

**WE KNOW**  
**HUMAN  
RESOURCES**

a guide for employers

DEALING WITH  
SEXUAL HARASSMENT

## FOREWORD

The Equal Opportunities Tribunal first found a respondent responsible for sexual harassment in 1985, in the case H v E (1985) 5 NZAR 333. That case determined that sexual harassment is a form of sex discrimination.

Since then the Human Rights Act 1993 has separately defined sexual harassment as unlawful discrimination. The Human Rights Act offers protection against such unlawful discrimination in employment, education, the provision of goods and services, the provision of access to accommodation and in access to public places.

Sexual harassment destroys morale, creates a hostile work environment and acts as a barrier to productivity. It almost always affects a person's work performance and undermines positive work relationships, trust and team building. It is prohibited by law.

**This guide contains information that will assist employers to ensure that should they ever have to respond to a case of sexual harassment the matter can be resolved by the organisation confidently and successfully. More importantly, however, this guide offers practical advice on how employers can, through the establishment of policies, procedures and training, combat sexual harassment and offer a workplace environment that respects the rights of all.**

The guide will contribute to positive, achieving workplaces to the economic benefit of both employer and employee.

*Human Rights Commission*

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## PART 1: GENERAL

### INTRODUCTION

Both the Human Rights Act 1993 (and its 2001 Amendment – the term ‘Human Rights Act’ will be used to refer to these two statutes from hereon in) and the Employment Relations Act 2000 make sexual harassment a form of unlawful discrimination. Anyone alleging sexual harassment may choose either to complain to the Human Rights Commission or to raise a personal grievance. So it is important that employers know and understand their statutory obligations. However, they also need to recognise how important it is to have in place policies and procedures aimed at preventing sexual harassment. If effective, these will limit, if not eliminate, claims. Should a claim be made, they will be there as an employer defence.

Employers must be concerned not only about their own behaviour; they are responsible too for the behaviour of all employees, customers and clients. A sexual harassment complaint can be made if a particular employee finds something sexually offensive, even if other employees are not offended. Some examples are:

- Personally sexually offensive verbal comments.
- Sexual or smutty jokes.
- Repeated comments or teasing about someone’s alleged sexual activities or private life.
- Persistent, unwelcome social invitations or telephone calls from work mates at work or at home.
- Following someone home from work.
- Offensive hand or body gestures.
- Physical contact i.e. patting, pinching, touching or putting an arm around another person’s body.
- Provocative posters with a sexual connotation.
- Sexual assault and rape.

Sexual harassment is legally and socially unacceptable. Taking steps to prevent it - and to deal with it if it does occur - will mean a better work environment for all employees.

### EFFECT OF SEXUAL HARASSMENT PROVISIONS

Sexual harassment is not friendly repartee, light-hearted exchanges or occasional compliments.

Sexual harassment may be perpetrated both by individuals and by groups of people, and it may be directed either to an individual or to a group.

Most sexual harassment complaints relate to workplace behaviour but a complaint may concern behaviour outside the workplace - for example, at a social function - and still be considered work-related. For work-related sexual harassment to occur the offender must be someone encountered in the course of employment.

Behaviour constituting sexual harassment may vary from rape, at one extreme, to persistent sexual jibes and innuendo to which not all employees may object. Where complaints are of the latter nature, the decision whether the complaint has substance will depend on whether the

behaviour was unwelcome or offensive to the complainant, whether the behaviour was repeated, and the extent to which it can be established that in some way or other, the behaviour had a detrimental effect on the complainant’s employment.

Since primary responsibility for sexual harassment in employment lies with the employer, employers must ensure all employees know that sexual harassment will not be tolerated. If sexual harassment does occur, there must be someone within the organisation to whom the employee can complain and a procedure for achieving a resolution. No-one is to be subject to discriminatory treatment because a sexual harassment complaint has been made.

It is important to remember that complaints are subjective in character. What matters is what offends the individual, and that person does not have to tell the offender that the behaviour was unwelcome or offensive.

Under the Employment Relations Act a sexual harassment complaint must first be raised with the employer as a personal grievance. Unresolved complaints may be taken to the Employment Relations Authority. Alternatively, a complaint may be made directly to the Human Rights Commission and in that case the employee is not required to tell the employer first. The exception is where an employee complains about sexual harassment by a customer or client of the employer. Then the employee must give the employer written notice of the complaint and the employer must inquire into the facts. If satisfied that the employee has suffered sexual harassment the employer must take all practicable steps to prevent any repetition. An employer who does not act on an employee's complaint may be deemed to have breached the Human Rights Act.

It is for complainants to choose between the Employment Relations Act and the Human Rights Act. If a complaint is made to the Human Rights Commission, the complainant cannot also exercise, or continue to exercise, the employee's personal rights under the Employment Relations Act.

***The existence of an effective programme or procedure will afford protection against sexual harassment complaints.***

## PART 2: EMPLOYER POLICY AND PRACTICE

### EMPLOYER LIABILITY

Under the Human Rights Act and its 2001 Amendment an employee alleging sexual harassment may make a complaint both about the employer and the offending employee but in practice, most claims will be directed to the employer. The employer, however, has a defence if he or she can show that reasonably practicable steps have been taken to prevent sexual harassment (or any unlawful discrimination), or to deal with it if it occurs.

That the employer is also liable for the behaviour of customers or clients - over whom, as a general rule, he or she has little or no control - is a complicating factor. To avoid liability the employer must take all practicable steps to prevent a repetition of the alleged offence; if the sexual harassment is repeated, the employer becomes responsible. The extent of liability is then

judged on the effort made to prevent sexual harassment. Efforts to reduce or ameliorate the behaviour will not remove the liability but will be taken into account in deciding what remedy will be granted and what penalty, if any, will be imposed.

