

Sexual Harassment: a code of practice



NCPE

**NATIONAL COMMISSION
FOR THE PROMOTION OF EQUALITY
FOR MEN AND WOMEN**

Sexual Harassment: A Code of Practice

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This Code of Practice is intended to disseminate information to employers, employees and the general public about the meaning of the term 'sexual harassment', and the relative rights and obligations of employers and employees. In particular, it is meant to ensure that sexual harassment at the workplace is prohibited and that it is clearly understood that it can give rise to serious consequences if it does in fact subsist.

1.0 What is Sexual Harassment?

Sexual harassment at the workplace is a prohibited form of gender discrimination which is essentially defined as 'unwelcome sexual conduct' and is unlawful under *the Equality for Men and Women Act, 2003 (Cap 456)* and under *The Employment and Industrial Relations Act, 2002 (Cap 452)*. The Commission Recommendation of 27 November 1991 on the protection of the dignity of men and women at work (92/131/EEC) defines sexual harassment as 'conduct of a sexual nature, or conduct based on sex affecting the dignity of women and men at work...'. It may take many different forms such as physical acts, words or gestures, and display of sexually offensive material.

Thus sexual harassment may involve:

- unwelcome physical contact such as touching, hugging or kissing;
- staring or leering;
- suggestive comments or jokes;
- unwanted invitations to go out on dates or requests for sexual interaction;
- intrusive questions about an employee's private life or body;
- unnecessary familiarity;
- insults or taunts based on your sex;
- sexually explicit emails or SMS messages;
- accessing sexually explicit internet sites;
- sexually explicit pictures, screen savers or posters; and

- behaviour which would also be an offence under the criminal law, such as physical sexual assault, indecent exposure, and obscene or pornographic communications.

1.1 What does not Constitute Sexual Harassment?

Sexual harassment is not sexual interaction, flirtation, attraction or friendship which is invited, mutual, consensual or reciprocated. This due to the fact that for sexual harassment to arise, the sexual conduct in question must be unwelcome.

CASE STUDY 1

A member of staff of a public entity lodges a complaint of sexual harassment with the NCPE (National Commission for the Promotion of Equality) against two other colleagues. In this case, the NCPE immediately informs the manager concerned about the allegations made and requests him to provide a report about the allegations. The NCPE proceeds to interrogate the complainant and the two alleged harassers.

The facts concerning these allegations are based on verbal behaviour of a sexual nature, in particular offensive sex-based jokes and remarks. Throughout the proceedings, the head of section separates the employees concerned as a precautionary measure in order to prevent any further harassment from occurring.

On examining the case in depth, it results that the complainant has in fact taken part in these jokes. Therefore, no sexual harassment is in fact proved, due to the fact, that the behaviour in question was not unwelcome. Before dismissing the case however, the NCPE holds separate meetings with the complainant and the alleged harassers, informing them that had their behaviour been directed at another person who did not in fact welcome such behaviour and was offended by it, sexual harassment would have subsisted. In this case an emphasis is made

on the kind of behaviour that is or is not appropriate at the workplace, since the alleged harassers have no idea that their behaviour can in fact be tantamount to sexual harassment. Hopefully here everyone learns a lesson and the behaviour at the workplace will improve!

Had the circumstances been otherwise, and enough proof assimilated to proceed to Court, the harasser, according to Art.2(b) of Chapter 456, Equality for Men and Women Act, would have been liable to pay a fine of not more than Lm1,000 or to imprisonment of not more than six months or even to both fine and imprisonment.

1.2 What is Unwelcome Sexual Conduct?

Sexual harassment arises if the sexual conduct in question is unwelcome. Whether the behaviour is unwelcome is a subjective question and will depend on the particular person against whom it is directed. It is irrelevant that the behaviour may not offend others or that it has been an accepted feature of the work environment in the past.

Different individuals will often perceive and react to behaviour in different ways. A person acting in a particular manner may think that their conduct is welcome or inoffensive, when in fact the person on the other end finds it distasteful or offensive. The latter might nonetheless go along with such behaviour in order to avoid confrontation. This can happen for instance, where there is a difference in age, racial or cultural background, seniority or personal power between those concerned. Sometimes workplace participants feel they have to join in so as to avoid being victimised, teased or excluded by their workmates or superiors.

Sexual behaviour between employees arising from mutual flirtatious, romantic or sexual relationships is not sexual harassment. However, the fact that such conduct was accepted by a particular person in the past does not preclude the possibility of it amounting to sexual harassment should it become unwelcome by

that person at a later stage. This can happen for instance where a relationship breaks down but one of the persons concerned continues to manifest acts of a sexual nature directed at the previous partner, in which case sexual harassment would arise if such acts are unwelcome by the person against whom they are directed. In such a case, the situation should be dealt with as any other sexual harassment complaint.

Employers also need to take care to ensure that sexual behaviour between employees, even if reciprocated, does not create an unpleasant and sexualised workplace for other employees.

Advances by an employer, even though tolerated by the majority of all other employees, may still give rise to liability.

Consent or participation which is obtained by fear, intimidation, threats or force may still give rise to sexual harassment.

