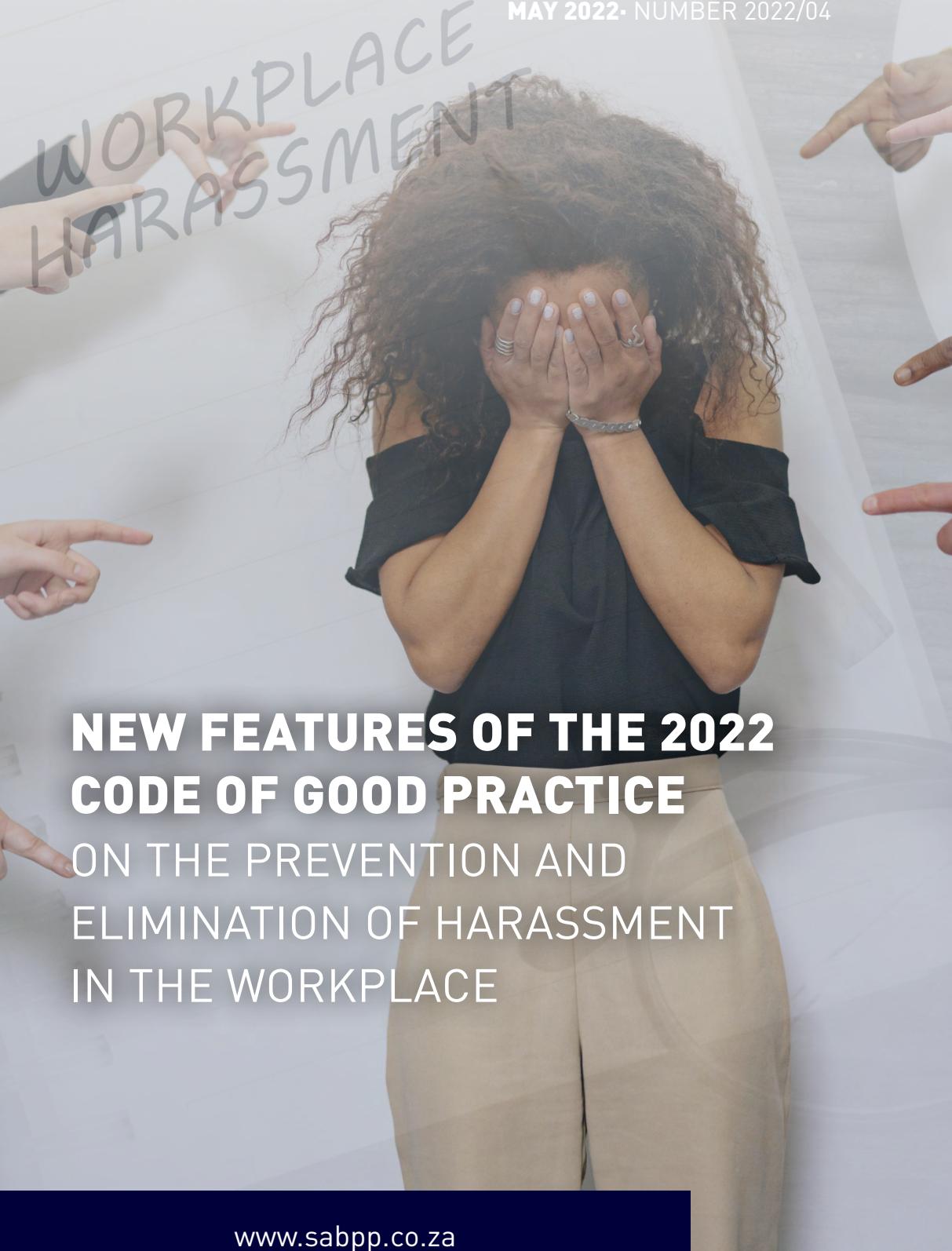


THE **SABPP™** **FACT SHEET**

MAY 2022- NUMBER 2022/04



**NEW FEATURES OF THE 2022
CODE OF GOOD PRACTICE
ON THE PREVENTION AND
ELIMINATION OF HARASSMENT
IN THE WORKPLACE**

INTRODUCTION

The International Labour Organisation (ILO) has become increasingly concerned over the last two decades about the increasing incidence of violence in the workplace, whether this is physical violence, sexual harassment, other forms of harassment or the insidious type of violence such as bullying and social exclusion. The ILO recognised that where violence is a feature of the workplace culture, workers are not able to enjoy security of personal dignity or personal safety and this has multiple effects not only on the victims, but also on work colleagues, the workplace in general and consequent negative impacts on productivity, morale and respect for the employer.

