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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF EMPLOYMENT AND LABOUR

NO. 896

20 AUGUST 2020

EMPLOYMENT EQUITY ACT, 1998 (ACT 55 OF 1998 AS AMENDED)**DRAFT CODE OF GOOD PRACTICE ON THE PREVENTION AND ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF WORK FOR PUBLIC COMMENT**

I Thembelani Waltermade Nxesi, Minister of Employment and Labour, hereby in terms of Section 54(2) of the Employment Equity Act, 1998 (Act No 55 of 1998 as amended), and on the advice of the Commission for Employment Equity (CEE), publish the Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work for public comment from the date of publication.

Written comments on the Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work should be submitted within 60 days of the publication of the notice in the Gazette to the following:

By post:**Department of Employment and Labour****Employment Equity Directorate****Attention: Innocent Makwarela****Private Bag X117****Pretoria****0001****By e-mail:**innocent.makwarela@lbaour.gov.zaniresh.singh@labour.gov.za

Any inquiries in relation to the Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work for public comment should be directed to Mr Innocent Makwarela at 012 309 4056 or Niresh Singh at 012 309 4034



MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 28 JULY 2020

**DRAFT CODE OF GOOD PRACTICE ON THE PREVENTION AND
ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF
WORK**

DRAFT CODE OF GOOD PRACTICE ON THE PREVENTION AND ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF WORK

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PREAMBLE

The South African Constitution protects the right to dignity, equality, and fair labour practices in terms of section 3(1) of the Bill of Rights. South Africa is committed to the elimination, prevention and management of Violence and Harassment, including gender-based Violence and Harassment in the world of work, with the aim to create safe workplaces that are free of Violence and Harassment.

Equity in the workplace is regulated and codified in the Employment Equity Act, 1998 (EEA). Section 54 of the EEA empowers the Minister of Employment and Labour to issue Codes of Good practice on the advice of the Commission of Employment Equity (CEE).

This Code of Good Practice is intended to address the prevention, elimination and management of Violence and Harassment that pervade the world of work, guided by the ILO Convention 190 and its Recommendation on eliminating and preventing Violence and Harassment in the World of Work, 2019; the Discrimination (Employment and Occupation) Convention 111 of 1958 (Convention 111) and The ILO Convention 151, relating to Occupational Health and Safety.

South Africa regards Violence and Harassment as a form of unfair discrimination that includes all forms of Violence and Harassment, Sexual harassment, Gender-based violence and Bullying. It is acknowledged that Violence and Harassment may include physical abuse, psychological abuse, emotional abuse, and sexual abuse. It also includes the use of physical force or power, threatened or actual, against oneself, another person or against a group or community, that either results in, or has a high likelihood of resulting in injury, death, physical and psychological harm, mal-development or deprivation. Violence and Harassment includes three types of violence: Self-directed Violence, Interpersonal Violence and Collective Violence.¹

¹ World Report on Violence and Health (WHO, 2019).

Violence and Harassment against women, men and LGBTQIA + persons in the world of work is an abuse of power. Violence and Harassment particularly affect workers in the most vulnerable work situations, who have poor access to labour rights such as freedom of association, collective bargaining, decent work, non-discriminatory practices, and access to justice.²

² UN Women and the ILO (2018)

ACRONYMS

BCEA	Basic Conditions of Employment Act, 75 of 1997
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
CONSTITUTION	The Constitution of the Republic of South Africa, Act 108 of 1996
CPA	Criminal Procedure Act. 51 of 1997
EEA	Employment Equity Act, 55 of 1998
LRA	Labour Relations Act, 66 of 1995
OHSA	Occupational Health and Safety Act, 85 of 1993
PAJA	Promotion of Administrative Justice Act, 3 of 2000
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act, 2000
PDA	Protected Disclosures Act, 26 of 2000
PFHA	Protection from Harassment Act, 17 of 2011
SORMA	Sexual Offence and Related Matters Act, 32 of 2007
ILC	International Labour Conference
ILO	International Labour Organisation

LGBTIQ+ Lesbian, Gay, Bisexual, Transgender, Intersex, Queer, Questioning, Asexual plus all other sexualities, sexes and genders not included (LGBTQIA+) persons.

1. DEFINITIONS

BULLYING means unwanted conduct in the workplace, which is persistent or a single incident which is serious and insults, demeans, humiliates, lowers self-esteem or self-confidence or creates a hostile or intimidating environment or is calculated to induce by submission or by actual or threatened adverse consequences, which includes the abuse of coercive power by either an individual or a group of individuals in the internal or external workplace or by an external client.

CYBER BULLYING refers to the inappropriate use of technology, expression of psychological and sexual Violence and Harassment through email, text, cartoons, memes, and web posts on any other form of online communication or electronic technology which has the same effect as conventional bullying. Cyberbullying/cyber harassment may take place inside or outside the physical workplace and includes online violence.

DISCRIMINATION means any act or omission, including a policy, law, rule, practice, condition, or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds, namely: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV & AIDS status; or any other ground where discrimination based on that other ground causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in section 6(1) of the EEA.

DOMESTIC VIOLENCE and HARASSMENT means intimate partner violence, family violence or domestic abuse, and includes physical, sexual, psychological, and economic violence, as well as coercive control, carried out by an intimate partner. This can include, for example control over domestic social interactions and autonomy,

- (c) sending, delivering, or causing the delivering of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant (s) or a related affected person(s) or leaving any such objects where they will be found by, given to, or brought to the attention of the complainant or a related person; or
- (d) amounts to harassment of the complainant(s) or a related affected person(s).⁵

INTIMIDATION means the (intentional) behaviour that "would cause a person of ordinary sensibilities" to fear injury or harm. It is not necessary to prove that the behaviour was so violent as to cause mean terror or that the victim was frightened.

MOBBING is a form of harassment by a group of people targeted at an individual. Like bullying, mobbing occurs when an individual is ridiculed, humiliated or otherwise targeted with hostile or harmful behaviours.

ONLINE VIOLENCE includes any act of Violence and Harassment that is committed, assisted or aggravated in part or fully by the use of Information and Communications Technology (ICT), such as mobile phones and smartphones, the internet, social media platforms or email.

PSYCHOSOCIAL RISKS refer to the psychosocial hazards and risks related to the structural or organizational features of a person's work. Psychological, physical, and sexual Violence and Harassment are considered psychosocial risks. Violence and Harassment is a potential work-related stress factor.

PSYCHOLOGICAL VIOLENCE AND HARASSMENT refers to the prejudicial effects such conduct has on the psychological integrity and well-being of the complainant.