The employer is clearly responsible for the work environment and if this is intimidating, hostile or offensive, liability will accrue whether or not sexual harassment is condoned by management or the employer. Special attention should be given to work environments where sexual harassment seems most likely, as may happen when small numbers of women are introduced into traditionally male work areas, or where management is substantially male and women perform the routine work.

### STANDARDS OF BEHAVIOUR

Although most sexual harassment complaints are from women against men, there are times when men are harassed by women, women by women, or men by men. Irrespective of gender, some people are affected by situations which do not appear to affect others. As well, some harassers can be stopped in the early stages of harassment while with others, this is not possible. There are many reasons for these differences, including personality type, relative positions of power in the workplace, and workplace culture in respect to sexual harassment. The more a climate of sexual harassment is condoned, the harder it is for someone experiencing harassment to deal with the problem.

This does not mean that there cannot be friendly banter and lighthearted comments between people. Rather, the aim should be to eliminate any attacks of a sexual nature, including direct or indirect verbal attacks, which may harass or hurt people who are helpless to prevent or avoid them without some risk to their work situation. Sexual harassment is more often an abuse of power or an exploitation of weakness, than a concern with sexuality, as such.

Both male and female employees, through ignorance, naivety or insensitivity, can place themselves and their employer at risk of a costly complaint or grievance by behaviour which has previously gone unchallenged and which, personally, they consider acceptable.

Company codes of behaviour are likely to afford protection against some sexual harassment claims and operate to mitigate the effect of others. The Human Rights Act provides a statutory defence if the employer can show that reasonably practicable steps have been taken to prevent offensive employee behaviour. This is not the case with the Employment Relations Act but at the very least, steps taken to prevent sexual harassment, and the existence of a procedure for dealing with it, should go to limit or reduce the liability of any employer faced with a sexual harassment claim.

## HAVING A WRITTEN POLICY

All employers should have a written policy statement advising employees that sexual harassment is illegal and will not be tolerated or condoned. The policy should give examples of what constitutes sexual harassment, and should point out that appropriate sanctions will be taken against anyone who offends.

Policy statements should set out an employee's right, under both the Human Rights Act and the Employment Relations Act, to complain about sexual harassment, together with initial in-house procedures to follow should a complaint be made.

The sexual harassment policy and its associated procedures should be communicated to all employees and be widely known within the enterprise. Policy and procedures should also be included in training and induction programmes for new staff.

## THE ROLE OF SUPERVISORS AND MANAGERS

Supervisors and managers should be required to maintain their workplaces free from sexual harassment and intimidation and to ensure that employees for whom they are responsible understand what is expected in terms of workplace behaviour.

To fulfil their obligation to maintain a positive and harmonious work environment, supervisors and managers should halt any harassment which comes to their notice, either by calling attention to company policy, or, if necessary, by direct disciplinary action. Supervisors and managers should report complaints of sexual harassment immediately to a specified employee (or employees) appointed for this purpose. They should also state what action, in line with company procedures, has been taken to date.

Management has two defences against complaints of sexual harassment:

- First, to have in place a company policy advising staff what constitutes sexual harassment and warning against such behaviour. All staff should be aware of the policy and it should be pointed out that the law holds the employer as well as offenders responsible.
- Second, to deal promptly, seriously and sympathetically with any complaint made, paying scrupulous attention to procedural fairness.

## ENCOURAGING INDEPENDENT RESPONSIBILITY

Anyone experiencing sexual harassment should be encouraged to make clear immediately that the behaviour in question is unwelcome and offensive (there is, however, no legal obligation to do so). If the behaviour continues, employees should be aware that it is to be reported to the immediate supervisor or manager or to the person designated for this purpose. The person to whom the complaint is made should prepare a report of the matter as soon as possible thereafter. However, for a variety of reasons, sexual harassment will often go unreported for some time and employers can never rely on a complaints system alone to prevent it. Consequently, an active prevention programme is also required.

## PROCEDURAL FAIRNESS

When a sexual harassment complaint is made, any inquiry undertaken by the employer must take account of procedural fairness. Procedural fairness (essentially the application of the concept of natural justice to the way in which a complaint is dealt with) is a major factor both in respect to the person making the complaint and to the alleged offender.

If, following an inquiry which supports a sexual harassment complaint, the offender is dismissed, or treated in some way detrimental to his or her employment (for example, receiving a lower performance appraisal rating than might otherwise have been expected), a personal grievance claim could follow. It is, therefore, most important to ensure any investigation is fairly carried out by having a policy which provides that:

Both parties have a reasonable opportunity to be heard, to answer allegations, and to challenge any defence put forward;

- The person who deals with the complaint or grievance (which will include hearing any explanations or other evidence), is someone independent of the parties and able to act impartially. If possible, this should be someone specially appointed who is experienced in carrying out inquiries of this sort;
- An initial inquiry is held as soon as possible after a complaint is reported;
- Any witness statements are put to both parties;
- Documentary evidence or records of allegations, defences and denials are retained and the parties given the opportunity to correct the record. Corrections requested should be signed, and any witness statements also recorded;
- Where accounts vary, the person carrying out the initial inquiry should record, giving reasons, a preference for one version of an event over another.

Procedural fairness is an extremely important element of any investigation or inquiry. If it can not be shown that the investigation carried out was fair, both to the person who made the complaint and to the alleged offender, a personal grievance claim may follow.

By the same token a complainant may experience a deterioration in the work environment after a complaint has been made. Sometimes duties, or work areas, are changed and/or the person who complained may be treated with hostility, or isolated, by colleagues of the alleged offender. Then, too, depending on how the complaint is handled, there may be a significant erosion of trust in the employer. In such circumstances the complainant will be entitled to take either a personal grievance under the Employment Relations Act, or a complaint to the Human Rights Commission. Therefore, care must be taken to minimise the disruption caused both by the behaviour complained of, and by the complaint itself. It is important to keep an employee who has made a sexual harassment complaint informed about steps taken to deal with that complaint.