Moreover, a complaint of sexual harassment should not be rejected just because the complainant did not specifically tell the harasser that their behaviour was unwelcome.

1.3 Conduct of a Sexual Nature

“Conduct of a sexual nature” is given a broad interpretation and it includes spoken words, gestures and the production, display and circulation of any written words, pictures or other material. The unwelcome behaviour must have a sexual element, overtone or implication. Conduct that may not, in isolation, appear to be sexual in nature, may become so because of the surrounding circumstances.

Sexual harassment needs to be distinguished from general harassment or bullying that is not sexual in nature.

1.4 Sexually Hostile Work Environment

A sexually hostile workplace is one in which a person is made to feel uncomfortable or excluded by the workplace environment, by, for example, the display of obscene or pornographic material, general sexual talk, crude conversation or innuendos and offensive jokes.

In some circumstances, a working environment or workplace culture that is sexually permeated or hostile may also in itself amount to sexual harassment.

Employers should be careful to ensure that professional standards are maintained in the workplace and that a culture of inappropriate behaviour does not develop. One should keep in mind that what may be acceptable socially or in private life could well be inappropriate in a work context. Sexualised or demeaning cultures are unacceptable in the modern workplace.

Hostile environments can be a particular problem for women and men working in non-traditional jobs or in workplaces dominated by members of the opposite sex. In some workplaces, sexual gossip, jokes and teasing may have become commonplace in the daily working life and often employees participate in the workplace culture without thinking about the consequences that such actions may have on their colleagues or other persons present. Since they do not directly intend to offend or humiliate, such persons might be surprised to find out that such behaviour could constitute sexual harassment.

Employers should discourage any workplace behaviour that is sexist or potentially offensive to others. An atmosphere of respect in which employees are careful of each others' sensitivities will be least likely to foster sexual harassment complaints.

1.5 How Many Times does Sexual Harassment have to be Endured Before Making a Complaint?

Sexual harassment does not have to be repeated or continuous to be against the law. One has the right to complain immediately after the occurrence of the first episode.

1.6 Sexual Harassment is Gender Discrimination

Sexual harassment is a legally recognised form of gender discrimination against an individual or group of individuals.

1.7 Sexual Harassment by Same Sex

Sexual harassment is prohibited regardless of the sex of the parties. This means that a person can make a complaint if they are harassed by someone of the same sex. For example, sexual harassment can involve a male apprentice who is subjected to comments about his sex life by male co-workers.

Sexual preference is also irrelevant to a complaint of sexual harassment. If lesbians or gay men are subjected to unwelcome conduct which is sexual in nature, they can lodge a sexual harassment complaint. For example, sexual harassment also arises if a group of workers makes offensive sexual jokes or comments about a homosexual colleague. For such purpose, the fact that the harasser has no sexual interest in the complainant would be irrelevant.

Another example is that of a saleswoman who is sexually harassed by a male retail manager, in which case the fact that the manager may be homosexual and has no sexual intentions in the woman has no relevance.

1.8 Where is Sexual Harassment Prohibited?

Sexual harassment is prohibited at the workplace and educational facilities, during working hours, at work/study-related activities such as training courses, conferences, field trips, work functions and office Christmas parties. It is also prohibited by and between all workplace participants and all other persons present at the place of work.

1.9 Criminal Conduct

When a case of sexual harassment is proven, it could constitute both a civil and a criminal offence. Some types of harassment may also be offences under the criminal law. These include physical molestation or sexual assault, indecent exposure and obscene communications (telephone calls, letters etc).

The Commissioner of Equality for Men and Women may refer cases of sexual harassment investigated by the NCPE to the Commissioner of Police.

CASE STUDY 2

A member of staff of an entity seeks legal advice on a private basis after being sexually assaulted at work by a senior colleague. In this case, the legal adviser lodges, on behalf of the complainant, a formal complaint with the NCPE, so that the latter can intervene on behalf of the victim. Again, in this case, the NCPE contacts the employer and requests a report on the matter.

The alleged harassment consists of repeated incidents of physical contact between the victim and the alleged harasser. The NCPE interrogates both the victim and the alleged harasser. It results that the victim has on a number of occasions tried to warn the harasser to stop his behaviour, by telling him directly that she does not welcome his 'attention' in her regard.

The alleged harasser does not admit to the accusations, however various inconsistencies result from his statement of the facts. In this case the NCPE concludes that prima facie, sexual harassment has occurred. Thus, the complainant is informed that she can either opt for a mediation with the other party, in the event that the latter would agree, or that alternatively the case can be referred to the Commissioner of Police for criminal proceedings to be instituted. The complainant opts for the latter course of action and the case is now pending before the Criminal Court.

In the interim, the NCPE again contacts the employer, and advises to transfer the alleged harasser to another division in order to avoid further conflict and embarrassment between the two parties. It results that this has, in fact, already been done, and thus the employer has taken all reasonable steps to avoid further harassment. Also, disciplinary proceedings are instituted against the harasser at the workplace after the relative investigations have been carried out.

If the harasser is proved guilty at the end of the Court proceedings, he may incur a fine of not more than Lm1,000 or a term of six-months imprisonment, or both such fine and imprisonment. Moreover, the harasser would be liable to further sanctions at the workplace if the outcome of the investigations at the place of work is against him.

