



NATIONAL ECONOMIC DEVELOPMENT AND LABOUR COUNCIL

FINAL NEDLAC REPORT ON THE REVISED DRAFT CODE OF GOOD PRACTICE ON THE PREVENTION AND ELIMINATION OF HARASSMENT IN THE WORKPLACE

1. BACKGROUND

- 1.1. In September 2020, Government presented a draft Code of Good Practice on Elimination of Violence and Harassment in the World of Work to the Labour Market Chamber Task Team and at the same time the Code was published for public comment.
- 1.2. The Task Team met twice. The social partners agreed to stop the deliberations on the Code to allow Government to finalise public comment process and develop the revised Draft Code that incorporates the public comments for re-tableting at NEDLAC. The Code covered key elements aligned to Convention 190 (C190) on elimination of violence and harassment in the world of work, and drew from legislation in South Africa the various definitions applicable to the world of work.
- 1.3. In March 2021, the Department of Employment and Labour presented a revised Code, titled Revised Draft Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace which excluded violence. Government advised that this exclusion was based on advice received from the legal drafters and public comments, that the inclusion of violence in the Code was outside the jurisdiction of the Employment Equity Act (EEA) and the Code would be open to litigation. Therefore, the revised code was confined within the jurisdiction of the EEA and excluded violence from the scope.

- 1.4. At the first meeting of the Task Team held on 19 April 2021, Labour and Community were of the view that the revised Code has substantively moved from the key principles and objectives embedded in C190 dealing with violence in the workplace and the world of work. Therefore, Labour and Community requested an opportunity to seek legal advice within their constituencies, find seek alternative options to address their concerns and to engage meaningfully on the revised Code, such that it still gave expression to the aims and objectives of C190.
- 1.5. At the same meeting of 19 April 2021, Government was requested to circulate the Explanatory Memorandum on the legal opinion received from Government's legal drafter on the Draft Code and the public comments report to social partners for consideration. Government circulated both the explanatory memorandum on legal opinion on the Draft Code and the public comment report to all Task Team members on 19 April 2021
- 1.6. In light of the above, the task team established a 2-a-side sub-committee to discuss different opinions and recommend a way forward on the process.
- 1.7. The 2-a-side met on 28 May 2021 where Labour and Community indicated that:
 - 1.7.1. Their highlighted alternatives to draft a Code through the LRA to extend the Code applications to persons who are not classified as employees. Therefore, it was vital to consider broader legislation and interventions with regards to implementation of C190, instead of dealing with it in a piece meal approach.
 - 1.7.2. In terms of the Constitutional context, the relevant provisions in the Bill of Rights should inform the way forward; the right to equality treatment, the right to human dignity, freedom of movement and the rights in terms of C190 and other relevant labour protections should be extended to all workers. In this regard, the task team to discuss other parallel processes underway to ensure application of C190 in the world of work. The other possibility is to consider PEPUDA, as an avenue to develop a Code, legislative amendment and provisions to align to C190.
- 1.8. Given the above processes, Secretariat recommended the following proposals. The Task Team would continue to engage on the Revised Code as tabled by Government on the basis of the following agreements.
 - 1.8.1. The Task Team establish a 3-a-side Subcommittee to develop proposals for other Codes/interventions that encompass C190 and the

Terms of Reference for a multi-disciplinary Task Team to be tabled at the Labour Market Chamber.

- 1.8.2. The proposal for establishment of a multi-disciplinary Task Team which will be a joint process between Labour Market and Development Chambers in order to take a comprehensive and well-integrated approach on issues identified in the proposals from the 3-a-side including Convention 190 issues not covered by the EEA Code.
- 1.9. Government tabled the Revised Draft Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace at the task team meeting on 12 August 2021

2. PROCESS AT NEDLAC

- 2.1. The Task Team convened meetings on the following dates:
 - a) 19 April 2021;
 - b) 15 June 2021;
 - c) 21 July 2021;
 - d) 12 August 2021
 - e) 25 August 2021;
 - f) 8 September 2021;
 - g) 28 September 2021;
 - h) 13 October 2021;
 - i) 26 October 2021;
 - j) 23 November 2021;
 - k) 30 November 2021
- 2.2. This report provides a summary of the engagement process at NEDLAC and also outlines areas of agreement and disagreement.
- 2.3. A list of task team members is attached as **Annexure 1**.
- 2.4. The following documents were submitted:

Revised Draft Code of Good Practice on the prevention and elimination of harassment in the workplace	Annexure 2
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Explanatory Memorandum on the legal opinion from the Government Legal Drafter on Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work	Annexure 3
Joint Legal Opinion from Community and Labour on the Implementation of Convention 190 and the Draft EEA Code on Harassment	Annexure 4
Labour's Proposals on Monitoring and Enforcement	Annexure 5
Labour's Proposals on Domestic Violence	Annexure 6

3. AREAS OF AGREEMENT

[*text*] denotes deletion

_____ denotes insertion

3.1. The following sections were agreed to by the Social Partners.

3.1.1. The social partners agreed to insert an Introduction into the Code in order to recognise Convention 190 and the Constitution, particularly the Bill of Rights, and the Employment Equity Act. It is acknowledged that South Africa regards all forms of harassment as a form of unfair discrimination, which constitute a barrier to equity and equality in the workplace.

