



Republic of Trinidad and Tobago



Equal Opportunity Commission  
*Promoting Equality*

# GUIDELINES on



# SEXUAL HARASSMENT in the Workplace

*Revised Edition - May 2018*





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of Trinidad and Tobago 2018

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# Foreword

Sexual harassment has been acknowledged as a serious problem in the workplace and has been condemned as sex discrimination and a violation of human rights internationally. The paying of a female person less than a male person for the same job, for example, is a serious problem for which some females have sought redress in the Courts. However, the recourse for an employee who is being subjected to sexual harassment in the workplace remains unclear. Undoubtedly, any person (whether male or female) who suffers a detriment, or is disadvantaged because of his/her sex, is being discriminated against in employment, when an employer's or another employee's conduct, denies him/her financial rewards because of his/her sex, or exacts some form of sexual compliance to improve or maintain his/her existing benefits. Sexual harassment in the workplace reduces the quality of the work environment, jeopardises the well-being of both women and men, undermines gender equality and imposes costs on its victims, employers and organisations.

The Equal Opportunity Commission (EOC) views workplace sexual harassment as a significant hurdle in achieving its primary goal of eliminating all forms of discrimination, while promoting equality of opportunity and good relations between persons of different status at different levels in an organisation. From our contact with organisations, individuals and complainants, we know that sexual harassment has serious potential to undermine and destroy working relationships and infringe on the human rights of individuals. In 1991, the European Commission noted that 'sexual harassment pollutes the working environment and can have a devastating effect upon the health, confidence, morale and performance of those affected by it'<sup>1</sup>. If complaints of sexual harassment are not resolved internally in the workplace, there arises a risk of having to incur the high costs of lengthy litigation, accompanied by the further risk of having to honour the payment of high monetary awards in

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<sup>1</sup>Sexual Harassment in the Workplace in the European Union <http://www.un.org/womenwatch/osagi/pdf/shworkpl.pdf>

damages, which are often awarded by the Court/Tribunal. A concomitant slur to an organisation's reputation may follow. Conversely, the benefits for a proactive business organisation which promotes awareness, and implements and enforces internal policies and guidelines to deal with sexual harassment can be substantial. Sickness, absenteeism, stress and conflict in the workplace are reduced, while staff retention, efficiency, morale and profitability are increased.

Managers and business owners in Trinidad and Tobago function in an environment that has not specifically legislated for sexual harassment. The purpose of these Guidelines is to enable employers to develop appropriate mechanisms for the prevention and management of complaints, with reference to a single document. A more significant purpose is to enable employers and managers to better understand how the law is meant to work, and provide them with a framework for understanding the need for them to play a leadership role in providing a workplace culture that does not tolerate nor condone sexual harassment.

No amount of legislation and case law in the world will root out sexual harassment if employers do not ensure that there is zero tolerance for it in their workplaces. Prevention of sexual harassment is more difficult than implementing grievance procedures, but prevention is crucial to workplaces in which merit is rewarded, discrimination not tolerated and equality fostered. These Guidelines should go some way in assisting employers, both large and small, to take up the leadership challenge of sexual harassment.

The EOC has prepared this document as a guide to both the private and public sectors, by providing information on understanding, preventing and resolving workplace sexual harassment. Employers and employees are encouraged to apply these Guidelines in the workplace and to be mindful of the practical guidance herein, to not only eliminate and prevent sexual harassment but to also minimise the risk of liability for unlawful sexual harassment at work. It is hoped that these Guidelines can be used as an aid to taking action to combat sexual harassment in the workplace.

On behalf of the EOC, I extend my sincere gratitude to Professor Rose-Marie Belle Antoine and Mr. Neil Parsanlal for their review and suggestions. I also wish to acknowledge the Australian Human Rights and Equal Opportunity Commission in making this document 'Guidelines on Sexual Harassment in the workplace.'



Lynette Seebaran Suite  
Chairman  
Equal Opportunity Commission

# 1. THE CURRENT LEGAL FRAMEWORK: SEXUAL HARASSMENT

## 1.1 Introduction

In 1993, the United Nations General Assembly defined violence against women as “*any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life*”. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which Trinidad and Tobago is a signatory, has classified sexual harassment in the workplace as a form of gender discrimination.

Internationally, workplace sexual harassment has been addressed as both an aspect of gender discrimination, as a form of gender-based violence and a violation of the right to equality, life, liberty and security.

Governments worldwide have enacted legislation to prohibit it. The role of legislation in encouraging employers to introduce workplace policies on sexual harassment is influencing compliance. Organisations are also using a range of techniques to prevent sexual harassment and help its victims.

The general lack of legislation targeting sexual harassment in the workplace has resulted in a commensurate unavailability of statistical evidence on its occurrence, prevalence, form and effects. Many employers tackle the issue in a haphazard manner instead of instituting a policy that is clear and well publicised and which allows the victims to have their grievances addressed.

In recent times, the scourge of sexual harassment in the workplace has been receiving international, regional and island-wide attention. The matters of Harvey Weinstein, Donald Trump, and Bill O'Reilly in the United States,<sup>2</sup> and that of company chairman of Angostura Ltd<sup>3</sup> in Trinidad and Tobago, highlighted respective situations where senior personnel have been accused of, among other things, sexual assault and harassment by dozens of women; and sexually harassing a contestant on *The Apprentice*; and have been pushed out at Fox News after a flood of sexual harassment allegations (but returned after settling the matter quietly); and a situation of sexual harassment allegations against a company Chairman by a senior executive respectively. In the last instance, the senior executive was dismissed in a controversial decision, and the company claimed that it would not be “commenting on the whistleblower process or policy” of the company.

The general haphazard and inconsistent manner of dealing with sexual harassment in the workplace is *not* recommended.

Generally speaking, specific legislation on sexual harassment would name and define sexual harassment, provide a mechanism for preventing harassment, articulate the employer's legal obligation to take immediate and appropriate action through a sexual harassment policy, contribute to the fair treatment of the harasser and the harassed/victim, define where is “work,” pre-empt the utilisation of mandatory arbitration agreements which employees are often compelled to sign (thereby stripping them of their freedom of choice and of their rights of recourse/redress to the Courts), and provide just and effective remedies for the misconduct.<sup>4</sup>

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2 Who is to blame for sexual harassment -Mark Joseph Stern  
[http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/10/blame\\_the\\_supreme\\_court\\_for\\_america\\_s\\_sexual\\_harassment\\_nightmare.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/10/blame_the_supreme_court_for_america_s_sexual_harassment_nightmare.html) -Who is to blame for sexual harassment -Mark Joseph Stern

3 <http://newsday.co.tt/2017/10/30/angostura-sexual-harassment-allegations-dismissed/>  
<http://news.power102fm.com/angostura-female-executive-axed-following-accusations-of-sexual-harassment-on-the-job-50289>

4 <https://www.google.tt/search?q=LAWS+ON+SEXUAL+HARASSMENT+IN+THE+CA+RIBBEAN&oq=LAWS+ON+SEXUAL+HARASSMENT+IN+THE+CARIBBEAN&aqs=chrome..69i57j0.10656j0j7&sourceid=chrome&ie=UTF-8>

However, despite the lack of specific legislation, the EOC is empowered under the Equal Opportunity Act, Chapter 22:03 (“EOA”) and common law to adequately provide many of the benefits of specific legislation on sexual harassment. The EOC has the power to receive, investigate, conciliate or refer complaints of sexual harassment to the Equal Opportunity Tribunal.