1.10 Abuse of Authority

An employee's refusal of submission to unwanted sexual advances by a person in authority cannot be used as a basis to a decision which affects the employee's access to employment, continued employment, training, salary and promotion opportunities. This prohibition applies whether such a decision is taken manifestly or is otherwise disguised under different forms.

The Equality for Men and Women Act Cap. 456, Art. 9 (1) states:

"...it shall be unlawful for any person to sexually harass other persons, that is to say:

(a) to subject other persons to an act of physical intimacy; or

(b) to request sexual favours from other persons; or

(c) to subject other persons to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of any written words, pictures or other material, where the act, words or conduct is unwelcome to the persons to whom they are directed and could reasonably be regarded as offensive, humiliating or intimidating to the persons to whom they are directed; or

(d) the persons so subjected or requested are treated less favourably by reason of such persons' rejection of or submission to such subjection or request, it could reasonably be anticipated that such persons would be so treated."

Reference is also made to the Employment and Industrial Act (EIRA), 2002 and subsequent additions where it is stated that it is unlawful to victimise any person for having made a complaint to the lawful authorities or participated in proceedings of redress on grounds of an alleged breach of the provisions of the Act. Therefore, a person who lodges a complaint with any authority on grounds of sexual harassment may not be further victimized for having made such a complaint.

2.0 What are the Legal Obligations of an Employer?

An employer has an interest in ensuring that sexual harassment does not occur at his workplace. This due to the fact that sexual harassment can damage business performance since staff who are harassing others are not using their time productively whereas victims of harassment may under-perform due to stress and loss of self-esteem. Organisations also have a duty to promote a positive work environment, and in this respect it is submitted that sexual

harassment, besides falling within the meaning of gender discrimination, may also become a health and safety issue if such acts have psychological repercussions on the victims. Sexual harassment at the workplace can also damage the company's public image due to the fact that the employer can incur liability and face legal sanctions if sexual harassment is allowed to subsist at the place of work. This last consideration can also cost the company money in cases where the employer is condemned to pay damages.

Under the Equality for Men and Women Act, an employer may be liable for acts of sexual harassment committed by one or more of his employees unless all steps as are reasonably practicable have been taken to prevent sexual harassment from taking place. An employer will not incur liability if he successfully proves the 'reasonable steps defence'.

There are two main actions that employers may take to show that they have taken all reasonable steps and thus avoid liability for sexual harassment:

- Adequate preventive measures, such as a sexual harassment policy should be adopted, fully implemented and monitored effectively;
- Remedial measures should be applied in cases where sexual harassment claims do in fact occur.

CASE STUDY 3

A case of sexual harassment allegations is reported to the NCPE by an organisation. In this case, the company concerned has instituted disciplinary procedures against an employee for a particular reason which has nothing to do with sexual harassment. Nevertheless, in the course of the investigations by the management, it transpires that the employee in question has persistently exhibited behaviour of a sexual nature in front of one of the female members of staff. In view of the fact that according to Cap 456, Equality for Men and Women Act, the employer has a liability in this regard, the organisation encourages the

latter to lodge a formal complaint with the NCPE. Furthermore, the organisation itself seeks the advice of the NCPE on this matter.

The facts regarding this case concern persistent comments about the physical appearance of the female members of staff, who are largely outnumbered in a male-dominated workplace; physical contact between members of staff, such as brushing and patting; and jokes which are sexual in nature.

The employee who lodges the complaint has particularly told the alleged harasser that his behaviour in her regard is unwelcome. On being interrogated, the victim explains how this behaviour is one that is commonplace at her place of work, and that it is not only one other employee who exhibits such behaviour, but also a number of other employees. It results that the managers are also aware of such behaviour, but no action was ever taken to stop it from happening.

On interrogating the alleged harasser, the version of the complainant is corroborated, in the sense that it results that other employees besides the alleged harasser exhibit behaviour of a sexual nature.

Thus, it results that this case is one concerning a sexually hostile work environment, where the female minority is constantly subjected to sexual remarks and physical contact. The employees however hardly ever stood up to this behaviour for fear of being isolated by the rest of the staff, as in fact has happened to the one who comes forward with the complaint.

In this case, the allegations against the harasser are proved. However, it further results that the employer is equally liable, due to the fact that although the managers are aware of this behaviour, no steps were taken for it to stop or to prevent it from happening again.

The alleged harasser is dismissed by the company on other grounds, not on the fact that he is guilty of sexual harassment. The complainant does not wish to take further legal action. Thus, after obtaining the agreement of all parties involved, the NCPE holds a mediation session whereby the managers of the organisation are informed about their liability at law in cases where no action is taken to prevent sexual harassment and indeed suppress it when it results. The organisation is also encouraged to adopt a sexual harassment policy and to hold training sessions wherein the staff is informed about the meaning of sexual harassment and its legal implications.

2.1 Preventive Measures: Formulating a Sexual Harassment Policy

The adoption of a sexual harassment policy is the best preventive measure which an employer may take with regards to issues of sexual harassment. The policy should include procedures which victims should follow in order to make complaints and guidelines which enable the employer to deal with such complaints.