3.1.2. **Application of the Code**

a) Clause 2.1 was amended to read: This Code applies to all employers and employees, as provided for in the Employment Equity Act. Any reference in this Code to "employees" includes applicants for employment. Agreed to with the addition for determining whether a person is an employee for the purposes of the EEA, the presumption of employment in section 200A of the Labour Relations Act is applicable.¹ Volunteers who in any manner assist in the carrying on or conducting the business of an employer, fall within the definition of an employee. Any person who employs another person to work for them as an employee in South Africa is an employer, irrespective of whether they operate

in the formal or informal sector or whether they are a commercial undertaking or not.

- b) Clause 2.2 was amended to read: Although this Code applies to the working environment as a guide to employers, employees and applicants for employment, the perpetrators and victims of harassment may include, but not limited to:
volunteers;
- c) Clause 2.3.2 was amended to read: places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing, changing, breast feeding and medical facilities.
- d) Clause 2.3.3 was agreed as contained in the Code.
- e) Clause 2.3.4 was amended to read: work-related communications, including those enabled by information, communication technologies and internet-based platforms.
- f) Clause 2.3.5 was amended to read: in employer-provided accommodation, which includes housing.
- g) Insertion of clause 2.3.7 was agreed to read: In the case of domestic workers and health care workers who are employed in the residences of their employers, or residence of the individual to whom they are providing care, the residence is the workplace.
- h) Insertion of clause 2.3.8 was agreed to read: in the case of employees who work virtually from their home, or any place other than the employer's premises, the location where they are working constitutes the workplace.

3.1.3. **Legal Framework**

- a) Clauses 3.1, 3.3.1 and 3.6 were agreed as outlined in the Code.
- b) Clause 3.2 was amended to read: The Employment Equity Act, 1998 (Act No 55 of 1998) as amended ("EEA") is one of several statutes that give effect to South Africa's obligations in terms of Convention 190. The EEA does so by prohibiting the harassment of employees on a ground listed in terms of section 6(1). A number of existing laws implement South Africa's obligations in terms of ILO Convention 190 and these are identified in paragraphs 7.3 to 7.7 of this Code.

- c) Clause 3.3.2 was amended to read: take into account recent developments in case law, statutes and South Africa's obligations in terms of ILO Convention 190 and other ratified Conventions.

3.1.4. **What is Harassment**

- a) Clause 4.1.1 was amended to read: unwanted conduct which impairs dignity.
- b) Clause 4.1.2. was deleted.
- b) Clause 4.1.3 was agreed as outlined in the Code.
- b) Clause 4.1.4. was agreed as outlined in the Code with the agreement to include a paragraph on Section 6(1) of the EEA outlining the prohibited grounds in the Introduction of this Code.
- c) Clause 4.2 was amended to read: Harassment includes violence, physical abuse, psychological abuse, emotional abuse, sexual abuse, gender-based abuse and racial abuse. It includes the use of physical force or power, whether threatened or actual, against another person or against a group or community.
- d) Clause 4.3 was amended to read: Harassment against employees in the workplace is an abuse of power. This Code recognises that harassment particularly affects employees in vulnerable employment who, while covered by labour legislation, may have in practice poor access to the exercise of labour rights such as freedom of association, collective bargaining, decent work, protection from discriminatory practices and access to dispute resolution forums.

3.1.5. **Unwanted conduct**

- a) Clause 4.4.1 was amended to read: The criterion that harassment involves unwanted conduct distinguishes acts of harassment from acceptable **[or innocent]** conduct in the workplace. A number of issues arise in evaluating whether the harasser/perpetrator knew or should have known that the conduct was unwanted.
- b) Clause 4.5.3 was deleted.
- c) Clauses 4.5.4 and 4.5.5.1 was agreed as contained in the Code.

- d) Clause 4.5.5.2 was amended to read: the circumstances of the complainant and the impact that the conduct has had on an employee.

3.1.6. Hostile work environment

- a) Clause 4.6.1. was amended to read: A hostile work environment will be present where conduct related to a prohibited ground impacts on the dignity of one or more employees. This will be present if the conduct has a negative impact on the employee's ability to work and/or on their personal well-being. This may be the result of conduct of persons in authority such as managers and supervisors or the conduct of other employees.
- b) Clause 4.6.2. was amended to read: A hostile environment may also be present where an employer should anticipate that employees will be subject to abusive conduct related to a prohibited ground by members of the public, customers or clients and fails to take reasonable steps to protect employees from such conduct.
- c) Clauses 4.6.3 and 4.6.4 were agreed as contained in the Code.

3.1.7. Types of Harassment

- a) Clauses 4.7.2, 4.7.3. and 4.7.4 were agreed as contained in the Code.
- b) Clause 4.7.5 was amended to read: A wide range of conduct in the workplace may constitute harassment. Examples of harassment include, but is not limited to –
- c) Clauses 4.7.5.2, 4.7.5.3, 4.7.5.5, 4.7.5.9, 4.7.5.11, 4.7.5.13, 4.7.6. and 4.7.11 were agreed as contained in the Code.
- d) Clause 4.7.9 was amended to read: Passive-aggressive or covert harassment may 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.

3.1.8. Prohibited grounds

- a) Clause 4.8.1 was amended to read: Harassment of an employee is prohibited in terms of section 6(1) of the EEA, if the harassment is related to one or more of the prohibited grounds
- b) Clause 4.8.2 was agreed as contained in the Code.

3.1.9. Nature and the extent of the conduct

- a) Clause 5.2.5(2) was amended to read: strip searching, including by same sex or in the presence of the opposite sex.
- b) Clauses 5.2.5(3), 5.2.5(4), 5.2.5(5), 5.2.5(8), 5.2.6 and 5.2.6(2) were agreed as contained in the Code.

