



The EU Mutual Learning Programme in Gender Equality

Tackling sexual harassment

Denmark, 27-28 September 2017

Comments Paper - Malta



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Justice



This publication is supported by the European Union Rights, Equality and Citizenship Programme (2014-2020).

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Tackling Sexual harassment in Malta: Overview of local policies and laws in light of the Danish and French strategy

Lara Dimitrijevic

Director of Women's Right Foundation

Introduction

This paper focuses on getting an insight of the Maltese context to tackle sexual harassment in light of the Danish and French policy as well as assessing critical aspects of effectiveness and transferability of these policies. The paper is divided into three main parts: Law and policy related to sexual harassment in Malta, assessing the local context of sexual harassment and finally examining the transferability of French and Danish policy to the Maltese framework.

1. Law and Policy related to sexual harassment in Malta

1.1 Legislative and policy background on sexual harassment

Sexual harassment came to be regulated in Malta as a result of efforts to transpose the relevant Directives through the Employment and Industrial Relations Act of 2002¹ and the Equality for Men and Women Act of 2003². Prior to this, there were no specific laws related to sexual harassment other than the offence of harassment as found in the Criminal Code³.

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

The Equality for Men and Women Act, has led to the creation of the National Commission for the Promotion of Equality for Men and Women (NCPE) to be the national entity to deal with equality between men and women, including matters related to sexual harassment. In 2005, NCPE published a Sexual Harassment Code of Practice⁴. This code of practice provides a definition of sexual harassment and its constitutive elements, the rights of employers and employees and also has attached a draft policy that is freely available for employers to adopt. Subsequently, NCPE

¹ Chapter 452 of the Laws of Malta available on <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8918> accessed on 8 September 2017

² Chapter 456, Laws of Malta available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8922&l=1> accessed 8 September 2017

³ Chapter 9, Laws of Malta available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574> accessed 8 September 2017

⁴ https://ncpe.gov.mt/en/Documents/Our_Publications_and_Resources/Resourses_and_Tools/Handbooks_and_Manuals/sexual_harassment_code_of_practice.pdf

participated in a number of broadcasted programmes to promote awareness on sexual harassment and provided training titled 'Preventing and Addressing sexual harassment at the workplace and in the provisions of goods' services' whereby participants were informed of the definition and ways of dealing with sexual harassment. In 2010, NCPE became the body to issue the Equality Mark Certification based on Sexual Harassment and Equality Policy. This certificate is awarded to companies and organisations that safeguard equality at the place of work. One of the necessary requirements to obtain the certification is to have internal measures to prevent and deal with sexual harassment at the place of work, including an internal policy. The mark is valid for 2 years, unless renewed. To date over 75 private companies and public entities have been trained and subsequently issued with this certification.

1.2 Laws dealing with sexual harassment and complaints mechanisms

The definitions of harassment and sexual harassment are a reproduction of those given in Article 2(1)(c) and (d) of Directive 2006/54, and in Article 2(c) and (d) of Directive 2004/113/EC.

1.2.1 Labour Law

The Employment and Industrial Relations Act⁵ (EIRA) gives a detailed definition of harassment and sexual harassment at place of work. This Act is further developed in a subsequent regulation, Equal treatment in Employment Regulations⁶, which regulation further gives a definition of what constitutes discriminatory treatment. The Equality for Men and Women Act also provides for a definition of sexual harassment similar to that found in EIRA, however it is not limited to place of work.

1.2.2 Criminal law

The Criminal Code gives a broad definition of harassment so as to mean 'A person who pursues a course of conduct: (a) which amounts to harassment of another person, and (b) which he knows or ought to know amounts to harassment of such other person. This definition does not specifically relate to sexual harassment but merely harassment in the generic sense.

In 2016, Malta was amongst the first European countries to introduce a specific offence related to revenge pornography that has criminalised the intent to cause harm to another person by disclosing a private sexual photograph or film without the consent of the person or persons in the film or photograph.