A sexual harassment policy should be in the written form and should clearly state that sexual harassment will not be tolerated under any circumstances.

A sexual harassment policy should include the following:

- A strong opening statement on the organisation's attitude to sexual harassment
- An outline of the organisation's objectives regarding sexual harassment
- A clearly worded definition of sexual harassment
- Some examples of sexual harassment that are relevant to the particular working environment
- What does not amount to sexual harassment

- A statement that sexual harassment is against the law
- The circumstances in which sexual harassment may occur
- The consequences that can be imposed if the policy is breached
- Responsibilities of management and staff
- Information on where individuals can get help, advice or make a complaint
- A brief summary of the options available for dealing with sexual harassment

Besides formulating and adopting such a policy, employers should however make sure that the sexual harassment policy is clearly understood by all the workplace participants, and that it is properly monitored and implemented.

2.2.0 Remedial Measures: How to Remedy Sexual Harassment

It is recommended that employers take the following steps to deal with the occurrence of sexual harassment. The basic premise must be that the procedures will be dealt in a strictly confidential manner. This in order to ensure that the person aggrieved does not suffer further victimisation at the workplace or embarrassing situations which may arise in such circumstances. Furthermore, the company should deal with the alleged harasser in a constructive manner so that the harassment is immediately ended and if possible, so that the accused will be provided with the possibility of improving their conduct in cases where the allegations result to be founded.

- Employers should implement an internal system for dealing with sexual harassment complaints or adapt existing complaints procedures for this purpose.
- Employers must ensure that the organisation's policy on sexual harassment provides employees with advice on what to do if they are sexually harassed. Employees should be given information on:
 - how to deal with the harassers themselves (employees should not be
 - pressured into pursuing this option and should only confront the harasser

- directly if they feel confident enough to do so);
 - how to approach their supervisor, manager or other officer who is
 - responsible for dealing with sexual harassment;
 - how to lodge a formal complaint through the organisation's complaint/grievance procedure; and
 - how to approach an external organisation such as the National Commission for the Promotion of Equality (NCPE), a Trade Union, or the Industrial Tribunal. In this regard, the victim should be informed about the possibility of pursuing legal proceedings, as provided for under the Equality for Men and Women Act Cap 456 Art, 19 (1) '...a person who alleges that any other person has committed in his or her regard any act which under any of the provisions of this Act is unlawful, shall have a right to action before the competent court of civil jurisdiction requesting the court to order the defendant desists from such unlawful acts and, where applicable, to order the payment of compensation for such damage suffered through such unlawful act.'
- Employers should carry out the necessary investigations under strict confidentiality.
 - The appropriate disciplinary measures should be applied in cases where the allegations are proved.
 - Employers may also apply the appropriate disciplinary measures in cases of frivolous or malicious complaints.

2.2.1 Disciplinary Measures in Sexual Harassment Cases

If an alleged case of harassment is proved, the employer may elect to impose any of a number of different sanctions such as a written reprimand, suspension without pay, downgrading and dismissal. Regard should be had to the severity of the case and to negotiations between the employer and the concerned union.

According to the law, however “Persons who sexually harass other persons shall be guilty of an offence against this article and shall, without prejudice to any greater liability under any other law, be liable on conviction to a fine (*multa*) of not more than Lm1,000 or to imprisonment of not more than 6 months or to both such fine and imprisonment.” (Cap 456, Art 9 (3)). Thus, notwithstanding the fact that the employer would have imposed disciplinary measures on a harasser, the person aggrieved might still institute legal action, in which case any of the penalties prescribed above may be imposed by a court of law if the case is successfully proved.

3.0 Seeking Legal Redress: The National Commission for the Promotion of Equality

Since all employees have a right to work in a positive working environment in which they are not subjected to any harassment of any kind, employers should ensure that any employee who may have fallen victim of sexual harassment is informed about his/her relative rights at law, and should be made to feel comfortable enough to come forward to make a complaint. The Employer should also ensure that his employees are adequately informed about the possibility of seeking redress and support from a third party, such as a Trade Union or the National Commission for the Promotion of Equality in cases where such complaints do in fact arise. In fact, in cases where the alleged harasser is a person of authority at the workplace the complainant may feel more comfortable to address the complaint to such an external authority, rather than at the workplace itself.

The National Commission for the Promotion of Equality is an autonomous body which has the power and the duty to implement the provisions of the Equality for Men and Women Act and to investigate cases in which gender discrimination is alleged. Thus the NCPE also has the power to investigate cases of sexual harassment upon receiving a complaint in writing to that effect. The NCPE will

delegate an official to formulate such complaints in writing in cases where the complainant himself/herself has difficulty in so doing.

Upon receiving such a complaint, the Equality Commission shall convene in a specific meeting in order to discuss the facts submitted, after which, the Commission shall endeavour to carry out all necessary investigations in order to establish whether the alleged sexual harassment is prima facie proved. In such cases, the Commission will liaise with the employer in order to ensure that the harassment is ended immediately and to ensure that the harasser is subjected to all relevant disciplinary procedures. In cases where the employer does not in fact take all the necessary steps to ensure that the harassment is ended and that it is not repeated, the Commission may institute civil proceedings on behalf of the complainant in order to redress this situation. In any case, the Commission shall take all the necessary steps to ensure that the victim is not subjected to further harassment throughout the course of the investigations or proceedings. At the end of the relative investigations, the Commission may also refer the case to the Commissioner of Police in order to initiate the relative criminal procedures.

