevant evidence
- the practice is to shift the burden of proof on all grounds and under both Acts, if the complainant establishes a prima facie case.[42]

The primary forum for deciding claims under both Acts[43] is ODEI/the equality tribunal, where cases may be decided by the Director of Equality Investigations in person or, more usually, by Equality Officers on her staff. ODEI is an impartial, statutory, publicly-funded tribunal: although it operates under the auspices of the Minister for Justice, Equality and Law Reform, it enjoys statutory independence. Although ODEI provides extensive high-level training in equality law to Equality Officers, they are not required to be lawyers: this follows a tradition under previous equality legislation where Equality officers attached to the Labour Court had established considerable legitimacy based on their industrial relations expertise rather than on legal qualifications.

The investigative function is specified in both Acts, which provide that the Director of Equality Investigations, or an Equality Officer to whom she has delegated the hearing of a case, "shall investigate the case" and confer extensive powers on Equality Officers to compel production of evidence they consider relevant. This investigative function is unusual in Irish civil law, and helps in making equality law, which is an increasingly complex subject, accessible to both parties in practice (legal aid is not generally available for such cases and a significant proportion of both parties are not legally represented[44].) Importantly, the investigative function is a neutral one, in keeping with the Equality Officer's quasi-judicial functions: it is used not to prove one party's case, but to assist the Equality Officer is establishing what has really occurred. For example, an Equality Officer may order production of an employer's records, or of a relevant witness not called by the employer, in order to establish whether the employer was aware of harassment: conversely, s/he may explore whether an unrepresented employer is entitled to invoke the "reasonably practicable steps" defence.

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[40] This is not required by statute, but is the practice in order to respect privacy. All decisions must be published under the Acts, but no details which identify the parties are published in cases of sexual harassment, harassment based on sexual orientation, or in other cases where the complainant so requests or the Equality Officer considers appropriate.

[41] Under both Acts mediation must be considered as a first option, but is voluntary. In practice, all cases are offered mediation where both parties consent: under the Acts, mediated settlements are confidential, but legally enforceable.

[42] See *Maguire v NE Health Board*, DEC-E2002-039, *Eng v St James' Hospital* DEC-E2001-041, *Dooley v Grand Hotel* DEC-S2002-016. There is no specific provision in either Act concerning the burden of proof. The practice adopted reflects a long tradition in Irish equality law and equates to the standard contained in the Burden of Proof Directive, the Race Directive and the Framework Directive.

[43] The main exceptions to this rule are discriminatory dismissal cases (where the Labour Court has jurisdiction) and cases involving discrimination by private clubs, which go to the District Court.

[44] The general Civil Legal Aid scheme does not cover equality cases. The 1998 Act established the Equality Authority, an important public advocacy body which may provide advice and (where judged strategic) free legal representation to complainants under both Acts, but under some limits: for example, it cannot represent respondents (employers or service providers).

Awards made under the equality Acts are legally binding, and Equality Officers may order compensation for harassment (up to a maximum of €6,349 in Equal Status cases, or two years' salary under the Employment Equality Act[45]): more significantly, perhaps, they are empowered under both Acts to order a specified person to take a specified course of action. This flexible power has been used, for example, to order the transfer of a superviser who had harassed a fellow-worker to a different area of work where he could more easily be supervised.

There is an appeal to the Labour Court[46] in cases under the 1998 Act, and to the Circuit Court in cases under the Equal Status Act, with a further appeal to the High Court on a point of law under either Act.

6. Closing points

In conclusion, I would like to refer briefly to the concerns expressed by a previous speaker that broadening the scope of Community equality law to include new grounds might weaken the protection afforded to gender equality. I can understand that in some respects there may be a need for vigilance, but (speaking in a personal capacity) I do not share these doubts.

The special status of gender equality in Community law seems to be well reflected by Articles 2 and 3 ECT. Moreover, the history of the most recent Directives suggests that increasing protection available to one ground tends rather to facilitate increasing protection for other grounds. The Framework Directive and the new Equal Treatment Directive, which both build on the new levels of protection agreed in the Race Directive, are concrete examples. Thirdly, the experience so far in Ireland of protection across nine grounds tends to support this hypothesis. Where no specific difference in the level of protection between different grounds is prescribed by the legislation, the developing caselaw has referred to the *acquis* on the gender ground for guidance. For example, the practice is now to shift the burden of proof, once a prima facie case is established, for all grounds of discrimination, and whether concerning employment or goods and services, as was traditionally done for gender discrimination in employment[47].

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[45] The maximum levels may present difficulties in cases of serious harassment. The 1998 Act provides an alternative avenue for sexual harassment: the complainant can choose to take the case to the Circuit Court, which may award compensation with no upper limit. In 1997 the High Court was reported as awarding compensation of £140,000 (€178,000 at today's exchange rate) and costs for a sexual assault on an employee which would have constituted sexual harassment under the 1977 Act, but was instead heard as an infringement of the constitutional right to bodily integrity. (*Reilly v Bonny*, Irish Times, 20 November 1997).

[46] The Labour Court, despite its name, is not technically a court, but a public body specialised in industrial relations issues. The Labour Court has a range of conciliation and quasi-judicial functions, including acting as a tribunal in deciding cases under various employment law Acts including the Employment Equality Act 1998 (at first instance concerning discriminatory dismissal, and otherwise on appeal from a decision of ODEI).

[47] See footnote 42, above.

Finally, it seems important to remember that a majority of those covered by the "new grounds" are also women. While we do not yet sufficiently understand multiple discrimination, it does seem that women of different ethnic origins, women with disabilities, older or younger women, and lesbian women, experience discrimination differently from men, and perhaps more severely than men. American research, for example, suggests that women workers start to experience older-age discrimination earlier than male workers. In my view, therefore, multi-ground protection against discrimination should be seen as enriching, rather than threatening, gender equality.