3.1.10. Test for Sexual Harassment

- a) Clauses 5.3. 2, 5.3.2.3 and 5.3.2.4 were agreed as contained in the Code
- b) Clause 5.3.2.2 was amended to read: whether the sexual conduct was unwanted and inappropriate to the working environment.

3.1.11. Racial, Ethnic or Social Origin Harassment

- a) Clause 6.1. was amended to read: Racial harassment is a form of unfair discrimination prohibited by section 6(1) of the EEA, which is 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 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.
- b) Clauses 6.4, 6.5.2, 6.5.5 and 6.5.6. were agreed as contained in the Code.
- c) Clause 6.5.1. was amended to read: Abusive language and racist jokes, cartoons, or memes including communications that amount to hate speech.
- d) Clause 6.5.3. was amended to read: Racist name calling or negative stereotyping impacting on a person's dignity.

- e) Clause 6.5.4 Offensive behaviour in the form of open hostility to persons of a specific racial or ethnic or social origin.

3.1.12 Factors to be considered in Racial Harassment

Clause 6.6.1 was agreed as contained in the Code.

3.1.13 Test to be applied for Racial Harassment includes:

- a) Clause 6.7.2 was amended to read: To establish harassment based on race or ethnic or social origin, it has to be established on a balance of probabilities that the conduct complained of was related to race, ethnic or social origin, or a characteristic associated, or assumed to be associated with such group. An important factor establishing racial harassment is 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 or social origin.
- b) Clause 6.7.3. was amended to read: Explicit racial conduct is assumed to be unwanted conduct. A relevant factor would be how the alleged perpetrator treats other persons not of the complainant's racial group or ethnic or social origin.
- c) Clauses 6.7.4, 6.7.4.2 and 6.7.4.3 were agreed as contained in the Code.
- d) Clause 6.7.4.1 was amended to read: whether the conduct was persistent or harmful.
- e) Clause 6.7.4.4. was amended to read: whether the language and conduct are directed at a particular person(s) based on their race, ethnic or social origin and is insulting, abusive and/or derogatory.

3.1.14 Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA)

- a) Clause 7.3.1. was amended to read: Harassment on prohibited grounds, which does not arise out of an employment policy or practice, is prohibited by the PEPUDA. While the Act regulates harassment and discrimination generally in society, there are circumstances where harassment and discrimination occurring in the workplace may be covered by PEPUDA.
- b) Clause 7.3.1.1 was agreed to as contained in the Code

c) Clause 7.3.1.2 was agreed to as contained in the Code.

3.1.15. Labour Relations Act

- a) Clause 7.4.1 was agreed as contained in the Code.
- b) Clause 7.4.2 was amended to read: Harassment may also constitute an unfair labour practice in terms of section 186(2) of the LRA, if the unfair conduct relates to promotion, demotion, probation, training or to the provision of benefits. To establish an unfair labour practice, it is not necessary to demonstrate the link to a prohibited ground. Harassment may also constitute an automatically unfair dismissal in

3.1.16 Occupational Health and Safety Act, 85 of 1993

Clause 7.5.1.was agreed as contained in the Code

3.1.17 Protected Disclosures Act, 26 of 2000

Clause 7.6.1 was agreed as contained in the Code.

3.1.18. Protection from Harassment Act, 17 of 2011

Clause 7.7.1. was amended to read: The Protection from Harassment Act, 2011 enables individuals who are subjected to harassment, as defined in that Act, to obtain a protection order, including an interim protection order against the harasser. The Act covers harassment in all spheres of life including the workplace. The definition of harassment is wide and includes physical conduct as well as electronic and other communications which may cause mental, psychological, physical or economic harm.

3.1.19 Guiding Principles on the Prevention, Elimination and Management of Harassment

- a) Clauses 8.1 and 8.2(3) were agreed as contained in the Code.
- b) Clause 8.2 was amended to read: Employers should have an attitude of zero-tolerance towards harassment. They should create and maintain a working environment in which the dignity of employees is respected. A climate in the workplace should also be created and maintained in which employees who raise complaints about harassment will not feel that their grievances are

ignored or trivialized, or fear reprisals. Implementing the following guidelines can assist in achieving these ends.

- c) Clause 8.2(1) was amended to read: Employers and trade unions/ employees are obligated to refrain from committing harassment.
- d) Clause 8.2(2) was amended to read: All employers and trade unions/ employees have a role to play in contributing towards creating and maintaining a working environment in which harassment is unacceptable. They should ensure that their standards of conduct do not cause offence and they should discourage unacceptable behaviour on the part of others.
- e) Clause 8.2(4) was inserted to read: Employers should put measures in place to ensure that employees in the employ of the company are not subjected to harassment by third parties such as customers, suppliers, and others who have dealings with the business.
- f) Clause 8.2(5) was amended to read: Policies and procedures adopted by an employer should provide a clear statement of the employer's position regarding the prevention, elimination and management of the various forms of harassment in the workplace.
- g) Clause 8.2(6) was amended to read: Employers, where applicable jointly with trade unions, must implement awareness training initiatives to educate employees at all levels about harassment, including violence to reinforce and maintain compliance through ongoing awareness programmes.
- h) Clause 8.2(7) was amended to read: Employers **[management]** should take appropriate action in accordance with this Code where instances of harassment occur in the working environment.

3.1.20. Harassment Policies

Clauses 9.1, 9.2, 9.3, 9.4, 9.4(1), 9.4(2), 9.4(3), 9.4(4), 9.5 and 9.6 were agreed as contained in the Code.