Alternatively, the Equality Commission may mediate between the parties, but consent of all those concerned is required for this to occur. Mediation is an informal, confidential process whereby an impartial person facilitates discussion and negotiation between the people who are in dispute, with a view to helping them reach a mutually acceptable outcome to the conflict. The process will usually involve each person having the opportunity to describe the situation from their perspective, as well as hearing from the other person, before going on to look at ways in which the situation could be improved for the future or negotiating a mutually acceptable settlement to a claim.

Since the NCPE also has an informative function, it will readily supply information regarding any type of gender discrimination, including sexual harassment, to anyone requesting it, even though no particular complaint would have as yet

been lodged. Therefore employers and employees are urged to contact the NCPE should they require any information or clarification regarding issues of sexual harassment.

For further assistance on sexual harassment issues, please contact:

National Commission for Promotion of Equality between Men and Women
(NCPE)

2, Cavalier Street

Valletta CMR 02

2590 3850

gender.equality@gov.mt

Industrial Tribunal at the

Department of Employment and Industrial Relations

121, Melita Street

Valletta CMR 02

2122 0497 / 2122 3658

vincent.a.micallef@gov.mt

ADDENDUM I

As from the *Equality for Men and Women Act*, (Laws of Malta, Cap. 456), provisions regarding sexual harassment are the following:

5. (1) It shall be the duty of employers upon the request of any person claiming to have been sexually harassed or discriminated against, or upon a request made by the Commissioner acting upon a complaint or otherwise, to provide such person or the Commissioner, as the case may be, within ten working days of such a request with a report on the allegation made or the procedures used by the employers in the matter alleged to constitute such sexual harassment or discrimination.

(2) The employers shall be entitled to claim from the person requesting the report, reimbursement of such reasonable expenses incurred in drawing up and making the report:

Provided that such expenses may be recovered from the person responsible for such sexual harassment or discrimination if it is found that such sexual harassment or discrimination did in fact take place.

9. (1) Without prejudice to the provisions of article 29 of the Employment and Industrial Relations Act, it shall be unlawful for any person to sexually harass other persons, that is to say:

(a) to subject other persons to an act of physical intimacy;

or

(b) to request sexual favours from other persons; or

(c) to subject other persons to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of any written words, pictures or other material, where the act, words or conduct is unwelcome to the persons to whom they are directed and could reasonably be

regarded as offensive, humiliating or intimidating to the persons to whom they are directed; or

(d) the persons so subjected or requested are treated less favourably by reason of such persons' rejection of or submission to such subjection or request, it could reasonably be anticipated that such persons would be so treated.

(2) (a) Persons responsible for any work place, educational establishment or entity providing vocational training or guidance or for any establishment at which goods, services or accommodation facilities are offered to the public, shall not permit other persons who have a right to be present in, or to avail themselves of any facility, goods or service provided at that place, to suffer sexual harassment at that place.

(b) It shall be a defence for persons responsible as aforesaid to prove that they took such steps as are reasonably practicable to prevent such sexual harassment.

(3) Persons who sexually harass other persons shall be guilty of an offence against this article and shall, without prejudice to any greater liability under any other law, be liable on conviction to a fine (*multa*) of not more than one thousand Liri or to imprisonment of not more than six months or to both such fine and imprisonment.

ADDENDUM II

As from the *Employment and Industrial Relations Act* (Laws of Malta, Cap. 452), provisions regarding sexual harassment are the following:

29. (1) It shall not be lawful for an employer or an employee to harass another employee or to harass the employer by subjecting such person to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of that person is based on sexual discrimination and which could reasonably be regarded as offensive, humiliating or intimidating to such person.

(2) It shall not be lawful for an employer or an employee to sexually harass another employee or the employer (hereinafter in this article referred to as "the victim") by:

(a) subjecting the victim to an act of physical intimacy; or

(b) requesting sexual favours from the victim; or

(c) subjecting the victim to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of written words, pictures or other material where -

(i) the act, request or conduct is unwelcome to the victim and could reasonably be regarded as offensive, humiliating or intimidating to the victim;

(ii) the victim is treated differently, or it could reasonably be anticipated that the victim could be so treated, by reason of the victim's rejection of or submission to the act, request or conduct.

30. (1) A person who alleges that the employer is in breach of, or that the conditions of employment are in breach of articles 26, 27, 28 or 29, may within four months of the alleged breach, lodge a complaint to the Industrial Tribunal and the Industrial Tribunal shall hear such complaint and carry out any investigations as it shall deem fit.

(2) If the Industrial Tribunal is satisfied that the complaint is justified, it may take such measures as it may deem fit including the cancellation of any contract of service or of any clause in a contract or in a collective agreement which is discriminatory and may order the payment of reasonable sums of money as compensation to the aggrieved party.