In South Africa, the CCMA and courts have regularly had to deal with workplace conflicts arising from racial attitudes as well as the continuing onslaught of gender-based violence including sexual harassment.

In 2019 the ILO adopted Convention 190, aimed at ending violence and harassment in the world of work. This has been ratified by the South African Government, and this means that our local legislation had to be brought into line with the principles of Convention 190. It was also a timely opportunity to update the 2005 Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace to take into account the development of case law in this area.

The new Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace was gazetted on 18th March 2022 and replaces in its entirety the 2005 Amended Code.¹

There are big changes in this Code, which has been extensively workshopped under the auspices of the Commission for Employment Equity and through Nedlac, and has been subjected to public comment over the last two years.

"This new Code is significant in providing consistency in definitions, and clarity in the elements and tests related to different forms of harassment and abuse of power in the world of work – it aims to guide the understanding of Harassment in its complexity and acknowledges the pervasive impact of Workplace bullying. The Code empowers employers and employees in dealing with the prevention and elimination of all different forms of harassment through its policies, practices, and procedures towards a dignified and equitable work environment."

Dr Annelie Gildenhuys

Employment Equity Commissioner and Director,
Aequitas Consultants

Please note that throughout this Fact Sheet, the actual text of the Code is put in inverted commas. There are some additional notes from the authors in square brackets and some words and phrases have been highlighted in bold for our emphasis.

The **2005** Code may be accessed here for reference:

**Employment Equity Act: Code of Good Practice:
Handling of Sexual Harassment Cases in Workplaces:
Amendment | South African Government (www.gov.za)**

The new **2022** Code may be accessed here:

**Employment Equity Act: Code of Good Practice on
the Prevention and Elimination of Harassment in the
Workplace | South African Government (www.gov.za)**

1. Some confusion existed for a number of years when the 1998 Code was not repealed at the same time as the 2005 Code was issued. This was cleared up in December 2018 when the 1998 Code was explicitly repealed.

COMPARISONS OLD CODE TO NEW CODE

The Code is dealt with in 2 parts – Part I on Substantive Issues and Part II on Procedural Issues. There are some major changes in Part I, while Part II derives mostly from the 2005 Code. The major changes in Part I are highlighted in this section of the Fact Sheet. The following section will deal with other changes in Part I which are concerned with clarification on some concepts following case law which interpreted various points in the previous Code and associated legislation. Following that, the minor changes in Part II are dealt with in the next section of this Fact Sheet.

1. EXTENSION FROM SEXUAL HARASSMENT TO HARASSMENT IN GENERAL

The new Code keeps the previous thrust of how to prevent incidents through awareness and education; and how to deal with complaints when they arise. This general approach is now applied to a much wider concept of harassment which now includes:

- “violence;
- physical abuse;
- psychological abuse;
- emotional abuse;
- sexual abuse;
- gender-based abuse;
- racial abuse.” (Para 4.2)

The Code states that this also includes “the use of physical force or power, whether threatened or actual, against another person or against a group or community “[our emphasis]. (Para 4.2) There is a general statement that “harassment is an abuse of power”, which particularly affects employees in vulnerable employment who have poor access to the exercise of their rights. (Para 4.3)

The inclusion of the idea that harassment in the workplace can be aimed at a particular group rather than only at an individual is quite a large step that employers need to be aware of.

The general statement about the abuse of power could presumably support a complainant who suffers harassment but is in some form of vulnerable employment (such as contract work), or has poor access to the exercise of his/her rights – this will give them grounds to approach the CCMA.

2. NEW SECTION ON RACIAL HARASSMENT

Paragraph 6 deals with Racial, Ethnic or Social Origin Harassment, and refers to conduct related to “a person’s membership or **presumed membership** of a group identified by one or more of the listed prohibited grounds or **a characteristic associated with such a group**. Racist conduct, including derogatory language, is contrary to the founding principles of the Constitution, in particular the values of non-racialism, dignity and equality.” (Para 6.1)

Provisions of paragraph 6 in general apply the same concepts as those contained in the section on Sexual Harassment, to Racial Harassment and therefore will not be expanded on here.