⁵ Protection from Harassment Act. 2011, pg. 4.

SEXUAL GENDER-BASED VIOLENCE AND HARASSMENT refers to any sexual act or unwanted sexual comments, verbal or nonverbal advances, attention, proposition, coercion, threats of harm or physical force, by any person regardless of their relationship to the complainant (s) in any setting. It may be driven by power differences and perceived gender norms. It includes forced sex, sexual coercion and rape of adult and adolescent men and women, and child sexual abuse and rape.⁶

SEXUAL HARASSMENT means unwelcome conduct of a sexual nature that violates the rights of an employee, considering all the following factors:

- a) whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation
- b) whether the sexual conduct was unwelcome
- c) the nature and extent of the sexual conduct; and
- d) the impact of the sexual conduct on the employee.⁷

VICTIMISATION means the action of singling someone out for cruel or unjust treatment.

VIOLENCE AND HARASSMENT in the world of work as a single term refers to as “a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm and includes gender based Violence and Harassment.”⁸

VIOLENCE AND HARASSMENT RELATED TO GENDER-BASED VIOLENCE AND HARASSMENT means Violence and Harassment directed at persons because of their sex or gender or affecting persons of a sex or gender disproportionately and includes

⁶ National Strategic Plan on Gender-Based Violence & Femicide 2020-2030.

⁷ SA Code of Good Practice on the handling of Sexual Harassment Cases in the Workplace, 2015 p.3.

⁸ ILO Convention 190 concerning the elimination of Violence and Harassment in the World of Work, 190, 2019.

sexual harassment.⁹ This form of Violence and Harassment is rooted in unequal power relations between (and among) women and men, which reflects and reinforces the subordinate status of women in many societies.¹⁰ Anyone can be victim of such Violence and Harassment, including those who do not conform to gender norms or traditional societal expectations based on gender, for example, LGBTIQ+ persons.¹¹

VIOLENCE AND HARASSMENT RELATED TO PARENTAL RESPONSIBILITY

means a form of Violence and Harassment because of pregnancy, childbirth, surrogacy, maternity or parental leave, parental responsibility or a medical condition related to pregnancy or childbirth or surrogacy, or a worker because of family responsibilities.¹²

VIOLENCE AND HARASSMENT RELATED TO PROTECTED DISCLOSURE means Violence and Harassment related to protected disclosure (whistleblowing) and shall be read in terms of the definition of “occupational detriment” in the PDA. Section 51 of EEA as well as the PDA provide protection for workers against victimisation, retaliation or suffering an occupational detriment as a result of exercising a right in terms of the EEA or the PDA. Occupational detriment in the PDA should be read with section 186(2)(d) of the LRA and includes employer actions such as disciplinary action, dismissal, suspension, intimidation, failure, or refusal to promote and an adverse reference.

VIOLENCE AND HARASSMENT RELATED TO RACE OR ETHNIC OR SOCIAL ORIGIN means Violence and Harassment based on race or ethnic or social origin, and include conduct complained of as unwanted conduct, which was persistent or serious and demeans, humiliates or created a hostile or intimidating environment; or is

⁹ ILO Convention 190 on Violence and Harassment.

¹⁰ Cruz and Klinger, 2011.

¹¹ Handbook: UN Women and the ILO, p. 6.

¹² ILO, 2016 d, pg. 57.

calculated to induce submission by actual or threatened adverse consequences and is related to race or a characteristic with such group.

VIOLENT CRIME OR CRIME OF VIOLENCE AND HARASSMENT is a crime in which an offender or perpetrator uses or threatens to use force upon a victim. This entails both crimes in which the violent act is the objective, such as murder or rape, as well as crimes where Violence and Harassment is a means to an end.

WORLD OF WORK (WoW) means a working environment in which persons are in some way or another associated with work and includes persons as reflected in Clause 3 of this Code. The world of work includes spaces that link workers to the workplace through technology.

WORKER means any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind.

2. SCOPE AND APPLICATION

- 2.1. This Code applies to any person to whom and to the extent to which the Employment Equity Act, 1998 applies.
- 2.2. This Code protects workers and other persons in the world of work, as well as other workers irrespective of their contractual status.
- 2.3. This Code applies to all sectors, whether private or public, both in the formal and informal economy, and whether in urban and rural areas.
- 2.4. The Code applies in the world of work occurring in the course of, linked with or arising out of work, including:
 - (i) Owners
 - (ii) Employers
 - (iii) Managers
 - (iv) Supervisors

- (v) Workers, including suspended workers
- (vi) Workers whose employment has been terminated
- (vii) Persons in training, including interns, apprentices and learnerships
- (viii) Volunteers
- (ix) Job seekers and job applicants
- (x) Clients
- (xi) Suppliers
- (xii) Contractors; and
- (xiii) others having dealings with the organisation.

2.5. This Code also applies to the world of work occurring in the course of, linked with or arising out of work, including, but not limited to:

- (a) In the workplace, including public and private spaces where they are a place of work.
- (b) In places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities.
- (c) During work-related trips, travel, training, events, or social activities.
- (d) Through work-related communications, including those enabled by information and communication technologies.
- (e) In employer-provided accommodation; and
- (f) When commuting to and from work.¹³

3. LEGAL FRAMEWORK

3.1. The International Labour Organisation (ILO) Convention, 190 and its Recommendation concerning the elimination of violence and harassment in the world of work obliges member states to adopt, in accordance with national laws and circumstances and in consultation with representative employers' and workers' organizations, an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work.

¹³ ILO Convention, 190, 2019.

- 3.2. Section 9 (2) of the Constitution of the Republic of South Africa (the Constitution) states that, "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."
- 3.3. Section 9 (3) of the Constitution states that, "the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."
- 3.4. Furthermore, Section 9 (4) of the Constitution states that, "no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."
- 3.5. Section 5 of the Employment Equity Act, 1998 (EEA) requires employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.
- 3.6. Section 6(1) of the EEA states that, "no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."
-
- 3.6. Section 6(3) of the Employment Equity Act states that, "Harassment of an employee is a form of unfair discrimination and is prohibited on anyone, or a combination of grounds of unfair discrimination in section 6 (1) of the EEA."
- 3.7. Section 60 (1) of the EEA prescribes the liability of employers and states that, "If it is alleged that an employee, while at work, contravened a provision of this Act, or

engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer."