1.2.3 Complaints mechanisms

There are no complaints procedures specifically related to sexual harassment, but the ones set out in general terms under the Equality of Men and Women Act, which set up NCPE and the Employment and Industrial Relations Act which provides for access to justice through the Industrial Tribunal. Same applies for the Public Service

⁶ Subsidiary Legislation 452.95 available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11229> accessed 8 September 2017

Commission. However, none impede recourse to civil remedies and criminal complaints.

NCPE

There are a number of mechanisms available for a person to bring forth a complaint of sexual harassment. One of such forms would be to file a complaint with NCPE that as one of its remits is to investigate complaints of such nature. Such complaints have to be made in writing and are then investigated.⁷ Following compilation of evidence, NCPE's Commissioner issues an opinion stating whether the case investigated is in breach of Malta's equality legislation. The Commissioner may refer the matter to the Industrial Tribunal or to the competent court depending on the case. Furthermore, the Commissioner is to file a complaint with the Commissioner of Police should the findings constitute a criminal offence.

It is worth noting that with regards to complaints received by NCPE on sexual harassment between 2013 and 2016, NCPE received 2 complaints from women in 2013. 3 complaints were filed by women in 2015⁸ and 0 complaints have been filed in 2014 and 2016⁹.

Public Service Commission

This role of the Commission is to staff and discipline in the public sector. It is an independent body that is set up by the Constitution of Malta¹⁰. The Commission has to power to investigate complaints against public officers, including complaints of sexual harassment. It is not clear how many cases were investigated by the Commission since there is no available date on the matter.

Industrial Tribunal

Complaints of sexual harassment may also be made directly to the Industrial Tribunal that unlike other complaint remedies described above, has the competence to award pecuniary damages and punitive punishment of up to 6 months imprisonment. However, the Tribunal is only in the position to examine cases brought against the employer and cannot decide on matters related to sexual harassment committed by employees as confirmed by the Court of Appeal following the decision of the Industrial Tribunal that declared the said tribunal to have remit to decide on cases of harassment by employees¹¹.

Criminal Court

Complaints may be filed directly to the person committing the act. As described above, the criminal code sanctions actions of harassment, however there are no specific offences in terms of the Code relating directly to sexual harassment.

⁷ Chapter 456, Article 12(1)(h) Laws of Malta available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8922&l=1>

⁸ NCPE Annual Report 2015 available at https://ncpe.gov.mt/en/Documents/Our_Publications_and_Resources/Annual_Reports/NCPE%20AR%202015.pdf

⁹ NCPE Annual Report 2016 available at https://ncpe.gov.mt/en/Documents/Our_Publications_and_Resources/Annual_Reports/NCPE%20AR%202016%20Lo%20res.pdf

¹⁰ Constitution of Malta, Art. 110 available at <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566>

¹¹ Court of Appeal (Inferior Jurisdiction), Presided by Judge Anthony Ellul, Anna Punga vs IGame Malta and Shaun O'Neill, 16 June 2017

2. Reality of the problem related to sexual harassment in Malta

Albeit the laws highlighted above and creation of institutions and mechanisms to deal with complaints, the reality is very much that sexual harassment in Malta remains prevalent, with the majority of the victims being women.

2.1 Local research

In a recent online survey conducted by a local civil society and WRF on the subject of sexual harassment at place of work, out of 602 respondents, 81% of the respondents were female. 41% responded to have directly experienced and witnessed sexual harassment at place of work, most prevalent form being physical and verbal advances. From all the respondents that have either both experienced and witnessed or simply witnessed sexual harassment, only 19% reported. Worth noting that from the participants that reported sexual harassment, 13.8% reported to have been dismissed from employment, another 13% were threatened with dismissal, 58% were ignored, 9% were offered promotion in order to drop the claim and 7 % were demoted. 52.8% of the participants that reported have also experienced unkind actions and remarks by colleagues and co-workers and 58% claim to be ignored and ostracised by the company.

Out of all the participants, only 40.4% expressed knowledge of existing internal procedures at their place of work, 88% of the participants have received no training on dealing with matters related to sexual harassment, however 92.2% clearly expressed the need for training on the matter.