Employers must be mindful that it is in the interest of employers to avoid the escalation of sexual harassment matters into fullblown conciliation and/or litigation, outside the workplace, as such actions could prove costly and serve to tarnish the organisation’s reputation and generally negatively impact on the organisation’s end product. Managers have informed that they lack confidence when dealing with complaints of sexual harassment. Even the most experienced managers unless trained, are likely to encounter difficulties in handling complaints of that nature.

It is hoped that these Guidelines provide resolutions to the issues with which those in positions of authority in the workplace are confronted in dealing with sexual harassment complaints. It is designed to answer the questions that are frequently asked about dealing with sexual harassment in the workplace. It covers the legal position from the employer’s perspective and provides guidance on how to handle complaints of sexual harassment. These Guidelines also advise on the measures which can be put in place to prevent harassment occurring in the first place – and to minimise the risk of liability if it does.

The EOC emphasises, however, that policies and procedures, while important, can never cover all the circumstances that can arise in the workplace nor the practicalities of how to handle them with sensitivity, tact and fairness.

It should be noted that while these Guidelines do not have the force of law, they provide critical guidance and may be referred to by employers, workers and enterprises who are attempting to prevent and effectively respond to sexual harassment in the workplace.

## 1.2 Caribbean Approaches to SEXUAL HARASSMENT

Regionally, the Caribbean Community and Common Market (“CARICOM”) has completed its draft Model Sexual Harassment Bill, Protection Against Sexual Harassment Bill 1996<sup>5</sup> for consideration by Member States. The CARICOM Model Sexual Harassment Bill (“the Caricom Bill”), like the EOA, seeks to prohibit sexual harassment in the workplace, as well as in the provision of goods and services, in accommodation and in education.

Unlike the EOA, the Caricom Bill serves to define the term “sexual harassment” and specific clauses are devoted to providing details of the circumstances in which acts of sexual harassment would constitute a breach (clauses 3-19 Caricom Bill). The Caricom Bill prohibits acts of “sexual harassment” over and within an extensive spectrum of society (including the workplace, public and private bodies, the landlord and tenant relationship and various types of institutions) and for an all-encompassing range of activities including employment, the provision of goods and services in education and in housing. A draft Sexual Harassment Policy is provided in the Bill at Schedule 1.

Individual countries in the Caribbean adopt different approaches to treating with sexual harassment. The Bahamas<sup>6</sup> and St Lucia<sup>7</sup> make sexual harassment a crime while Belize and Barbados have stand-alone legislation to combat sexual harassment.<sup>8</sup> Sexual harassment is addressed in antidiscrimination legislation in Guyana<sup>9</sup> and is covered by under the prohibition of sex discrimination in Trinidad and Tobago.<sup>10</sup>

5 <http://caribbeanimpact.org/website/wp-content/uploads/2016/12/IMPACT-Justice-Sexual-harassment-report-April-2015-1.pdf>

6 Sexual Offences and Domestic Violence Act, Chapter 99

7 Criminal Code Act, Chapter 3:01

8 Protection Against Sexual Harassment Act, Chapter 107 in Belize and Employment Sexual Harassment (Prevention) Act Revised 2017-10-18 in Barbados at <http://www.barbadosemployers.com/Tools/Employment-Sexual-Harassment-Prevention-Act-2017.aspx>

9 Prevention of Discrimination Act, Chapter 99:09

10 Equal Opportunity Act, Chapter 22:03

The Bahamas and St Lucia have created an offence of sexual harassment within the Sexual Offences and Domestic Violence Act, Chapter 99 (section 26<sup>11</sup>) and the Criminal Code, Act Chapter 3:01 respectively. The long title of the former is an “Act to amend the law relating to sexual offences and to make provision in respect of related circumstances involving parties to a marriage” and that of the latter is an “Act to provide for criminal offences and procedure and for matters incidental thereto.”

In both The Bahamas and St Lucia, a complaint of sexual harassment is a criminal complaint and can only be triggered by a formal complaint to the police. In countries where sexual harassment is not a criminal offence, the complaint can be initially handled at the workplace, education facility or place where the accommodation is sought, using approved internal processes, and maintaining a degree of confidentiality should the victim deem it necessary. In countries where sexual harassment is a criminal offence, the mandatory recourse only to the Courts, the attendant publicity in accessing the Court system (although

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11 S.I. 36/2005. Sexual harassment. CH.99 – 16] SEXUAL OFFENCES AND DOMESTIC VIOLENCE STATUTE LAW OF THE BAHAMAS LRO 1/2006 26.

(1) Any person who —

(a) being a prospective employer importunes or solicits sexual favours from another person —

(i) in the terms or conditions on which he offers, to that person or any other person, employment or admission into any institution; or

(ii) under a threat of rejection (whether implied or otherwise) of any application made by that person or any other person for employment or for admission into any institution, or of causing such rejection;

(b) being in a position of authority over, or being a co-worker of, another person in any place of employment or any institution, importunes or solicits sexual favours from that other person under any holding out, promise or threat of the grant or imposition of any favour, benefit, advantage or disadvantage, as the case may be, at the place of employment or institution; or

(c) importunes or solicits from a person in a position of authority in any place of employment or any institution, any favour, benefit or advantage, or the forbearance from the exercise of any right, power or duty relating to that authority under any holding out or promise of sexual favours, is guilty of the offence of sexual harassment.

(2) Any person who is guilty of the offence of sexual harassment is liable to a fine of five thousand dollars or to imprisonment for two years or to both such fine and imprisonment.

(3) In this section, “prospective employer” means any person who —

(a) is in a position of authority in any place of employment or any institution; or

(b) is authorised to act on behalf of a person mentioned in paragraph (a) for the purpose of employing personnel for a place of employment or admitting persons into an institution.

‘in camera’ hearings may be held), and the risk of victimization may often be a deterrent to reporting. In The Bahamas, for example, no prosecution of an offence of sexual harassment can proceed without the consent of the Attorney General, thereby narrowing the likelihood of confidentiality.

Further, treating sexual harassment as a criminal matter does not create a duty on the part of employers to promulgate policies and remedies in the workplace or create liability on the part of the employer for the harassing behaviour of employees.

Belize has stand-alone legislation on sexual harassment through its Protection Against Sexual Harassment Act, Chapter 107. This Act protects against sexual harassment in employment (by prospective employer, actual employer or other employee), in institutions and in relation to accommodation. Further to this, on 15th December 2017, Barbados commenced by proclamation the Employment Sexual Harassment (Prevention) Act 2017. Under this Act, employers are mandated to draft a clear Sexual Harassment Policy Statement, which must be issued by the employer to each employee on the commencement of his/her employment. More importantly, the Act further mandates that the Policy Statement be given to all employees **within six (6) months of the Commencement of the Act.**

Guyana, like Trinidad and Tobago, treats with the issue of sexual harassment under its anti-discrimination Act, that is, the Prevention of Discrimination Act, Chapter 99:09, the long title of which reads “an Act to provide for the elimination of discrimination in employment, training, recruitment and membership of professional bodies and the promotion and equal remuneration to men and women who perform work of equal value, and for matters connected therewith.”