- 3.8. Section 60 (2) of the EEA states that, "the employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act."
- 3.9. Section 60 (3) of the EEA states that, "If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision."
- 3.10. Furthermore, Section 60 (4) of the EEA states that, "Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act."
- 3.11. This Code adopts the term "Violence and Harassment" as a single term.
- 3.12. This Code must be read in conjunction with relevant Labour Related statutes as well as all other National statutes dealing with Violence and Harassment such as:
- (a) Employment Equity Act, No. 55, of 1998 as amended
 - (b) Employment Equity Amendment Act, No. 47 of 2013
 - (c) Employment Equity Regulations of 2014 as amended
 - (d) Labour Relations Act, No. 66 of 1995 as amended
 - (e) National Minimum Wage Act, No. 9 of 2018
 - (f) Occupational Health and Safety Act, No. 85 of 1993 as amended
 - (g) Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 as amended.
 - (h) The Protection from Harassment Act 17 of 2011
 - (i) The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA)
 - (j) Employment Services Act, Act No. 4 of 2014; and

(k) The Protected Disclosures Act 26 of 2000.

3.13. This Code is issued in terms of section 54 of the Employment Equity Act and must be read and understood in conjunction with the EEA and other Codes of Good Practice issued in terms of this Act.

4. OBJECTIVES OF THE CODE

4.1. The objectives of this Code are to:

4.1.1. provide a framework and clarity on the interpretation and implementation of the Employment Equity Act pertaining to the prevention and elimination of Violence and Harassment including Gender-based Violence and Harassment.

4.1.2. provide guidelines to employers, workers, employer organisations and unions on the prevention and elimination of Violence and Harassment, including Gender-based Violence and Harassment as a form of unfair discrimination; and

4.1.3. guide human resource policies and practices related to Violence and Harassment, including Gender-based Violence and Harassment that are based on equity, dignity, health and safety and non-discrimination.

5. GUIDING PRINCIPLES

5.1. The following key principles guide the conventionalisation and implementation of strategies to prevent and eliminate Violence and Harassment in the world of work:

5.1.1. Workplaces should be free of Violence and Harassment. Employers have a duty to remove all forms of unfair discrimination in terms of s 5 of the EEA.

- 5.1.2. Employers are responsible for providing such information, instructions and training as may be necessary to ensure, as far as reasonably practicable, a working environment that is safe and without risk to health (physical and psychological health) for all employees creating and maintaining a working environment in which the dignity of all employees is respected and protected.
- 5.1.3. A workplace culture should be created and maintained wherein complainants and/or other persons affected by Violence and Harassment, including gender-based violence may bring a complaint without fear of reprisal, with the assurance that their complaints are not trivialised or ignored.
- 5.1.4. All Employers, employees, employer organisations and trade unions are required to proactively refrain from committing acts of Violence and Harassment, including Gender based Violence and Harassment.
- 5.1.5. All employers, employees, employer organisations and trade unions have a role to play in contributing towards creating and maintaining a working environment in which Violence and Harassment including gender-based Violence and Harassment is regarded as unacceptable.
- 5.1.6. Employers, employees, employer organisations and worker unions should attempt to ensure that persons such as clients, suppliers, job applicants and others who have dealings with the employer are not subjected to Violence and Harassment including Gender based violence by the employer or its employees, nor perpetrate Violence and Harassment against employees of the employer.
-
- 5.1.7. Employers, employees, employer organisations and trade unions should take appropriate action in accordance with this Code where instances of Violence and Harassment including Gender -based violence harassment occur in the world of work. ¹⁴

¹⁴ SA Code of Good Practice on the Handling of Sexual Harassment Code, 2005.

6. VIOLENCE AND HARASSMENT IN THE WORLD OF WORK

- 6.1. This Code includes various forms of Violence and Harassment and the manifestations thereof but is not limited to the forms of Violence and Harassment specifically included in this Code.
- 6.2. Violence refers to the intentional use of physical force of power, threatened or actual, against oneself, another person, or against a group or category of persons that either results in, or has a high likelihood of resulting in injury, death, psychological harm, under-development or deprivation.
- 6.3. Violence and Harassment is a form of unfair discrimination that includes sexual harassment, racial harassment, harassment related to parental responsibility, gender, and gender-based violence.
- 6.4. Bullying is considered a form of Violence and Harassment and is a violation of the right to dignity. The Code is guided by Section 6 (3) of the EEA in its interpretation in the light of the general prohibition of unfair discrimination intended by section 9 (3) of the Constitution and Section 186 (2) of the LRA which covers unfair conduct relating to promotion, demotion, training or relating to the provision of benefits which may be areas of manifestations of workplace bullying.

6.5. Categories of violence and harassment

6.5.1. Violence and Harassment generally falls into the following three broad categories:

- (a) Self-directed Violence (violence against oneself).
- (b) Interpersonal Violence (violence against another person); and
- (c) Collective Violence (group or community violence).

6.5.2. Violence and Harassment may include one or more of the following:

- (a) **Physical assault**, as well as a range of verbal or non-verbal threats and abusive behaviours, which may be sexualised and/or rooted in unequal power relations.
- (b) **Discrimination related Violence and Harassment** affecting workers in the most vulnerable situations, including women, LGBTQIA+ workers and racialised workers, who experience multiple forms of discrimination and are disproportionately affected by Violence and Harassment at work.
- (c) **Gender-based violence** affect both women and men and can manifest itself in various forms. All genders could be complainants of such Violence and Harassment, particularly if they do not conform to societal expectations of masculinity. Gender-based Violence and Harassment of a sexual nature, may be reported in world of work, often because of the discriminatory social norms and structures that reinforce power inequalities based on gender.
- (d) **Violence and Harassment** that takes place away from the traditional workplace, for example at social events, conferences, training courses or meetings related to work, in the home or workplace of clients or when work takes place away from the workplace and involves contact with the public. It also includes travel during business hours and travel to and from work.
- (e) **Working with clients or the public** exposes some workers to a higher risk of Violence and Harassment, e.g. working in night-time services such as bars and cafes where alcohol is consumed, in policing or criminal justice operations, in front-line first responder emergency services, in situations where money or prescription drugs are handled, where care and education services are provided, and where work is carried out in isolated locations, at unsocial hours or in mobile locations, including but not limited to hotel workers, bar attendants, waitresses, nurses, social care workers, teachers and teaching assistants, and shop workers.
- (f) **Domestic Violence and Harassment** impacting the world of work, include intimate partner violence, family violence or domestic abuse includes

physical, sexual, psychological, and economic violence, as well as coercive control, carried out by an intimate partner. This can include, for example control over partner's social interactions and autonomy, control of children and parenting, verbal, emotional, economic control, and threats of abuse and violence, which may have an impact on the workplace and vice versa.