Paragraph 6.5 picks up the issue of racial innuendo and stereotyping, and the issue, which was determined in the important Constitutional Court judgment in the well-known ‘Bester’ case, that “when determining whether language or conduct is racial and derogatory, account must be taken of South Africa’s history of institutionalised racial discrimination which legitimised racial prejudice and the impact of the legacy of racial discrimination on the present. **The test to be applied in identifying whether language is racist is whether is it reasonably capable of conveying a racist meaning to the reasonable hearer.**”

Section 6.6 provides a list of what might be included as forms of racial harassment:

- 6.6.1 Abusive language and racist jokes, cartoons, or memes, including communications that amount to hate speech;
- 6.6.2 Racially offensive written or visual material, including on-line racial harassment;
- 6.6.3 Racist name calling or negative stereotyping impacting on a person’s dignity;
- 6.6.4 Offensive behaviour in the form of open hostility to persons of a specific racial or ethnic group;
- 6.6.5 Subtle or blatant exclusion from workplace interaction and activities and other forms of marginalisation; and
- 6.6.6 Threatening behaviour, which intimidates a person or creates a hostile work environment.

The test for Racial Harassment in paragraph 6.8 follows that for sexual harassment, in that a situation must be assessed objectively using the reasonable person approach. Paragraph 6.8.2 specifically states that “it has to be established on a balance of probabilities that the conduct complained of was related to race ...”.

There is an apparent omission in wording at the end of this paragraph which states, “An important factor for establishing racial harassment is whether a perpetrator would have spoken the words or behaved in the manner complained of towards the complainant” and leaves this sentence incomplete. The drafters of the new Code have confirmed to the author of this Fact Sheet that the sentence should be completed by the words “but for the complainant’s race or ethnic origin.”

3. NEW SECTION ON TYPES OF HARASSMENT

Paragraph 4.7 sets out extensively the various types of harassment which gives further description of the concept of harassment in paragraph 4.2. As section 4.7.5 states: "A wide range of conduct in the workplace may constitute harassment".

Harassment is considered under the headings of physical, verbal or psychological conduct.

Physical harassment includes physical attacks, simulated or threatened violence, or gestures (such as raising a fist as if to strike a person or throwing objects near a person). (Para 4.7.2)

Verbal bullying may include threats, shaming, hostile teasing, insults, constant negative judgement, and criticism, or racist, sexist, or LGBTQIA+ phobic language. (Para 4.7.3)

Psychological harassment in the workplace may be associated with emotional abuse and involves behaviour that has serious negative psychological consequences for the complainant(s) such as is often the case with verbal abuse, bullying and mobbing." (Para 4.7.4)

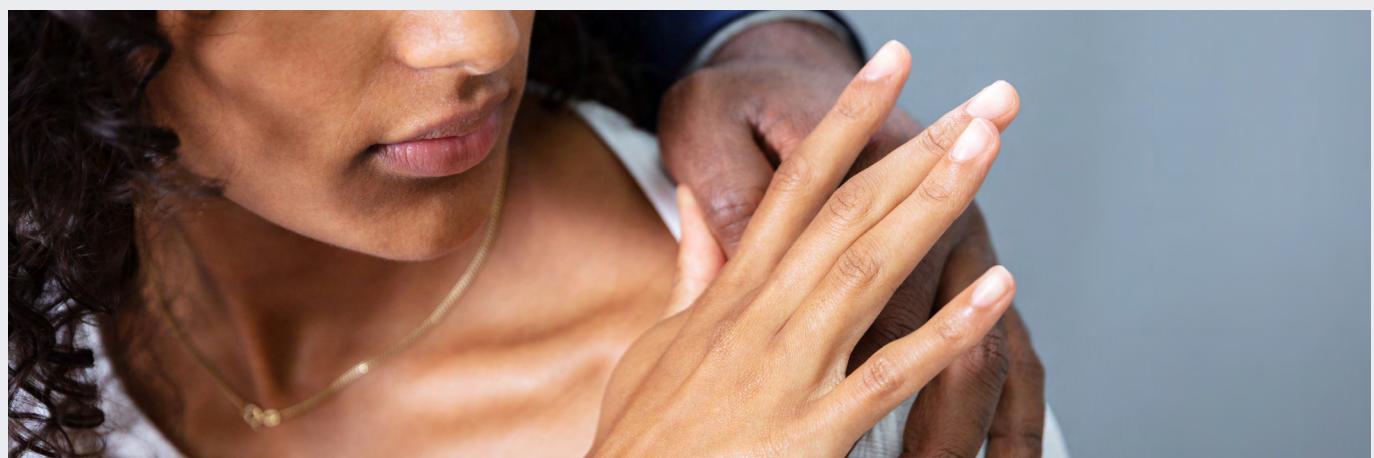
Examples of harassment are given in para 4.7.5 (but there is a caveat that the following list may not be exhaustive). We have included some additional notes in square brackets.