In-house policies and training manuals must, in providing a sexual harassment complaints procedure, take procedural fairness into account. Procedural fairness is fundamental to any such procedure.

*The Canterbury Employers' Chamber of Commerce can assist in drafting policies and training manuals.*

## PART 3: SETTING THE POLICY

### AN OUTLINE PROGRAMME ON SEXUAL HARASSMENT

The Chamber can help develop a programme for specific companies. However, any programme, big or small, should have the following:

- **Co-ordinator/Specified Employee**  
A programme co-ordinator/specified employee to whom complaints may be taken.
- **Policy Statement**  
A statement from the Chief Executive Officer.
- **Company Complaint Procedure**  
An established and publicised complaint procedure.
- **Education and Promotion**  
Education for employees about their rights and responsibilities and promotion of the policy and procedures.

#### STEP 1: CO-ORDINATOR/SPECIFIED EMPLOYEE

The first step in a sexual harassment programme will be the appointment of a co-ordinator or specified employee. The co-ordinator/specified employee will:

- Undertake training on sexual harassment prevention (where practicable);
- Promote the policy and educate employees about their rights and responsibilities;
- Set up a network of informed contact people;
- Ensure that contact people meet regularly and are told about all developments in the area of sexual harassment;
- Establish formal and informal complaint procedures;
- Monitor programmes and procedures, providing regular reports to management.

#### STEP 2: POLICY STATEMENT

A statement from the Chief Executive Officer which reinforces the company's commitment is essential. The policy statement should also include a description of what sexual harassment is and what it is not. This statement should say that sexual harassment will not be tolerated in the workplace, and that action will be taken should sexual harassment occur.

## STEP 3: COMPLAINT PROCEDURES

Company procedures will vary according to the organisation's size and structure. However, the following points should be covered:

- There should be provision for complaints of sexual harassment to be handled promptly, privately and in a procedurally fair manner;
- There should be a specified employee to whom staff can go with inquiries or complaints, and his or her name, (or names, if more than one specified employee has been appointed) location and contact phone number should be known;
- There should be an assurance that all discussions and any investigations are to be conducted in the strictest confidence;
- The procedures should be set out clearly and care taken to ensure they are understood by all parties, staff and management alike.

## STEP 4: PROMOTION AND EDUCATION

Effective promotion is important to a successful sexual harassment programme because:

- It alerts all employees to sexual harassment and tells them what to do if it happens to them;
- It sets down appropriate, acceptable standards;
- It warns that management will act against sexual harassment (which may, of itself, lead to a change in behaviour).

The following is the kind of information which could be distributed to staff:

- Definition/descriptions of sexual harassment;
- What constitutes sexual harassment, discussion of relevant examples, the role of power in harassment situations, the reasons why some individuals harass, cross-cultural perspectives;
- An explanation of the company's policy and procedures;
- The name of an appropriate person or persons (specified employee) to contact, for inquiries, information, or if a complaint is to be laid;
- An assurance that all inquiries and complaints will be private and confidential.

## ACQUIRING AND USING RELEVANT INFORMATION

### TRAINING RESOURCES

#### *Videos*

The Human Rights Commission has a number of videos dealing with the issue of sexual harassment.

#### *Speakers*

Speakers are available to speak at meetings or training sessions.

## **Training Consultants**

The Human Rights Commission can recommend sexual harassment prevention training consultants and there are other independent consultants working in the area whose names can be obtained from the Equal Employment Opportunities Trust.

**Videos and speakers can be arranged. Please contact The Chamber.**

## **HOW TO USE INFORMATION ABOUT SEXUAL HARASSMENT**

Information about sexual harassment, what it is and how to deal with it, should be used for employee education and training purposes.

Sexual harassment information should be communicated through formal, internal communications systems - memoranda, policy statements, notices in company newspapers and the like.

## **WHO SHOULD RECEIVE INFORMATION?**

Everyone - but the employer should be aware that in spite of efforts to communicate, some employees may miss out. Some may not, for example, be able to read notice boards or be able to understand the message at the level of language used. It is important to keep all employees in mind when planning to distribute information.

Employees should be continually reminded about sexual harassment so that the message is kept alive. All new employees should be informed of the organisation's policies.

Promoting increased awareness of sexual harassment is an insurance policy - the better the programme, the less likely the company to receive harassment complaints.

## **A SAMPLE POLICY ON SEXUAL HARASSMENT**

Sexual harassment in the workplace is unlawful in New Zealand and will not be tolerated by this company. Appropriate action will be taken against staff members who offend.

Sexual harassment is verbal or physical behaviour of a sexual nature by one person or group of persons towards another person or group. It includes the misuse of visual or written material. The behaviour must be unwelcome, or offensive to the employee and persistent enough, or

sufficiently serious, to have a detrimental effect on the employee's employment, job performance or job satisfaction.

Sexual harassment is prohibited by sections 62 and 69 of the Human Rights Act 1993 and is grounds for a personal grievance under sections 103 and 108 and 117 of the Employment Relations Act.

If an employee feels he or she is being harassed, relevant information on available options may be obtained from (*contact person*) who will listen carefully and respond in strict confidence. No one who does not wish to will be required to make a complaint.

## **OPTIONS**

### **1. Self Help**

*The employee may:*

- a. tell the person, or persons, in private, that their behaviour is offensive and request that it stops;
- b. write to the person, or persons, about their behaviour, sealing and marking the letter "personal and confidential";

- c. speak to the person, or persons, in private, in the presence of \_\_\_\_\_ (*contact person*).