7. MAIN FORMS OF VIOLENCE AND HARASSMENT

7.1. Sexual Violence and Harassment

7.1.1. Sexual Violence and Harassment in the world or work is a form of unfair discrimination that is prohibited on one or more grounds, including sex, gender, and/or sexual orientation. Same-sex harassment can amount to discrimination based on sex, gender, and sexual orientation.¹⁵

7.1.2. Sexual Violence and Harassment" means directly or indirectly engaging in conduct that the perpetrator knows or ought to know is not welcome, is offensive to the complainant and makes the complainant feel uncomfortable and interferes with work, causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably:

- (i) following, watching, pursuing, or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies, or happens to be.
- (ii) any unwelcome sexual attention, advances or proposals from a person who knows or ought reasonably to know that such attention is unwelcome.
- (iii) unwelcome explicit or implicit behaviour, suggestions, messages, advances, attention, proposals or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances which a reasonable person, having regard to all

¹⁵ SA Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, 2005.

the circumstances, would have anticipated that the complainant or related person would be offended, humiliated or intimidated, (implied or expressed), promise of reward for complying with a sexually orientated request, proposal, advances or attention; or

- (iv) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request, advance, attention, or proposals.¹⁶

7.1.3. Forms of Sexual Violence and Harassment include:

(a) **Victimization** occurs where a complainant (s) or affected person(s) is victimized or intimidated for failing to submit to sexual advances, attention or proposal.

(b) **Quid pro quo harassment** occurs where a person such as an owner, employer, supervisor, manager, member of management or co-employee, influences or attempts to influence an employee's employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances.¹⁷

(c) **Sexual Favouritism** is a form of quid pro quo harassment and occurs where a person in authority in the workplace rewards only those who responds to sexual advances. Those who are not approached for sexual favours are not harassed but may be discriminated against.

(d) **Hostile working environment** occurs when a person is deprived of their dignity but not of any tangible benefit. The ongoing work environment has a negative impact on the complainant and constitutes a barrier to sexual equality.¹⁸ Hostile working environment harassment includes

¹⁶ Protection from Harassment Act, 2011, pg. 4

¹⁷ SA Code of Good Practice on Sexual Harassment in the LRA, 1998 – repealed in December 2018.

¹⁸ Le Roux, p.37.

conduct that creates an intimidating, hostile or humiliating working environment.

7.1.4. Factors to be considered¹⁹ in Sexual Violence and Harassment

7.1.4.1. Unwelcome conduct:

- (a) There are different ways in which an employee may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator or indicating that it constitutes inappropriate conduct.
- (b) Previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be welcome.
- (c) Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend.

7.1.4.2. Nature and extent of the conduct:

- (a) The unwelcome conduct must be of a sexual nature, and includes physical, verbal, or non-verbal conduct.
- (b) Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault and

¹⁹ Currently the factors are conflated with the words "test" and does not address subjective or objective test or reasonable victim test.

rape, as well as strip search by or in the presence of the opposite sex.

- (c) Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text.
- (d) Non-verbal conduct includes unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.
- (e) Sexual harassment may include, but is not limited to, victimization, hostile work environment, *quid pro quo* harassment and sexual favouritism.
- (f) A single incident of unwelcome sexual conduct may constitute sexual Violence and Harassment.

7.1.4.3. Impact of the conduct:

- (a) The conduct should constitute an impairment of the employee's dignity, taking into account:
 - (i) circumstances of the employee; and
 - (ii) the respective positions of the employee and the perpetrator in the workplace.
 - (iii) A single incident of unwelcome sexual conduct may constitute sexual Violence and Harassment.

7.1.4.4. The test to be applied for Sexual Violence and Harassment:

- (a) The subjective feelings of the complainant should be evaluated against the objective standard of a “reasonable person/complainant” test which involves how the reasonable person would have reacted in the circumstances.
- (b) Sexual attention becomes sexual Violence and Harassment when:
 - (i) The behaviour is persistent in, although a single incident of harassment can constitute sexual harassment; and/or
 - (ii) recipient has made it clear that the behaviour is considered offensive; and/or
 - (iii) The perpetrator knows or ought to have known that the behaviour is regarded as unacceptable.

7.2. RACIAL, ETHNIC OR SOCIAL ORIGIN VIOLENCE AND HARASSMENT

7.2.1. Racial Violence and Harassment is a form of racial discrimination and it is prohibited by section 6(1) of the EEA.

- (a) Racial Violence and Harassment is unwanted conduct which is persistent or a single incident which is serious demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.
- (b) Racial Violence and Harassment shall include, direct or indirect behaviour which involve issues such as racist verbal and nonverbal conduct, remarks, abusive language, racist name calling, offensive behaviour gestures and racist cartoons, memes, or innuendos.

7.2.2. Forms of Racial, Ethnic, Social Violence and Harassment may include:

- (a) Abusive Language and racist jokes, cartoons, or memes
- (b) Racially offensive written or visual material, including cyber harassment
- (c) Racist name calling and/or negative stereotyping impacting dignity
- (d) Offensive behaviour in the form of open hostility to persons of a specific racial or ethnic group
- (e) Subtle or blatant exclusion from workplace interaction and activities
- (f) Marginalisation; and:
- (g) Threatening behaviour, which intimidates a person and creates a hostile environment.

7.2.3. Factors to be considered in Racial Violence and Harassment:

- (a) Whether the language or conduct complained of is abusive
- (b) Whether the language or conduct complained of impairs the dignity of the complainant(s)
- (b) Whether the language or conduct is directed at a particular employee or employees
- (c) The level of malice
- (d) The extend and degree of abuse or impairment to dignity; and
- (e) The impact of the conduct.

7.2.4. The test to be applied for Racial Violence and Harassment includes:

-
- (a) Racial Harassment has to be assessed objectively with reference to the reaction of the normal or reasonable person.

 - (b) To establish racial Violence and Harassment based on race or ethnic origin, it has to established on a balance of probabilities that the conduct complaint of:

- (i) was unwanted conduct, which
- (ii) was persistent or serious,
- (iii) demeaned, impaired dignity, humiliated, or created a hostile or intimidating environment or
- (iv) was calculated to induce submission by actual or threatened adverse consequences and
- (iii) was related to race, ethnic origin, or a characteristic with such group.²⁰
- (v) whether a perpetrator would have spoken the words or behaved in the manner complained of towards the complainant but for the complainant's race or ethnic origin.
- (vi) how the alleged perpetrator treats other persons not of the complainant's racial group or ethnic origin, even if the conduct complained of is race-neutral and whether language or other conduct is considered Violence and Harassment might depend on the circumstances; and the motives of the perpetrator
- (vii) The impact of the Violence and Harassment; and
- (viii) Whether the language or conduct is Violence and Harassment might depend on the circumstances of the particular circumstances and whether the language and conduct are directed at a particular person(s) and is insulting, abusive and/or derogatory.

