GUIDELINES FOR SEXUAL HARASSMENT AT THE PUBLIC, PRIVATE AND INFORMAL SECTOR

Initiated by the European Union and the United Nations:
ABOUT THE GUIDELINES

Under the support of EU funded UN-Joint Spotlight Initiative Programme through United Nations Development Program (UNDP) in Malawi, these guidelines have been developed to provide guidance for development of sexual harassment policies in the workplace to combat sexual harassment in the private and public sector and the business community. Per the Gender Equality Act, the Malawi Human Rights Commission and Ministry of Gender, Children, Community Development and Social Welfare are mandated to provide guidance for the implementation of the Act. Sexual harassment has been first regulated through the Act as a criminal offence. The guidelines are meant to serve as a reference on the steps to be followed to create a conducive and legally acceptable workplace environment in various settings for addressing sexual harassment issues. It is also meant to be useful for employers, cooperatives, and the business community in providing recourse on how to provide prevention, response, and protection from sexual harassment. It is expected that these guidelines will enhance the capacity of employers, employees, cooperatives and the business community in undertaking policy reforms, measures, and investments towards creating a sexual harassment free environment.
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Chapter 1: Introduction

A situation analysis conducted by Malawi Human Rights Commission under the support of EU funded UN-Joint Spotlight Initiative Programme through UNDP in Malawi, on sexual harassment at workplace in Malawi 2021, revealed high incidents of sexual harassment at the workplace in private, public and informal sectors. Under the Gender Equality Act, hereinafter referred to as “the GEA”, the Malawi Human Rights Commission, hereinafter referred to as “the Commission” is mandated to provide guidance on addressing sexual harassment in the workplace. The Act’s Implementation Plan also emphasised the role of the Commission and the Ministry of Gender, Children, Community Development and Social Welfare to collaborate on the provision of guidance on development of gender equality policies in the workplace. Section 6 of the Gender Equality Act (GEA 2013) criminalises sexual harassment in Malawi. Further, section 7 of the GEA calls on employers to develop appropriate policies and procedures aimed at eradicating sexual harassment in the workplace. The situation analysis study on sexual harassment conducted by the Malawi Human Rights Commission (the Commission) in May 2021 revealed that in both formal and informal employment in the public and private sectors have no clear guidelines or policy documents to help eradicate sexual harassment.

It is for this reason that the Commission, in the exercise of its mandate, under sections 8, 9 and 10 of the GEA, developed these guidelines to act as a general reference tool for employers in establishing policies for addressing sexual harassment in the workplace. In developing these guidelines, the Commission affirms that sexual harassment is a violation of human rights as it creates an intimidatory and discriminatory work and business environment while violating the victim’s Constitutional right to dignity. These guidelines, therefore, buttresses the Commission’s commitment in ensuring that sexual harassment in public, private and the informal sector is eliminated and that rights guaranteed by the Constitution are upheld and enjoyed by everyone regardless of status.

1.1  Goal and Objectives

1.1.1  Goal

The main goal of the guidelines is to guide the public and private sector when developing workplace sexual harassment policies. The guidelines are also applicable in the informal business sector.
1.1.2 Objectives

1. To raise awareness and sensitize the public and private sectors on the concept of sexual harassment

2. To provide guidance on the legal framework on the prohibition of sexual harassment in Malawi.

3. To provide practical guidance to the public, informal and public the sector on developing and implementing workplace sexual harassment policies.
Chapter 2: Definitions

**Business community:** the body of individuals who manage businesses

**Cooperatives:** a farm, business, or other organization which is owned and run jointly by its members, who share the profits or benefits.

**Discrimination:** any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise, by any person of human rights, and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

**Employer:** any person, body corporate, undertaking, public authority or body of persons who or which employs an employee and includes heirs, successors and assignees of the employer, or (b) where appropriate, a former employer.

**Employee:** (a) a person who offers his services under an oral or written contract of employment, whether express or implied; (b) any person, including a tenant share cropper, who performs work or services for another person for remuneration or reward on such terms and conditions that he is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of employee than that of an independent contractor; or (c) where appropriate, a former employee.