Since allegations of sexual harassment are extremely serious it is important to keep any information confidential to those directly involved.

## 2. Informal intervention

The employee may approach a member of management to intervene. The selected member of management must act quickly, discreetly and fairly, and ensure that all discussions and any investigations are conducted in strictest confidence and according to the procedures laid down by the company in its employment agreement or company rules/work policies. It is the role of the supervisor to explain relevant procedures to the employee, and allow the employee to choose whether or not to proceed with this option.

## 3. Formal Complaint

### a. *Complaint to Manager in Writing*

If self help or informal intervention have not worked or if the allegation is, in the employee's view, serious enough to warrant formal disciplinary action, the employee should submit a detailed written complaint to the manager. Appropriate disciplinary action will be taken if investigation shows the complaint to be justified.

### b. *Complaint to Employee's Representative*

As sexual harassment may be grounds for a personal grievance the complainant may wish to discuss the complaint with his or her representative. The alleged offender may also have representation.

Anyone may discuss any issue relating to sexual harassment, big or small, in confidence with a/their supervisor, manager, or representative or support person and will not be victimised for doing so. Any victimisation of a complainant (if it occurs) will be treated very seriously by the company.

## PART 4: PROCEDURE FOR HANDLING INITIAL COMPLAINTS

The procedure for investigating an initial complaint of sexual harassment should be the same, whether, in the event of an unsatisfactory outcome for the complainant, the complaint is lodged with the Human Rights Commission under the Human Rights Act, or raised as a personal grievance under the Employment Relations Act. How an employer handles, or fails to handle, an investigation may be taken into account by the Commission or Employment Relations Authority in any subsequent consideration of the complaint. Having a correct procedure is, therefore, of the utmost importance.

### WHEN A COMPLAINT IS RECEIVED

- When a written complaint is received, the person to whom it is made (if this is not the person designated to deal with sexual harassment complaints) should note it and direct the employee to whoever is appointed and, where practicable, trained to deal with such complaints.
- The person making the complaint should be assured that the complaint will be taken seriously and dealt with quickly and impartially.
- The person dealing with the complaint should advise that a formal investigation will be carried out, that the complainant will be fully interviewed about the complaint, and that he or she is entitled to bring a representative or support person to the interview.

- The person who makes the complaint should also be advised that although the process is confidential, the alleged offender will have to be told who has made the complaint and that any witnesses and persons directly involved in the complaints process will also learn the complainant's identity.
- The complainant should be told that his or her employment will not suffer unless the complaint is shown to be false and that if any work difficulties *are* experienced, he or she should report these immediately. It should be made clear that the employer is committed to ensuring that there is no retaliation against the employee who has complained.
- The person making the complaint should be asked whether counselling is required and this should either be arranged, or the complainant referred to an appropriate person. (The employer may consider assisting with the cost of counselling.)
- If English is the complainant's second language, or the person making the complaint is from another culture and communication problems may arise, he or she should be asked if an interpreter, or someone with a knowledge of the culture, should be brought in to assist with the interview.
- The complainant's wish to proceed with a formal investigation should be confirmed.
- If the person who has made the complaint does wish to proceed, a time for a full interview should be arranged shortly afterwards. However, the interview can be conducted immediately if the complainant is happy with this and does not want a representative or support person present. It is important to investigate complaints without delay, particularly if those involved must go on working together.
- In some instances, it may, if the person who has complained agrees, be appropriate to deal initially with a complaint on an informal basis, simply requesting the alleged offender not to repeat the behaviour in question, or to remove offensive visual material.

## INVESTIGATING A COMPLAINT

Anyone investigating a complaint should be experienced in dealing with sexual harassment cases, although this will not always be possible (an organisation's size, for example, may mean that no such person is available). However, whoever carries out the investigation should be recognised as being fair, impartial and independent of the parties to the complaint. If the person who has complained is a woman, and there is a male investigator, the employee should be allowed to have a female support person with her if she wishes.

The investigator will record the result of any investigation and make a recommendation as to outcome, which the person whose job it is to decide the matter (the employer, manager, or supervisor) may either accept or reject.

## INTERVIEWING THE COMPLAINANT

- The employee should be assured that the complaint is taken seriously and it should again be made clear that retaliation is unacceptable. If it occurs, it is to be reported, and will be dealt with promptly.
- The complaints process should be explained: that an interview with the alleged offender will follow the complainant's interview, as will interviews with any others who have relevant information. The person who has made the complaint should also be told who will make the final decision and what the likely consequences will be for both parties.
- Anyone making a complaint should be told that if the result of the investigation is not accepted, he or she can go either to the Human Rights Commission, or take a personal grievance under the Employment Relations Act. The differences between the two processes should be explained: the fact that there is a 90-day period in which a personal grievance must be raised, compared with a 12-month period under the Human Rights Act (with a discretion to lodge appeals after that time), that personal grievances are always

taken against the employer whereas it would be possible under the Human Rights Act to take a complaint against an individual employee and that remedies under the two Acts are similar but not the same (reinstatement, compensation and lost wages are available under the Employment Relations Act with a broader range of remedies available under the Human Rights Act – restraining order, apology, the ordering of any other action to redress the damage suffered by the complainant, damages for pecuniary loss, or any other loss, whether or not of a monetary kind, and for humiliation).

- The person investigating a complaint should stress that questioning does not indicate that the person who has complained is disbelieved, but is intended to establish independently that a complaint has substance. To this end the complainant should be asked to give a summary of the complaint. Specific questions are best left until a general picture has been formed. It is preferable to consider the complaint chronologically.

