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LEGAL PRACTICE COUNCIL

SEXUAL HARASSMENT POLICY

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Executive Committee: Ms. Kathleen Matolo - Dlepu – Chairperson, Adv Anthea Platt SC - Deputy Chairperson, Adv. Greg Harpur SC, Ms. Trudie Nichols, Mr Lutendo Sigogo, Mr Jan Stemmett, Adv. Ghandi Badela, Executive Officer: Ms. Charity Nzuza

1. **OBJECTIVE**

1.1 The Legal Practice Council of South Africa (the Council) is committed to ensuring that as far as possible legal practitioners and candidate legal practitioners (referred to in this policy as "practitioners") conduct themselves in a manner which creates a working environment in which members of the legal profession respect one another's integrity, dignity and privacy and the integrity, dignity and privacy of individuals who have dealings with them.

1.2 Sexual harassment is a form of unfair discrimination on the basis of gender and/or sexual orientation which infringes the rights of a person who is subjected to harassment.

1.3 This policy of the Council ("this Policy/the Policy") is intended to guide and direct the Council and practitioners in regard to complaints of sexual harassment.

2. **COUNCIL'S POLICY**

2.1 Sexual harassment within the legal profession will not be permitted or condoned.

2.2 Persons who have been or are being subjected to sexual harassment in addition to any other recourse they may have, have the right to lodge a complaint in accordance with this Policy, and appropriate action will be taken by the Council.

2.3 The Council has a duty to implement this policy and will, subject to the provisions of clauses 7 and 9, take disciplinary action against members of the legal profession who do not comply with the Policy. Such action will be taken in accordance with this Policy read with the Council's disciplinary policies and procedures.

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2.4 Allegations of sexual harassment will be dealt with in a serious, expeditious, sensitive and confidential manner.

2.5 Alleging sexual harassment, when it is known to be false, is a serious form of misconduct.

2.6 If an anonymous charge of sexual harassment is made, the Council will not take any action.

2.7 There will be no victimisation in any form of a complainant, an alleged perpetrator or any witness involved in any past or future investigation of complaints about sexual harassment.

2.8 This Policy is to be read with the Amended Code of Good Conduct on the Handling of Sexual Harassment Cases in the Workplace issued by the Department of Labour in terms of the Employment Equity Act no 55 of 1998 ("the Code").

3. DEFINITION OF SEXUAL HARASSMENT

Sexual harassment is defined in the Code of Conduct issued by the South African Legal Practice Council in terms of Section 36(1) of the Legal Practice Act 28 of 2014. ("Legal Practice Act").

3.1 "*sexual harassment*" is unwanted conduct of a sexual nature, or other unwelcome conduct based on the gender or sexual orientation of a person, which has the purpose or effect of violating a person's rights, or creating an uncomfortable, degrading, humiliating or hostile environment or has the effect of violating a person's dignity;

3.2 "*harassment*" is unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submissions by actual or threatened adverse consequences and which is related to a person's membership or presumed membership of a group identified by one or more of the constitutionally prohibited discriminatory grounds or a characteristic associated with such group;

3.3 "*conduct*" may take the form of non-verbal conduct. verbal conduct, and/or physical conduct. Conduct qualifying as sexual harassment may occur in a single instance or may include conduct that occurs on a repeated basis where the effect is to sexually harass the person.

3.4 Sexual attention becomes sexual harassment if –

3.4.1 the behaviour is persisted in, although a single incident of harassment may constitute sexual harassment; and/or

3.4.2 the recipient has made it clear that the behaviour is considered offensive; and/or

3.4.3 the perpetrator should have known that the behaviour is regarded as unacceptable.

4. FORMS OF SEXUAL HARASSMENT

Sexual harassment may include unwanted physical, verbal or non-verbal conduct and includes, but is not limited to the following forms:

4.1 physical contact of a sexual nature, this includes all unwanted physical contact, ranging from touching to sexual assault; and, in its most serious form, rape;

4.2 verbal forms of sexual harassment, this includes all unwanted innuendoes suggestions and hints, sexual advances, comments with sexual overtones, sex related jokes or insults or unwanted graphic comments about a person's body, unwanted and inappropriate enquiries about a person's sex life, unwanted whistling at a person or group of persons and unwanted sending by electronic or otherwise of sexually explicit text;

4.3 non-verbal forms of sexual harassment, including unwanted gestures, indecent exposure, and the unwanted sending by electronic means of sexually explicit pictures and objects;

4.4 *quid pro quo* harassment, occurs when a person in a supervisory or senior role undertakes or attempts to influence a subordinate's employment circumstances (for example engagement, promotion, training, discipline, dismissal, remuneration or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances; and

4.5 sexual favouritism, occurs where a person who is in a position of authority rewards only those who respond to his or her sexual advances, while other deserving employees who do not submit to sexual advances are denied promotions, merit rating or salary increases.