**Hostile work environment:** A hostile work environment is one in which unwelcome conduct of a sexual nature creates an uncomfortable work environment for some employees.

**Quid pro quo:** It occurs when (1) job benefit, including employment, promotion, salary increases, shift or work assignments, performance expectations and other conditions of employment are associated with the provision of sexual favours, usually to an employer, supervisor or agent of the employer who has the authority to make decisions about employment issues; or (2) the rejection of a sexual favour or request for sexual favour results in a tangible employment detriment, a loss of a job benefit of the kind described above.
**Organization**: an organized group of people with a particular purpose, such as a business or government department

**Perpetrator**: a person who carries out a harmful, illegal, or immoral act.

**Sexual favour**: An act, sexual in nature done in exchange for something such as money or other benefit.

**Sexual harassment**: any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person, would be offended, humiliated or intimidated.

**Victims**: a person harmed, injured, or killed as a result of a crime, accident, or other event or action

**Gender**: socially constructed roles, norms, behaviours assigned to a person for being male or female

**Sex**: male, female or other
Chapter 3: Overview of sexual harassment

Sexual harassment can take place between male and/or female persons anywhere including at place of work, business, school, worship market or playgrounds, among other places. Sexual harassment is defined as “*any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another person*” (GEA, 2013).

According to the International Labour Organization (ILO), sexual harassment is not only a safety and health problem but also a form of violence primarily against any person. The ILO further considers sexual harassment as a sex-based behaviour that is unwelcome or unwanted and offensive to the receiver. The word unwelcome or unwanted is very key as it is considered as unwelcome when the receiver does not accept it.

3.1 Forms of sexual harassment

Sexual harassment can occur in different forms such as visual, verbal and physical.

i. Visual form: A person may harass another by exposing themselves or their bodies to another individual who does not appreciate the exposure. In addition, visual harassment can also be demonstrated through cartoons, drawings, pictures, messages and video clips that are considered offensive and or insulting to the victim.

ii. Verbal form: Remarks or comments that are disrespectful insults or slurs may also be considered as verbal harassment towards an individual. verbal form of sexual harassment can occur in different ways as follows:

   a. referring to an adult as a girl, hunk, doll, babe, or honey.
   b. Whistling at someone, cat calls.
   c. Making sexual comments about a person's body.
   d. Making sexual comments or innuendos.
   e. Turning work discussions to sexual topics.
   f. Using official tools for displaying sexual content.
   g. Telling sexual jokes or stories.
h. Asking about sexual fantasies, preferences, or history.
i. Asking personal questions about social or sexual life.
j. Making kissing sounds, howling, and smacking lips.
k. Making sexual comments about a person's clothing, anatomy, or looks.
l. Repeatedly asking out a person who is not interested.
m. Telling lies or spreading rumours about a person's personal sex life.

iii. Non-verbal forms: This involves actions such as expressions, gestures and paralinguistics. Other examples include the following:
a. Looking a person up and down.
b. Staring at someone.
c. Blocking a person's path.
d. Following the person.
e. Giving personal gifts.
f. Displaying sexually suggestive visuals.
g. Making sexual gestures with hands or through body movements.
h. Making facial expressions such as winking, throwing kisses, or licking lips.

iv. Physical form: physical form is exercised through unwelcome touching such as rubbing up against a person or physically interfering with another’s movements or preventing another from completing their work. Other examples include the following:

a. Giving a massage around the neck or shoulders.
b. Touching the person's clothing, hair, or body.
c. Hugging, kissing, patting, or stroking.
d. Touching or rubbing oneself sexually around another person.
e. Standing close or brushing up against another person.

3.2 Types of sexual harassment

i. A hostile work environment: This is unwelcome conduct of a sexual nature which creates an uncomfortable work environment for some employees. Examples of this conduct include: sexually explicit talk, sexually provocative photographs, foul or hostile language or inappropriate touching.
ii. **Quid Pro Quo** (this for that/ exchange): In this case, the exchange is between employees, where one provides sexual favours in exchange for something else, such as favourable treatment in work assignments, pay or promotion. **Quid Pro Quo** sexual harassment occurs when employment decisions and conditions are based upon whether as employee is willing to grant sexual favours.

