



## List of Definitions and Important Terms – Sexual Harassment

**Harassment:** Harassment is unwanted conduct that occurs with the purpose or effect of violating the dignity of an individual or creates an intimidating, hostile, degrading, humiliating or offensive environment. It may be carried out by one individual or a group of individuals.

**Sexual Harassment:** Sexual Harassment refers to unwanted behaviour of a sexual nature. A range of behaviours that may fall under this definition include the following:

- Touching, sexual assault, rape
- Sexual Innuendos, suggestions, hints and sex related jokes
- Unwelcome enquiries about a person's sex life
- Displaying sexually explicit pictures and objects
- Quid pro Quo
- Sexual Favouritism

An act of sexual harassment can be one incident or a persistent set of events.

**Quid pro Quo:** Quid pro Quo is one form of sexual harassment in which the perpetrator offers an employee something in return for sexual favours. Examples of what is offered may include an increase in remuneration, a promotion, more shifts or a favourable performance appraisal. In this example, the perpetrator is usually, but not always, senior to the employee.

**Sexual Favouritism:** This refers to a form of sexual harassment where a more senior employee grants something favourable to the person who responds to his/her sexual advances and denies it to those who do not respond to them the favour(s).

**Sexual Attention or Flirting:** This, in contrast to sexual harassment, describes a set of behaviours which is welcomed by the recipient. Such behaviour is experienced as mutually acceptable to both parties. It is experienced as complimentary or pleasing. It can become problematic should the relationship change at any point and the attentions then become unwelcome.

**Alleged Perpetrator:** This refers to the person who has been accused of sexual harassment. Should the accusations be proven, the person would be referred to as the perpetrator.

**Complainant:** This refers to the person who, in response to behaviour of a sexual nature that is unwelcome, will report the behaviour formally or informally to a person in authority in order that the unwelcome behaviour may be addressed and stopped.

**Micro- Aggressions:** These refer to comments or actions that subtly and often unconsciously or unintentionally express a prejudice towards a marginalised group. This includes discriminatory

comments or behaviours whose negative effects lie in their invisibility to the perpetrator who may deny that he or she possesses biased attitudes (unconscious bias).

**Intent versus Impact:** This concept is important in understanding the principle in sexual harassment cases, that the impact of the behaviour on the recipient is given more weight than the intention of the perpetrator in determining the extent of the misconduct. Intention may become relevant in determining an appropriate sanction, although the impact will always carry more weight.

**Corroboration:** In weighing up the evidence presented to support an allegation of sexual harassment, usually the alleged victim's case is made stronger if there are witnesses to the behaviour who can corroborate the version of the alleged victim. This is not always possible as the behaviour may have happened in a private place and then the challenge is to weigh up the probability of each person's version of events against the others – known in the Law of Evidence as a single witness scenario.

**Serial Harasser:** This refers to a type of Harasser which is described as one of the more difficult types to identify and deal with. The behaviour may be compulsive and indicate a psychological problem. This perpetrator builds up an image so that people find it hard to believe ill of him/her. This image may include a happy marriage, a commitment to a religion, an excellent working track record, a caring manager and so on. Such a person plans his/her approaches carefully and often only "strikes" in private, so that it his/her word against the other person's.

**A Hostile Environment:** This refers to a workplace in which sexual harassment is intentionally or unintentionally permitted, encouraged or simply, that there is little or no response to complainants' allegations. Should it be proven that the employer did not take reasonable steps to intervene and stop the alleged behaviour, the employer may be held jointly liable to pay compensation to the victim.

**Corrective Actions:** This refers to actions that the employer may take to address the behaviour of a perpetrator and would include warnings, dismissals, counselling sessions and other remedies in line with the Code of Good Practice's Recommendations.

**The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace:** This Code was developed and amended by the Minister of Labour on the 22<sup>nd</sup> of June 2005, on the advice of the Commission for Employment Equity, in terms of Section 54 (1) (b) of the Employment Equity Act, 1998 (Act No 55 of 1998). The objective of the Code is to eliminate sexual harassment in the workplace, by providing appropriate procedures to deal with sexual harassment and prevent its recurrence. The Code encourages and promotes the development and implementation of policies and procedures that will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another's dignity and integrity, their privacy and their right to equity in the workplace. An update to the Code is under discussion at Nedlac as at early 2020 in response to developments in the conventions of the International Labour Organisation.

**Power Differential:** A power differential exists in sexual harassment cases where the person harassing another is more senior, or in some way, has the capacity to influence the life of the victim, often due to positional power. Such harassment may be viewed even more severely than harassment between co-workers as it represents illegitimate abuse of legitimate levels of organisational authority.

**Protection Order:** In terms of the Protection from Harassment Act No 17 of 2011 (promulgated in April 2013), the concept of Harassment was extended to include Sexual Harassment and, for the first

time, a protection order can be obtained in respect of an employer or co-worker guilty of sexual harassment. Previously, such orders were limited to people with whom one had a domestic or family relationship.