5. SCOPE OF THE POLICY

This Policy applies to all practitioners and in the following circumstances namely –

5.1 at all premises where the activities of practitioners are conducted;

5.2 to all activities of practitioners performed at any other site;

5.3 to any social, business or other function in which practitioners are involved.

6. GUIDING PRINCIPLES

The Council seeks to create and maintain a working environment within the legal profession in which sexual harassment is disapproved of and victims of sexual harassment will not feel that their grievances are ignored or trivialised, or fear reprisals. Accordingly, the following guidelines should be noted:

6.1 practitioners are required to refrain from committing acts of sexual harassment;

6.2 all persons who are subject to this policy have a role to play in creating and maintaining a working environment within their practices in which sexual harassment is not accepted. They should ensure that their conduct does not cause offence, and should discourage unacceptable behaviour on the part of others;

6.3 the Council will take appropriate action in accordance with this policy when instances of sexual harassment which occur during the course of a practitioner's practice are brought to its attention.

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7. PRACTITIONERS SEXUAL HARASSMENT POLICIES

7.1 Practitioners are required to adopt a sexual harassment policy in their practices and which policy should as far as is practical be aligned to the provisions of this Policy.

7.2 All incidents of sexual harassment by any practitioner which are brought to the notice of the practitioner must be dealt with by the practitioner in accordance with this Policy.

7.3 Where the alleged perpetrator of sexual harassment is a practitioner, the practitioner who is the employer of the perpetrator, or a partner or a co-director of the perpetrator must deal with the conduct in terms of its sexual harassment policy. After a finding of guilty, the employer of the perpetrator must report such finding to the Council.

7.4 Where the alleged perpetrator is an advocate and a member of a society of advocates, the chairperson of such society deals with the conduct in terms of its sexual harassment policy. After a finding of guilty, the chairperson of the society must report such finding to the Council.

7.5 If the chairperson of a society of advocates of which the alleged perpetrator is a member, or a practitioner to whom this Policy applies has not adopted a sexual harassment policy for his or her practice or society and there has been no enquiry in terms of such a policy or in terms of any other disciplinary process, then the practitioner or the society concerned must report the matter to the Council to be dealt with by the Council in terms of this Policy and its disciplinary processes.

7.6 A finding of guilty following a disciplinary enquiry by the firm in which the alleged perpetrator practiced or the society of which the perpetrator is a member, will be *prima facie* evidence of misconduct.

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8. **PROCEDURES IN DEALING WITH ALLEGATIONS OF SEXUAL HARASSMENT**

The Council is committed to providing a supportive environment in which to deal with allegations of sexual harassment and resolve such issues subject to the consent of the individual who was the subject of the alleged harassment (the complainant). Subject to the provisions of clause 9, such allegations will deal with the complaint in accordance with a disciplinary process established by the Council.

9. **INFORMAL RESOLUTION OPTION**

9.1 The complainant (or, if requested to do so by the complainant, a person nominated by the complainant or the employer or the Council) may address the issue directly with the alleged perpetrator by making it clear (either verbally or in writing) that the behaviour is unwelcome, offensive and unacceptable.

9.2 In certain circumstances, it may be sufficient to explain to the alleged perpetrator that the behaviour in question is not welcome in the workplace, that it offends the complainant or makes them uncomfortable, or that it interferes with the complainant's work.

9.3 The informal process aims to resolve the dispute and restore the working relationship between the parties.

9.4 Should the complainant choose to express his or her complaint in writing, the communication to the alleged perpetrator should state the following:

9.4.1 his or her perception of the behaviour;

9.4.2 where and when the unwelcome action occurred;

9.4.3 a request that the behaviour should stop; and

9.4.4 give notice that further action will be taken if the behaviour persists or re-occurs.

9.5 If the matter is resolved, it will be determined as having been finalised and no note of misconduct on the part of the alleged perpetrator will be entered in his or her record with the Council.

10. FORMAL PROCESS

10.1 If the matter remains unresolved a person appointed by the Council will decide whether the matter proceed by means of mediation or by means of a disciplinary enquiry in terms of the rules of the Council. The decision of the person will be final and binding on the complainant and on the alleged perpetrator.

10.2 Notwithstanding any other provision in this Policy, a complainant may lodge a complaint directly with the Council at any stage after the occurrence of the alleged incident of sexual harassment.