- "Slandering or maligning an employee or spreading rumours maliciously;
- Conduct which humiliates, insults or demeans an employee;
- Withholding work-related information or supplying incorrect information;
- Sabotaging or impeding the performance of work;
- Ostracising, boycotting, or excluding the employee from work or work-related activities;
- Persecution such as threats, and the inspiration of fear and degradation;
- Intolerance of psychological, medical, disability or personal circumstances; [Note: personal circumstances could include child support needs, or other family issues]
- Surveillance of an employee without their knowledge and with harmful intent; [Note: this would include monitoring of emails and social media platforms]
- Use of disciplinary or administrative sanctions without objective cause, explanation, or efforts to problem solving;
- Demotion without justification;
- Abuse, or selective use of, disciplinary proceedings;
- Pressuring an employee to engage in illegal activities or not to exercise legal rights;
- Pressuring an employee to resign."

There are additional notes expanding on various terms which are not found in legislation, but “provide a useful basis for understanding and preventing harassment in the workplace” (Para 4.7.6):

- “**Bullying** – where harassment involves the use of coercive power by an individual or a group of individuals in the workplace. **Intimidation** – this is intentional behaviour that would cause a person of ordinary sensibilities to fear injury or harm. Workplace bullying may involve aggressive behaviour in which someone repeatedly causes another person injury or discomfort. [our emphases] (Para 4.7.7)
- It is noted that harassment may occur both **vertically** and **horizontally**, where vertical harassment “involves the use of formal power (i.e. title, position or supervisory control) or material leverage (i.e. financial, informational, resource or legal) to intimidate, threaten, harass, or harm an employee or to dominate and control the complainant”. Horizontal harassment occurs between employees “in the same position or at the same level”. (Para 4.7.8). [There is a footnote citing the authority of a Constitutional Court judgement that “the seniority of a perpetrator and a disparity in age .. are aggravating factors in instances of sexual harassment. It is presumably therefore the intention of the new Code that this should also apply to other forms of harassment.]
- Para 4.7.9 expands on the concept of **passive-aggressive or covert harassment**, described as including “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 [presumably meaning treating someone as invisible], marginalisation, social exclusion, professional isolation, and deliberately sabotaging someone’s dignity, well-being, happiness, success, and career performance.
- “**Mobbing** is a form of harassment by a group of people targeted at one or more individuals.” (Para 4.7.10)
- Whilst the old Code did refer to electronic means of sexual harassment, this new Code brings this up to date by stating “**Online harassment** is harassment which is committed, assisted, or aggravated in part or fully, by the use of information and communications technology such as mobile phones, smart phones, the Internet, social media platforms or email. Bullying when conducted online is referred to as cyber-bullying.” (Para 4.7.11)

Sexual Harassment as a particular form of harassment is dealt with in Paragraph 5 of the new Code and largely includes provisions stated in the 2005 Code.





4. EXTENSION OF WHO IS COVERED BY THE CODE AND THE DEFINITION OF WORKPLACE

- Who is covered: Paragraph 2 of the new Code expands the application to include not only employees (there is a new cross reference to Section 200A of the Labour Relations Act and the Code of Good Practice: Who is an Employee, 2006) and applicants, but also **volunteers**. The Code specifically states that **all employers** are included, whether in the formal or informal sectors, and whether a commercial undertaking or not. [Para 2.1]

The list of potential perpetrators and victims is extended to include job seekers as well as applicants, “persons in training including interns, apprentices and persons on learnerships”, and volunteers. [Para 2.2]

- The protection of employees against harassment “applies in **any situation in which the employee is working, or which is related to their work**. This includes, but is not limited to:

- 2.3.1 the workplace which includes both public and private spaces in which people perform their work;
- 2.3.2 places where the employee is paid, takes a rest break or a meal, or uses sanitary, washing or changing, breastfeeding and medical facilities;
- 2.3.3 work-related trips, travel, training, events, or social activities;
- 2.3.4 work-related communications, including those enabled by information and communication technologies and internet based platforms;
- 2.3.5 employer-provided accommodation, which includes housing;
- 2.3.6 when commuting to and from work in transport provided or controlled by the employer;
- 2.3.7 in the case of domestic workers and health care workers who are employed in the residence of their employers, or residence of the individual to whom they are providing care, the residence is the workplace; and
- 2.3.8 in the case of employees who work virtually from their homes, or from any place other than the employer's premises, the location where they are working constitutes the workplace. [This could be problematic where employees, for example, work in a public space such as a coffee shop.]

It is clear from this list that the intention of the Code is to include a very wide interpretation of the workplace.

CLARIFICATION OF CONCEPTS IN PART I

DEFINITION OF HARASSMENT

The definition follows fairly closely the previous definition of sexual harassment and now includes the concept of the hostile work environment. The previous definition of sexual harassment was “unwelcome conduct of a sexual nature that violates the rights of the employee ...”. The new Code states that “harassment is generally understood to be:

- unwanted conduct, which impairs dignity [a footnote in the Code sees the terms ‘unwanted’ and ‘unwelcome’ as synonymous, and the Code uses ‘unwanted’ to be consistent with language used in the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)];
- which creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of, inducing submission by actual or threatened adverse consequences; and
- is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the Employment Equity Act. (Para 4.1)



THE TEST FOR HARASSMENT

- The Code specifies that it is this notion of **unwanted conduct** that sets harassment apart from acceptable conduct in the workplace. (Para 4.4.1) The Code also states “harassment may occur as a result of non-violent conduct”. (Para 4.4.4) And the Code reminds employers that “certain acts of harassment may involve a criminal offence and the employer may be under a duty to report .. to the police.” (Para 4.4.4)

So how is the perpetrator supposed to know that the conduct is unwanted? The Code states that, even if the victim did not communicate the unwelcome nature of the conduct (whether directly or indirectly, whether verbally or non-verbally), if the conduct was “of such a nature that the harasser/perpetrator knew or **should have known** that conduct of the type engaged in, is **generally considered** to be unacceptable.” (Para 4...4.2/3)

- The Code then discusses the requirement to assess, on an objective basis, the impact of the misconduct on the victim (and there is a footnote about the use of the term victim, complainant, survivor or other terms, which a person may prefer), but provides that the “**reasonable person**” test should be applied to assess the complainant’s perceptions. The Code states that this reasonability test should look at whether the complainant’s perceptions are “consistent with societal values reflective of our constitutional ethos”. (Para 4.4.5) This follows case law on the topic.
- As with the previous Code in relation to single instances or repeated conduct (in relation to sexual harassment), the new Code provides for both, depending on the severity of a single incident. The Code notes that “harassment, in particular, bullying, 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.” (Para 4.5.2)
- The new Code again follows case law in stating that “It is not necessary to establish the **intention** or state of mind of the harasser/perpetrator in order to prove harassment for the purposes of the EEA. The fact that the conduct was calculated or intended to offend the complainant(s) may be an **aggravating factor** relevant to determining a remedy for the complainant.” (Para 4.5.3). Thus, even if the alleged perpetrator had no intention of offend, a finding of harassment can still be made. Where the conduct was intentional, this would be an aggravating factor.

HOSTILE WORK ENVIRONMENT

In addition to describing conditions which amount to a hostile work environment, a duty is imposed on employers to anticipate where abusive conduct related to a prohibited ground on the part of members of the public, customers or clients might occur and to take reasonable steps to protect employees from such conduct.

RELATIONSHIP TO OTHER LEGISLATION

Paragraph 7 is a very useful summary of other important legislation in this field, including the constitutional right to fair labour practices, the PEPUDA, the Labour Relations Act, the Occupational Health and Safety Act, the Protected Disclosures Act and the Protection of Harassment Act. It is important for employers to note the various remedies available to complainants, which might extend to personal damages orders against perpetrators and fines on the employer.

PART II - ADDITIONS TO THE PROCEDURAL ISSUES FROM THE PREVIOUS CODE

As stated earlier, in general, the procedural requirements for employers to prevent and deal with incidents of harassment follow the requirements of the 2005 Code. A few new additions are dealt with here.