**Constructive Dismissal:** This refers to a category of dismissals where the employee has resigned due to the employer making a continued employment relationship “intolerable”. The employee bears the burden to prove that there was a dismissal. The use of the concept of “intolerable” must go beyond mere dissatisfaction and indicate a high level of discomfort. Proven sexual harassment will often be a ground for the employee resigning and then claiming an unfair dismissal.

**Wrongful Accusation(s) of Sexual Harassment:** Such accusations do sometimes occur but this is not the norm and should not be the first assumption when a complaint has been made. This should be covered in the organisation’s Sexual Harassment Policy in which it is clearly articulated that false accusations of this nature are regarded as serious misconduct and will be dealt with accordingly.

**When to Report Sexual Harassment:** The Employment Equity Act says the alleged sexual harassment should be reported “immediately” but the Amended Code interprets “immediately” as “as soon as possible in the circumstances and without undue delay taking into account the nature of the sexual harassment, including that it is a sensitive issue, that the complainant may fear reprisals and the relative positions of the alleged perpetrator in the workplace”. These caveats were added due to some rulings that implied that waiting to report an incident was a mitigating factor for the perpetrator.

**The “Silencing” of Victims:** It is important within the context of sexual harassment (and other forms of abuse) to understand that many victims may find it hard to talk out about their experiences. They may fear secondary abuse in not being believed, or having to face cross-examination in a formal legal process. This is common for victims of rape and has been widely written and spoken about. This means that the employer, in the Sexual Harassment Policy, needs to make a commitment to creating a safe environment for reporting and dealing with matters that can be very sensitive and disruptive.

**Dealing with the Aftermath or “Fallout” during and after a Sexual Harassment Case in the Workplace:** Due to the sensitivity of such an incident and accusations that may be made by various parties to such a dispute, the workplace may be divided on the outcome, certain people may choose “sides”, disagree with the outcome of the case and morale and relationships at the workplace may suffer. Interventions may be required to restore working relationships within a team or across the workforce. Such interventions may include Sexual Harassment Awareness Raising, counselling or policy changes.

**Confidentiality in Dealing with Sexual Harassment Cases:** The Code encourages as much confidentiality as possible in handling investigations around alleged sexual harassment to protect all the parties implicated. This is correct in principle but not always possible in practice for a variety of reasons, including informal communication such as gossip based on hearsay, disbelief, anger and fear. Sometimes an organisation may need to weigh the need for confidentiality against the need to deal with misperceptions and emotions which are causing workplace disruption.

**Confidentiality Clauses in Termination Agreements:** In some circumstances, one or both the parties, with the agreement of the employer and on the advice of legal practitioners, may agree to leave without going through a formal disciplinary or grievance process. Often such Agreements to Terminate the employment relationship may contain Confidentiality Agreements where what happened and the outcome is not disclosed. There has been some criticism of this approach when it is deemed to protect the identity of an alleged perpetrator and, if often used, can contribute to a

perception of protection of perpetrators by the organisation which can cause loss of engagement amongst other employees and reputational damage.

**Formal versus an Informal Approach to dealing with Sexual Harassment at the Workplace:** The Code allows for the victim(s) to choose whether they would want to follow either an informal approach to dealing with the harassment in their workplace.

1. The Informal Approach which comprises two options
  - a. The complainant or another appropriate person explains to the perpetrator that the conduct in question is not welcome, that it offends the complainant, makes him or her feel uncomfortable and that it interferes with his or her work.
  - b. An appropriate person approaches the perpetrator, without revealing the identity of the complainant and explains to the perpetrator that certain forms of conduct constitute sexual harassment, are offensive and unwelcome, make employees feel uncomfortable, and interfere with their work.

2. The Formal Approach

A formal approach may be followed after, or instead of, the informal approach. This includes sharing the details about the formal Grievance Process of the organisation and the time frames with the aggrieved employee. Should the alleged victim not be satisfied by an internal process, they may refer the dispute to the CCMA. Similarly, an alleged perpetrator may refer a dispute to the CCMA arising out of disciplinary action taken by the employer. The employer also needs to state that it will be a disciplinary offence to retaliate against or victimise a complainant who in good faith lodges a grievance of sexual harassment.

Even if the complainant refuses to follow a formal route, the employer reserves their right to follow a formal process against the perpetrator. The employer needs to take into account, in this decision, such factors such as the risk to other employees, the severity of the sexual harassment and if the perpetrator has a history of sexual harassment.

**Appointment of a Sexual Harassment Advisor/“designated person”:** Some organisations have opted to identify one or more people to play a prominent role in dealing with sexual harassment claims, supporting the alleged victim and holding an investigation before proceeding to any other steps required. Such a person, or persons, would have training in sexual harassment and related matters and be able to professionally guide all the parties involved on dealing with a sensitive and potentially disruptive matter.