However, **unlike Trinidad and Tobago**, the other Caricom countries which have enacted legislation have done so providing remedies and recourse only to the Courts or judicial system. This redounds to the disadvantage of victims.

**UNLESS** a Caricom state enacts antidiscrimination legislation similar to Trinidad and Tobago, thereby creating a Tribunal for the conciliation of

discrimination complaints, access to civil courts for damages would remain a costly remedy.

The procedure for hearing complaints in the Bill and under the aforementioned Acts varies from that of the EOA/EOC, as the processes of receiving, investigating and conciliating complaints of discrimination ONLY occur at the stage where the matter is brought before a tribunal or Court (*clauses 20-30 Bill*). Unlike under the EOA, where the initiation of the claim of sexual harassment is NOT accompanied with a cost to the complainant up to the stage of conciliation, under the aforementioned Bill/Acts, the initiation of the claim of sexual harassment IS inevitably accompanied with a cost to the complainant in the form of legal costs for advice, drafting and filing of documents and conciliating and adjudicating the claim.

The costs attendant with proceeding with a claim for sexual harassment under the aforementioned Bill/Acts, may deter the filing of such claims as the recourse offered would only be accessible to persons with the financial means to proceed with seeking redress, UNLESS, the individual Caribbean countries create a Commission akin to the Equal Opportunity Commission, or similar institution for the purpose of handling complaints of sexual harassment.

Further, unlike the EOA, the Bill and the aforementioned Acts provide for sanctions for the initiation of frivolous, false or vexatious claims **without providing a facility to assist the complainant in having his/her claim assessed on its merit at no cost.** The EOA provides for such an assessment at **section 34.**

## 1.3 Current Law on SEXUAL HARASSMENT in Trinidad And Tobago

Trinidad and Tobago has not specifically legislated for sexual harassment. These Guidelines are based on national and international standards as well as relevant legislation, including the:

- Constitution of the Republic of Trinidad and Tobago Act, Chapter 1:01
- Equal Opportunity Act, of the Laws of Trinidad and Tobago, Chapter 22:03
- Common Law and Decisions of the Industrial Court of Trinidad and Tobago
- Occupational Safety and Health Act Chapter 88:08
- Sexual Offences Act, Chapter 11:28
- Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)
- International Labour Organisation (ILO) Convention (No.111) 1958 on Discrimination in Respect of Employment.

### 1.3.1 Constitution of the Republic of Trinidad and Tobago Act, Chapter 1:01

The Constitution of the Republic of Trinidad and Tobago itself prohibits discrimination on the basis of sex and the right not to be discriminated against on the basis of sex is enshrined as a fundamental right of citizens of Trinidad and Tobago (Part 1 section 4).

Part 1, Section 4 of the Constitution of the Republic of Trinidad and Tobago Chapter 1:01 protects a person from being discriminated against on the ground of sex and from being denied his/her right to equality before the law and the protection of the law (section 4 (a), (b) (d)).

**Recourse under the Constitution requires that the person bring a Constitutional claim, which may offer limited Constitutional remedies and may come with high legal costs.**

### **1.3.2 Equal Opportunity Act of Trinidad and Tobago, Chapter 22:03 (“EOA”)**

Excellent protection for redress is afforded through the EOA and the Industrial Court.

Under the EOA, sexual harassment is encompassed as unlawful sex discrimination against a man or woman in the category of employment, in the way that the employer dismissed him/her OR subjected him/her to a detriment due to his/her sex. Sexual harassment is interpreted as a form of sex-based discrimination given that the complainant’s sex is one of the motivating factors for the treatment he/she received. The issue of sexual harassment is one to be interpreted by the Tribunal in complex cases. Recourse under the EOA is simple and free during the investigative process at the EOC and Conciliation Department of the EOC. It is only when the process of conciliation has been unsuccessful that the victim/complainant would incur costs if

he/she decides to exercise the option to proceed to have his/her matter adjudicated upon before the Equal Opportunity Tribunal (“EOT”).

### 1.3.3 Common Law and Decisions of the Industrial Court

The Industrial Court, through its landmark Judgments<sup>12</sup> in the matters of:

- *T.D. 17/95 Bank Employees’ Union and Republic Bank Limited;*
- *T.D. 78 of 2009 All Trinidad General Workers’ Trade Union and National Gas Company of Trinidad and Tobago; and*
- *T.D. 26 of 2007 (S) All Trinidad Sugar and General Workers’ Trade Union and Aquí Limited,*

has collectively provided judicial guidance on sexual harassment. In these judgments, the Court has:-

Recognised the peculiarities of Trinidad and Tobago society and culture

defined sexual harassment

clearly upheld that sexual harassment in the workplace is offensive and punishable behaviour

identified its negative effects in the working environment,

examined the difficulties encountered by parties in ventilating a case

<sup>12</sup> The Industrial Court of Trinidad and Tobago. <http://industrialcourt.org.tt/SearchResults.aspx?Search=judgements> T.D. 17/95 Bank Employees’ Union and Republic Bank Limited; T.D. 78 of 2009 (s) All Trinidad General Workers’ Trade Union and National Gas Company of Trinidad and Tobago; and T.D. 26 of 2007 (S) All Trinidad Sugar and General Workers Trade Union and Aquí Limited

identified the balancing act to be performed by management and the Court to take the greatest care to avoid false accusations and at the same time ensure that justice for the complainant is fair and reasonable in the circumstances

provided guidance in assessing the appropriate punishment for sexual harassment and identified the need for employers to establish a reasonable framework for addressing problems associated with sexual harassment at the workplace. (The respondent employee in T.D. 17/95 was dismissed for inappropriate gestures and touching.)

In T.D. 17/95 *Bank Employees' Union and Republic Bank Limited*, His Honour Bernard acknowledged that the Court is

*“under a duty to take into account those peculiarities of Trinidad and Tobago society which may find expression in the workplace and which could influence us in a direction different from that taken by foreign courts and tribunals.....”*

Having acknowledged this, His Honour Bernard, in defining sexual harassment, as iterated the following:

*“...Therefore when we speak of sexual harassment or any derivative thereof, we mean no more than sexual misconduct, directed, in the workplace, at an unwilling victim to whom that misconduct is offensive, unsettling, upsetting, psychologically damaging or otherwise stressful.”*

Further, in T.D. 17/95,<sup>13</sup> His Honour Bernard referred to a common law duty on employers to provide a safe system of work, stating, among other things:

*“There is a common law obligation on an employer to provide a safe system of working.....That obligation may well extend to*

*the provision of a work environment which is free of the threat or application of sexual coercion by one employee towards another.”*

Thus, even without a legislative framework, the Industrial Court established that employers had a duty to protect their employees from harm at work, and this harm includes sexual harassment.

