



**Western Cape
Government**

Western Cape Education Department
Directorate: Employee Relations

PROTOCOL FOR MANAGING AND REPORTING SEXUAL MISCONDUCT

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1. Definitions

In this protocol, any word or expression to which a meaning has been assigned shall bear that meaning assigned to it hereunder and, unless the context indicates otherwise—

“alleged perpetrator” means a person or employee who is being accused of **sexual misconduct**;

“protected disclosure” means a disclosure that contains information about unlawful and wrongful conduct, made in good faith to the right person or body as per the *Western Cape Government (WCG) Whistle-blowing Policy, 2021* and/or the Protected Disclosures Act, 2000 (Act 26 of 2000);

“sexual abuse” according to section 1 of the Children's Act, 2005 (Act 38 of 2005), in relation to a child means—

- (a) sexually assaulting a child or allowing a child to be sexually assaulted;
- (b) encouraging, inducing or forcing a child to be used for the sexual gratification of another person;
- (c) using a child in or deliberately exposing a child to sexual activities or pornography; or
- (d) procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child;

“sexual harassment” may include unwelcome physical contact, verbal or non-verbal conduct, discriminatory or offensive behaviour based on the gender or sexual orientation of a person, is not limited to situations where an unequal power relationship exists between parties involved and can be committed by or against any person regardless of gender, sex or sexual orientation; with reference to the Protection from Harassment Act, 2011 (Act 17 of 2011), sexual harassment means—

- (a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;
- (b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;
- (c) implied or expressed promise of reward for complying with a sexually-oriented request; or
- (d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually-oriented request inclusive of gender-based abuse;

“Sexual Misconduct Contact Officer” means an employee nominated by the Western Cape Education Department (WCED) for reporting purposes and to fulfil an advisory role in relation to dealing with and referring cases to the Directorate: Employee Relations;

“workplace” includes all WCED premises, as well as any other areas/spaces where an alleged act of sexual abuse or harassment is perpetrated by a WCED employee or a WCED service provider during the execution of official duties.

2. Legislative framework

The legislative framework for this protocol is as follows:

- (a) Constitution of the Republic of South Africa, 1996
Sections 9(3)–(4) provides that neither the State nor any person may directly or indirectly unfairly discriminate against anyone on one or more of the listed grounds. Section 12(2)(b) states that everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body. Section 28(2) asserts that a minor child's best interests are of paramount importance in every matter concerning the child.
- (b) Labour Relations Act, 1995 (Act 66 of 1995)
This Act, in principle, provides for the rights of employees in various employment matters and processes.
- (c) Employment Equity Act, 1998 (Act 55 of 1998)
This Act provides for a Code of Good Practice specifically drafted and issued to deal with sexual harassment in the workplace. As such the Department of Employment and Labour issued the *Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace*, published in *Government Gazette* No. 46056 on 18 March 2022.
- (d) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007)
The purpose of this Act is to amend all aspects of the law and further implementation of the law relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute. The latest amendment of this Act regulates the inclusion of the details of persons in the National Register for Sex Offenders and provides for the reporting duty of persons who are aware that sexual offences have been committed against persons who are vulnerable, amongst others. This proviso becomes relevant in the recruitment and selection process in that an appointed candidate must be subjected to a vetting process in terms of this Act and the Children's Act, 2005 (Act 38 of 2005). If such candidate's name appears on either one of the national registers, their application may be rejected.
- (e) Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2021 (Act 13 of 2021)
The purpose of this Act is to regulate the inclusion of the details of persons in the National Register for Sex Offenders and provides for the reporting duty of persons who are aware that sexual offences have been committed against persons who are vulnerable, amongst other.