Given that 85% of Maltese would not report sex crimes¹², this survey shows a reality that Malta is a far cry from successfully tackling matters related to sexual harassment. This can also be seen from the low number of reports being made to NCPE that had received only 5 complaints related to sexual harassment between 2013 and 2016. There are no figures to show complaints made to criminal justice and tribunal directly on matters related to sexual harassment, however in light of these recent studies it is highly unlikely that there are of high proportion.

It is worth noting that on the other hand, complaints related to revenge porn and illegal sharing of sex videos and photos are on the increase. Police officials expected that over 100 complaints would have been reported by June 2017¹³, many of whom were minors as young as 12 years of age. Just until 27 August 2017, a minor of 17 years of age pleaded guilty for threatening his ex-partner to share her naked photos.¹⁴

¹² <https://www.timesofmalta.com/articles/view/20170526/local/85-of-maltese-unlikely-to-report-sexual-offenses.649066>

¹³ <https://www.timesofmalta.com/articles/view/20170530/local/reports-of-illegal-sharing-of-sex-videos-photos-double-say-police.649419>

¹⁴ <https://www.timesofmalta.com/articles/view/20170827/local/youth-17-admits-to-revenge-porn-charges.656653>

3. Transferability and effectiveness of the Danish and French strategy

A willingness to implement effective policy based upon substantiated research highlighting the local demographic reality of the matter in Malta is paramount. For the purpose of this section, comments will be made on the respective countries independently.

3.1 France

A clear and well thought through national campaign is always a positive action when coming to raise awareness among the general public. However, this may never be done without ensuring that there are the necessary services available to deal with matter as this may lead to more sufferance to the victim who will feel utterly let down by a failed system that was intended to protect them.

A nation-wide campaign raising awareness on sexual harassment in Malta would be of great benefit, however it is the author's opinion that there has to be a serious commitment at national level to seriously tackle matters related to sexual harassment. To date, there are no support help lines providing services to victims of sexual harassment, surveys indicate that very few are aware of their rights and complaints mechanisms, and there still prevails the attitude that the system will not protect them and will be shamed and shunned. Perhaps a more suitable campaign would be to educate the general public of the constitutive elements of sexual harassment, the trauma and ordeal faced by victims and consequential repercussions of committing such offence. This would have to be done, following an assessment of the reality of sexual harassment in Malta (not only limited to sexual harassment at place of work) and added proviso to the criminal code specifically dealing with sexual harassment, including cyber harassment, since to date this is still lacking.

3.2 Denmark

The policy adopted by Denmark is comprehensive, researched and a step positive in the right direction to tackling harassment via digital media. A multi-pronged approach to tackling the subject, will lead to a better outcome. As highlighted above, Malta is also seeing its fair share of harassment online, notably through Facebook and Whatsapp, having its victims and perpetrators including to be young adolescents.

To a certain extent Malta already has a vehicle to deliver similar programmes in school through Personal, Social and Career development classes which are compulsory to all students up to the age of 16. Although these classes deal with a variety of topics it is time that digital harassment is seriously tackled amongst students so a similar policy and programme can be implemented if there is serious commitment.

Furthermore, the Danish policy has embraced the reality that the digital world is being used as a medium for sexual harassment, which policy was instituted through the determined initiative of 3 different ministries. In the Maltese context, online sexual harassment and misuse of digital means require immediate attention. Any

change in policy involving an effort through collaborative ministerial effort, would help to gather a better understanding of the unfolding reality.

There is to the author's knowledge only one programme that is dealing with prevention of sexual harassment in schools that aims to provide teachers and students with enough knowledge of prevention of sexual harassment and to give an incentive to the schools to create their own policy with the involvement of students and parents to prevent and tackle sexual harassment. However, this programme is project based, so it is left to be seen whether the outcomes of the project will be taken on board at national level.

4. Conclusions

Sexual harassment has, in the author's opinion, been diffused by other offences and is not gendered but tackled as an issue of violence or bullying. This has led to it being viewed as a component under the umbrella of violence rather than a standalone issue. Some effort has been done at national level to deal with sexual harassment at place of work, however this is clearly insufficient. To date, as the Danish experience has shown, digitalisation has led to other means of harassment and not merely that related to place of work. It is time to reassess the definition of sexual harassment to reflect the reality of today's world.