### 3.3 Victims and Perpetrators

Both men and women may be victims or perpetrators of sexual harassment. However, women are mostly the victims while men are perpetrators in most cases. In the business context, people can be harassed by partners, suppliers and customer supervisors. In the workplace, people may be harassed by peers, supervisors or senior managers and clients.

### 3.4 Impact of Sexual Harassment

Sexual harassment can have both short term and long-lasting impacts on the victim, society and organization.

#### 3.4.1 Impact in the employment sector

In the employment sector, both the victim and the organization or institution can be negatively affected.

**Victim:** resignation from work, early retirement, depression, stigma and discrimination, frequent absenteeism and hostile working environment.

**Organization:** loss of expertise in the case where a victim with special skills resign from work, challenges in gap filling, unproductive workforce where the victim undisclosed some of his/her skills due to persistence harassment.

#### 3.4.2 Impacts in the business sector

Just as both a victim and an organization are affected at the workplace, there are also effects in the business sector as follows:

**Victim:** withdraw of business due to persistent harassment, stigma and discrimination, being refused to acquire business space or opportunities.

**Business place:** low collection of market revenue due to withdraw of business people, challenges in economic stand by the dependents of the victim.
3.5 Prevalence

The situation analysis revealed alarming levels of sexual harassment in the workplace and the business community that are kept under wraps as they are mostly not reported. Some cases are discovered during cases of unfair dismissal from the workplace at the Labour Office or Industrial Relations Court. Several factors such as fears of loss of benefits and other reasons influence non-reporting of sexual harassment cases. Some of the factors include the following:

a. Fear of being dismissed from work when they report.
b. Loss of benefits and opportunities from workplace or business place.
c. Avoiding being labelled as prostitutes.
d. Stigmatisation or Discrimination as a result of reporting.
e. Sometimes men may feel they are less powerful if they disclose or refuse unwelcome sexual advances.
Chapter 4: Legal and Policy Framework

Malawi is a State Party to a wide range of international, regional and national legal instruments that have been developed to address gender equality, including protection from sexual harassment for every person. Malawi has consequently domesticated the conventions through the promulgation of the Gender Equality Act which criminalises acts of sexual harassment against any person. Some of the key international instruments include the Universal Declaration of Human Rights, Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (The Maputo Protocol), and the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) among others. This chapter discusses the international, regional and national legal framework addressing sexual harassment and related gender equality issues.

4.1. International Instruments

3.1.1 Universal Declaration of Human Rights (UDHR), 1948

This Declaration provides for equal protection of all persons: men, women, girls, boys alike against any form of discrimination. Article 1 in particular stipulates that all human beings are born free and equal in dignity and rights and are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2 of the same requires everyone to enjoy all the rights and freedoms set forth in the declaration without distinction of any kind including gender or race. Likewise, Article 3 accords everyone the right to life, liberty and security of persons. Article 8 also accords every person the right to an effective remedy by a competent national tribunal for acts violating the fundamental rights granted by the constitution or any other law. In the workplace, one is also accorded enjoyment of rights under favourable conditions of work.

Article 23 (1) of the UDHR states that: “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”

Thus no one must be subjected to unpalatable conditions such as being forced to sexual advances by superiors just to keep his or her job. Such acts are gross violation of the spirit of the UDHR that Malawi largely adopted as part of the Malawi Constitution.

4.1.2 International Covenant on Economic, Social and Cultural Rights (ICESCR)
The ICESCR is another international human rights treaty adopted in 1966 and ratified by Malawi in December 1993. The ICESCR requires state parties to ensure equal enjoyment of economic, social and cultural rights among men and women without discrimination of any kind. Specifically, Article 7 of the Convention promulgates the right to fair conditions of work. Any acts that affect the enjoyment of fair conditions of work including sexual harassment is unlawful.