- (f) Abuse No More Protocol of the Western Cape Education Department, 2014
The purpose of this protocol is to guide managers to assist and provide support to all learners who are victims or perpetrators in cases of child abuse and deliberate neglect, as well as children who are victims of sexual offences.
- (g) WCG Sexual Harassment Policy, 2011
The purpose of this transversal policy is to—
- (i) make all WCG employees aware, in line with the relevant national statutory prescripts and policy provisions, of what constitutes harassment in the workplace and their responsibilities in preventing and managing such incidents; and
 - (ii) provide guidance in relation to the procedure for dealing with allegations of harassment; and
 - (iii) endeavour to achieve a workplace that is free from all forms of harassment.
- (h) Education Labour Relations Council (ELRC) Collective Agreement 3 of 2018, dated 25 September 2018
The purpose of this agreement is to safeguard and protect minor children from experiencing further psychological harm and/or exposing them to secondary trauma by repeatedly delivering testimonies and/or evidence at various disciplinary forums. This agreement mandates the relevant parties to the proceedings, where an educator is the alleged perpetrator, to initiate an inquiry by an arbitrator appointed at the ELRC.
- (i) Circular 0011/2019, dated 09 March 2019
The purpose of this circular is to provide guidelines to assist principals with the reporting and managing of alleged misconduct as well as their role during disciplinary hearings and unfair dismissal disputes stemming from such processes.
- (j) Circular 0008/2021, dated 26 February 2021
The purpose of this circular is to inform employees of what constitutes sexual harassment in the workplace and the procedure to be followed when incidents of sexual harassment are reported by employees, as well as to promote respect for and knowledge about the rights of employees, particularly their rights to safety, personal security, bodily integrity and equal treatment.
- (k) Circular 0035/2021, dated 23 June 2021
The purpose of this circular is to outline the conditions for the prevention of the re-employment of former educators and employees discharged or deemed discharged for misconduct or deemed resigned.
- (l) Circular 0001/2023, dated 03 March 2023
The purpose of this circular is to outline the amended process of vetting process of all officials who have contact with learners against the National Register for Sex Offenders to ensure safe and secure spaces for all, and strengthen the professional image and standing of all public service and educator staff in every school and office.

3. **Purpose and strategic objectives**

3.1 The purpose of this protocol is to—

- (a) provide standard operating procedures for the reporting and management of sexual abuse and harassment allegations;
- (b) make all WCED employees aware, in line with the relevant national statutory prescripts and policy provisions, of what constitutes sexual abuse and harassment in the workplace as well as their responsibilities in preventing and managing such incidents;
- (c) provide guidance on the procedure for dealing with allegations or complaints of sexual abuse and harassment; and
- (d) endeavour to achieve education institutions, be it schools or workplaces, free from all forms of sexual abuse and harassment.

3.2 The objectives of this protocol are to—

- (a) define and conceptualise the management of sexual abuse and harassment at our education institutions;
- (b) explain the process of managing and dealing with sexual abuse and harassment allegations;
- (c) create and maintain a school and working environment in which the dignity and right to bodily integrity of learners and employees are respected as well as an environment free from sexual abuse and harassment through the implementation and practice of this protocol;
- (d) ensure effective people management by instituting efficient and effective labour procedures and vetting practices; and
- (e) empower principals/supervisors/managers and advocate for proactiveness in managing and reporting sexual abuse and harassment.

4. **Scope**

This protocol is effective from the date signed by the Head of Education and is applicable to all employees at WCED public schools and office-based institutions. All existing and newly appointed WCED employees must be made fully aware of the contents of this protocol by their respective principals/supervisors/managers.

5. **Introduction**

- #### 5.1
- Acts of sexual abuse and harassment targeting learners and employees deprive them of their inherent right to equality and dignity as well as access to a safe and healthy environment as enshrined in the Constitution of the Republic of South Africa, 1996. This protocol recognises that everyone in the education sector has a role to play in protecting both learners and employees in the workplace by ensuring an appropriate and timely response to all sexual abuse and harassment allegations.

5.2 The WCED is accountable for the management of sexual abuse and harassment allegations in the workplace and subscribes to the constitutional values of human dignity, bodily integrity, equality and the regulatory framework within which it is required to operate.

6. **Compulsory reporting and disclosure**

6.1 There is a corresponding duty and responsibility imposed on every person who becomes aware of sexual misconduct to immediately report the matter to the WCED in terms of the *Abuse No More Protocol of the WCED, 2014*, and the South African Police Service as contemplated in section 54(1)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007), as amended by section 26 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2021 (Act 13 of 2021).