- Open, not leading, questions should be asked. Open questions begin with who, when, where, what and how. Closed questions suggest the answer. For example:

Ask

Q. Explain what happened?

A. He touched me

Q. Where did he touch you?

A. He touched me on my leg and breast

Do not ask

Q. Did he touch you?

A. Yes

Q. Did he touch you on the breast?

A. Yes

- The person investigating the complaint should be provided with the following information:
  - The alleged offender's name (or other means of identification), and position;
  - Whether the person who has complained works with the alleged offender or encounters him or her in the course of work;
  - The times, dates and location of each incident and the names of possible witnesses;
  - Details of each incident, as for example, with alleged touching, how the person making the complaint was approached and where he or she was touched;
  - How the complainant reacted. Whether he or she responded in any way (the alleged offender need not have been told that the behaviour was unwelcome or offensive), and the reason for that reaction. Questions should be asked in a neutral way, with no blame attaching to the person who has complained for failing to indicate that the behaviour was unwelcome;
  - How the complainant felt immediately after the incident and later;
  - Whether the complainant told anyone else about any incident and if so, what was said, when, and to whom. If nothing was said, the person making the complaint should be asked why not, but in a neutral way, with no conclusions drawn from any failure to report;
  - Whether there was a delay in telling someone else what happened and, if so, why. Again, no automatic conclusions should be drawn;
  - The complainant's relationship with those he or she might have told but either did not tell, or delayed telling (co-workers, close relations and so on);
  - Whether any written record was made - diary notes, letters, for example - and whether these are available;
  - Whether someone else has allegedly been harassed by the same person. The complainant may have seen evidence of this, or been told about it by the person alleging harassment, or by others;
  - Whether, apart from work, the person making the complaint has encountered the alleged offender socially, or whether the two have had a personal relationship;
  - Whether the harassment has had any effect on work performance, morale, or health;
  - Whether, because of the harassment, the complainant has visited a doctor or counsellor. In that case permission should be sought to obtain records or to discuss the consultation;
  - Whether there is anyone who can help establish the truth of the allegation made;
  - Where evidence is inconsistent, whether this can be explained;
  - How the complainant would like the matter resolved.

- The person making the complaint should be told that it is important to make a full statement, should be asked if there is anything else he or she can think of, and asked to get in touch as soon as possible if new information becomes available.
- When the interview ends, the complainant should be asked to sign his or her statement, told not to speak to possible witnesses, assured that the investigation will be conducted in private, and asked to discuss matters only with a representative or support person.

## NOTIFYING THE ALLEGED OFFENDER

- A preliminary interview should be held as soon as possible after the interview with the person who has made a complaint;
- The alleged offender, that is, the person against whom a complaint has been made, should be told about the complaint and given a summary of specific allegations, preferably in writing. Evidence by which the complaint can be tested should *not* be provided at this stage, witnesses' names in particular or for example, that another employee saw the incident, or that the complainant told someone else about it;
- The person against whom a complaint has been made should be told that the complaint is being treated seriously, that a formal investigation will be carried out, and that a full interview, to which he or she may bring a representative or support person, will be held shortly;
- It should be explained that although the investigation process is confidential, witnesses will be interviewed and will therefore know something about the complaint. It should also be explained that the alleged offender should not speak to possible witnesses, and that witnesses will not be told either who the parties are, or the allegations made.
- No-one against whom a complaint has been made should, at this stage, be told the identity of proposed witnesses.
- The alleged offender should be assured of a fair and impartial investigation;
- If English is the alleged offender's second language, or the alleged offender is from another culture and communication problems may arise, he or she should be asked whether an interpreter, or someone with a knowledge of the culture, should be brought in to assist with the interview.
- The person against whom the complaint has been made should be told what is likely to happen if it is upheld, invited to bring a representative or support person to the formal interview, and asked if any assistance, such as counselling, is required. The interview should follow reasonably soon after.

It is, of course, possible that in some cases a preliminary interview will be all that is necessary. If the offence is admitted, and a promise not to repeat the behaviour is given, together with an offer of apology (and this is acceptable to the complainant), it may be possible to resolve the matter without the need for further formalities. But if this does not happen, or the person who made the complaint wants something more than an apology, or the complaint is sufficiently serious, interim measures may be needed while an investigation is carried out.

## INTERIM MEASURES

What, if any, interim measures are necessary will depend on the nature of the complaint and the particular workplace. In larger workplaces, it may be possible to move the alleged offender to some other department (particularly if the complainant and the alleged offender would otherwise be working together and/or there is the possibility of animosity or retaliation).

More serious cases may require suspension on pay or a grant of paid leave while an investigation takes place. This might also happen in smaller workplaces if the alleged offender's presence is likely to mean further stress and/or victimisation for the complainant.

Altering the employment situation of someone against whom a complaint has been made is, however, a reasonably drastic thing to do and this course should not be taken without allowing the person concerned the opportunity to offer an explanation and to speak in his or her own defence. Where transfer or suspension is decided on, stress should be laid on the interim nature of the decision. It does not mean that the allegations have been accepted, but is simply to allow a more effective investigation to be carried out.

## INTERVIEWING THE ALLEGED OFFENDER

- Whoever carries out the investigation should explain that as much information as possible will be required to allow an impartial decision to be made. The person against whom the complaint has been made should be asked whether there are any witnesses who can speak in his or her defence;
- The alleged offender should be asked to describe details of the working relationship with the complainant, any supervisor, and other employees. And as with the person making the complaint, open, not closed questions should be asked. For example: "How have you generally got on with ..." **not** "Have there been problems between you and ...";
- Allegations should be addressed in turn and more detailed explanations or defences obtained. Written records or documentary evidence should be sought;
- The alleged offender should be asked whether:
  - there was anyone about at the time alleged incidents occurred,
  - there are people in the workplace who might shed light on the complaint,
  - there are people who could help establish the truth, including possible character witnesses;
- The alleged offender should be advised that:
  - a full response is important. Other information that comes to mind should be provided, and any new information presented during the course of the investigation,
  - if further material is provided by the complainant, there will be the opportunity to comment on it,
  - possible witnesses should not be contacted,
  - the investigation will be conducted in private and is to be discussed only with a representative or support person,
  - a refusal to respond to any allegations may create a bad impression.
- If time to consider a response is necessary, the person against whom the complaint has been made should be allowed to confer with his or her representative or support person;
- Where statements provided are inconsistent, an explanation should be sought.