3.1.21. Procedures

Clause 10 was amended to read: Employers should develop clear procedures to deal with harassment in terms of the EEA. These procedures should enable the resolution of problems in a gender-sensitive, confidential, efficient and effective manner

3.1.22. Reporting Harassment

- a) Clauses 10.1.1, 10.1.2 and 10.1.3 were agreed as contained in the Code.
- b) Clause 10.1.4 was amended to read: Sexual, or other, harassment may be brought to the attention of the employer by the complainant or any other person aware of the harassment, for example a trade union/ employee representative, friend, colleague or human resources official acting on the request of the complainant. An employee may also confide in someone else about a sensitive issue of harassment sometime after the event has occurred. However, where the harassment is of a particularly serious nature, the complainant should be encouraged to inform the employer.

3.1.23. Obligations of the employer

- a) Clause 10.2.1 was amended to read: When an allegation of harassment of an employee has been brought to the attention of the employer, the employer must: consult all relevant parties;
- b) Clause 10.2.2 was amended to read: take the necessary steps to address the complaint in accordance with this Code, the employer's policy, where applicable the collective bargaining agreement.
- c) Clauses 10.2.3, 10.3, 10.4(1), 10.4(2) and 10.4(3) was agreed as contained in the Code

3.1.24. Advice and assistance

Clauses 10.5.1, 10.5.2, 10.5.2(1) 10.5.2(2) and 10.5.2(3) were agreed as contained in the Code.

3.1.25. Advising the complainant of workplace procedures to deal with harassment

- a) Clauses 10.6.1(1), 10.6.1(2), 10.6.1(4), 10.6.1(5) and 10.6.1(6) were agreed as contained in the Code.
- b) Clause 10.6.1(3) was amended to read: advise the complainant that an employee [**she/he**] may choose which procedure should be followed by the employer, except that in certain limited circumstances, as set out in this Code, the employer may choose

to follow a formal procedure even if the complainant does not wish to do so.

3.1.26. Informal procedures

- a) Clause 10.7.1(1) was amended to read: the complainant or another appropriate person explains to the perpetrator that the conduct in question is unwanted, that it is related to a prohibited ground and its impact on the complainant, for example, that it makes the person feel uncomfortable and that it interferes with the person's work.
- b) Clauses 10.7.1(2) and 10.7.2 were agreed as contained in the Code.

3.1.27. Formal Procedure

- a) Clauses 10.8.1, 10.8.3, 10.8.(3) and 10.8.3(5) were agreed as contained in the Code.
- b) Clause 10.8.2 was amended to read: In the event that 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 perpetrator. In assessing such risk, the employer must take into account all relevant factors, including the severity of the harassment and whether the perpetrator has a history of harassment. 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 must follow a formal procedure, irrespective of the wishes of the complainant, and advise the complainant and/ or their representative accordingly.
- c) Clause 10.8.3(2) was amended to read: the internal grievance and disciplinary procedures to be followed, including provision for the complainant's desired outcome of the procedures.
- d) Clause 10.8.3(4) was amended to read: that should the matter not be satisfactorily resolved by the internal procedures outlined above, a complainant of harassment may refer the dispute to the Commission for Conciliation Mediation and Arbitration ("CCMA") and Bargaining Councils. Similarly, an alleged perpetrator of

harassment may refer a dispute arising from disciplinary action taken by the employer to the CCMA.

3.1.28. Disciplinary Sanctions

- a) Clauses 10.9.1 and 10.9.2 were agreed as contained in the Code.
- b) Clause 10.9.3 was amended to read: in appropriate circumstances upon being found guilty of harassment, a perpetrator may be transferred within the workplace or to another workplace within the company.
- c) Clause 10.9.4 was inserted to read: A complainant of harassment, in particular sexual harassment, has the right to institute separate criminal and/or civil charges against the alleged perpetrator

3.1.29. Confidentiality

- a) Clause 11.1 was amended to read: and employees must ensure that grievances about harassment are investigated and handled in a manner that ensures that the identities of the persons involved are kept confidential for the purpose of protecting all parties involved [complainants, if requested].
- b) Clause 11.2 was amended to read: In cases of sexual harassment, management, employees and the parties concerned must endeavour to ensure confidentiality in the disciplinary inquiry. Only management designated to handling disciplinary cases as well as the aggrieved person, representatives, the alleged perpetrator, witnesses and an interpreter if required should be present in the disciplinary inquiry
- c) Clause 11.3 was amended to read: Employers are required to disclose to the complainant, the perpetrator and/or their representatives, all relevant information as may be reasonably necessary to enable the parties to prepare for any proceedings in terms of this Code.

3.1.30. Additional sick leave

Clauses 12.1, 12.2 and 12.3 were agreed as contained in the Code.

3.1.31. Information and Education

Clauses 13.1, 13.2 and 13.3 were agreed as contained in the Code.