#### **1.3.4 Occupational Safety and Health (“OSHA”), Act Chapter 88:08**

The OSH Act<sup>14</sup> is an Act respecting the safety, health and welfare of persons at work and prohibits sexual harassment in the workplace. Section 6 of OSHA sets out the “General Duties of Employers to Employees” and places a statutory requirement on the employer to inter alia provide and maintain a working environment for his/ her employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate, as regards amenities and arrangements for their welfare at work. In his judgment delivered on 25th March 1996, His Honour Mr. C.O. Bernard in *Trade Dispute 17/95 between Bank Employees and Republic Bank Limited* held that

*“...sexual harassment is a serious transgression of the right of workers to enjoy a safe working environment and to be protected against sexually offensive conduct at the hands of fellow employees. The Company has a duty to its workers to protect them in the enjoyment of that right.”*

Section 83A of OSHA provides that an aggrieved person may apply to the Industrial Court for redress and the Industrial Court

14 The Occupational Health and Safety Act [https://rgd.legalaffairs.gov.tz/laws2/alphabetical\\_list/lawspdfs/88.o8.pdf](https://rgd.legalaffairs.gov.tz/laws2/alphabetical_list/lawspdfs/88.o8.pdf)

may make an award in favour of the aggrieved person and impose any penalty, other than a term of imprisonment, that a summary Court may impose in respect of that contravention or failure to comply.

### 1.3.5 **Sexual Offences Act, Chapter: 11:28**

Sexual harassment may manifest itself as a criminal offence liable on conviction in the criminal court to imprisonment and determined on a higher standard of proof “beyond reasonable doubt.” The offence of “indecent assault” (Section 15, Sexual Offences Act, Chapter 11:28)<sup>15</sup> means an assault accompanied by words or circumstances indicating an indecent intention.

A person found guilty of the offence is liable on conviction to imprisonment for five years for the first offence and to imprisonment for ten years for the subsequent offence. Sections 4 and 16 of the Sexual Offences Act, Chapter 11:28 refer to the offences of rape and of serious indecency, respectively, both of which are extreme and although rare, can occur in the workplace. These offences carry a punishment of imprisonment if convicted.

**As noted above, that criminalising sexual harassment does not address the problem of sexual harassment in the workplace as it does not speak clearly to employers, does not advise them of their duties, nor does it provide recourse to the victims.**

15 The Sexual Offences Act. [http://rgd.legalaffairs.gov.tt/laws2/Alphabetical\\_List/lawspdfs/11.28.pdf](http://rgd.legalaffairs.gov.tt/laws2/Alphabetical_List/lawspdfs/11.28.pdf)

## 2. DEFINING SEXUAL HARASSMENT

### 2.1 Definitions

The Australian Human Rights Commission<sup>16</sup> states that *sexual harassment is an unwelcome sexual advance, an unwelcome request for sexual favours or other unwelcome conduct of a sexual nature that makes a person feel offended, humiliated and/or intimidated, where a reasonable person would anticipate that reaction in the circumstances. Unwanted conduct* is defined as any behavior that is not requested or wanted by the victim and that is considered inappropriate. Whether it was “reasonable” for the victim to believe that he/she was sexually harassed would depend on the context in which “it occurred”, for example the frequency of the occurrence, the seriousness and extent of the intimidation, the form of its manifestation and whether a hostile and offensive working environment was created for the victim. **The reasonableness of conduct of a person** is therefore determined by considering whether it was “reasonable” for the victim to believe that he or she was sexually harassed in the context of which the harassment occurred. In other words, sexual harassment is:

- (i) Misuse of sexual behaviour
- (ii) Request for sexual favours
- (iii) Verbal statement or physical action/gesture that describes a sexual act

16 Sexual Harassment in the Workplace – the Legal Definition of Sexual Harassment  
<https://www.humanrights.gov.au/publications/sexual-harassment-workplace-legal-definition-sexual-harassment>

- (iv) Unwanted action of a sexual nature where the victim made it clear that the behaviour is unwanted, and felt humiliated, offended and/or intimidated by the conduct.

Sexual harassment can occur, within the physical confines of the workplace OR during the course of any work-related duties whether on site or off site.

### **2.1.1 FORMS OF SEXUAL HARASSMENT**

Sexual harassment is manifested in the following forms:

- (i) **Misuse of sexual behaviour** and request for sexual favours - when it is made a condition of employment or promotion
- (ii) **Physical sexual harassment** - sexual violence or unwelcome physical contact
- (iii) **Verbal sexual harassment** - offensive and sexually suggestive jokes and comments
- (iv) **Non-verbal sexual harassment** - suggestive gestures of a sexual nature and sexually suggestive body language
- (v) **Written or graphic sexual harassment** - displays of sexually explicit photographs and pornographic materials
- (vi) **Psychological sexual harassment** - repeated unwanted proposals and taunts of a sexual nature

### **2.1.2 WHAT CONSTITUTES SEXUAL HARASSMENT?**

- (i) When the conduct is unwanted and has the effect of creating an intimidating hostile or offensive work environment.

- (ii) When the perpetrator attempts to influence the process of employment, terms or conditions of employment or other benefit of an employee or job applicant in exchange for sexual favours.
- (iii) When such conduct is offensive and unacceptable for the victim.

### **2.1.3 WHAT DOES NOT CONSTITUTE SEXUAL HARASSMENT?**

The decisive factor in classifying certain behavior as sexual harassment is the unwelcome nature of the behavior. Besides the ‘unwanted’ criterion, offensive behavior can also lead to sexual harassment.

**Interaction which is based on mutual consent is not sexual harassment. Sexual harassment does not refer to occasional compliments that are socially and culturally acceptable and appropriate.**

### **2.1.4 POTENTIAL CONSEQUENCES OF WORKPLACE HARASSMENT**

Sexual harassment is universally considered an extremely negative and hostile working condition and can have significant adverse effects on employees, colleagues and the employer. The productivity and remuneration of victims of sexual harassment, as well as of their co-workers, are expected to be lower if sexual harassment induces inefficient turnover, increases absenteeism and, generally, wastes work time, as workers attempt to avoid interactions with harassers. There is the effect of lower job satisfaction, diminished psychological and physical health, higher absenteeism, less commitment to the organisation and a higher likelihood of quitting one’s job. Workers who report sexual harassment are also at risk of retaliation, which results in even lower job satisfaction and worse psychological and health outcomes.

The adverse consequences for victims of sexual harassment can translate into reduced output performance and a less productive work environment for the organisation. The costs to organisations include increased turnover and absenteeism, lower individual and group productivity, loss of managerial time to investigate complaints, and legal expenses, including litigation costs and paying damages to victims. The potential of sexual harassment in the workplace to affect the breakdown of team and individual relationships in the organisation is a reality. Deterioration in relations between and among the organisation's stakeholders can become a serious cause of concern resulting in a loss to the organisation of public confidence and credibility.

## 3. MECHANISMS

### 3.1 Mechanisms to PREVENT SEXUAL HARASSMENT

Every employer, regardless of the size of the organisation, must take all reasonable steps to prevent sexual harassment in the workplace. This means that employers must actively implement precautionary measures to minimise the risk of sexual harassment occurring and to respond appropriately when harassment does occur.

The key to preventing sexual harassment is for employers and managers to make it clear to every employee and workplace participant that sexual harassment is unacceptable and adopt a zero-tolerance policy for sexual harassment in the workplace.

Dissemination of policies and mechanisms for the prevention of harassment to all employees and supervisors are equally important. In order to meet the communication needs, employers must additionally, provide a programme whereby employees and supervisors can be educated about harassment. To this end, all parties must have a high awareness of various ways to create a productive work environment that is free from harassment.