(3) For the purposes of hearing and deciding cases of alleged discrimination, breaches of the principle of work of equal value, victimisation or harassment, the Industrial Tribunal shall be composed of a chairperson alone in the manner set out in article 73(4).

(4) Any action taken by a complainant in accordance with the provisions of this article shall be without prejudice to any further action that such complainant may be entitled to take under any other applicable law and shall also be without prejudice to any other action to which the respondent may be subject in accordance with any other applicable law.

Addendum III

POLICY ON SEXUAL HARASSMENT¹

Introduction

This document defines what the Management of the organization (specify name) perceives as sexual harassment and stipulates the procedures that shall be adopted in cases of allegations of sexual harassment at work.

This policy binds all the employees of the organization (specify name)

Declaration of Principles

1. The Management of the organization (specify name) believes that preventing sexual harassment is part of good management. The victim of sexual harassment may experience emotional stress, physical stress, and/or a negative change in job performance. On the other hand, the organization may be negatively effected in terms of morale amongst employees, higher rate of absenteeism, job turnover and low job performance. Through this Sexual Harassment Policy it wants to ensure that all its employees are treated with respect and dignity.
2. This organization (specify name) believes that sexual harassment is an intolerable violation of the dignity of workers and that it may have negative effects on the work environment and the general well-being of staff and/or clients, and is therefore committed to create a climate at work in which women and men respect each other.

¹ Policy modelled on a specimen provided by the Malta Employers Association.

3. This organization (specify name) is an equal opportunity employer and as such it will not tolerate any form of sexual harassment at the workplace. Management and all employees in general are duty bound to safeguard and uphold the precepts articulated in this policy document. Non-compliance will be severely reprimanded.

Aims

4. This policy is aimed at:
 - Securing the dignity and personal development of all members of staff within this organization (specify name). The Management makes it clear that sexual harassment is unlawful and will not be permitted or condoned in the workplace.
 - Informing and educating the employees on the type of behaviour that is acceptable or unacceptable at the place of work.
 - Providing redress to the victims of sexual harassment at the place of work. No employee needs to fear that he/she will be victimized for bringing a complaint of sexual harassment. All sexual harassment claims will be treated very seriously, confidentially, and all the necessary action will be taken to deal with the claim.
 - Building a pro-active work environment that prevents the occurrence of sexual harassment at the place of work.

Definition of Terms

5. Sexual harassment is unwelcome behaviour of a sexual nature or other sex based conduct affecting the dignity of women and men at the workplace. Male

and female employees may not always realize that their behaviour constitutes sexual harassment. They must recognize that what is acceptable to one person may not be acceptable to another. Sexual harassment takes many forms, from relatively mild sexual comments to actual physical violence. The following may be considered as a broad classification system in this regard:

- Physical conduct of a sexual nature: commonly regarded as meaning unwanted physical conduct ranging from unnecessary touching, patting or pinching or brushing against another employee's body to assault and coercing sexual intercourse at the place of work. Recourse to such coercive conduct could lead to the institution of criminal charges.
- Verbal conduct of a sexual nature: this may include unwelcome sexual advances, propositions or pressure for sexual activity; continued suggestions for social activity outside the workplace after it has been made clear that such suggestions are unwelcome; offensive flirtations, suggestive remarks, insensitive jokes, innuendoes or lewd/obscene comments.
- Non-verbal conduct of a sexual nature refers to the display of pornographic or sexually suggestive pictures, objects or written materials, and making sexually suggestive gestures.
- Sex-based conduct refers to conduct that denigrates or ridicules or is intimidatory or physically abusive of an employee's gender, such as derogatory or degrading abuse or insults that are gender related and offensive comments about appearance or dress. Such conduct can create an offensive working environment for the recipient.
- Sexual blackmail (Abuse of authority) refers to conduct where an employee's refusal or submission to unwanted sexual behaviour is used as a basis for a decision which affects that employee's access to employment, continued

employment, training, salary, and promotion opportunities. This form of behaviour involves abuse of authority as only somebody holding direct or indirect (that is capable of influencing) supervisory or managerial authority has the power to threaten or actually take an employment decision affecting the person harassed.

The above list is not an exhaustive list and should not be considered as such.

Procedures

6. Objectives:

- These procedures are intended to make explicit to both Management and staff how sexual harassment cases are to be tackled.
- The procedural framework identified herein ensures that sexual harassment cases are dealt with fairly, consistently, constructively and speedily. All cases will also be dealt with utmost confidentiality.
- These procedures reflect the current standards of good practice and follow the basic precepts of natural justice, namely:
 - The alleged harasser should be informed of the nature of the accusation against him/her;
 - The alleged harasser will be given the opportunity to state his/her case prior to the undertaking of any disciplinary action.
 - Those presiding over both investigative and disciplinary hearings will act in good faith prior to reaching any decisions.

The primary purpose of this procedural framework is to deal with cases of sexual harassment in a constructive manner by providing employees the possibility of

improving their conduct. These procedures aim to achieve this by dealing with minor breaches of code of conduct informally (where the complainant agrees).

7. Application

These procedures apply to sexual harassment cases experienced by the employees of this organization as well as any students and trainees placed within this organization.