4. AREAS OF DISAGREEMENT

4.1. Section 1 – Objectives of the Code

- 4.1.1. Social partners agreed to clause 1.1 as amended to read: The objective of this Code is to eliminate all forms of harassment of employees in the workplace, while working or engaged in work-related activities.
- 4.1.2. Labour proposed further inclusion of “and related violence”. By “related violence” Labour is referring to violence that is discriminatory in nature. Harassment often takes violent forms and therefore the concepts of violence and harassment (based on discrimination) are inter-related and must be included as objectives. Taken cognisance of cases with clear findings that harassment in the workplace can have an element of related violence. For example, gender-based violence is a form of discrimination and therefore falls within the scope of the EEA. Furthermore, they have been advised by their legal advisor to include related violence under the objectives of the Code. Furthermore, government’s legal advisor advised that violence that is not discriminatory in nature falls outside of the scope of the EEA.² LRA deals with poor working performance and conduct related matters and not conduct that expresses violence. OHSA currently does not make reference to gender-based violence as an occupational health and safety risk. Based on the C190 violence is not limited to physical violence but may include psychological abuse as a form of violence.
- 4.1.3. Government disagreed with Labour’s proposal to insert **‘and related violence...’** because their interpretation is that violence falls outside the jurisdiction of the Employment Equity Act (EEA) and they are of the that it is adequately covered under LRA and OHSA.
- 4.1.4. Business and Community agreed with Government not to include “and related violence”.
- 4.1.5. Social partners agreed to clause 1.2.1 as amended to read: to employers, and employees on the prevention and elimination of all forms of harassment, as a form of unfair discrimination, in the workplace;

² To the extent that the draft CGP seeks to give guidance in respect of violence that does not constitute harassment or does not occur in the workplace, it would not be valid. The Minister has previously issued a Code of Good Practice on Sexual Harassment and it would be competent to extend the terms of that Code to cover harassment on other proscribed grounds, in particular, racial discrimination (legal opinion from Govt drafter paragraph 4)

- 4.1.6. Labour proposed further inclusion of “related violence”.
- 4.1.7. Government maintained its position that violence falls outside the jurisdiction of the EEA and covered under the LRA and OHSA.
- 4.1.8. Business and Community agreed with Government not to include “related violence” because it falls outside the jurisdiction of the EEA.
- 4.1.9. Business and Community agreed to clause 1.2.2. as outlined in the Code.
- 4.1.10 Labour proposed the inclusion of “related violence” to clause 1.2.2
- 4.1.11 Government maintained its position that violence falls outside the jurisdiction of the EEA and covered under the LRA and OHSA.
- 4.1.12 Business and Community agreed to clause 1.3.as amended to read:
This Code identifies the steps that employers must take to eliminate harassmentincluding the development and implementation of policies, practices and procedures that will lead to the creation of workplaces in which employees are treated fairly and are free of discrimination and harassment’ and in which employers and employees treat each other with respect and observe the rights of all persons to integrity, dignity, privacy and equality.
- 4.1.13 Labour proposed the inclusion of “related violence” to clause 1.3
- 4.1.14 Government maintained its position that violence falls outside the jurisdiction of the EEA and covered under the LRA and OHSA.

4.2. Application of the Code

- 4.2.1. Business agreed to clause 2.3.6 as outlined in the Code
- 4.2.2. Labour proposed that clause 2.3.6. should make a reference to PEPUDA in terms of protection when commuting to and from work in private and public transportation.
- 4.2.3. Government disagreed to the inclusion and cited that ensuring safety in public transport is outside the jurisdiction of the Code and the EEA. However, the matter can be discussed with the Department of Transport to ensure safe public transport to curb the scourge of gender-based violence. The Code would be aligned with provisions of C190 outlining that employers have control over transport they provide. This can be discussed within the confinement of the labour law.

4.3. Legal Framework

- 4.3.1. Business and Community agreed to the amended clause 3.3.1 to read: provide guidance in respect of harassment on any of the prohibited grounds.
- 4.3.2. Labour proposed inclusion of and related violence in clause 3.3.1.
- 4.3.3. Government disagreed to Labour's inclusion because violence falls outside the jurisdiction of the EEA and covered under the LRA and OHSA.
- 4.3.4. Business and Community agreed to the amended clause 3.4 to read: Section 5 of the EEA requires employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination, in any employment policy or practice. Harassment in the workplace is a form of unfair discrimination, which employers are required to eliminate and it constitutes a barrier to equity in the workplace.
- 4.3.5. Labour proposed inclusion of and related violence in clause 3.4
- 4.3.6. Government maintained its position that violence falls outside the jurisdiction of the EEA and covered under the LRA and OHSA.
- 4.3.7. Business and Community agreed with Government not to include "and related violence".
- 4.3.8. Business and Community agreed to clause 3.5 as contained in the Code.
- 4.3.9. Labour proposed inclusion of gender, gender identity and sexual orientation to clause 3.5.
- 4.3.10. Government disagreed to the inclusion citing that prohibited grounds are covered under section 6(1) of the EEA and cannot be amended through the Code.

4.4. Substantive Issues

- 4.4.1. Labour proposed the following insertion to the clause, agreed to by Business and Community, to read: This section of the Code deals with the definition and different types of harassment, inclusive of sexual harassment and racial, ethnic or social origin harassment.
Labour further proposed insertion of gender-based harassment, noting that in some cases, harassment may be based on gender and not sexual in nature.