An alleged offender may not comment on the complainant's sexual reputation or previous sexual experience unless these relate to previous false claims of sexual harassment. Both the Human Rights Act and the Employment Relations Act state that in cases of alleged sexual harassment such matters are not to be taken into account.

## INTERVIEWING WITNESSES AND FURTHER INVESTIGATION

- Persons interviewed should be those whose names have been provided by the parties and anyone else considered to have relevant information, such as:
  - Eye witnesses,

- Anyone who overheard the incidents complained of,
  - Anyone who saw either of the parties immediately after an alleged incident,
  - Anyone the complainant spoke to about an incident,
  - Anyone who has previously complained of sexual harassment by the alleged offender,
  - Any doctor or counsellor who can support a complaint or confirm stress-related problems probably related to sexual harassment;
- Witnesses should not be given details of a complaint but asked if they have any relevant evidence. They should be asked if they know what the complaint is about and to provide any known details. They should also be asked how they know and/or who told them. There should be no comment about the correctness of their information;
  - Anyone cited as an eyewitness should be asked about dates, times and places. “Did you see an incident between x and y on a particular date?” If yes, the incident should be described. If no, the witness should be asked where he or she was at the relevant time, whether the witness observed the person who made the complaint and the alleged offender, if anything was overheard, and how far away he or she was from the parties (if actually present). Poor lighting, for example, might make it difficult to see anything;
  - Anyone to whom the person making the complaint spoke after the incident should be asked about dates, times and places, what he or she was told, and how the complainant looked and behaved;
  - Anyone also thought to have been subject to harassment should be asked to describe his or her experiences. Questions should be open-ended and the working and personal relationship of witness and alleged offender established;
  - Any suggestion that the motivation for the complaint was poor work performance or retaliation should be investigated. If work performance was an issue, how long this had been the case should be checked by consulting previous performance appraisals. Poor work performance could relate to distress at the alleged behaviour. Similarly, if a warning was given about the time of the alleged incidents, it could either have been the reason for retaliation (by the complainant) or a consequence of rejecting the alleged offender’s advances. Working relationships should be examined and information obtained from anyone who observed those relationships;
  - Where work records are relevant, those responsible for them should be interviewed, unless this is not possible because a former employee can not readily be contacted.

### NOTIFYING THE ALLEGED OFFENDER

#### THE INVESTIGATION REPORT/DEALING WITH THE EVIDENCE

The report should be based on interviews conducted and should concentrate on statements relevant to the allegations made. Once completed, it will be necessary to determine whether or not the report confirms sexual harassment and to make an impartial recommendation or decision (if given that power). Advice should be obtained, however, before any disciplinary action is taken against the offender.

In reaching a conclusion, the following should be taken into account:

##### *Best evidence*

This is the evidence of eye witnesses, or direct corroborative evidence from people with knowledge of an issue. Such evidence is often lacking in sexual harassment cases, so other kinds of evidence may have to be relied on instead.

##### *Prior consistent complaint*

The complainant may, shortly after an incident, have told someone else who can provide evidence of a complaint *reasonably consistent with the central allegations made*. Such evidence, which need not be detailed, can show

consistency between the complainant's conduct at the time of an incident and at the time of the investigation. It can support credibility, but can not, in itself, be taken as the truth. Absence of a prior complaint, or delay in complaining, will sometimes reflect badly on credibility but factors such as age, nature and personality will also need to be taken into account, as will the complainant's relationship with persons to whom a complaint might have been made, and any other relevant factors.

### *Similar fact evidence*

This is evidence of similar behaviour towards other employees and can show a pattern of conduct. The alleged offender might, for example, have had a habit of preying on young women: complimenting them during the job interview and harassing them after a week or two on the job. If there is also a strong similarity between conduct towards the person who has made the complaint and conduct towards others, the likelihood that harassment occurred is strengthened. However, this is not evidence which, by itself, can be treated as evidence that the complainant was subjected to such behaviour.

### *Evidence of state of mind*

Evidence that the person who has made the complaint was distressed, agitated or showed some kind of stress reaction tends to support an allegation's truth, but is probably not sufficient on its own.

### *Credibility of complainant and alleged offender*

The behaviour of the parties should be considered: did they evade questions or refuse to answer relevant points? Could they explain apparent contradictions? Persons who are stressed react in different ways and someone who appears very upset is not necessarily more credible than someone who is not.

## **RELEVANT STATUTORY PROVISIONS**

Section 62 of the Human Rights Act and section 108 of the Employment Relations Act provide a basis for analysing whether or not sexual harassment has occurred. Section 108 relates only to employees in the course of their employment (including those intending to work) but section 62 has a wider application, extending to unpaid work, partnerships, industrial unions, trade associations, education or vocational training, access to any approval, authorisation, qualification, vehicles or facilities, goods and services, land, housing or other accommodation, or applications for employment or vocational training.

It should be noted that the Human Rights Act definition of "employer" is very broad, extending to "employees" of independent contractors as well as to those whose work is unpaid.

Answers to the following questions will help to establish or refute sexual harassment claims:

### **Human Rights Act**

Section 62(1)

Was the complainant involved in employment at the time the harassment occurred?