4.1.3 International Convention on Civil and Political Rights (ICCPR)

This Covenant was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976 and ratified by Malawi on 22nd December, 1993. It undertakes to ensure equal rights of men and women to the enjoyment of all civil and political rights. Article 1 of the convention requires the state to respect the rights of every individual without distinction of any kind and 2(3) ensures that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

4.1.4 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

This Covenant was adopted in 1979 by the United Nations general Assembly and ratified by Malawi on 12th March 1987. Article 11 (1) requires state parties to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights. Articles 2 (f), 5 and 10 (c) 11 also requires state parties to remove Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion.

4.1.5 The UN World Conference on Human Rights, Held in Vienna in 1993

This UN World Conference on Human Rights identifies sexual harassment as a case of Human Rights violation and treats it primarily as a form of violence against women.

4.1.6 Declaration on the Elimination of Violence Against Women, 1993, Adopted in 1993
The Declaration outlines the steps which states and the United Nations should undertake to address gender-based violence. It defines violence against women as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. It makes clear that states should take steps to eliminate any custom, tradition or religious consideration to prevent, investigate and, in accordance with national legislation, punish acts of violence against women.

4.2 Regional Instruments

4.2.1 Maputo Protocol

The Maputo Protocol’s provisions cover all spheres in which women experience violence such as in the family, in the community, at workplaces, in schools and at the hands of the state. In particular, Article 12(c) requires state parties to eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training and to protect women and girls from abuse and sexual harassment in educational institutions and the workplace and provide sanctions against the perpetrators of such practices.

4.2.2 SADC Protocol on Gender and Development

Article 22 of the protocol requires state parties to legislate, adopt and implement policies, strategies and programmes that define and prohibit sexual harassment in all spheres and provide deterrent sanctions for perpetrators of the same. The state is also required to ensure representation of women in adjudicating bodies hearing sexual harassment complaints.

4.3 National legal instruments

4.3.1 Constitution of the republic of Malawi

The Constitution of the Republic of Malawi under section 20 promotes equality for all and prohibits discrimination against any person on the basis of any status. In particular, section 20(1) states that “discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.” Further, section 20(2) provides that legislation may be passed addressing inequalities in society and prohibiting discriminatory
Section 24(1) provides that women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right (a) to be accorded the same rights as men in civil law including equal capacity— (i) to enter into contracts; (ii) to acquire and maintain rights in property, independently or in association with others, regardless of their marital status. Section 24(2) any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as— (a) sexual abuse, harassment and violence; (b) discrimination in work, business and public affairs; and (c) deprivation of property, including property obtained by inheritance.

4.3.2 The Gender Equality Act, 2013

The Gender Equality Act requires employers to implement specific policies and procedures aimed at eliminating sexual harassment in the workplace, including a procedure for filing grievances and a policy to ensure appropriate disciplinary action against perpetrators. Section 6(1) in particular defines sexual harassment as ‘any form of unwanted verbal, non-verbal or physical conduct of a sexual nature in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated’. Further section (2) states that a person who sexually harasses another in terms of subsection (1) commits an offence and is liable to a fine of one million Kwacha (K 1,000,000) and to a term of imprisonment for five (5) years. Section 7 of the act also states that the Government shall take active measures to ensure that employers have developed and are implementing appropriate policy and procedures aimed at eliminating sexual harassment in the Workplace Focused on: - Both employees and non-employees dealing with employee’s grievances and complaint procedures. It further requires the protection of complainants from victimization or workplace-based oversight over implementation of workplace policies.

4.3.3 The Employment Act, 2000

Section 5(1) of the employment Act prohibits discrimination against any employee or prospective employee on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, marital status or family
responsibilities in respect to recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship. Although this provision does not explicitly mention sexual harassment, inappropriate sexual behaviour including sexual advances is a recipe for a hostile work environment and leads to unfair treatment of those who are being harassed. That is, the “right to fair labour practices, the right to work, the right to safe working environment and personal dignity may all be affected.