Measures which can be implemented to prevent the occurrence of sexual harassment in the workplace include:

- (i) **Communication:** socialise and foster awareness of the Guidelines for example using various print and electronic media
- (ii) **Education:** organise orientation and staff induction programmes

- (iii) **Training:** provide specialised training for supervisors and managers to identify problems in the workplace and to develop strategies for prevention; train a Harassment Response Team
- (iv) **Commitment: demonstrate a commitment** organisations to commit to the prevention of harassment in the workplace, including taking disciplinary action in the form of:
  - (a) Company Policy
  - (b) Working Agreement / Company Regulations/ Collective Labour Agreement
- (v) **Dissemination: circulate to all employees and supervisors'** policies and mechanisms for the prevention of sexual harassment.

There are two (2) main actions that employers must take to deter complaints of sexual harassment in the workplace.

- (i) An employer should have a **sexual harassment policy**, communicating it to each workplace participant, ensuring that it is understood and implementing it as fully as possible.
- (ii) If sexual harassment does occur, the employer should take appropriate **remedial action** for dealing with a complaint once it is made.

## 3.2 Mechanisms to RESPOND TO CASES OF SEXUAL HARASSMENT

### 3.2.1 GRIEVANCE PROCEDURES

As part of the organisation's responsibility to handle sexual harassment in the workplace, employers should implement effective and accessible complaints/grievance procedures for employees and other workplace participants. Complaints/grievance procedures may differ according to the size and available resources of the organisation.

An effective complaints/grievance procedure conveys the message that the organisation:

- (i) takes all cases of sexual harassment seriously
- (ii) is able to prevent sexual harassment and maintain positive workplace relationships
- (iii) ensures that complaints are dealt with consistently and within a specified timeframe
- (iv) monitors patterns of unacceptable conduct and
- (v) implements prevention strategies in particular areas.

Employers must develop complaints/grievance procedures to suit their particular workplace, which includes conferring with the organisation's attorney to ensure that the right steps are being taken to determine whether sexual harassment did in fact occur. An effective complaints procedure provides various options to address sexual harassment.

A victim can choose the option that is most suitable to his/her circumstances.

**The employer should act in good faith and the employee should not be compelled to sign mandatory arbitration agreements which would strip them of their rights to sue and seek recourse to the Courts.**

In offering various choices, it is vital that the manager possesses the relevant knowledge and receives the correct training to handle complaints of sexual harassment. Staff should also be made aware that the complaint could be forwarded to any other relevant agency external to the organisation.

**A complaints/grievance procedure** can be based on:

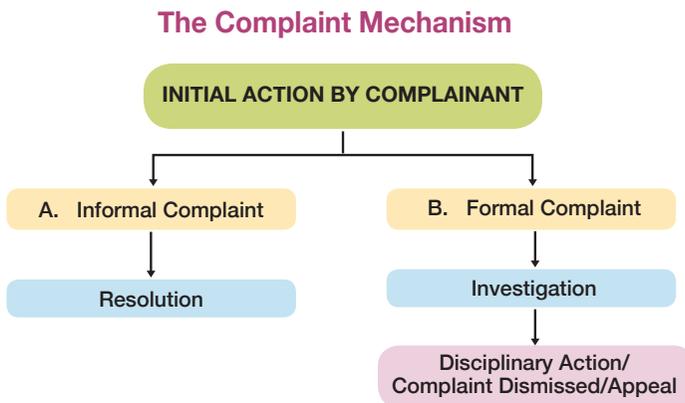
- (i) A **formal or informal complaint** that emphasises **solving the problem** instead of the factual evidence or verification of the complaint; or
- (ii) A formal procedure that focuses on whether the **factual evidence/verification** of the complaint can be proven.

**A complaint/grievance procedure** must at least contain the following elements:

- (i) **An orderly procedure** for the reporting and processing of complaints, with an appropriate timeframe for each step
- (ii) **Investigation procedures** and
- (iii) An appeal procedure that allows parties who are *not* satisfied to **appeal** against the results of investigations to the higher authorities.

### 3.2.2 PROCEDURES TO RESOLVE COMPLAINTS

Employees should have the option to resolve their harassment grievances through a formal or informal procedure. The diagram below shows the in-house complaints resolution mechanism.



#### (i) Informal Complaints Procedure

Informal procedures emphasise a forward-looking settlement of the conflict, confidentiality and reconciliation, while avoiding questions of liability and compensation. Persons who are subjected to sexual harassment may simply want the offensive behaviour to stop. Informal complaints must be settled within thirty (30) days, with the aim of resolving the case through deliberation. Informal ways of dealing with sexual harassment can include the following actions:

- (a) It may be sufficient for the employee concerned to have an opportunity to explain to the offender that his/her conduct is not welcome
- (b) The employee concerned may seek confidential advice on possible solutions from a supervisor,

trusted colleague or an officer trained to deal with sexual harassment issues

- (c) The employee concerned may request a supervisor or relevant officer to privately and informally speak with the offender on his/her behalf.

Employers may also consider creating an alternative informal mechanism for complaints or advice, as follows:

- (a) A telephone information line that can be used by employees, without having to reveal their identity to discuss questions or concerns about the sexual harassment with an officer trained to deal with harassment issues to explain what action can be taken by employees, and
- (b) A system of mediation between co-workers, where the mediators try to find a solution to sexual harassment complaints, can be offered to the individual who filed the complaint and the suspected perpetrator(s) of the harassment.

## **(ii) Formal Complaints Procedure**

An employee should not be required to exhaust all informal attempts of resolution before choosing to lodge a formal complaint. Employers should ensure that a formal procedure to respond to complaints is established and communicated to all employees. The formal procedure should include the following steps:

- (a) Conduct a private interview with the complainant and articulate the allegations in writing
- (b) Convey the allegations, in full, to the alleged harasser

- (c) Provide an opportunity for the alleged harasser to respond and defend himself/herself against the allegations
- (d) If there is a dispute over facts, investigate the claim, take statements from witnesses and collect other evidence
- (e) Make a finding on whether the complaint is substantiated
- (f) Prepare a written report documenting the investigation process, evidence, findings and recommended outcome(s) is submitted to senior management/the employer
- (g) The senior management/employer/ must implement the recommended outcome(s) or decide on an alternative course of action.

In responding to cases of sexual harassment, the following factors must be taken into account:

- (i) The investigation must be thorough
- (ii) The alleged offender is innocent until proven guilty
- (iii) The victim must have the support of his/her employer and not be afraid to lodge the complaint
- (iv) The receipt and investigation of the complaint should be treated with strict confidentiality
- (v) Investigation files/reports should be kept separately from employees' personal files
- (vi) The process of investigation must be transparent

- (vii) Time is important' when a stalemate is reached, a decision to move to the next step must be expeditiously taken
- (viii) The victim must be protected from retaliation and victimisation.

Apart from the Human Resources (“HR”) Department a Committee established for the purpose of preventing sexual harassment in the organisation can receive the complaint and conduct the investigations.

