

NEW CODE OF GOOD PRACTICE SHINES A SPOTLIGHT ON

WORKPLACE HARASSMENT



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Harassment is unlawful, unpleasant and has no place in any working environment. In the workplace it is, more often than not, a difficult conversation for employers and employees alike. The taboo around the topic has made a massive problem much more significant. Harassment in the workplace creates a toxic environment that can lead to absenteeism, high employee turnover and decreased productivity. Nurturing a Speak Up culture within organisations is essential; however, more so is recognising and adequately addressing it with a solid policy, process and practice. Harassment in the workplace, due to victims spending most of their day at work, has a knock-on effect that impacts their life. In many cases, victims are unaware that the behaviour aimed at them constitutes harassment. Moving away from the legal definitions to layman's terms for clarity:

What constitutes harassment?

Harassment is unwanted conduct that impairs dignity, thus creating a hostile or intimidating working environment. Essentially it is designed to, or may induce, submission by actual or threatened adverse consequences.

Harassment may be a pattern of persistent conduct or a single instance or event whereby the perpetrator knows, or should reasonably know, that the behaviour was unwanted or unwarranted.

Incidents of workplace harassment happen both in the immediate working environment and outside, for example, at a year-end function, a conference or a business trip.

Various types of behaviours fall under the scope of harassment, such as, but not limited to:

1 Sexual Harassment	2 Physical Harassment
3 Psychological Harassment	4 Third-party Harassment
5 Racial, Ethnic or Social Origin Harassment	6 Bullying

1 What constitutes Sexual Harassment?

The term 'Sexual Harassment' refers to a perpetrator acting sexually or romantically toward an individual who does not want such attention.

Behaviour further falls into this category if it involves making a threat, such as the termination of employment or a promise offering a promotion, based on a victim carrying out a request. Other examples of sexual harassment include:

- > Innuendos directed at an individual;
- > Pressure for sexual activity;
- > Remarks about a person's body or clothing;
- > Unwanted messages, letters, calls, emails or gifts;
- > Unwelcome requests for dates; and
- > Inappropriate physical contact or comments.

2 What constitutes Physical Harassment?

This type of harassment falls under 'workplace violence'. It's when physical attacks or threats take place within a workspace. Instances include:

- > Direct threats of intent to harm;
- > Destroying property;
- > Physical attacks - such as hitting, pushing or kicking; and
- > Threatening behaviour.

3 What constitutes Psychological Harassment?

Harassment of this nature negatively impacts a victim's well-being. Left to fester, Psychological Harassment can spiral out of control and impact a victim's physical health, social life and work ethic. Psychological Harassment manifests through:

1. Opposing or challenging everything an individual suggests;
2. Isolating someone;
3. Spreading rumours; and
4. Belittling someone in the workplace.

4 What constitutes Third-party Harassment?

Third-party Harassment is when a perpetrator is, for example, a contractor, supplier, customer or other individual dealing with an employer. Not all harassment happens in the immediate working environment. For example, a supplier may harass an employee in return for business or bully them into a situation where they are not comfortable.

5 What constitutes Racial, Ethnic or Social Origin Harassment?

Racial Harassment is an incident or a series of incidents intended to, or is likely to, intimidate, offend or harm an individual or group due to their ethnic origin, colour, race, religion or nationality. A racist incident is an incident that is perceived to be racist by the victim or any other reasonable person. Incidents can include, however, are not limited to:

- > Abusive language in the form of racist jokes, cartoons, memes and communication that amount to hate speech;
- > Racially offensive written or visual material, including online harassment;
- > Racist name calling or negative stereotyping impacting on a person's dignity;
- > Abusive behaviour in the form of open hostility towards people from a specific racial or ethnic group;
- > Subtle or blatant exclusion from workplace interaction or activities, including other forms of marginalisation; and
- > Threatening behaviour which intimidates a person or creates a hostile work environment.

6 Bullying

Bullying falls within the ambit of harassment. There's a perception that bullying only happens in the playground as if when one leaves school, one never meets a bully again. Unfortunately, bullying continues through age and environment. Bullying can be covert or overt. As it can occur in a variety of contexts and forms, it is helpful to define workplace bullying by the key features that these behaviours typically possess, namely:

- > Repetition - it occurs regularly;
- > Duration - it is enduring;
- > Escalation - there is increasing aggression;
- > Power disparity - the target lacks the power to defend themselves successfully; and
- > Attributed intent.