Was there a request for sexual intercourse, sexual contact or other form of sexual activity?

Did the request contain an implied or overt promise of preferential treatment or implied or overt threat of detrimental treatment?

### **Employment Relations Act**

Section 108 (1)(a)

Was the complainant involved in employment at the time the harassment occurred?

Was there either directly or indirectly a request for sexual intercourse, sexual contact or other form of sexual activity?

Did the request contain an implied or overt promise of preferential treatment, implied or overt threat of detrimental treatment, or disadvantage in present or future employment status?

### Section 62(2)

Was the complainant subjected to language (whether written or spoken) or visual material or physical behaviour of a sexual nature which was: unwelcome or offensive (whether or not the employee told the offender so), and was either repeated, or of such a significant nature that it had a detrimental effect on the employee in employment or application for employment? This provision also applies to suppliers of goods and services in respect to education and training and to the other areas noted in the introduction to this section.

### Section 108 (1)(b)

Was the employee sexually harassed either directly or indirectly by use of language (whether written, spoken) visual material or physical behaviour of a sexual nature which was: unwelcome or offensive (whether or not the employee told the employer/employer's representative) and by its nature or through repetition had a detrimental effect on the employee's employment, job performance, or job satisfaction? (Employee includes a person intending to work.)

If "yes" is the answer to the questions in section 62(1)(a) or section 108(1)(a) a sexual harassment complaint has substance.

In determining an offence under section 62(1)(b) or section 108(1)(b), all the following matters should be considered:

- Whether language used (written or spoken), visual material (posters, photographs etc) or physical behaviour were of a sexual nature;
  - Did words used refer to body parts or sexual activities? Was there any physical contact and/or touching? Touching the genitals, breasts and buttocks has been found to have sexual implications but it is not so clear whether this is so with touching around the shoulders. Such touching would need to be considered in the context in which it occurred. In deciding whether particular behaviour, words, photographs etc were of a sexual nature, the test is whether a reasonable person would consider that they were. (An objective test.)
- Whether what happened was offensive to the complainant.
  - Did the person who has complained willingly initiate or participate in sexual discussions on an equal footing or retaliate when unwelcome sexual comments were made? Here a subjective test applies: what matters is how the complainant experienced the behaviour (although someone else might not have been upset by it). The fact that the parties once had a consensual relationship does not mean that subsequent behaviour cannot be considered unwelcome or offensive.
- Whether the behaviour was either repeated or of such a significant nature that it had a detrimental effect on the complainant in his or her employment. (This is the Human Rights Act wording. The Employment Relations Act omits the word "significant" and refers to behaviour that by its nature or through repetition has a detrimental effect on that employee's employment, job performance, or job satisfaction. This may mean that under the Employment Relations Act a lower standard of proof will apply.)
  - What was the nature of the incident or incidents? Rape would, for example, obviously constitute an immediate detriment, but some less serious behaviour would have to occur more than once to be accepted as having an adverse effect. Again, what is important is how the *complainant* was affected (although another employee might have reacted differently). A detrimental effect will include effect on rates of pay, job opportunities, perks, job performance, as well as the creation of a hostile or poisoned working environment where sexual harassment has meant psychological stress for the person who has complained.

A complaint will succeed if answers provided indicate that it is more probable than not that the complaint was true.

## COMPLAINT ESTABLISHED

If a complaint is upheld:

- Both parties should be told of the decision, preferably in face to face interviews, and the decision, with reasons, confirmed in writing. The offender should also be told what the consequences will be;
- Where there are no preventive measures in place, appropriate steps to prevent similar behaviour from occurring should be decided on and explained to all employees;
- Checks should be made to see that preventive measures have been put in place;
- The complaint and its resolution should be noted on the offender's personal file and the person who has committed the offence allowed to add any comment he or she might wish to make. A later check should ensure the behaviour has ceased and that the solution decided on is working satisfactorily. The complainant should be contacted to confirm that no victimisation has resulted from the complaint;
- Disadvantage suffered should be discussed with the complainant and how best to restore pre-harassment status.

Possible solutions are:

- A written apology
- A verbal apology
- Return of sick or other leave taken as a consequence of sexual harassment;
- Payment of any medical/counselling fees associated with stress/sexual harassment;
- Assistance to find suitable counselling (if necessary), possibly with a contribution to costs from the offender;
- Removal from personal file of detrimental comments dating from the harassment period;
- Transfer, with no job disadvantage, from the environment in which the harassment occurred (if this is requested and the nature of the organisation allows it);
- Financial compensation.

Possible disciplinary measures are:

- Downgrading of job status and responsibilities;
- Transfer to another position with no job disadvantage;
- Withholding of bonus payments or other job benefits;
- Warning about and counselling on misconduct;
- Compulsory anti-sexual harassment counselling;
- Dismissal.

The offender should be told why disciplinary measures are necessary and the kind of future conduct required. Appropriate counselling and/or the completion of a sexual abuse programme might be advised (if not insisted on) and the consequences of any repetition made clear.

Employers need to be aware, however, that dismissal or action to the employee's disadvantage can lead to a personal grievance under the Employment Relations Act which is likely to be upheld on procedural grounds if proper investigation, warning and disciplinary procedures have not been followed. At all stages an alleged offender or offenders should be allowed representation (if wanted) and given the right to speak in his or her own defence.

## COMPLAINT NOT ESTABLISHED

If it is not possible to determine whether a complaint is true or false, the reason for reaching this decision - insufficient evidence to support the allegation made, provision of appropriate alibi, for example - should be given in

writing to both parties. The complainant should be reminded of the right to take either a complaint to the Human Rights Commission, or raise a personal grievance under the Employment Relations Act.