6.2 All WCED employees are further reminded that failure to comply with said legislation, as contemplated in sections 54(1)(b) and 54(2)(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007), as amended by section 26 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2021 (Act 13 of 2021), may result in a criminal offence with a penalty for non-compliance in respect of reporting.

6.3 Any employee found guilty of non-compliance can be sanctioned in terms of a monetary fine or imprisonment of five years or a combination of both.

6.4 The WCED, as the employer, will institute further disciplinary action against any employee where it is evident that said employee had prior knowledge or a reasonable suspicion of sexual misconduct being committed and failed to report said conduct.

6.5 All reports/disclosures must be made on reasonable grounds and in good faith. It is imperative that all disclosures are handled with the utmost care, sensitivity and confidentiality to ensure that victims are protected from any further emotional trauma, victimisation and unnecessary probing in respect of the validity of the allegations.

6.6 Sexual Misconduct Contact Officers appointed at Head Office and Labour Relations Officers at the respective district offices must assist with the reporting and disclosure of sexual abuse and harassment.

6.7 A protected disclosure may apply in some instances which allows for a disclosure that contains information about unlawful and wrongful conduct, made in good faith to the right person or body as per the *WCG Whistle-blowing Policy, 2021* and/or the Protected Disclosures Act, 2000 (Act 26 of 2000).

7. **Obligation of the employer**

7.1 The WCED, as the employer, must act in the following manner:

- (a) Take the necessary steps to eliminate sexual abuse and harassment.
- (b) Advise a complainant of the informal and/or formal procedure(s) applicable to sexual harassment and in the event of sexual abuse, deal with the allegations formally, subject to the merits.
- (c) Take the necessary steps to address a complaint in accordance with the *Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace*, published in *Government Gazette* No. 46056 on 18 March 2022, the employer's policy and the applicable collective agreement(s).
- (d) Consult with all relevant parties in good faith.

7.2 **Failure to take adequate steps to eliminate sexual misconduct will render the employer vicariously liable for the conduct of the perpetrating employee – even in one incident of sexual abuse or harassment.**

8. **Responsibilities of a Sexual Misconduct Contact Officer**

The responsibilities of a Sexual Misconduct Contact Officer will include:

- (a) working closely with the Directorate: Employee Relations in respect of reporting cases and arranging psychosocial support where necessary;
- (b) meeting regularly with other Sexual Misconduct Contact Officers to discuss and resolve pertinent issues and trends in the workplace to be proactive and preventative; and
- (c) creating awareness about sexual abuse, sexual harassment and gender-based violence in the workplace.

9. **Responsibilities of the principal/supervisor/manager/all employees**

All WCED employees (regardless of rank or position) shall—

- (a) respect all other WCED employees, as well as all members of the public;
- (b) provide full support when required to assist with an enquiry;
- (c) report acts of sexual abuse and harassment;
- (d) be discreet and always maintain strict confidentiality;
- (e) actively contribute to a workplace that is free from sexual abuse and harassment;
- (f) refrain from participating in conduct and/or acts regarded as sexual abuse and harassment; and
- (g) encourage a culture of whistle-blowing without fear of victimisation, intimidation or harassment.

10. Confidentiality

In line with the prescripts of the Protection of Personal Information Act, 2013 (Act 4 of 2013), all complaints must be investigated and disciplinary actions managed with the strictest confidentiality while still ensuring that the rights of the affected person(s) and/or complainant(s) are upheld.

11. Psychosocial support

- 11.1 Employees who experience or have recently experienced emotional, physical or psychological distress resultant from sexual harassment are encouraged to contact the Employee Health and Wellness Programme (EHWP) for support and assistance.
- 11.2 At school level, a learner will be supported by a social worker from the relevant district office.
- 11.3 The interventions provided by the EHWP and the psychosocial support of the social worker from the district will aim to support the employee or learner in managing and dealing with sexual abuse and harassment.