How does legislation address harassment in the workplace?

In March 2022, the Department of Employment & Labour (DoEL) issued a Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace 2022 (New Code). It replaced its repealed predecessor, the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace. The objective of the New Code is to manage harassment in its broader context to eradicate and prevent it.

The New Code sets out guidelines for how an employer should include harassment in its broader context in their policies, procedures and practices. Employers should consider the measures they will take to address harassment in the workplace. The application of the New Code is extensive in that it applies to all employees and employers. When the New Code refers to 'employees', it includes job applicants, as defined in the Employment Equity Act of 1998 (EEA), volunteers and persons in training. As per the New Code, a perpetrator and a victim can be an employee or a third party such as a contractor, supplier, customer or any other person dealing with an employer.

What does the New Code introduce?

The New Code emphasises equality, privacy and dignity, providing employers and employees with guidelines for preventing and eliminating harassment as a form of unfair discrimination. The New Code expressly refers to online harassment as committing, assisting or aggravating in part or entirely through information and communication technology, like mobile phones, smartphones, the internet, social media or email. Part of the evolution of the New Code is that it embraces technology, as, at times, such conduct does not happen in person.

Employers must align existing policies, procedures and practices to incorporate the expansion of the definition of harassment, the amendments to the definition of Sexual Harassment, the express provision for Racial, Ethnic and Social Origin Harassment as a stand-alone category, bullying, the expansion of the definition of 'workplace', duty of care Third-party Harassment and additional sick leave.

Expanding the definition of Harassment

Like its predecessor, the New Code stipulates that to constitute harassment, the behaviour in question must relate to one of the listed grounds of discrimination in section 6 of the EEA or an arbitrary ground.

In expanding the definition, the definition of harassment in the New Code includes, but is not limited to:

- > Slandering, maligning and humiliating employees;
- > Maliciously spreading rumours;
- > Withholding work-related information and/or providing incorrect information;
- > Sabotaging or impeding work performance;
- > Boycotting or excluding employees from work-related activities;
- > Passive-aggressive or covert harassment;
- > Mobbing, which is a form of harassment perpetrated by a group targeting one or more individuals; and
- > Online harassment.

The New Code incorporates acts of violence that an employer may not tolerate. It prohibits unfair discrimination based on race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground. In applying the criteria, the New Code refers to the EEA.

In expanding the focus from sexual harassment, the New Code introduces violence, physical, psychological, emotional, sexual, gender-based and racial abuse, as well as a person's disability status. It incorporates physical force or power, threatened or actual, against any person of a group or community, including the abuse of power against women, men, the LGBTQIA+ community and/or other vulnerable groups.

The New Code identifies harassment as any form of unfair discrimination that infringes on a complainant's right and constitutes a barrier to equality in the workplace. Importantly, it is a disciplinary offence to victimise or retaliate against an employee who, in good faith, lodges a harassment grievance, whether in respect of themselves or another employee. Furthermore, it obligates an employer to investigate and manage harassment grievances confidentially.

Irrespective of whether or not conduct constitutes harassment, an employer must assess a grievance from the perspective of an employee who alleges that harassment has occurred. However, the perceptions of the person harassed must be consistent with the views of a reasonable person in the complainant's situation. A stance that the intent was not to harass or bully is not a basis for the defence of any allegation. Examples cited in the New Code include, but are not limited to:

- > Slandering or maligning an employee or spreading malicious rumours;
- > Conduct which humiliates, insults or demeans an employee;
- > Withholding work-related information or supplying incorrect information;

- > Ostracising, boycotting, or excluding an employee from work or work-related activities;
- > Persecution such as threats and the inspiration of fear and degradation;
- > Surveillance of an employee without their knowledge and with harmful intent;
- > Use of disciplinary or administrative sanctions without an objective case, explanation, or efforts to problem-solve;
- > Demotion without justification;
- > Abuse or selective use of disciplinary proceedings;
- > Pressuring an employee to resign; and
- > Intolerance of psychological or medical disability taking into account personal circumstances.