4.5. Unwanted conduct

- 4.5.1. Social partners agreed to the amended wording to read: Firstly, the issue arises as to whether the complainant communicated to the harasser/perpetrator that the conduct was unwelcome. Secondly, this may have occurred verbally or non-verbally and may have been communicated directly or indirectly to the harasser/perpetrator.
- 4.5.2. Labour further proposed that clause 4.4.2 should be revised to focus on the impact of the conduct and whether the conduct is appropriate to the workplace and in line with constitutional values of dignity and equality. Furthermore, the responsibility should not be on the victim to stop abuse. Therefore, we should not have as a starting point whether the victim communicated the conduct was unwelcome.
- 4.5.3. Business and Community agreed to clause 4.4.3 as contained in the Code.
- 4.5.4. Labour proposed redrafting of clause 4.4.3 Because of power imbalances there may have been no communication either verbally or through action on the part of the complainant, and this lack of communication should in no way be viewed as the conduct being wanted. The enquiry should therefore be focused on the conduct of the perpetrator and whether that conduct would be welcome in the work environment or whether the said conduct would lead to or create a hostile work environment.
- 4.5.5. Business agreed to clause 4.4.4 as contained in the Code.
- 4.5.6. Labour proposed the following inclusion on clause 4.4.4: that is not physically violent. In such instances, it may be necessary to consult with and inform the complainant and advise them of the obligation.
- 4.5.7. Government disagreed to include 'physical' before 'violence'. It believes that additional inputs by Labour do not enhance the content of clause 4.4.4.
- 4.5.8. Business agreed to the amended clause 4.5.2 to read: In such circumstances, a person or an employer charged with harassment may seek to establish that the complainant's perceptions are not consistent with societal values reflective of our constitutional ethos.
- 4.5.9. Labour proposed inclusion of the following wording on clause 4.5.2. to read: However, there may be circumstances and facts relevant to the inquiry that indicate the possibility that the complainant may have

misinterpreted the conduct as not being conduct which would be welcomed in the work environment. In such instances the employer or complainant may seek to assess and establish whether the complaint is valid.

- 4.5.10 Government disagreed to Labour's rephrased proposal because labour's inputs are not compliant to legal drafting aimed at creating a standard. Therefore, believes that the new additions in clause 4.5.2. mitigate the argument around 'reasonable person' issue.
- 4.5.11 Business and Community agreed to clause 4.5.5.3 as contained in the Code.
- 4.5.12 Labour proposed that the issue of social rank must be covered based on case law Campbell Scientific Africa (Pty) Ltd v Simmers and Others (CA 14/20144) [2015] ZALCCT62 (23 October 2015)

4.6. Types of Harassment

- 4.6.1. Business and Community agreed to clause 4.7.1 to read: Harassment may take different forms and can be physical, verbal or non-verbal or psychological conduct.
- 4.6.2. Labour proposed inclusion of emotional, financial or economic abusive conduct, which results in harm with the understanding that economic harm is both a type of harassment and a consequence.
- 4.6.3. Government disagreed to inclusion because they are of the view that economic harm is only a consequence of harassment.
- 4.6.4. Business and Community agreed with Government not to include the proposed wording by Labour.
- 4.6.5. Business and Community agreed to clause 4.7.5.4 as contained in the Code.
- 4.6.6. Labour maintains reference to employee performance and conduct It can be any form of conduct and then that harassment not only impedes the employee doing their work, but also their behavior in the work environment as a whole.
- 4.6.7. Business and Community agreed to clause 4.7.5.6 as contained in the Code.
- 4.6.8. Labour proposed additional wording on clause 4.7.5.6 to read: or any other conduct that creates fear and degradation.

- 4.6.9. Business and Community agreed to clause 4.7.5.7. as contained in the Code.
- 4.6.10 Labour proposed additional wording on clause 4.7.5.7 to read: and discriminatory conduct towards an employee based on their psychological, medical, disability or any other personal circumstance.
- 4.6.11 Business and Community agreed to clause 4.7.5.8 as contained in the Code
- 4.6.12 Labour proposed deletion of [with harmful intent] on clause 4.7.5.8 and inclusion of recording, video graphing, photographing of an employee without their knowledge and consent because the intention here is irrelevant as the action would be a violation of the employees right to privacy. Also included other acts beside surveillance.
- 4.6.13 Business and Community agreed to clause 4.7.5.10 as contained in the Code.
- 4.6.14 Labour proposed inclusion of the following on clause 4.7.5.10 to read: and purposeful exclusion of promotion or other professional opportunities without justification.
- 4.6.15 Business and Community agreed to clause 4.7.5.12 as contained in the Code.
- 4.6.16 Labour proposed to amend clause 4.7.5.12 to read: or withholding of information on their legal rights because the clause implies that employees are aware of their rights;
- 4.6.17 Business and Community agreed to clause 4.7.8. as contained in the Code.
- 4.6.18 Labour proposed to amend clause 4.7.8 to read: deletion of **[tangible or material]** and insert may. The clause is confusing and seeks to redefine and add additional elements to the definition of harassment towards the end of the section and contradicts and undermines the earlier wording.
- 4.6.19 Government disagreed to the deletion and addition as proposed by Labour because clause 4.7.8 provides clarity on types of harassment that may be experienced by employees on the ground.
- 4.6.20 Business and Community agreed to clause 4.7.10 to read: Mobbing is a form of harassment by a group of people targeted at one or more individuals.
- 4.6.21 Labour proposed the following addition to read: a group or class of persons.

4.7. Sexual Harassment

- 4.7.1. Business and Community agreed to clause 5.1 as contained in the Code.
- 4.7.2. Labour stressed the importance to maintain reference to sexual harassment as a form of gender-based violence. Furthermore, gender-based violence is not sexual in nature and should be captured to cover the whole range of forms of GBV and harassment. Labour proposed that clause 5.1. should include the wording to read: sexual harassment is a form of gender-based violence which perpetuates gender-based discrimination and violence in the working environment.