RISK ASSESSMENT

Paragraph 8.1 introduces the notion of “an assessment of the risk of harassment that employees are exposed to while performing their duties as far as is reasonably practicable.”

ZERO TOLERANCE

Paragraph 8.2 discusses that employers should have an attitude of zero tolerance towards harassment. This paragraph also extends the same obligations that employers have to trade unions.

VICTIMISATION

Paragraph 9.4.6 requires an employer’s harassment policy to include protection against victimisation for raising a good faith complaint about harassment either on their own behalf **or on a fellow employee’s behalf**.

CONFIDENTIALITY

Paragraph 9.4.4 and paragraph 10 note that grievances and resolution of problems must be dealt with in a confidential manner.

TIME DEPENDENCY OF REPORTING AN INCIDENT

In paragraph 10 on reporting harassment, paragraphs 10.1.2 – 10.1.4 deal with the issue determined by the Labour Appeal Court, that although the EEA requires that allegations of harassment must immediately be brought to the attention of the employer, this must not be interpreted in a literal, or technical sense, taking into account that factors such as fear of reprisals cause a complainant to delay reporting. The important issue is that, once reported, the employer must investigate and take steps to prevent a re-occurrence expeditiously.

VICARIOUS LIABILITY OF THE EMPLOYER

Paragraph 10.3 explains that, if an employer fails to take steps within a reasonable time to eliminate harassment once an allegation has been made, the employer becomes vicariously liable for the conduct of the perpetrator.

DISCIPLINARY SANCTIONS

Paragraph 10.9 basically repeats from the 2005 Code the range of sanctions an employer's policy should specify for acts of harassment except that:

- Paragraph 10.9.1 states, in relation to warnings issued for minor acts of harassment, "A warning issued to a perpetrator must describe the essence of the discriminatory misconduct".
- Paragraph 10.9.4 reminds that "a complainant about harassment has the right to lay a criminal charge or institute civil proceedings against the alleged perpetrator".

DISCIPLINARY SANCTIONS

In addition to clauses about confidentiality carried forward from the old Code, the new Code states:

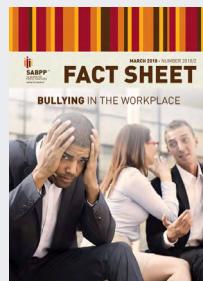
- Paragraph 11.2 "All internal and external communications related to an incident of harassment should be treated as confidential".
- Paragraph 11.3 "Considerations of confidentiality do not preclude an employer from taking appropriate steps to protect the safety or dignity of employees, either during the conduct of the investigation or subsequently." [This could be read as meaning that considerations of confidentiality may not be as important as taking appropriate action, even if this breaches confidentiality. This remains to be tested.]

REFERENCE TO OTHER SABPP PUBLICATIONS

Further background, information, discussion and tools for HR practitioners are available free of charge from the SABPP as listed below:



FACT SHEET
SEXUAL HARASSMENT IN THE WORKPLACE



FACT SHEET
BULLYING IN THE WORKPLACE



FACT SHEET
THE PROTECTED DISCLOSURES ACT



FACT SHEET
CREATING A SPEAK-UP CULTURE AT WORK

SEXUAL HARASSMENT TOOLKIT

VIRTUAL HR (SABPP.CO.ZA)

Welcome to the SABPP SEXUAL HARASSMENT IN THE WORKPLACE Toolkit

SABPP™ SA BOARD FOR PEOPLE PRACTICES *Setting HR standards*

CONFlict DYNAMICS TRAINING & DISPUTE RESOLUTION SERVICES

TOKISO

Why a toolkit?

- The number of cases of sexual harassment being reported is increasing, both internationally and in South Africa.
- Sexual harassment is a complex issue; it can be emotive, divisive and disruptive.
- Because they are so complex, cases are often poorly handled. HR practitioners are central in advising and guiding management and the affected employees and need knowledge and support to do so effectively.

This toolkit was developed from discussions at an SABPP Open Space event in October 2019.

Click [here](#) to see the record of those discussions

Background **Understanding the Law** **Preventing Sexual Harassment in the Workplace**

Handling Sexual Harassment Complaints **Feedback loops in Sexual Harassment Cases** **Organisational Case Studies with learning points** **Links to other useful Sexual Harassment resources**

The resources in this toolkit can be accessed by clicking on the boxes in the graphic above, by going to the drop down menu on the main tab, or by referring to this list of [Frequently Asked Questions](#) which will also direct you to the appropriate resource.