In handling the complaints, the tasks of the HR Department/committee should include the following:

- (a) Notify employees of their rights and depending on the nature of the harassment, the right to press separate charges against the alleged harasser
- (b) Not to disadvantage the complainant or not to prejudice the alleged harasser, if the claim is found to be unwarranted
- (c) Provide the alleged harasser with an opportunity to tell his/her version of the story and to identify all supporting witnesses
- (d) Ensure that the investigation and grievances are handled in a manner that guarantees that the identities of the persons involved and all records relating to the harassment complaint are kept confidential
- (e) Ensure that temporary working arrangements are made, if necessary, to guarantee the alleged victim and perpetrator a continued safe working environment, while the case is being investigated, this could include a temporary relocation of the accused to a different workspace.

### 3.2.3 DISCIPLINARY ACTION

To foster deterrence, it is necessary to establish forms of disciplinary action. Disciplinary action should be included in the company regulations and/or collective labour agreement. The form of disciplinary action or penalty depends on factors such as:

- (a) The severity or frequency of the harassment
- (b) The wishes of the person who was harassed
- (c) The extent to which the harasser could have anticipated that such behaviour was unacceptable or unwanted
- (d) The level of remorse, and/or
- (e) Whether there have been any prior incidents or warnings.

Disciplinary action should be taken in response to any employee who:

- (a) who has retaliated against or victimised another employee who has made a sexual harassment allegation or who has served as a witness in a sexual harassment investigation
- (b) makes malicious or vexatious false accusations.

Any action taken should be comparative to the gravity of the sexual harassment and consistent within the organisation. The types of responses to the perpetrator can include:

- (a) Issuing a written warning or reprimand
- (b) A transfer or reassignment of duties to the perpetrator
- (c) Removal of management authority or duties
- (d) Reduction in wages

- (e) In serious cases, suspending or terminating employment
- (f) Training or counselling of the harasser, if necessary to ensure that the harasser understands why his or her conduct is unacceptable (Continued monitoring of conduct is also needed to ensure behavioural change.).

If there is insufficient proof to determine the validity of a sexual harassment claim, employers should ensure that the person who made the complaint is not sanctioned. However, if there is sufficient evidence, the employers should:

- (a) Disseminate information on the possibility of disciplinary action in accordance with the regulations
- (b) Conduct training and awareness raising activities for staff and
- (c) Monitor the situation carefully.

### **3.2.4 PROTECTIVE AND REMEDIAL ACTION**

Retaliation/Victimisation is a matter of serious concern, particularly in cases where the alleged perpetrator is of superior rank. Employers should:

- (a) ensure confidentiality during the investigation and protect the complainant
- (b) periodically check up on the complainant to ensure that no adverse actions have been taken
- (c) restore the victim in cases where a demotion, a denial of a promotion, wrongful dismissal or termination of employment, or monetary loss, arising out of a denial of employment-related benefits would not have occurred, had the sexual harassment not taken place

- (d) request an apology from the perpetrator
- (e) restore sick or annual leave taken because of the sexual harassment
- (f) consider granting additional sick leave in cases of sexual harassment where an employee and/or perpetrator requires psychological support and follow-up for resettling in the workplace
- (g) remove negative evaluations from the personal file of the harassment victim that arose as a result of the sexual harassment
- (h) review the treatment and employment decisions affecting the complainant and witnesses to ensure that such treatment or decisions are not retaliatory in nature
- (i) compensate losses such as medical expenses
- (j) grant an appropriate remedy to the accused person if there has been any loss suffered by such person, where the complaint is found to be unjustified.

## 4. WRITING a SEXUAL HARASSMENT POLICY

### 4.1 Introduction

A policy statement on sexual harassment is a message from management to employees that states the organisation's philosophy policies and commitment to ***understand, prevent and respond*** to sexual harassment, in order to create a positive working environment. It is a key element in the successful prevention of sexual harassment in the workplace. The policy statement should come from upper management to ensure that the policy is accepted and observed by all employees.

Some employers incorporate information on sexual harassment into a general workplace harassment policy, which covers other forms of unlawful harassment (such as harassment on the grounds of race, disability, sex or age). Others decide there is a need for a stand-alone sexual harassment policy, particularly if sexual harassment is a common or recurring problem within the workplace. Both options are valid and it is left to employers to decide what is most appropriate for them. If a general policy is adopted, however, it is important that the different types of harassment are well defined and addressed comprehensively. If the policy is too broad or generic, its impact and clarity may be compromised.

It is recommended that an organisation officially launch its sexual harassment policy at a full staff meeting. In a large organisation, the Chief Executive Officer or a senior management representative should endorse the policy and emphasise the fact that all staff are required to comply with it.

## 4.2 How to Write a SEXUAL HARASSMENT POLICY

A Sexual Harassment Policy should include the components described hereunder:

(i) **A strong opening statement on the organisation's attitude to sexual harassment**

This should state that the organisation is committed to treat all workers, job applicants and any third party associated with the organisation with dignity and without discrimination. It should also state that sexual harassment is not permitted or condoned in the organisation on the principle of zero tolerance and that disciplinary action will be taken against any employee (or agent) who breaches the policy.

(ii) **An outline of the organisation's objectives regarding sexual harassment**

This demonstrates that the organisation is committed to a comprehensive strategy for eliminating sexual harassment. Employers may wish to consider an approach along the following lines:

- (a) Affirm the aim of the organisation to create a working environment which is free from sexual harassment and where all members of staff are treated with dignity, courtesy and respect;
- (b) Implement training and awareness raising strategies to ensure that all employees know their rights and responsibilities;
- (c) Provide an effective procedure for complaints based on the principles of natural justice;

- (d) Treat all complaints in a sensitive, fair, timely and confidential manner;
- (e) Guarantee protection from any victimisation or reprisals;
- (f) Encourage the reporting of behaviour which breaches the sexual harassment policy, and
- (g) Promote appropriate standards of conduct at all times.

**(iii) A clearly worded definition of sexual harassment**

There is no single, universally accepted definition of sexual harassment. However, the definition adopted should be consistent with the legal definition to avoid any confusion. The most important element to emphasise in any definition is that sexual harassment is unwelcome behaviour of a sexual nature.

**(iv) Examples of sexual harassment that are relevant to the particular working environment**

The policy should identify specific examples of sexual harassment, such as:

- (a) uninvited touching
- (b) uninvited kisses or embraces
- (c) smutty jokes or comments
- (d) making promises or threats in return for sexual favours
- (e) displays of sexually graphic material, including posters, pinups, cartoons, graffiti or messages left on notice boards, desks or common areas
- (f) repeated invitations to go out after prior refusal
- (g) “flashing” or sexual gestures;

- (h) sex-based insults, taunts, teasing or name-calling
- (i) staring or leering at a person or at parts of his/her body
- (j) unwelcome physical contact such as massaging a person without invitation or deliberately brushing up against his/her
- (k) touching or fiddling with a person's clothing, including lifting up skirts or shirts, flicking bra straps, or putting hands in a person's pocket
- (l) requests for sex
- (m) sexually explicit conversation
- (n) persistent questions or insinuations about a person's private life
- (o) offensive phone calls or letters
- (p) stalking, and
- (q) offensive e-mail and other digital/electronic messages or computer images.