4.3.4 The Penal code (Chapter 7:01 of the Laws of Malawi)

The Malawi Penal Code codifies sexual harassment as a criminal offence termed as indecent assault. For instance, section 137(1) of the Penal Code states that any person who unlawfully or indecently assaults any woman or girl shall be guilty of a felony and be liable to imprisonment for 14 years. Malawi Courts have defined indecent assault as any unwelcome sexual advances against women. Although the Penal Code only makes reference to female persons with regards to indecent assault, the Gender Equality Act criminalises sexual harassment generally against both male and female persons.

Other similar sections in the Penal Code criminalises insulting modesty of a woman. Section 137(3) states that whoever intending to insult the modesty of a woman utters any word makes sound or gesture or exhibits any object intending that such word or sound shall be heard or that such gesture or object shall be seen or intrudes upon the privacy of a woman shall be guilty of a misdemeanour and shall be liable to imprisonment for one year. Likewise, although use of sexually bad words against females is a crime in the Penal Code, under the GEA it is also a crime against either male or female persons.
1. All sectors should acknowledge that it is their legal as well as moral responsibility to provide a sexual harassment free environment.

2. All sectors should adopt a sexual harassment policy which should include a detailed definition of sexual harassment. Furthermore, the policy should include;

   - Readily available adequate procedures to deal with the sexual harassment when it occurs to anyone employed or a person who visits the workplace, not being an employee.
   - Provision of education and awareness of legal aspects of sexual harassment to employees and employers.
   - Outline of the procedures to be followed when lodging a complaint on sexual harassment.
   - Mandated office personnel and offices to offer psychosocial services to victims of sexual harassment.

3. Sexual harassment policy implementation plan.

4. Constitute a complaints’ handling mechanism to effectively resolve the complaints and establish a committee responsible for handling cases of sexual harassment. The committee should constitute both men and women. Members of the committee should also be trained or oriented on sexual harassment.

5. Establish a step-by-step procedure in reporting and processing of complaints with the appropriate timeframe for each step.

6. It is not necessary to be sure or to have proof before reporting a concern, as long as the concern is in good faith.

7. Allegations made in bad faith, which include malicious or seriously reckless allegations, however; shall be deemed to be a form of misconduct. Motive of bad faith can be established after investigations or in court of law.
8. All complaints of sexual harassment must be promptly investigated by a gender balanced investigation team. Appropriate and immediate disciplinary action must be taken if sexual harassment has been established.

9. Ensure confidentiality during the process of the investigation and safeguard the complainant.

10. The number of people who are informed about any reported complaint should be kept to a minimum, although other persons believed to be vulnerable and likely to become victims may be informed of the disclosing person’s concerns.

11. Members, including managers, should not take it upon themselves to investigate allegations in order to obtain proof before reporting. All concerns raised in good faith or suspicions must be reported.

12. Workplace members should actively identify and report risks in their workplace programs that they genuinely believe could present a risk of sexual harassment.

13. Placement of a suggestion box in strategic areas in the work and business places where victims can freely and anonymously lodge their complaints.

14. Reports received from anonymous sources may be assessed by the complaints handling committee and may lead to an investigation, if they include sufficient detail to allow for independent corroboration of the information provided.

15. All sectors should be committed to ensuring that effective Training measures are continuously developed and implemented.

16. All sectors should conduct prospective Staff Screening, Staff Monitoring and Provision of References. This will minimize the risks of hiring someone who might engage in sexual harassment or retaining someone who might be engaged in sexual harassment, or facilitating the hiring by another employer of Staff found to have committed sexual harassment.
17. Conduct awareness and sensitization programs on sexual harassment at regular intervals in order to equip people with knowledge on how to prevent and eradicate sexual harassment.

18. Empower men and women to speak out on issues of sexual harassment, which helps in changing people attitudes towards the issue.

19. Ensure protection against retaliation to complainants, whistle blowers, witnesses, complaint committee members and other employees involved in prevention and complaints resolution.

20. All sectors should ensure provision of professional Psychosocial Support Services to victims of sexual harassment in their work environment. One or two members of the complaints handling committee should be trained in Psychosocial support.

21. Evaluate the effectiveness of the existing mechanisms for preventing and handling sexual harassment.
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