7.3. WORKPLACE BULLYING

7.3.1. Workplace Bullying is unwanted conduct which is persistent or a single incident which is serious and demeans, humiliates, or creates a hostile or intimidating environment, or is aimed to induce, through submission or through actual or threatened adverse consequences. It includes any unfavourable or offensive conduct which has the effect of creating a hostile workplace environment.

²⁰ Le Roux, R, Roycroft, A & Orleyn, T (2010)

- 7.3.2. Section 6 (3) of the EEA should be interpreted in the light of the broader prohibition of unfair discrimination intended by section 9 (3) of the Constitution to include workplace bullying.
- 7.3.3. Section 186 (2) of the LRA covers unfair conduct relating to promotion, demotion, training or relating to the provision of benefits which may be areas of manifestations of workplace bullying.
- 7.3.4. Workplace bullying includes either physical, verbal, or psychological acts.
- 7.3.5. The terms “harassment”, “bullying” or “mobbing” are interpreted interchangeably and do not differentiate between physical, psychological, and non-physical conduct.
- 7.3.5. Workplace Bullying as a form of Psychological Violence and Harassment may be perpetrated through repeated behaviour, of a type, which alone may be relatively minor, but which cumulatively can become a very serious form of Violence and Harassment”.²¹
- 7.3.6. Workplace Bullying and mobbing includes the abuse of coercive power by either an individual or a group of employees/colleagues in the internal or external workplace.
- 7.3.7. Workplace bullying includes a wide range of insulting, demeaning or intimidating behaviour that lowers the self-esteem or self-confidence of an employee including:

-
- (a) **Harassing, offending, professionally or socially excluding** someone or negatively affecting someone’s work tasks.

²¹Di Martino, 2003, p. 4.

- (b) **Physical bullying:** Examples of physical bullying include physical attack, simulated violence, or gestures (such as raising a fist as if to strike or throwing objects near a person).
- (c) **Tangible/material bullying:** Using formal power (i.e. title, position, or supervisory control) or material leverage (i.e. financial, informational, resource or legal) as forms of intimidation, threat, harassment, and/or harm or to dominate and control the complainant.
- (d) **Verbal bullying:** may include threats; shaming; hostile teasing; insults; constant negative judgment and criticism; or racist, sexist, or LGBTIQA+ phobia language.
- (e) **Passive-aggressive or covert bullying:** Examples of passive-aggressive and covert bullying include negative gossip, negative joking at someone's expense, sarcasm, condescending eye contact, facial expression or gestures, mimicking to ridicule, deliberately causing embarrassment and insecurity, invisible treatment, marginalisation, social exclusion, professional isolation, and deliberately sabotaging someone's dignity, well-being, happiness, success and career performance.

7.3.8. Examples of this form of Violence and Harassment may include but not limited to:

- (i) Slandering or maligning an employee.
- (ii) Deliberately withholding work-related information or supplying incorrect information.
- (iii) Deliberately sabotaging or impeding the performance of work.
- (iv) Ostracising, boycotting, or disregarding the employee.
- (v) Persecution in various forms, threats, and the inspiration of fear and degradation.
- (vi) Deliberate insults, being hypercritical or negative response or attitude or ridicule.

- (vii) Supervision or surveillance of an employee without their knowledge and with harmful intent.
- (viii) Offensive administrative punitive sanctions without objective cause, explanation, or efforts to problems solving.
- (ix) Intolerance of psychological, medical, disability or personal circumstances.
- (x) Demotion without justification.
- (xi) Humiliation and demeaning conduct.
- (xii) Abuse of disciplinary proceedings.
- (xii) Wrongful conduct causing harm.
- (xiv) Pressure to engage in illegal activities.
- (xvi) Recommendation to resign; and
- (xvii) Spreading of rumours maliciously.

7.3.9. Factors to be considered in Workplace Bullying:

- (a) Interpersonal conflict may not be bullying if the incident is an isolated event or if two parties of approximately equal strength are in conflict.²²Bullying may be an escalating process in the course of employment in which the complainant ends up in an inferior position and becomes the target of systematic negative social acts.
- (b) Workplace Bullying may take the “form of aggressive behaviour in which someone systematically and repeatedly causes another person injury or discomfort.”²³
- (c) Workplace bullying is a form of Psychological Violence and Harassment may be associated with emotional abuse and it constitutes unwelcome,

²² Di Martino and Musri, 2001, p. 179.

²³ The American Psychological Association.

any employee who has reason to believe that the information concerned shows or tend to show improprieties.”²⁵

- (b) Employees have the right to disclose information about any criminal and other irregular conduct in the workplace, without fear of reprisals by their employer.
- (c) No employee may be subjected to any occupational detriment by their employer on account or partly on account of making a protected disclosure as defined in s3 of the PDA.
- (d) The experience of a whistle-blower who is subjected to an occupational detriment is regarded as similar to an employee subjected to discrimination.
- (e) In terms of this Code the PDA must be read with sections 186(2) (d) and 187 (1) (b) of the Labour Relations Act which includes subjecting an employee to an occupation determined or allegations of occupational detriment as defined in the PDA as an unfair labour practice.

7.4.2. Factors to consider in Violence and Harassment related to Protected Disclosure:

7.4.2.1. The issue to be considered is whether the whistle-blower deserves protection in terms of the four stages of the PDA i.e.

- (a) **Stage one:** The meaning of disclosure – The definition of “disclosure” must be read with the definition of “impropriety” in terms of s 1 of the PDA. The interpretation of “impropriety”

²⁵ Protected Disclosures Act 26 of 2000.

includes seven categories listed in the definition of protected disclosure:

- (i) Committing a criminal offence.
- (ii) Failure to comply with any legal.
- (iii) Whether there has been a miscarriage of justice.
- (iv) Endangering of the health or safety of an individual.
- (v) Damaging the environment.
- (vi) Unfair discrimination; and
- (vii) The deliberated concealment of any of the above.