Sexual Harassment

It remains the most prevalent form of harassment in the workplace. The traditional principles apply, namely that sexual attention becomes sexual harassment if :

- > The behaviour is persistent in nature, although a single incident of harassment may constitute sexual harassment; and/or
- > The victim has made it clear that the behaviour is considered offensive; and/or
- > The perpetrator should reasonably have known that the behaviour is unacceptable or unwanted.

Sexual harassment may include unwelcome physical, verbal or non-verbal conduct that includes:

- > All unwanted physical contact, such as touching or assault, sexual assault and rape, intimidation that includes, for example, a strip search conducted in the presence of the opposite sex;
- > Verbal forms of sexual harassment, including unwelcome innuendo, suggestions and hints, sexual advances and comments with sexual overtones;
- > Sexually related jokes or insults;
- > Unwelcome graphical comments about a person's body made in their presence or directed toward them;
- > Unsolicited and inappropriate inquiries about a person's sex life; and
- > Uninvited whistling at a person or group of people.

Non-verbal forms of sexual harassment include:

- > Unwelcome gestures;
- > Indecent exposure; and
- > Displaying or sending by electronic means or otherwise of sexually explicit pictures and objects.

The New Code outlines factors to establish whether sexual harassment has occurred, like:

Unwanted conduct	Either the perpetrator should have been alerted to the fact that their behaviour is unwanted, or the conduct should be such that the alleged perpetrator knew or ought to have known that the behaviour was unwanted.
Nature and extent of the conduct	The conduct must be sexual in nature to qualify as sexual harassment. The behaviour could be physical, verbal or non-verbal, which a perpetrator could express directly or indirectly.
Impact of the conduct	To establish sexual harassment, the perpetrator's behaviour must have impaired an employee's dignity.

Falling within the ambit of sexual harassment is Quid Pro Quo harassment, whereby management or a co-employee undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or job applicant in exchange for sexual favours. Sexual favouritism exists when a person is in a position of authority and rewards only those who respond to their sexual advances—denying promotions or merit ratings or paying poor remunerations to deserving employees who do not submit themselves to sexual advances.



Express provisions on Racial, Ethnic and Social Origin Harassment

Whether verbal or non-verbal, conduct involving racial innuendos, stereotyping, or other racial overtones is assumed to be offensive and unwanted to any individual exposed to such language or behaviour. Furthermore, an employer must interpret this form of harassment within the context of South Africa's history of institutionalised racial discrimination.

The applicable test to identify whether language or conduct is racist is whether it is reasonably capable of conveying a racist meaning to the reasonable hearer or recipient. An employer must establish the balance of probabilities that the grievance was related to race, ethnicity or social origin, including characteristics associated, or assumed to be associated, with such a group. An employer must objectively assess an allegation against a reasonable person's reaction in keeping with the values underlying the constitutional order in South Africa.

Racial harassment is unwanted conduct that is either persistent or a single incident that is harmful, demeaning, humiliating or creates a hostile or intimidating environment. According to the New Code, 'conduct calculated to induce submission by actual or threatened adverse consequences constitutes harassment, although it is not an essential element of its definition.'

It may include direct or indirect behaviour, which may involve verbal or non-verbal conduct, including, but not limited to, remarks, racist name-calling, racist cartoons, memes or innuendos.

Importantly, stereotyping or racial conduct is assumed to be offensive and unwanted. Therefore, employees need to know that such behaviour is assumed to be unwanted and unwelcome, having a negative impact on an employee's dignity. For employers to avoid liability for employees' actions, it is thus crucial for employers to conduct comprehensive training on the New Code.

Areas for consideration in cases of Racial, Ethnic and Social Origin Harassment:

- > Whether the language or conduct complained of is abusive, impairs a complainant's dignity, or is directed at a particular person;
- > The extent and degree of abuse or impairment to a person's dignity; and
- > The impact of the conduct.

The assessment of racial harassment is an objective one. Establishing the validity of a grievance or alleged misconduct is based on a balance of probabilities that the offending behaviour was related to race, ethnicity or social origin or with a character associated with one of those where the racial harassment is in the form of explicit conduct. An essential factor to consider is how the perpetrator treats others not of the complainant's race, ethnicity or social group.

Bullying

The New Code defines bullying as harassment involving coercive power abuse by an individual or group in the workplace. It can include verbal, non-verbal, psychological, and physical abuse and humiliation tactics. The burden of proof lies in the balance of probability.