(v) **What sexual harassment is not**

The policy should explain that sexual harassment is not behaviour, which is based on mutual attraction, friendship and respect. If the interaction is consensual, welcome and reciprocated it is not sexual harassment.

(vi) **A statement that sexual harassment is against the law**

The policy should make it clear that sexual harassment is against the law. Reference should be made to the State or anti-discrimination laws that apply to the organisation. Staff need to know that legal action could be taken against them for sexual harassment and that they could also be exposing the company to liability.

**(vii) The circumstances in which sexual harassment may occur**

The policy should state that a supervisor or manager, co-worker, contractor, service provider, client or customer may sexually harass a person. Although not all these situations would necessarily give rise to a complaint under the legislation, it makes good sense to provide an internal procedure for dealing with any sexual harassment, which could affect the welfare of employees. The policy should also state that sexual harassment is not just unlawful during working hours or within the confines of the workplace itself, and also not only between coworkers. The behaviour is unlawful in any work-related context, including conferences, work functions, office parties and business or field trips and includes interactions with clients and customers.

**(viii) Grievance and Complaint Procedures**

The policy should state that all persons who have been subjected to sexual harassment at the workplace have a right to raise their grievance, and appropriate action shall be taken in accordance with the regulations of the organisation. An explanation of the procedure that should be followed by employees, who are victims of sexual harassment and by management and employees who are tasked to manage complaints, should be clearly stated.

**(ix) The consequences that can be imposed if the policy is breached**

The policy should operate as a general warning to all employees of the consequences they can expect if they do not comply. Depending on the severity of the case, consequences can include an apology, counselling, transfer, dismissal, demotion or other forms of disciplinary action. Employees should also be informed that immediate disciplinary action will be taken against anyone who victimises or retaliates against a person who has complained of sexual harassment.

(x) **Responsibilities of management and staff**

The policy should state that the organisation has a legal responsibility to prevent sexual harassment and a positive duty to implement the policy, otherwise it can be liable for the behaviour of its employees.

This means that **managers and supervisors** have a responsibility to:

- (a) monitor the working environment to ensure that acceptable standards of conduct are observed at all times
- (b) model appropriate behaviour themselves
- (c) promote the organisation's sexual harassment policy within their work area
- (d) treat all complaints seriously and take immediate action to investigate and resolve the matter or refer complaints to another officer if they do not feel that they are the best person to deal with the case (for example, if there is a conflict of interest or if the complaint is particularly complex or serious).

All staff have a responsibility to:

- (a) comply with the organisation's sexual harassment policy
- (b) offer support to anyone who is being harassed and let him/her know where him/her can get help and advice (they should not, however, approach the harasser themselves)
- (c) maintain complete confidentiality if they provide information during the investigation of a complaint. Staff should be warned that spreading gossip or rumours may expose them to a defamation action.

(xi) **Information on where individuals can get help, advice or make a complaint**

The policy should tell employees where they can get help and support if they are sexually harassed. Depending on the size of the organisation and the system that is in place for dealing with sexual harassment, employees can be advised to approach their manager or supervisor, sexual harassment contact officer, human resources manager, industrial relations manager and/or their union delegate. Relevant agencies such as the Equal Opportunity Commission can be a source of recourse. Where possible, a number of contact persons of both sexes should be identified, so that staff can approach someone with whom they feel comfortable. It is not appropriate to only give staff the option of approaching their line manager because there may be cases where the manager is the alleged harasser or is perceived to be closely associated with the harasser and therefore not impartial. The organisation can also consider referring employees to a third party to obtain requisite support and counselling.

(xii) **A brief summary of the options available for dealing with sexual harassment**

Employees should be advised of the different ways that sexual harassment can be addressed. This includes informal action such as confronting the harasser directly (but only if the individual feels confident enough to do so), making a formal complaint to a manager or using the organisation's internal complaints procedures. The way that complaints will be handled should be documented in the policy or in a separate complaints procedure. **Employees can also approach their union, or the relevant State anti-discrimination agency (the Equal Opportunity Commission), for information and confidential advice.**

#### **4.2.1 ADDITIONAL FEATURES OF POLICY**

Policy statements should be specific, avoid legal jargon, and be made part of the organisation's regulations or part of collective labour agreements that must be met as a condition of employment, with corresponding disciplinary measures for non-compliance.

#### **4.2.2 REMEDIAL MEASURES**

Even with the most effective and fully implemented sexual harassment policy, harassment can still occur. Employers need to know in advance how they would approach a complaint of sexual harassment in their workplace, and have procedures in place to deal with harassment.

Employers can also encourage employees to assist in the prevention of sexual harassment in the workplace. Given that employees are aware of inappropriate behavior before management, staff can be encouraged to report early concerns about unwelcome behavior before it becomes a serious sexual harassment complaint.

#### **4.2.3 RECORD KEEPING**

Sexual harassment complaints are often very sensitive and involve personal information about employees. Employers should develop guidelines on dealing with such information, in order to comply with privacy laws and maintain staff confidence. Information relating to sexual harassment complaints should be protected by reasonable security safeguards. For example, any files or reports associated with an investigation should be kept in locked storage.

##### **(i) Importance of keeping records**

Employers should develop, and make known to employees, clear guidelines on how to document and record complaints and reports

of sexual harassment. This has a number of benefits, including those identified hereunder:

- (a) The incidence of sexual harassment is able to be monitored and particular problem areas identified and targeted for further awareness-raising strategies. Statistical records will assist the organisation to determine whether an incident is isolated or forms part of a pattern
- (b) It allows informed and fair decisions to be made on the basis of accurate reports
- (c) Evidence in respect of the way in which the organisation dealt with the case can be submitted in any subsequent legal proceedings. For example, if a complaint is lodged with the State anti-discrimination agency or there is subsequent litigation, records of internal action will be useful in establishing whether reasonable steps were taken to deal with the harassment and may assist in discharging the organisation's liability
- (d) It ensures that employees are aware of how personal information will be handled when an allegation or complaint is made in the workplace. This will help to reduce the likelihood of complaints by parties regarding a breach of privacy, avoid discouraging workplace participants from seeking assistance and advice, and assist in assuring workplace participants accused of harassment that they would be treated fairly. Employees should be aware of what information will be collected, why, how it will be used and to whom it may be given
- (e) It also ensures that the organisation can account for the amount of work spent on sexual harassment matters

- (f) The nature of the documentation to be collected and retained will depend on the level of formality of the complaint.

## **(ii) Records of Informal Complaints**

If informal measures have been used to resolve a situation, only limited records are usually collected. Information provided to a sexual harassment contact officer, manager or other designated officer, will be highly sensitive and will necessarily involve allegations against a particular individual. As no investigation occurs in an informal process, the allegations are likely to remain untested. It is therefore inappropriate to keep potentially damaging records containing unsubstantiated claims against an alleged harasser, particularly if he/she has no knowledge that the record exists and has not been given the opportunity to refute the allegation.

A possible way of balancing these considerations is to develop a standard form which can be used for recording essential information without compromising an alleged harasser's rights. The name of the alleged harasser should not be recorded on the form, but the particular department or section where the incident occurred should be noted for monitoring purposes.

Recording the name of the individual who has been harassed should be optional. In some cases, an individual will want his/her name recorded so that if formal action is required at a later stage, his/her can show that informal attempts were made to resolve the situation. Alternatively, an individual may be reluctant for any record to be retained which identifies his/her personally.