4.8. Unwanted conduct

- 4.8.1. Business and Community agreed to clause 5.2.1 as contained in the Code.
- 4.8.2. Labour proposed language adjustment of clause 5.2.1 to remove the obligation on the victim to avoid the harassment from taking place.
- 4.8.3. Government disagreed to Labour's proposal because of its complexity.
- 4.8.4. Business and Community agreed to clause 5.2.2. as contained in the Code.
- 4.8.5. Labour proposed deletion of **[necessarily]** on clause 5.2.2. because it creates ambiguity and undermines the point being made.
- 4.8.6. Business and Community agreed to clause 5.2.3 as contained in the Code.
- 4.8.7. Labour proposed paraphrasing of clause 5.2.3. to read: Conduct will be deemed as unwanted where a third party (including a co-worker, superior, counsellor, human resource official, family member or friend) indicates to the perpetrator that their conduct is not welcomed by the employee or within the work environment with the view that language suggest to shift the obligation, and also to empower co-workers to address sexual harassment within their workspace.
- 4.8.8. Business and Community agreed to clause 5.2.4. as contained in the Code.
- 4.8.9. Labour proposed a new wording for clause 5.2.4. to read: The lack of engagement (the complainant either responding to, reporting, or rejecting the conduct as unwelcome) should in no way be interpreted

as the conduct having been welcomed or appropriate within the work environment.

4.9. Nature and extent of conduct

- 4.9.1. Business and Community agreed to clause 5.2.5 as contained in the Code.
- 4.9.2. Labour proposed inclusion of physical violence associated with this type of conduct on clause 5.2.5.
- 4.9.3. Government disagreed to Labour's proposed wording because it is not enhancing the substance of the content of clause 5.2.5.
- 4.9.4. Business and Community agreed to clause 5.2.5.5 as contained in the Code.
- 4.9.5. Labour proposed further addition of the words: behaviour that is unwelcome and inappropriate within a work environment.
- 4.9.6. Government disagreed to Labour's proposed wording because it is not enhancing the substance of the content of clause 5.2.5.5.
- 4.9.7. Business and Community agreed to clause 5.2.5.7 as contained in the Code.
- 4.9.8. Labour proposed inclusion of reference to sexual orientation, gender and gender identity to clause 5.2.5.7
- 4.9.9. Government disagreed to Labour's proposed wording because it is not enhancing the substance of the content of clause 5.2.5.7.
- 4.9.10 Business and Community agreed to clause 5.2.6.1 as contained in the Code.
- 4.9.11 Labour proposed inclusion of the wording: gender-based discriminatory conduct
- 4.9.12 Business and Community agreed to clause 5.2.6.3 as contained in the Code
- 4.9.13 Labour proposed the following inclusions on clause 5.2.6.3 either real or perceived or promise to reward those who respond or are coerced into responding.
- 4.9.14 Business and Community agreed to clause 5.2.7 as contained in the Code
- 4.9.15 Labour proposed deletion of **[may]** on clause 5.2.7 with the understanding that unwelcome sexual conduct is perceived as sexual harassment.

4.10. Impact of the conduct

- 4.10.1 Business and Community agreed to clause 5.2.8.1 as contained in the Code.
- 4.10.2 Labour proposed inclusion of the following to clause 5.2.8.1 to read: Impact of the conduct on their work as well as on their well-being.
- 4.10.3 Business and Community agreed to clause 5.2.8.2 as contained in the Code.
- 4.10.4 Labour proposed to include the following to clause 5.2.8.2. to read: their community and society as a whole with due regard given to the systemic nature of discrimination in our society and country.

4.11. Test for sexual harassment

- 4.11.1 Business and Community agreed to clause 5.3.1. as contained in the Code
- 4.11.2 Labour proposed to delete the wording on clause 5.3.1 **[perpetrator knows or ought to know]** and focus on a more objective assessment of what is acceptable in the work environment in terms of the labour court findings.
- 4.11.3 Business and Community agreed to clause 5.3.2.1
- 4.11.4 Labour proposed inclusion of the following on clause 5.3.2.1 to read: or any other prohibited ground. They are of the view that since sexual harassment is not about sex but about power, it should not only link it to the grounds that have to do with sex and gender. It could easily be based on race or pregnancy etc. Similarly, discrimination is almost always interconnected and compounded so there may easily be more than one ground.
- 4.11.5 Government disagreed with Labour's inputs citing that they are not enhancing the content of clause 5.3.2.1.

4.12. Racial, ethnic or social origin harassment

- 4.12.1 Business and Community agreed to clause 6.2. as amended.
- 4.12.2 Labour proposed to include the following to clause 6.2 can be persistent or one incident that is harmful and to delete **[serious]**. This is consistent with broader definition of harassment and sexual harassment. Believes that the suggested language also recognises that women and other vulnerable groups can suffer intersecting forms

of discrimination on multiple grounds such as race, gender, sexual orientation and ethnicity or social origin; therefore, employers should be mindful of these intersectionality's which can compound discrimination.

- 4.12.3 Government disagreed to add the proposed last sentence on intersectionality because sex, gender, sexual orientation is already part of the prohibited grounds under section 6(1) of the EEA. Furthermore, section 5 of this Code on Sexual harassment already deals with these issues. There are no statutes, including the Constitution that list vulnerable groups, because it creates limitations. Globally, governments do not list vulnerable groups in their statutes, but list prohibited grounds. Therefore, it would be legally incorrect to list such in this Code.
- 4.12.4 Business and Community agreed to clause 6.3 as outlined in the Code.
- 4.12.5 Labour proposed inclusion of the wording to clause 6.3: which may include but is not limited to: racist conduct, derogatory language. Add to definition that indirect also applies to witnessing racist behaviour which creates hostile environment
- 4.12.6 Government disagreed to Labour's inputs and explained that "such" means that these are examples and the list is not exhaustive. Racist conduct, derogatory language is already included under clause 6.1.