12. Termination of employment

- 12.1 Sexual misconduct is deemed by law as a serious form of misconduct and constitutes a dismissible offence where an employee is found guilty.
- 12.2 Alleged sexual perpetrators are not only subjected to a departmental process but may also face criminal action, civil litigation and action by a professional body or Council.
- 12.3 Educators
 - 12.3.1 Educators found guilty of sexual misconduct are sanctioned in terms of Schedule 2 of the Employment of Educators Act, 1998 (Act 76 of 1998), and if found guilty in terms of section 17, mandatory dismissal is applicable.

- 12.3.2 In terms of the *Terms and conditions of employment of educators determined in terms of section 4 of the Employment of Educators Act, 1998*, published in *Government Gazette* No. 44433 of 09 April 2021, an act of misconduct in relation to an employee found guilty of sexual harassment (in respect of another employee or adult person) has a prescribed prohibition period for re-employment at government institutions of **four years**. However, any person found guilty of sexual offences against children and persons with mental disabilities and whose name appears on the National Child Protection Register and the National Register for Sex Offenders is prevented from employment until removed from the registers held by the Department of Social Development or the Department of Justice and

Constitutional Development respectively. In this regard, the prescribed prohibition period for re-employment at government institutions is **indefinite**.

12.4 Public servants

12.4.1 Public servants found guilty of sexual misconduct are sanctioned in terms of the *Disciplinary Code and Procedures for the Public Service* set out in Public Service Coordinating Bargaining Council (PSCBC) Resolution 1 of 2003, dated 28 February 2003.

12.4.2 Circular 0035/2021, dated 23 June 2021, read with Department of Public Service and Administration Circular 08 of 2020, dated 19 October 2020, states that an act of misconduct in relation to an employee found guilty of sexual harassment has a prescribed prohibition period for re-employment at government institutions of **four years**. However, any person found guilty of sexual offences against children and persons with mental disabilities and whose name appears on the National Child Protection Register and the National Register for Sex Offenders is prevented from employment until removed from the registers held by the Department of Social Development and the Department of Justice and Constitutional Development respectively. In this regard, the prescribed prohibition period for re-employment at government institutions is **indefinite**.

13. **Vetting process**

13.1 Circular 0001/2023, Amended process of vetting officials against the National Register for Sexual Offenders, dated 03 March 2023, is applicable to all officials of education institutions within the WCED who have contact with learners.

13.2 The law emphasises the need to vet all employees who come into contact with children. The following are three types of security clearances that must be undertaken for persons working with children:

- (a) Fingerprint clearance report from the South African Police Service;
- (b) National Register for Sex Offenders check; and
- (c) National Child Protection Register check.

13.3 The wording of the Protection from Harassment Act, 2011 (Act 17 of 2011), read with the Domestic Violence Act, 1998 (Act 116 of 1998), states that if an applicant for a post (or promotion) is found to be the final selected candidate and it is discovered that he/she failed to disclose an interim or final protection order, such application may be rejected and the appointment may be reconsidered.

13.4 Principals/supervisors/managers and governing bodies must ensure that the vetting process forms part of an inherent requirement in the appointment process and ensure that parties are proactive in ensuring that we protect the young lives entrusted to us as well as that of our employees.

14. **Non-compliance**

Non-compliance with the provisions of this protocol may be dealt with in terms of the *Disciplinary Code and Procedures for the Public Service* set out in PSCBC Resolution 1 of 2003, dated 28 February 2003, the Employment of Educators Act, 1998 (Act 76 of 1998) and the Senior Management Service Handbook.

15. **Conclusion**

This document was duly consulted with all education stakeholders with the aim of being preventative and yielding positive outcomes in the WCED's commitment to creating an environment free from sexual misconduct.

16. **Review**

This protocol is subject to review when the need arises or in the case of changed circumstances, such as pronouncements by legislation and/or regulations, amendments to policies and budgetary constraints.

I Brent Walter (name) Head of Department for Education in the Western Cape hereby approve the Protocol for managing and reporting sexual misconduct, 2023.
B. Walter (signature)
18/05/2023 (date)