Recording an individual's name on the form should only be done with his/her explicit consent, to avoid discouraging any workplace participant from seeking advice and assistance. A brief summary of the alleged incident along with an agreed course of action should also be recorded. Again, this allows the contact officer

to follow up the case to ensure that informal measures have effectively resolved the situation.

If a manager has taken informal action on an individual's behalf, a brief diary entry noting the incident and the action taken would suffice. If the complaint is subsequently formalised (either internally or externally), this can be used to demonstrate that steps were taken to deal with the matter when it was first raised.

### **(iii) Records of Formal Complaints**

If a formal complaint is lodged, the documentation collected is likely to be substantial and will include statements provided by the parties, records of interview with the investigation officer, personal notes and reports. All this information will be highly sensitive and strict guidelines are required to ensure that it is kept confidential and is not used for improper purposes.

The investigation officer will need to document all interviews with the complainant, alleged harasser and any witnesses. Records of interview should contain as much relevant, factual information as possible - times, dates, details of specific incidents and frequency of occurrences. It is desirable that the interviewees' own words are used as far as possible.

The parties to a complaint and any witnesses should be given the opportunity to peruse, correct and endorse their record of interview. The interviewee should be provided with a copy of his/her own record of interview if requested. To avoid any possibility of collusion, he/she should not be provided with anyone else's statement or record of interview. A complainant's support person should not also be a witness as this may compromise his/her evidence.

If a formal complaint against an employee is found to be substantiated, a summary of the complaint, the finding and the

action taken should be recorded in their personnel file. This can be removed after a reasonable period of time determined by the employer if there has been no repetition of the behaviour. All other documentation relating to the investigation should be kept in a sealed confidential file which can be accessed only with the authority of a specified senior management representative. However, the “primary purpose” for which the information was collected, in this case to deal with a complaint, will continue to limit the use of that information.

Once a case is finalised, records will still need to be retained for a reasonable amount of time. If a complaint is subsequently lodged with the EOC, it will request records as part of its investigation into the allegations. Records relating to the complaint will demonstrate that steps were taken to deal with the matter. Evidence of any internal action that was taken may assist in reducing liability. Freedom of information legislation may also require records to be retained for a certain period.

#### **(iv) Security**

Records of sexual harassment complaints will invariably contain highly sensitive and potentially damaging personal information. It is therefore imperative that they are protected by reasonable security safeguards. Also, organisations and agencies may have legal obligations to protect this data under relevant workplace regulations. Any files or reports associated with an investigation should be kept in locked storage. Access should be restricted to authorised personnel only. Records should not be placed on general or open access files. Care should also be taken to ensure the security of the transmission of information by e-mail or facsimile, and the storage of electronic information.

## 4.3 Monitoring and Evaluation of COMPLAINTS OF SEXUAL HARASSMENT

The organisation should instruct supervisors/managers to take all complaints of sexual harassment seriously, regardless of whether they conform to the organisation's complaints procedure. In the regard:

- (i) The organisation should monitor supervisors/managers to ensure that they comply with the organisation's sexual harassment policy
- (ii) Designated officers should develop annual reports for employers/management on the number and types of complaints that were raised, the manner in which they were dealt with and recommendations for policy revision and training
- (iii) The organisation should regularly evaluate the effectiveness of the existing mechanisms for preventing and handling sexual harassment at the workplace.

# 5. SEXUAL HARASSMENT COMPLAINT to THE EQUAL OPPORTUNITY COMMISSION

## 5.1 The Equal Opportunity Commission (EOC)

The EOC provides the ideal avenue for redress for complaints of sexual harassment in the workplace. The EOC is empowered to receive, investigate and conciliate complaints of discrimination in the workplace in circumstances where **sex/sexual harassment** is an explicit ground for protection in the workplace is the ground for the discrimination. **Sex and sexual harassment** are explicit grounds for protection under the EOA. This **service bears no cost**, and if there is no resolution at conciliation, it can be referred to the Equal Opportunity Tribunal, which has all the powers of the High Court to award damages, reinstatement, injunctions and any other remedy the Tribunal deems just. Further, the EOC is available to assist organisations:

- through its Public Education Programme, which involves providing lectures and training workshops, generally or on request;
- in formulating guidelines and codes for their manual/policy on sexual harassment in the workplace, emphasising the strengthening of remedies for victimisation.

If internal mechanisms have been exhausted, the victim can approach the EOC. Complaints of sexual harassment in the workplace can be made to the EOC online via the website [www.equalopportunity.org.tt](http://www.equalopportunity.org.tt) or by visiting its offices, centrally located at Nos. 55to 57 Manic Street, Chaguanas.

Further, as indicated earlier, while other pieces of Caribbean legislation provide for sanctions for the initiation of frivolous, false or vexatious claims, but under the EOA, a facility is provided to assist the complainant in having his/her claim assessed on its merit, at no cost. The EOA provides for such an assessment at **section 34**. The complaint will be investigated by the Legal Unit and the Employer can be compelled to respond or face criminal prosecution. Once the investigation is completed, the matter is forwarded to the Conciliation Unit that facilitates the parties to reach an agreement. If no agreement is reached, the complainant has the option of taking the matter to the Equal Opportunity Tribunal, where the matter will be heard by a Judge who will give a decision.

## 5.2 Tips to Prepare for YOUR COMPLAINT

**It is important for the complainant of sexual harassment to:**

- (i) Document incidents and unwanted behaviour as they occur by noting: -
  - (a) what happened
  - (b) where and when it happened
  - (c) who witnessed it (if anyone)
  - (d) how your physical condition has changed as a result of this behaviour (that is, sleeplessness, crying bouts, weight loss/gain, etc.), and
  - (e) what, if anything, you did about it at the time and thereafter,
- (ii) Lodge complaints early and put all complaints in writing.
- (iii) Secure, where possible the cooperation of other persons who have witnessed the harassment.
- (iv) Seek extended support.
- (v) Share with colleagues as it happens.

**It is the employer's responsibility to document:**

- (i) Conversations with the parties involved in the complaint
- (ii) What actions were taken to resolve the harassment
- (iii) What was witnessed
- (iv) What was said, and
- (v) Who witnessed any conversations/behaviour should the records need to be made available to investigators.

**The alleged victim is reminded that he/she may also lay a criminal complaint in the Magistrates' Court against the alleged perpetrator, while a workplace investigation is being pursued.**

**The alleged victim is also reminded that he/she may also seek legal advice to determine whether there is merit in pursuing a civil lawsuit in the High Court.**



# APPENDICES

## SAMPLES of CODES OF GOOD PRACTICE ON THE **HANDLING OF SEXUAL HARASSMENT COMPLAINTS**

# APPENDIX 1

## **Australia Sexual Harassment Code of Practice -**

<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/sexual-harassment-code-practice-employers-2004>

## APPENDIX 2

**Code of Conduct of Sexual Harassment in the Workplace – Vietnam -**

[http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-hanoi/documents/publication/wcms\\_421220.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-hanoi/documents/publication/wcms_421220.pdf)



**Equal Opportunity Commission**

*Promoting Equality*

Equal Opportunity Commission  
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