Instances of bullying could be an over-critical boss singling out one employee to blame and punish, a workforce repeatedly pranking and humiliating a colleague or choosing to ignore a person's real contribution to a project. Bullying at work can take many forms, such as:

- > Cyberbullying, which includes spreading gossip about a victim on social media or harassing them through instant messages or texts;
- > Using intimidation tactics;
- > Making critical remarks;
- > Making excessive demands that are impossible to meet;
- > Intruding on a person's personal life; and
- > Threatening, shouting, swearing at or insulting an individual, publicly or privately.

Workplace bullying is typically a persistent pattern of mistreatment that causes either physical or emotional harm. It can include verbal, non-verbal, psychological, or physical abuse and humiliation tactics. Generally, a bully in a working environment is someone in authority over their victim. However, bullies can be peers and occasionally sub-ordinates.

Mobbing is an interesting form of harassment perpetrated by a group targeting one or more individuals, for example, a group of employees targeting their manager.



The definition of 'Workplace'

Like its predecessor, the New Code confirms that harassment applies to any situation where an employee is working or is work-related. According to the New Code, the workplace definition includes trips undertaken for work purposes, training programmes, virtual working and work-related social activities. Employees must make their employer aware of any incidents of harassment, whether they happen outside working hours or off-site.

Duty of care Third-party Harassment

Suppose an employee lodges a grievance against a third party, namely a contractor, supplier, customer or other people that have dealings with an employer. In that case, they have a duty of care to take appropriate steps to address the harassment. An alleged victim of harassment or bullying can lodge a grievance with the alleged perpetrator's employer where the harassment or bullying occurred.

Although employers do not have the authority to take disciplinary action against third-party perpetrators, there is an expectation that they would raise a grievance against an alleged perpetrator with their employer and then assist and support them as far as reasonably possible.

Additional sick leave

Another notable departure from the previous Code concerns the application for additional sick leave. In terms of the previous Code, it was up to an employer to provide extra sick leave to a complainant. The New Code specifies that if the harassment results in an employee taking sick leave for more than two weeks, an employee can claim illness benefits under the Unemployment Insurance Act, 2001.

Employees with disabilities

Although the New Code mentions this vulnerable group, it fails to deal expressly with the intimidation and abuse often faced by employees with disabilities. In line with other examples in the Code, one could draw up a list, which could include the following typical examples:

- > Withholding work-related information or supplying incorrect information that negatively impacts the performance of an employee with disabilities.
- > Ostracising, boycotting, or excluding an employee with a disability from work or work-related activities.
- > Micromanagement and/or over attribution of mistakes.

- > Putting up physical barriers to make movement around the workplace difficult for persons with mobility impairments and/or wheelchair users.
- > Making fun of or mimicking how the person with the disability talks, walks or engages with others.
- > Gossiping and rumour-mongering about persons with psychosocial disabilities.

Considerations for employers

All employers should expand their current policies, procedures and practices to align with the broader scope of the New Code. An employer must communicate the existence and contents of its harassment policy to all employees. Should a case end up in the court system, such communication will be a consideration by a court when deciding whether an employer has discharged its duty as per section 60(2) of the EEA. According to section 60, all employers must take remedial and proactive steps to prevent all forms of harassment in the workplace.

All employers' harassment policies must comply with the New Code, thus incorporating the following statements:

- > Harassment, including acts of violence, will not be tolerated in the workplace;
- > Harassment on a prohibited ground is a form of unfair discrimination which infringes on the rights of the complainant and constitutes a barrier to equality in the workplace;
- > Harassment related to any prohibited ground in the workplace will not be permitted, tolerated or condoned;
- > Harassment grievances will be investigated confidentially;
- > Complainants in harassment matters have the right to follow the procedures in the policy, and an employer must take appropriate action. Such procedures should be laid out clearly in the policy; and
- > It will be a disciplinary offence to victimise or retaliate against an employee who, in good faith, lodges a grievance about harassment, whether in respect of themselves or another employee.

Upon reporting an incident of harassment, an employer must investigate and consult all the relevant parties, take the necessary steps to address the complaint under the New Code and their internal policy, and then take the steps needed to eliminate the harassment. Notably, a failure by an employer to take the necessary steps within a reasonable time frame may render it liable for the perpetrator's conduct.



"Harassment in the workplace creates a toxic environment that can lead to absenteeism, high employee turnover and decreased productivity."