8. Advice and Assistance

All employees will be informed of this organisation's sexual harassment policy through formal and informal training programmes, where the key constructs of this policy will be outlined and disseminated. Also, the legal mechanism relating to sexual harassment will be explained, and the employees will be informed about where to seek assistance outside the organization should they feel that they will be better safeguarded that way. The employees will be further informed about the possibility of seeking assistance from the relative trade union/employee representative.

These training initiatives will stress that complaints related to sexual harassment will be treated very seriously. All employees of this organization are entitled to adequate, regular, and ongoing training on the prevention of sexual harassment at work to ensure that this policy is adhered to at all times.

9. Dealing with sexual harassment informally

- Persons experiencing the more minor forms of sexual harassment may take informal action by approaching the person concerned and attempting to resolve issues informally. This is done, primarily, by making it clear to the harasser that the behaviour is unacceptable and must stop. Such informal

action is intended to avoid seeking redress through formal procedures that may lead to a disciplinary hearing depending on the severity of the alleged offence. Employees should note that, whilst informal settlement may be appropriate in some instances, it remains within their rights to seek redress through the formal procedure of the organization. This organization further recognizes the difficulties related to pursuing informal redress to experiences of sexual harassment, particularly if the alleged harasser is a senior member of staff.

- Where the complainant is too embarrassed to approach the harasser to reach informal settlement, the former may ask a colleague, head of section or a trade union representative to raise the issue with the person concerned.
- If anyone is approached by a colleague on behalf of the complainant, the approached party is entitled to assistance by a colleague, trade union or any other representative as delineated above.
- The organization may consider that it is opportune to identify and appoint someone within the same organization to act as a 'confidential counsellor' or adviser to individuals experiencing sexual harassment upon the latter's consent. Sexual harassment counsellors will offer advice and support to the individual who has been harassed and suggest possible courses of action to the latter, depending on the severity of the case, such as, for example, whether to lodge a formal or informal complaint.
- Management at all levels have a positive duty to establish and maintain workplaces free of sexual harassment. Should any sexual harassment be taking place, the head of section is duty bound to bring this to the attention of the appointed 'confidential counsellor'.

10. Formal complaints

- Where informal methods fail, or serious harassment occurs, employees are advised to lodge a formal complaint and should seek assistance from the respective head of section or any other senior staff member in doing so. If the latter is somehow implicated in the allegations made by the complainant, the complainant should report the incident to another officer holding a senior grade within or outside the complainant's section.

- The complaint should be made in writing and where possible state:
 - the name of the harasser
 - the nature of the harassment
 - Dates and times when the harassment occurred
 - Names of potential witnesses to the alleged incident
 - Any action taken by the complainant to stop the harassment.

The complaint, once signed by the complainant, should be sent, in confidence, to the Head of the organization.

- When formal complaints are instituted against an employee, the latter is advised to seek the support of a work colleague or trade union representative or any other person as delineated above.

- If the complainant, and/or the alleged harasser are victimized by other colleagues because of their actual or alleged behaviour, the latter are liable to disciplinary action.

- Copies of all formal complaints should not only be kept confidentially on file, but should also be sent to the complainant and the alleged harasser, who are also to be informed about the duty of confidentiality in relation to the same complaint. Similarly, copies of reports defining the outcome of the preliminary investigation into the allegation should be sent to those involved in the case.

The report must be submitted by the investigating board not later than one week from when the investigations are terminated.

- Finally, if the preliminary investigation leads to a formal disciplinary hearing, the case against the harasser is proved and the relevant sanctions are imposed, a written document delineating the said information should be filed in the employee's personal file. A copy of this document should be made available to both the complainant and harasser.
- The course of action delineated above does not override the right of the complainant or the alleged party to take recourse to legal action.

11. Investigations

- Immediately after a formal complaint of harassment has been received, where necessary, action will be taken to separate the alleged harasser from the complainant. This may involve the temporary transfer of the alleged harasser to another section or suspension from work until the complaint has been resolved.
- At least two officers nominated by the Head of the Organization will carry out a full and thorough investigation as quickly as possible. The Head of the organization may also appoint specialist persons as members of the investigating board. The Head or his delegate must appoint the Investigating Board within three working days from when the complaint is received. It is recommended that where possible, the constitution of the Board will reflect equal gender representation. All persons involved in the investigation are expected to maintain and ensure confidentiality at all times.

- Given the sensitivity of sexual harassment cases, Board members should ensure an efficient and expedient investigating process. The investigating Board must initiate its work within five working days when appointed.
- Copies of statements made by witnesses will be made available to the alleged harasser and the complainant. Witness will be encouraged to appear at the complaints hearing if requested by either party. The organization acknowledges that some witnesses may be reluctant to do so. In these circumstances, the Board will, if necessary, adjourn the hearing to ask supplementary questions to the witnesses in private. Further, witnesses will be informed by the Board that the organization shall not permit their victimization due to giving evidence.
- Both the complainant and the alleged harasser will also have the right to be accompanied at the complaints hearing by a staff representative.
- Where the Board concludes that the harassment has actually taken place, disciplinary procedures will be immediately instigated. The Board may also recommend that the harasser is offered counselling.
- The harasser will have an opportunity to defend his/her actions before a full disciplinary hearing.
- The complainant will be offered recovery assistance if he/she so desires.