IMPLICATIONS FOR HR PRACTITIONERS

◆ TOP MANAGEMENT SUPPORT:

- The intention and general nature of the new Code should be brought to the attention of the Executive Committee and Board of the organisation, and, where applicable, to the Social and Ethics Committee. The response of the organisation will impact on the perceptions of employees and the public of the ethical nature of the organisation's climate.
- Organisations often (and in fact are required by the Code to) state that they have a Zero Tolerance approach to harassment. However, all too often, this is perceived by employees as merely paying lip service, as practices and precedents show the opposite (for example, where senior or influential people are 'let off the hook'). HR practitioners should be able to advise management where there is a risk that the zero tolerance approach is not being lived up to.
- Harassment policies must be revisited and brought into line with the Code.

◆ AWARENESS AND TRAINING:

- The content of awareness / training sessions for general employees and managers must be aligned with the Code.
- Given the explicit nature of the examples given in para 4.7.5, it is critical that awareness/training sessions for line managers emphasise this and deal with the difficult issue of where is the line between firm management and harassment.
- The new Code emphasises, more than the old code, the role of trade unions in preventing and eliminating harassment (paragraphs 8.2.1-6). This would include the behaviour of not only trade union members, but also officials and shop stewards acting as agents of the union. Where possible, therefore, a collaborative approach with the union to running awareness sessions should be adopted.



◆ DESIGNATED PERSONS:

- The Code requires organisations, as far as is practicable, to designate persons “outside of line management who complainants may approach for confidential advice and/or counselling”. (Para 10.5.1) It is noted that such persons may be specifically employed for such purpose, may be a trade union official, a co-employee or a professional engaged to do this (such as Employee Assistance Providers, for example). It is common practice to designate members of the HR department for such a role. However, it is unfortunately true in many organisations that the HR department does not enjoy the trust of employees in general – sometimes because they are seen as always favouring management, particularly people in senior positions. HR practitioners are therefore advised to reflect honestly on whether they do enjoy the trust of employees and if there is any doubt, to find some other person or persons to designate. It is a good practice to designate a varied set of people, such as a trusted informal leader, a manager known for independence and discretion, or a shop steward or trade union official.

◆ SUSPECT PRACTICES:

- The comprehensive description of passive-aggressive or covert harassment includes many ways in which managers and teams seek to exclude someone, possibly on the grounds of perceived poor performance, or not “fitting in”. This can happen, for example, where the HR department has advised a manager that there are no grounds for disciplining an employee (lack of adverse performance appraisal for example), and therefore these covert means are used. Of course, this is grounds for a claim of constructive dismissal. HR practitioners, therefore, need to be able to watch out for such covert harassment and deal with it accordingly.

◆ THE USE OF ALTERNATIVE METHODS OF DISPUTE RESOLUTION:

- It is not made clear in the paragraphs on informal procedures for dealing with complaints, that mediation may be a useful way to handle tricky situations. The SABPP Toolkit referred to above contains several articles about the use of mediation and its benefits. Some recent thinking, however, raises the issue that mediation rather than a formal process, may have the effect of minimising what may well be a pervasive problem in the workplace, by making the dispute resolution process a private one. A possible advantage of a formal process is that it gives the opportunity to make a clear statement that harassment will not be tolerated. Maybe the mediation approach is indicated primarily where it would seem that the misconduct is correctable, or can be ‘nipped in the bud’. HR practitioners are advised to consult with experts in this area to determine the best use of these types of less formal procedures.
- Another recent development in the resolution of disputes in these tricky areas is the use of an inquisitorial approach rather than an adversarial approach. An article on this is contained in the Toolkit.

CONCLUSION

The publication of this new Code on Harassment is an important step forward for HR practitioners in dealing with the complexities of workplace violence in general and the very tricky issues involved in racial and sexual harassment, particularly in South Africa where the history of the country has to be taken into account when assessing conflict in the workplace.

A thorough understanding of the issues, including the legislation and case law as it evolves, is the basis from which HR practitioners should build their skills in this area.

This fact sheet was written by:

Dr Penny Abbott,
with further inputs from
Dr Angela du Plessis.



PREVIOUS EDITIONS OF THE FACT SHEET

2021



2022