4.13. Factors to be considered in racial harassment

- 4.13.1 Business and Community agreed to clause 6.6.1 as contained in the Code
- 4.13.2 Labour proposed to include the following on clause 6.6.1 to read: harmful or incites harm.
- 4.13.3. Business and Community agreed to clause 6.6.3 as contained in the Code.
- 4.13.4 Labour proposed inclusion to clause 6.6.3 to read: group of persons because of their identity or a characteristic associated with such group. Believes that the suggested language would broaden the scope to persons in the workplace and not just employees as currently stated and to also align the section with the definition of racial harassment.

- 4.13.5. Business and Community agreed to clause 6.6.5 as contained in the Code.
- 4.13.6 Labour proposed inclusion of the wording: of the person or such group of persons. It believes that the suggested language would align clause 6.6.5 with the above sections and the ruling of the Courts which acknowledged that hate speech may be directed at an individual but impact not just that individual, but the group to which that individual belongs. Therefore, the same principle could apply in the workplace where racial harassment may be directed against one person but affect the entire group of persons with the same identity in the workplace.

4.14. The test to be applied for Racial Harassment includes:

- 4.14.1 Business and Community agreed to clause 6.7.1 as contained in the Code.
- 4.14.2 Labour proposed inclusion of the wording: from the perspective of the complainant who alleges the racial harassment. The suggested language aims to move away from using the language of a “reasonable person”. The Courts have illustrated that the reasonable person in instances prior to our constitutional democracy in our law was a white male. This test fails to take into account intersecting forms of discrimination and how these are perpetuated at a systemic level at every facet of an individual’s lives.
- 4.14.3 Government disagreed with Labour’s input that objectivity cannot be one-sided.

4.15. Other statutes impacting on harassment

- 4.15.1 Business and Community agreed to clause 7.1 as outlined in the Code.
- 4.15.2 Labour proposed that the state has a role as employer to amend some laws for compliance with Convention 190 at a later stage.
- 4.15.3. Government disagreed to include the state because it is covered under employers.

4.16 Constitutional right to fair labour practices

- 4.16.1 Business and Community agreed to clause 7.2.1 as outlined in the Code.

- 4.16.2 Labour proposed rewording of clause 7.2.1 to provide the full scope of constitutional protection to bring multiple rights that are affected when there is harassment in the workplace. The Constitution is the supreme law in South Africa and provides that everyone has the right to be treated equally (s9), the right to human dignity and to have such dignity respected and protected (s10), the right to freedom and security of the person which includes the right to be free from all forms of violence from either public or private sources (s12) and the right to fair labour practices (s23(1)).
- 4.16.3 Government disagreed with Labour's views and cited that clause 7.2.1 is consistent with case law.

4.17 Occupational Health and Safety Act, 85 of 1993

- 4.17.1 Business and Community agreed to clause 7.5.2 as contained in the Code.
- 4.17.2 Labour proposed inclusion of transport sector to clause 7.5.2 as it relates to the public.

4.18 Obligations of the employer

- 4.18.1 Business and Community agreed to clause 10.4.2 as contained in the Code.
- 4.18.2 Labour proposed deletion of [where reasonably practical] to be consistent with clause 10.5
- 4.18.3 Government disagreed with Labour's inputs on clause 10.4.2. Employers also need to exercise caution not to compromise disciplinary proceedings by randomly offering assistance. Where disciplinary and investigation proceedings are concerned employers should always exercise caution.

5. NEW/ADDITIONAL PROPOSALS BY LABOUR FOR INCLUSION IN THE CODE

- 5.1. Labour proposed provisions specifically dealing with the monitoring and enforcement to ensure compliance of this Code (Annexure 5)

- 5.2. Labour proposed provisions specifically to include the impact of domestic violence in the workplace as it affects workplace in terms of productivity, health and safety of all workers in the workplace. (Annexure 6)

6. CONCLUSION

This report therefore concludes considerations at Nedlac report on the draft Code of Good Practice on Elimination of Violence and Harassment in the World of Work. The Report is submitted to the Minister of Employment and Labour in terms of Section 8 of the NEDLAC Act No 35 of 1994.

ANNEXURE 1

<p>BUSINESS:</p> <ol style="list-style-type: none"> 1. Jahni de Villiers 2. Sino Moabalobelo 3. Lwandile Ngendane 4. Sanelisiwe Jantjies 5. Kgauhelo Muavha 6. Noni Tshabalala 	<p>GOVERNMENT:</p> <ol style="list-style-type: none"> 1. Tabea Kabinde 2. Ntsoaki Mamashela 3. Masilo Lefika 4. Niresh Singh 5. Lucia Rayner
<p>LABOUR:</p> <ol style="list-style-type: none"> 1. Gertrude Mtshweni 2. Patricia Nyman 3. Liesl Orr 4. Sipho Ndhlovu 5. Bonita Loubser 6. Matshediso Sebatane 7. Brenda Modise 	<p>COMMUNITY:</p> <ol style="list-style-type: none"> 1. Conti Matlakala 2. Thandiwe Mfulo 3. Lawrence Munyahi 4. Tumi Zwane 5. Lulama Makhubela