(b) **Stage two: Whether the disclosure is protected:**

- (i) A disclosure is protected if made in the prescribed manner to one of the persons or bodies identified in the PDA.
- (ii) **Whether the disclosure was made in good faith:** This depends on the motives of the whistle-blower, if a disclosure is exclusively made to embarrass the employer, the requirement of Good faith is unlikely to be met. (CWU v Mobile Telephone Networks (Pty) Ltd 2003 8 BLLR741 (LC).
- (iii) **Disclosure to the employer:** Disclosures must be made in accordance with any prescribed employer procedures or authorised by the employer of the employee. If there is no procedure the disclosure will be protected if it was made to the employer.
- (iv) **General disclosure:** Disclosures should be made to persons other than those prescribed in section 5 to 8 of the PDA: Disclosure must be filtered through the three filters set out in terms of s 9 (1), 9 (2) and 9 (3) of the PDA.

- (b) **Stage three:** Whether the employee has been subjected to an occupational detriment.
- (i) The disclosure should be the principal reason for the occupational detriment.
 - (ii) The definition of an occupational detriment as defined in s1 of the PDA applies refers to disciplinary actions, dismissal, suspension, demotion, harassment, intimidation, transfer against the employee's will, refusal to promote, altering conditions of employment, refusal to provide a certificate of service, or any other listed conduct as forms of harassment.
 - (iii) To claim protection of the PDA or the benefit of an automatically unfair dismissal terms of section 187(1) (b) of the LRA, the employee must be able to show that the disclosure was the reason for the dismissal. (*Sekgobela v State Information Technology Agency (Pty) Ltd* (2008) 29 (ILJ 1995 (LC) (32)).
- (d) **Stage four: What remedy should be awarded.**
- (i) A complainant may proceed in terms of the LRA i.e. either as an unfair labour practice or an unfair dismissal claim.

7.4.3. The test for Protected disclosure includes:

-
- (a) The PDA should be read with section 186 (2) (d) of the LRA.
 - (b) Occupational detriment in the PDA, Act 26 of 2000 includes employer actions such disciplinary action, dismissal, suspension, intimidation, or refusal to promote and a detrimental work adverse reference. (*Protected Disclosures Act 26 of 2000*).

- (c) A protected disclosure will be protected if it is made in the prescribed manner to one of the persons or bodies as identified in the PDA. These include a legal advisor, an employer, a member of Cabinet of the Executive Council of a Province, the Public Protector or Auditor General.
- (d) The information should either concern the employer of the employee making the disclosure or another employee of that employer.
- (e) The nature of the information must be such that the whistle-blower has reason to believe that it is showing or tends to show one of the listed improprieties as listed under paragraph (e).
- (f) The reasonableness of the belief must relate to the information being substantially true.
- (g) There should be some factual basis upon which the reason to believe the complainant is based.
- (h) Reporting of a mere suspicion without reasonable facts is not sufficient as the disclosure has to relate to impropriety”

The listed proprieties include:

- (i) committing a criminal offence.
- (ii) failure to comply with any legal obligations.
- (iii) miscarriage of justice.
- (iv) endangering of health or safety of an individual.
- (v) damaging the environment.
- (vi) unfair discrimination
- (vi) the deliberate concealment of any of the above.²⁶

²⁶ Adapted from Le Roux, R, Rycroft, Orleyn, T (2010).

8. THE PREVENTION, ELIMINATION AND MANAGEMENT OF VIOLENCE AND HARASSMENT

- 8.1. Employers are under obligation in terms of Section 60 of the Act to take proactive and remedial steps to prevent all forms of Violence and Harassment in the World of Work.
- 8.2. Employers are required to have clear rules, policies and procedures prohibiting all forms of Violence and Harassment and other forms of unfair discrimination in the world of work or Violence and Harassment which impeded the dignity, health, and safety of all workers.
- 8.3. The policy should make it clear that all forms of Violence and Harassment are forms of unfair discrimination or violation of dignity, health and safety, which are regarded by the employer as a very serious form of misconduct, which may result in a dismissal.²⁷
- 8.4. Policies and Procedures adopted by an employer should provide a clear understanding of the employer's position regarding the prevention and elimination of the various forms of Violence and Harassment in the world of work.
- 8.5. Employers should ensure the policy and procedures are communicated effectively to all workers.
- 8.6. Policies and procedures related to the elimination of Violence and Harassment in the world of work should substantially comply with the provisions of this code and include at least the following:

8.6.1. Violence and Harassment is a form of unfair discrimination on the basis of any listed or arbitrary ground and/or conduct which infringes on the rights and dignity, health and safety of affected person(s) and /or complainant(s) in the world of work.

²⁷ HR-CODE & HIV CODE

- 8.6.2. Violence and Harassment in the world of work will not be permitted or condoned.
- 8.6.3. The affected person(s) and / or complainant(s) have the right to lodge a complaint to the employer concerning any matter related to Violence and Harassment without victimisation or fear of reprisal.
- 8.6.4. Procedures to be followed by an affected person (s) and / or complainant (s), including referrals involving affected persons who are not workers, when Violence and Harassment has already occurred, should be outlined in the policy.
- 8.6.5. The obligations of an employer are to investigate complaints in accordance with the provisions of section 60(2) of the Employment Equity Act, considering the impact and the privacy of the affected person(s) and / or complainant(s).

9. PROTECTION AND PREVENTION MEASURES

- 9.1. This section of the Code provides employers, workers, employers' organisations, and worker Unions with appropriate measures to prevent Violence and Harassment, including Gender Based Violence in the World of Work.

9.2. Prevention and Awareness Programmes

~~9.2.1. Employers must implement awareness training initiatives to educate workers at all levels about Harassment and Violence and re-enforce and maintain compliance through ongoing awareness programmes.~~

9.2.2. Prevention and awareness programmes must ensure that:

- (a) communication campaigns are conducted in the workplace to clarify the understanding of the different forms of Violence and Harassment in the

world of work, use appropriate methods and relevant expertise in accessible formats

- (b) assessments of the current situation pertaining to the elimination of Violence and Harassment in the world of work; are conducted in consultation with workers and worker unions
- (c) effective occupational health and safety measures are adopted and implemented, including harm-reduction strategies
- (d) effective measures are in place to reduce or mitigate the risk of Violence and Harassment from occurring in the world of work
- (e) prevention programmes are developed and implemented in consultation with all relevant stakeholders
- (f) information and access to counseling is available.
- (g) training of workers on preventing Violence and Harassment from occurring in the world of work, including anger management.
- (h) monitoring and evaluation take place.
- (i) Training and awareness programmes must be incorporated in a formal ~~written policy like a code of conduct with an appropriate dispute resolution~~ procedure that is well communicated and displayed in prominent places.²⁸