### **COMPLAINT REJECTED**

Where a complaint is rejected, the reason should also be explained to both parties. There may, for example, be no supporting evidence, or it may be found that the conduct complained of was not sexual harassment. Again, the person who made the complaint should be reminded of the right to go to the Human Rights Commission, or raise a personal grievance under the Employment Relations Act.

### **RECORD KEEPING**

Where a written complaint has been investigated and substantiated, a summary of the nature of the complaint, its outcome, and disciplinary action taken, should be recorded on the offender's personal file. The full report should be kept in a locked or secure file for between two to five years, depending on the complaint's severity.

A written complaint not established, or rejected should not be recorded on the alleged offender's personal file.

A complainant's personal file should make no reference to a complaint, or the circumstances surrounding it, unless it was shown that the complaint was malicious.

## **PART 5: COMPLAINTS TO HUMAN RIGHTS COMMISSION**

If a complaint is made to the Human Rights Commission, the Commission must first see if the parties themselves can resolve the dispute promptly and it can provide mediation assistance for this purpose. The requirement on the Commission is to facilitate resolution by the parties concerned "in the most efficient, informal, and cost-effective manner possible". The Commission can decide for itself to investigate suspected breaches of the Act without a complaint. However, in the case of sexual harassment it is far more likely that a complaint will be initiated by the person or persons affected by the offensive behaviour. Complainants do not have to tell the employer that they are complaining to the Commission unless the complaint relates to a customer or client of the employing organisation and the employee wants the employer to deal with it. Then the complaint must first be made in writing to the employer.

Once a complaint has been made the Commission must assess it and gather relevant information. The Commission must also, in line with its obligation to facilitate resolution, offer services to achieve resolution including the provision of information, expert problem-solving support, mediation and other assistance. The Commission will take action or further action on a complaint only if the complainant wishes to proceed. Action or further action may be declined if the Commission considers a complaint to be trivial, frivolous, vexatious or not made in good faith, if in the circumstances the Commission does not consider that further action should be taken, or if the complainant knew about the complaint for more than 12 months before the Commission received it. If the Commission decides not to proceed it must inform both the complainant and the person against whom the complaint was made giving reasons for its decision and pointing out the complainant's right to bring proceedings before the Human Rights Review Tribunal.

Before gathering evidence, the Commission must inform both the employer and the complainant about its intention and tell them about their rights and obligations under the Act, the processes applying to complaints and any other services that may help those involved to secure a settlement. Information gathering must be conducted in private but the Commission may hear or obtain information from anyone it thinks fit.

Dispute resolution (mediation) meetings are convened at the request or with the agreement of the parties and are designed to give the parties the opportunity to discuss and try to resolve a complaint without prejudicing their respective positions.

The Commission must try its best to reach a settlement and this means getting all parties' agreement on what is to be done to settle the matter. This can include payment of compensation, tendering an apology and giving a satisfactory assurance that the conduct complained of will not be repeated.

It is possible that the Privacy Act 1993 may complicate an employer's ability to respond to a complaint since this Act makes it unlawful, in most circumstances, to reveal personal information without the consent of the person to whom it relates. As a consequence, employers who do release personal information without consent at the investigation or mediation stages of a complaint should be careful to record clearly in writing their reason for doing so.

A complainant seeking to enforce a settlement may refer the complaint to the Director of Human Rights Proceedings who must then decide whether to represent the complainant in proceedings before the Human Rights Review Tribunal or refer the complaint back to the Commission. The Tribunal may also refer a complaint back to the Commission. Where it is decided to refer a complaint back to the Commission all reasonable efforts must be made to inform the persons involved. The Commission may require the parties to attend a dispute resolution meeting or some other form of mediation. Information provided at any dispute resolution meeting must be kept confidential unless the parties agree otherwise.

Where a settlement has not been reached through mediation, both parties have the right to take civil proceedings before the Tribunal. If, in such a case, the Tribunal is satisfied on the balance of probabilities that the complaint should be upheld, it can grant any one or more of the following remedies – a declaration that there has been a breach of the Act's sexual harassment provisions, an order restraining any repetition of the breach of any similar future conduct, damages for pecuniary loss or loss of any benefit (not necessarily a monetary benefit) and compensation for humiliation. The Tribunal may also specify a period during which the breach must be remedied or it may order specified training or the development of a specified policy or programme. In the case of sexual harassment this would likely involve the development of a policy on the matter along with procedures for dealing with harassment should it occur. (Similar procedures could be applied to the prevention of racial harassment as well).

The Tribunal must take notice of the fact that a particular breach was unintentional or without negligence on the employer's part but lack of intention or negligence is not an automatic defence for the employer. However, it is a defence to any proceedings under the Act if the employer can prove that he or she had taken reasonably practicable steps to prevent sexual harassment.

Failure to appear before the Tribunal carries with it liability to a fine not exceeding \$1,500.00.

No award of damages, or any remedy granted, may exceed monetary limits set in the District Courts Act 1947 (\$200,000.00), unless, where a breach is established, the Tribunal refers the case to the High Court for a decision as to appropriate remedies.

Appeals against Tribunal decisions, including the grant of an interim order, go to the High Court, whose decision is final. However, the High Court may agree that questions of law arising in appeal proceedings will be decided by the Court of Appeal. The Tribunal must have notice of any appeal within 30 days of its decision.

It is an offence unlawfully or wilfully to obstruct or hinder the Commission or a Commissioner, or to fail to comply with any lawful requirement, or to make a false or intentionally misleading statement. In such cases a fine of up to \$3,000.00 may be imposed.

**The Canterbury Employer's Chamber of Commerce can be contacted for assistance with drawing up Sexual Harassment Policies. Call (03) 366 5096 to speak to an Employment Relations Advisor or e-mail [es@cecc.org.nz](mailto:es@cecc.org.nz)**