Workplace Procedures

To further fulfil their obligations in line with the EEA and New Code, employers must have a zero-tolerance stance towards harassment and:

- > Create and maintain a working environment in which the dignity of all employees is protected and respected;
- > Refrain from committing acts of harassment;
- > Reasonably ensure that all parties dealing with the business are protected from harassment by an employer's employees and/ or anyone representing an employer;
- > Attempt to ensure that employees are not subjected to harassment by people they come into contact with in the course of their employment, for example, a contractor, supplier, customer or other people that have dealings with an employer.
- > Adopt policies and procedures which make their position clear in respect of the elimination, prevention and management of harassment;
- > Implement training and awareness programmes on an ongoing basis for employees at all occupational levels; and
- > Take appropriate measures that comply with the New Code where instances of harassment do occur in their workplaces.

Harassment is a sensitive issue; therefore, a victim may be unable to approach the perpetrator, lodge a formal grievance or even turn to colleagues for support. The New Code proposes that an employer formally designate a person to whom complainants may report alleged incidents. Procedures should enable resolution in a "gender-sensitive, confidential, efficient and effective manner".

It is imperative that employers make employees aware of their rights contained in the new Code and that they understand what constitutes harassment. Furthermore, employees must be mindful of how they lodge a grievance and the obligation of an employer to follow through.

In some cases, it may be sufficient for a complainant to have the opportunity to explain to the alleged perpetrator that their behaviour was offensive and unwelcome. However, engaging with a perpetrator may be unsettling, uncomfortable and/ or interfere with their work. Therefore, an appropriate person, typically from Human Resources, would facilitate such discussions or may even, in some instances, caution the alleged offender without revealing a complainant's identity.

An employer's Harassment Policy and/or Disciplinary Code must specify the sanctions imposed on a perpetrator guilty of workplace harassment. Furthermore, an employer must inform the complainant of the informal and formal procedures available to deal with their grievance. An employer should offer advice, assistance and counselling to the complainant to the extent that it is reasonably practical. Following procedures in the New Code in a substantively and procedurally fair manner is imperative. A complainant can choose whether a resolution is formal or

informal upon lodging a grievance. Notably, a complainant must not be under duress to accept one resolution over another. Suppose the informal approach does not provide a satisfactory result and the behaviour continues, or the behaviour is of a severe nature which necessitates embarking upon the formal procedure in the first instance. In that case, the complainant may lodge a formal grievance according to the standards outlined in the standard procedures. Where the facts presented during the grievance procedure establish the presence of harassment or bullying, an employer must institute formal disciplinary action against the perpetrator. During the grievance and/or disciplinary procedure, an employer must take reasonable steps to protect the complainant in good faith against victimisation or retaliation and/or to limit contact between the individuals involved.

Notwithstanding, an employer must, on the other hand, protect themselves and other employees against false accusations. Therefore, an employer may take action against employees who purposefully and intentionally raise allegations they know are not valid.

A victim may lodge separate criminal and/or civil and/or equality charges against an alleged perpetrator, independent of workplace procedures.

An employer has the right, regardless of whether a formal grievance has been raised and irrespective of the wishes of the complainant, to take disciplinary action it deems necessary should allegations of harassment come to its attention. In coming to such a decision, an employer must, amongst others, assess and determine risks to other employees.

Sanctioning the perpetrator

Although an employer must not tolerate harassment, not all forms will justify dismissing a perpetrator. Disciplinary sanctions must be proportionate to the seriousness of the harassment in question.

An employer must consider mitigating and aggravating circumstances on a case-by-case basis, deciding on an appropriate penalty against the perpetrator. A decision must consider the context of the harassment, the complainant's circumstances and the impact of the harassment, including the respective position of the perpetrator.

To conclude, all forms of harassment require decisive action from an employer. The New Code provides guidelines to employers for preventing and eliminating all forms of harassment and guidance on human resource policies and procedures to adequately deal with harassment. Employers must comply with pieces of legislation supporting non-discrimination. However, employers should bear in mind, when adjudicating each case, to always weigh an alleged victim's perception, interpretation and/ or emotions against how the reasonable person/hearer would interpret or react to the conduct or language in question.

*Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace
– General Notice 1890 in the Government Gazette 46056 of 18 March 2022.*



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