²⁸ HR CODE

- (j) Employers should address its obligation to eliminate Violence and Harassment in the workplace through measures such as consultation, awareness raising, training and support, enforcement, monitoring and evaluation and by making appropriate referrals, which may include parallel processes involving labour, criminal, equality, and / or civil law.
- (k) Any remedy to address Violence and Harassment must be pre-empted by a common understanding of what a person ought to know and the rules and procedures to be followed by affected person (s) and / or complainant (s), such as:
 - (i) Adopting and implementing policies procedures and practices that seek to eliminate Violence and Harassment in the world of work.
 - (ii) Adopting and implementing a Code of Conduct for the elimination of Violence and Harassment in the world of work; and
 - (l) Detailing procedures to follow by affected person(s) and / or complaint (s) and other stakeholders involved in the world of work including:
 - (i) investigation referrals procedures for workers
 - (ii) referrals, reporting mechanisms and remedies for non-workers and stakeholders who are not workers.
 - (iii) accessing relevant expertise for the conducting of investigations.
 - (iv) dispute resolution mechanisms for workers and for other stakeholders involved in the world of work.
- (v) ~~dispute resolution jurisdiction in relation to the CCMA and the Labour Courts~~

9.2.3. The dispute system for the EEA, the LRA and OHSA shall apply. Violence and Harassment should be managed in terms of the relevant cross-referred applicable legislation and codes.

9.2.4. A claim in terms of the Promotion of Equality and Prevention of Unfair Discrimination applies to persons not covered by the EEA and LRA.

9.2.5. PEPUDA applies to alleged perpetrators who fall outside of the employment relationship having dealings with the business and fall within the scope of this Code.

9.2.6. PDA applies to all whistle-blowers²⁹ protection against victimisation of or retaliation against affected persons (s) and / or complainant (s); and record keeping, legal, social, medical, and administrative support.³⁰

10. TREATMENT, CARE AND SUPPORT

10.1 Treatment, care, and support programmes must ensure that:

- (a) health and safety measures are clear on the interventions required and the procedures to be followed in managing different forms of Violence and Harassment.
- (b) eliminating Violence and Harassment in the world of work should be included in the workplace Occupational Health and Safety strategy.
- (c) employers and workers are jointly responsible for contributing towards a safe and healthy working environment.
- (d) records of available security, police, health and safety and other support services are kept.
- (e) appropriate referrals, for counselling and any other appropriate interventions are made.
- (f) all programmes on treatment, care and support are clearly communicated.

²⁹ Refer to s6(3); s10; s11 of the EEA ; s141,s186(2), s187(1)(f), s191, s191 (5) (a), s191 (5)(b)(i); of the LRA: , as well as s20 of PEPUDA; unfair labour practice in terms of the Constitution; and a claim of Delict.

³⁰ ILO Convention, 190, 2019.

- (g) programmes of care and support include measures to reasonably accommodate those who are negatively impacted.
- (h) there is no unfair discrimination against any group or individual.
- (i) where treatment, care and support services are not possible or available, workers must be informed about the location of available external services.

10.2. Appropriate measures to mitigate the impact of domestic violence in the world of work could include:

- (a) leave victims of domestic violence;
- (b) flexible work arrangements and protection for victims of domestic violence;
- (c) temporary protection against dismissal for victims of domestic violence; as appropriate, except on grounds unrelated to domestic violence and its consequences;
- (d) the inclusion of domestic violence in workplace risk assessments;
- (e) a referral system to public mitigation measures for domestic violence, where they exist; and
- (f) awareness-raising about the effects of domestic violence.

11. PRIVACY AND CONSENT

11.1 Employers and workers must ensure that complaints procedures and disciplinary action related to Violence and Harassment are investigated and managed which ensures privacy and the rights of the affected person(s) and / or complainant (s) are upheld with due consideration to privacy and confidentiality by taking the following into account:

- (a) An employer can only be held liable for keeping information private and confidential which is within its control.

- (b) Respecting the sensitivity of information on record and being recorded.
- (c) Keeping of records in a safe and secure place.
- (d) Limiting partially or completely, as appropriate, access to information, particularly to affected person(s).
- (e) Acquiring consent, preferably in writing, for the sharing of private information.
- (f) Developing, communicating, and implementing a clear policy on privacy and confidentiality.
- (g) Monitoring, evaluation and review of policy governing privacy and confidentiality.
- (h) In cases of Violence and Harassment, particularly GBV, management, workers and the parties concerned must endeavour to ensure confidentiality in the disciplinary inquiry.
- (i) Only appropriate members of management as well as the complainant(s), affected person(s), representatives, alleged perpetrator, witnesses, and interpreter, if required, should be present at the disciplinary inquiry; and
- (j) Employers are required to disclose to the complainant(s), affected person(s), the perpetrator, and/or their representatives such information as may be reasonably necessary to enable the parties to prepare for any proceedings in terms of this Code.

12. PROGRAMMES, TRAINING AND AWARENESS

12.1. Employers, worker unions and workers must develop and effectively implement appropriate integrated gender sensitive strategies, including training and awareness programmes for the elimination of Violence and Harassment in the world of work by:

12.1.1. Assessing the impact of Violence and Harassment in the World of Work

12.1.2. By assessing the environment involving the world of work, including risk profiling and resource implications, and

12.1.3. Developing and implementing policies and programmes that are free from unfair discrimination and promote human rights and dignity.

12.1.4. Developing and implementation of awareness and compliance programmes. The following should be considered for the development and implementation of an effective programme:

- (a) Compliance with legal obligations
- (b) Method of delivery and tracking thereof
- (c) Management commitment
- (d) Consultation with relevant stakeholders
- (e) Prevention and Wellness, including treatment
- (f) Resources, including human, financial, and operational resource allocation; and
- (g) Policies and programmes must be informed by the outcomes of research and evidence and monitoring and evaluation.

12.2. Education, training, and information sharing to eliminate Violence and Harassment in the world of work should take the following into account:

12.2.1. Consultation and involvement of key stakeholders

12.2.2. Training and instructions to be provided in a clear, concise, and accessible format

12.2.2. Training, instructions, and guidance must be sensitive to gender, religious and cultural concerns

12.2.3. Up to date information must be used for education, training and awareness and informed decision-making

12.2.4. Proper record keeping; and

12.2.5. Monitoring and evaluation.

13. PROCEDURES IN MANAGING VIOLENCE AND HARASSMENT

- 13.1. Employers must develop clear procedures to deal with Violence and Harassment. These procedures should enable the immediate resolution of problems in a sensitive, efficient, and effective manner.
- 13.2. Reporting Violence and Harassment: Section 60(1) of the EEA provides that conduct in contravention of the Act must immediately be brought to the attention of the employer.
- 13.3. The word “immediately” shall mean, as soon as is reasonably possible in the circumstances and without undue delay, taking into account the nature of sexual harassment, including that it is a sensitive issue, that the complainant may fear reprisal and the relative positions of the complainant and the alleged perpetrator in the workplace.
- 13.4. Violence and Harassment may be brought to the attention of the employer by the complainant (s) or any other person(s) aware of the Violence and Harassment for example a friend, colleague or human resources official acting on the request of the complainant (s), where the complainant has indicated that he/she wishes the employer to be made aware of the conduct.
- 13.5. Where the Violence and Harassment are of a particularly serious nature, the complainant(s) should be encouraged to inform the employer directly.