Disciplinary Hearings/Measures in Sexual Harassment Cases

12. It is important to note that proven sexual harassment by staff constitutes gross misconduct which could lead to dismissal.

- If an alleged case of harassment by staff is actually proved, the following sanctions may be imposed according to the severity of the case :

Written reprimand

Suspension without pay

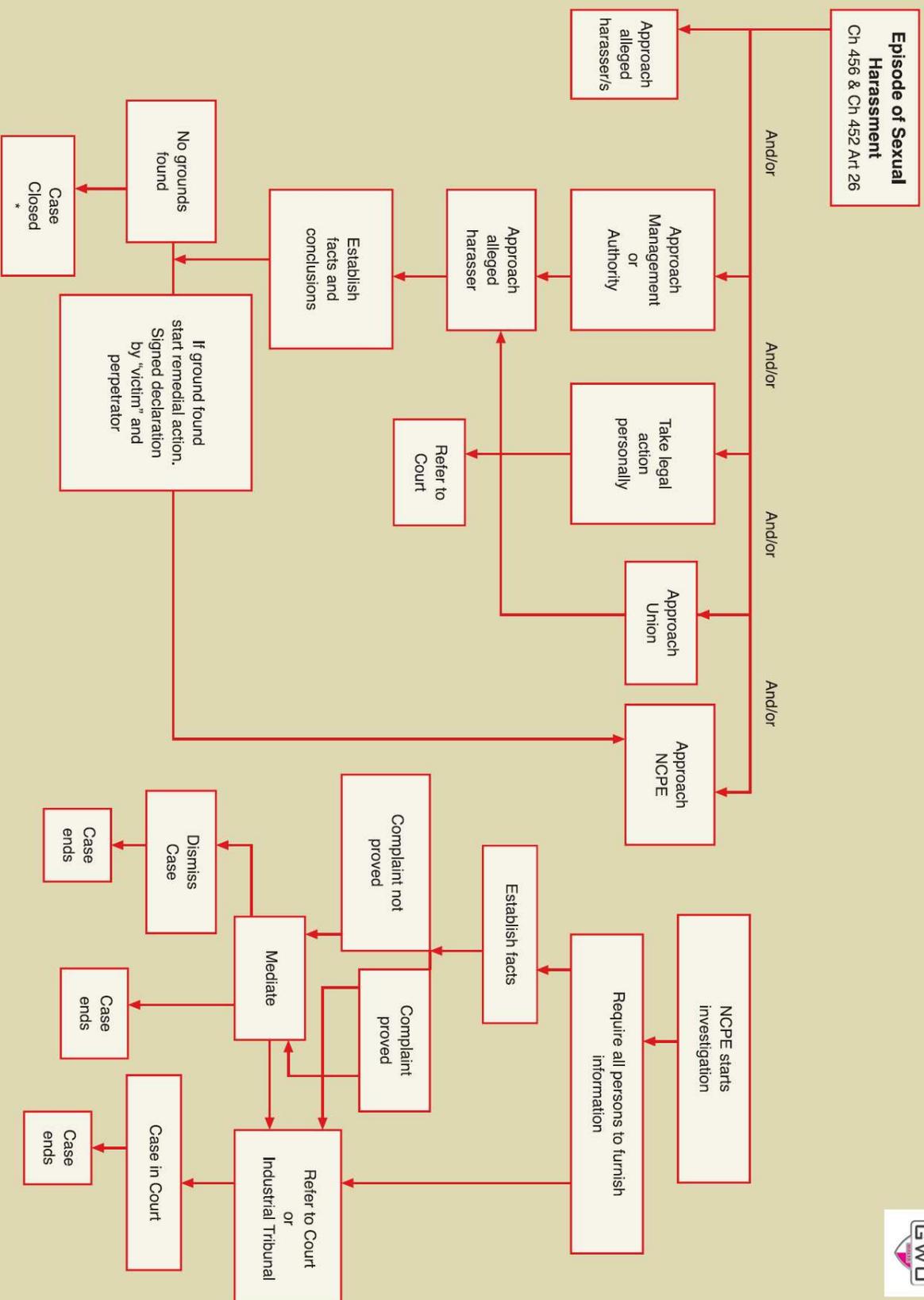
Downgrading

Dismissal

- Where a lesser penalty is appropriate (such as a written warning), this will be administered in tandem with the necessary action to ensure that the victim is able to work without undue embarrassment or anxiety.
- Appeals against the above penalties and/or conclusions delineated in the Investigating Board's report may be undertaken in accordance with the stipulated Disciplinary Procedure.
- Where it is found that the allegations of sexual harassment made by employees are untrue, every effort will be made to facilitate the resumption of duties by the falsely accused employee. Any employee unjustly accusing colleagues or lodging malicious and/or frivolous complaints will himself/herself be liable to dismissal and/or other disciplinary action as indicated above.

Persons Experiencing Sexual Harassment May:

Co-sponsored by



• Management must however always ensure that the sexual harassment policy has been duly followed and effectively implemented, and should further seek to educate the parties concerned notwithstanding that the facts presented are not enough to give rise to an offence.