11. MEDIATION

11.1 The person appointed by the Council or the employer of the practitioner or the society which the practitioner is a member, after consulting the complainant and the person against whom the complaint has been made will select a mediator (who will be a practising attorney or a practising advocate of not less than 10 years' standing) to serve as mediator.

11.2 The role of the mediator will be to assist in the informal resolution of the complaint. This may involve:

11.2.1 Informing the alleged perpetrator or assisting the complainant to inform the alleged perpetrator that the conduct in question is not welcome, that it offends the complainant, and that it makes him or her feel uncomfortable; or

11.2.2 Approaching the alleged perpetrator and explaining to him or her that certain forms of conduct constitute sexual harassment, are offensive and unwelcome and make the complainant feel uncomfortable and interfere with his or her work or personal life.

11.3 The mediator must also:

11.3.1 provide details of this Policy concerning sexual harassment to the alleged perpetrator; and

11.3.2 inform the alleged perpetrator of his or her rights as well as the rights of the complainant.

11.4 The purpose of the mediation process is to ensure that the offensive behaviour does not recur, and that the complainant will not experience reprisals. If the matter is resolved, it will be considered as finalised. No further steps of a disciplinary nature will be taken against the alleged perpetrator, and no note of misconduct on the part of the alleged perpetrator will be entered in his or her record with the Council.

11.5 Should the mediator find that the allegations are unfounded the complainant will be requested to withdraw the allegations.

12. **DISCIPLINARY PROCESS**

12.1 If the matter remains unresolved the mediator will advise the Council or the employer of the practitioner or the society and both parties in writing of his or her findings. If the complainant persists in his or her complaint the matter will be dealt with in terms of the disciplinary process set out in the rules of the Council.

13. **CRIMINAL CHARGES AND CIVIL REMEDIES**

Nothing in this Policy will prevent a victim of sexual harassment to press separate criminal charges or pursue civil remedies against an alleged perpetrator.

14. **VICTIMISATION OF COMPLAINANT**

It shall be a disciplinary offence to victimise or retaliate against an employee who in good faith lodges a complaint of sexual harassment.

15. **CONFIDENTIALITY**

15.1 The Council recognises that a person who is subjected to sexual harassment may find it difficult to lodge a complaint, and understands that victims and alleged perpetrators may be particularly concerned about confidentiality and the effect that a complaint may have on their careers.

15.2 To protect the interest of the complainant, the alleged perpetrator, and any other person who may report or be a witness to incidents of sexual harassment, confidentiality will be maintained throughout any investigation process to the extent that this is practical and

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appropriate in the circumstances. The provisions of section 38(4) of the Legal Practice Act, with regard to proceedings of disciplinary hearings being closed to the public will apply.

15.3 Despite what is stated above the Council has a duty to ensure that sexual harassment does not recur. Accordingly, all records of complaints, including notes of meetings, interviews, the results of investigations and other relevant material will be kept confidential by the Council, except where disclosure is required for disciplinary or other remedial processes and ordered to be released by an order of court.

15.4 If, following a disciplinary hearing, the alleged perpetrator is found guilty of misconduct, the Council will be obliged to comply with Section 38(3) of the Legal Practice Act.

16. TEST FOR SEXUAL HARASSMENT

16.1 Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of a person and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

16.1.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;

16.1.2 whether the sexual conduct was unwelcome;

16.1.3 the nature and extent of the sexual conduct; and

16.1.4 the impact of the sexual conduct.

17. **FACTORS TO ESTABLISH SEXUAL HARASSMENT**

17.1 **Harassment on a prohibited ground**

17.1.1 The grounds of discrimination to establish sexual harassment are sex, gender and sexual orientation.

17.1.2 Same-sex harassment amounts to discrimination on the basis of sex, gender and sexual orientation.

17.2 **Unwelcome conduct**

17.2.1 There are different ways in which a victim may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator.

17.2.2 Previous consensual participation in sexual conduct does not mean that the conduct continues to be welcome.

17.2.3 Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resources, family member or friend.

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17.3 **Nature and extent of the conduct**

17.3.1 The unwelcome conduct must be of a sexual nature, and includes physical, verbal or non-verbal conduct.

17.3.2 The conduct may include, but is not limited to, the conduct listed in paragraph 3.1 of this Policy.

17.3.3 A single incident of unwelcome sexual conduct may constitute sexual harassment.

17.4 **Impact of conduct**

The conduct should constitute an impairment of the victim's dignity, taking into account:

17.4.1 The circumstances of the victim; and

17.4.2 The respective positions of the victim and the perpetrator in the workplace, where the victim is an employee, or the working environment, where the victim is not an employee.



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