13.6. Obligations of the employer

- 13.6.1. When complaints of Violence and Harassment has been brought to the attention of the employer, the employer should as soon as, reasonably possible:
- a) consult all relevant parties.
 - b) confer with all relevant parties
 - c) question all relevant parties

- d) interview all relevant parties; and
- e) seek information from all relevant parties

13.6.2. The purpose of this consultation is to investigate to obtain a comprehensive understanding of the circumstances and events relating to the complaint. This will enable the employer to:

- (a) take the necessary steps to address the complaint in accordance with this code and the employer's policy; and
- (b) take the necessary steps to eliminate the harassment.

13.6.3. The steps to be taken by the employer on receipt of a complaint by the complainant(s) or affected person(s), should include but not be limited to the following:

- (a) advising the complainant of the informal and formal procedures available to deal with the Violence and Harassment.
- (b) where reasonably practicable, offering the complainant advice, assistance and counselling including during any disciplinary enquiry that may be instituted.
- (c) following the procedures required in a manner that is procedurally and substantively fair.
- (d) providing advice and assistance
- (e) A complainant of harassment may require advice and assistance, including counselling; and
- (f) As far as is practicable, employers should designate a person outside of line management who complainants may approach for confidential advice and or counselling:
- (g) Such a person could be a person employed by the company to perform such a function, a worker union representative, a co-employee or a professional engaged to perform such activity
- (h) who have the appropriate skills and experience including counselling and labour relations skills; and who is properly trained and given adequate resources

- (i) who is responsible for coordinating all activities relating to Violence and Harassment complaint, including investigations, hearings, and reporting.

13.7. Advising the complainant of workplace procedures to deal with Violence and Harassment

13.7.1. When a complaint of Violence and Harassment is brought to the attention of an employer, such employer should:

- (a) immediately advise the complainant that there are either formal or informal procedures which could be followed to address the problem.
- (b) explain the formal and informal procedures to the complainant.
- (c) advise the complainant that they may choose which procedure should be followed by the employer, and that in certain limited circumstances, the employer may choose to follow a formal procedure even if the complainant does not wish to do so.
- (d) reassure the complainant(s) or affected person(s) there will not be any adverse consequences if they choose to follow either the formal or informal procedure; and
- (e) advise the complainant(s) or affected person(s) that the matter will be dealt with confidentially if the complainant so chooses.

13.8. Informal and Formal procedures

13.8.1. **Informal Procedures:** Complainant(s) of Violence and Harassment may choose to follow either of the following informal procedures:

- (a) the complainant(s) or another appropriate person(s) explains to the alleged perpetrator that the conduct complained of is not welcome, that it offends the complainant, makes the complainant feel uncomfortable, and that it interferes with work.
- (b) or an appropriate person approaches the alleged perpetrator, without revealing the identity of the complainant, and explains to the

perpetrator that certain forms of conduct constitute Violence and Harassment, are offensive and unwelcome, make workers feel uncomfortable and interfere with their work; and

- (c) An employer should consider any further steps, which can be taken to assist in dealing with the complaint.

13.8.2. Formal procedure:

- (a) A complainant(s) may choose to follow a formal procedure, either with or without first following an informal procedure.
 - (b) If a complainant chooses not to follow a formal procedure, the employer should still assess the risk to other persons in the workplace where formal steps have not been taken against the alleged perpetrator.
 - (c) In assessing such risk, the employer must consider all relevant factors, including the severity of the Violence and Harassment and whether the alleged perpetrator has a history of Violence and Harassment.
 - (d) If it appears to the employer after a proper investigation that there is a significant risk of harm to other persons in the workplace, the employer may follow a formal procedure, irrespective of the wishes of the complainant, and advise the complainant; accordingly, and
 - (e) The employer's Violence and Harassment policy and/or collective agreement should outline the following in respect of a formal procedure:
 - (i) with whom and how the complainant(s) should lodge a complaint.
-
- (ii) the internal complaint procedures to be followed, including provision for the complainant's desired outcome of the procedures.
 - (ii) time frames which will allow the complaint to be dealt with expeditiously.
 - (iii) that should the matter not be satisfactorily resolved by the internal procedures outlined above, a complainant of Violence

and Harassment may refer the dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). Similarly, an alleged perpetrator of Violence and Harassment may refer a dispute arising from disciplinary action taken by the employer to the CCMA; and

- (iv) that it will be a disciplinary offence to victimise or retaliate against a complainant who in good faith lodges a complaint of Violence and Harassment.

13.9. Disciplinary sanctions

13.9.1. The employer's Violence and Harassment policy should specify the range of disciplinary sanctions that may be imposed on a perpetrator.

13.9.2. The sanctions should be proportionate to the seriousness of the harassment in question, and should provide that:

- (a) warnings may be issued for minor instances of Violence and Harassment.
- (b) dismissal may ensue for continued minor instances of Violence and Harassment after warnings, or for serious instances of Violence and Harassment.
- (c) in appropriate circumstances a once off single incident of Violence and Harassment may result in dismissal; and
- (d) Alternatives to dismissal should be considered only in appropriate circumstances.

14. MONITORING AND EVALUATION

14.1. Monitoring and evaluating systems should provide the required information and need not be complicated.

14.2. Employers and workers should consider to:

- (a) design and implement a plan for monitoring and evaluation of strategies, policies, and programmes to eliminate Violence and Harassment in their environment involving the world of work
 - (b) identify the key elements needed for a monitoring and evaluation system
 - (c) select and make use of indicators that are specific, measurable, attainable, relevant, and time-bound; and
 - (d) gather and analyse both qualitative and quantitative information; and ensure effective communication thereof with stakeholders.
- 14.3. Employers in collaboration with the workers must establish monitoring and evaluation mechanisms for workplace programmes to track implementation and ensure an informed response.
- 14.4. The monitoring and evaluation strategies should consider and support the national monitoring and evaluation efforts to eliminate Violence and Harassment in broader society.
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