

108<sup>th</sup> Session of the International Labour Conference  
(June 2019)

**Agenda item V**

Briefing Note for Workers' Delegates



## Violence and Harassment in the World of Work

Second year discussion with a view to the adoption of a Convention supplemented by a Recommendation

### BACKGROUND

The standard-setting Committee on Violence and Harassment in the World of Work held its first discussion at the International Labour Conference in June 2018 and adopted proposed conclusions in the form of a Convention and Recommendation.

In August 2018 the ILO published Report V (1): “Ending violence and harassment in the world of work” (the “brown report”), which invited governments to send comments (after consulting the most representative organisations of employers and workers) to the ILO on the proposed text of a Convention and Recommendation.

([https://www.ilo.org/ilc/ILCSessions/108/reports/reports-to-the-conference/WCMS\\_637108/lang-en/index.htm](https://www.ilo.org/ilc/ILCSessions/108/reports/reports-to-the-conference/WCMS_637108/lang-en/index.htm))

Governments were also asked whether they considered the proposed texts as a satisfactory basis for discussion at the 108th Session of the International Labour Conference (June 2019).

In February and March 2019 the ILO published Report V (2), “Ending violence and harassment in the world of work” (the “blue report”). This is a two-part report consisting of:

- Report V (2A) which compiles the replies of governments, employers’ and workers’ organisations to the questions put forward by the ILO in the Brown report. ([https://www.ilo.org/ilc/ILCSessions/108/reports/reports-to-the-conference/WCMS\\_675567/lang-en/index.htm](https://www.ilo.org/ilc/ILCSessions/108/reports/reports-to-the-conference/WCMS_675567/lang-en/index.htm))
- Report V (2B): which contains the final draft texts of the Convention and Recommendation as amended in light of replies to the brown report, which will be used as a basis for negotiations in June 2019. ([https://www.ilo.org/ilc/ILCSessions/108/reports/reports-to-the-conference/WCMS\\_673728/lang-en/index.htm](https://www.ilo.org/ilc/ILCSessions/108/reports/reports-to-the-conference/WCMS_673728/lang-en/index.htm))

An addendum to Report V (2A) was published in May 2019. It contains the replies of the governments of Namibia and the Netherlands, which for technical reasons had not been included at the time report V (2A) was prepared.

([https://www.ilo.org/ilc/ILCSessions/108/reports/reports-to-the-conference/WCMS\\_696407/lang-en/index.htm](https://www.ilo.org/ilc/ILCSessions/108/reports/reports-to-the-conference/WCMS_696407/lang-en/index.htm))

An informal tripartite meeting of experts was held in Geneva on 14-15 March 2019, with the aim of finding common ground on the more difficult issues arising from the first discussion, namely:

- Definition of ‘violence and harassment’
- Scope of the Convention: ‘persons covered’ and ‘world of work’
- List of groups disproportionately affected by violence and harassment

This was a ‘non-meeting’ with no official outcome document. However, it can be expected that amendments based on the outcomes of the meeting may be introduced during the 2019 discussion. Further information on the outcomes can be found within this briefing.

In June 2019, the Committee will finalise its work. The Workers Group’s important goal is to aim at the adoption of comprehensive instruments in the form of a meaningful Convention supplemented by a Recommendation.

## 1. Position of governments and employers concerning the adoption of a Convention and Recommendation

A total of 59 governments (including Namibia and the Netherlands) responded to the brown report within the prescribed deadline of 8 November 2018. A further 17 countries<sup>1</sup> responded after the deadline. Their replies were therefore not taken into account by the Office in preparation of report V (2).

Whilst a majority of governments who responded expressed their satisfaction with the office text as a basis for discussions in 2019, it is clear that there are a significant number of outstanding concerns. Observations from governments indicating support for a Convention supplemented by a Recommendation include: *“Convention should contain general principles and be efficient, enforceable and broadly ratifiable”*; *“Questions about responsibility for counteracting violence and harassment should be clarified. Recommendation should be less detailed, more flexible”*; *“Proposed texts are excellent basis for further deliberations. Resolve ambiguities regarding definitions and scope”*; *“Instruments need to be practical, flexible and effective”*.

Further, of the 59 governments whose responses were taken into account in the blue report, a small number<sup>2</sup> expressed preference for a stand-alone Recommendation.

Issues of on-going concern for governments and on which we might expect a number of proposed amendments include:

- definition of violence and harassment
- scope of the world of work
- inclusion of the effects of domestic violence
- reference in the preamble to violence and harassment in the world of work as “a form of human rights violation”
- inclusion of a list of groups in the Recommendation, aimed at supplementing article 7 of the draft Convention

In their consolidated reply, employers describe the proposed instruments as containing “too many implementation and ratification barriers”. Employers are of the view that the proposed definitions are unclear and “overly extend employers’ responsibilities, including small and medium enterprises and family businesses”. They further propose to replace “world of work” with “workplace” throughout the text and to insert reference to “lesbian, gays, bisexual, transgender, intersex and gender-non confirming persons” and “gender identity or sexual orientation” at various points in the draft instruments (Preambular paragraph 11 and article 1(1)(b)).

Given their objections to large parts of the proposed Convention, it is possible that employers will call for a record vote on the form of the instruments. It is therefore extremely important that titular

<sup>1</sup> Australia, Côte d’Ivoire, Czech Republic, Greece, Guinea, India, Ireland, Japan, Kenya, Portugal, Republic of Korea, Saudi Arabia, Serbia, Slovenia, Singapore, Turkey and Zimbabwe.

<sup>2</sup> Includes the Russian Federation and the United States

members are present in the event of a vote and that efforts are made to keep the number of titular members as low as possible throughout the Committee work in order to maintain the Workers' Group full voting strength.

## 2. Observations concerning the proposed Convention

### Preamble

#### **Reference to violence and harassment as a violation of human rights (paragraph 6)**

A few governments and the employers objected to the inclusion of violence and harassment in the world of work as a **form of human rights violation**.

It would be important to retain the reference to violence and harassment as a (form of) violation of human rights. Suggesting otherwise risks reversing decades of advancement through international treaties, including the Universal Declaration on Human Rights and the International Covenant on Economic, Social and Cultural Rights.

In its general recommendations No. 19 (1992) and No. 35 (2017) on violence against women, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) clarified that discrimination against women “includes gender-based violence, that is, ‘violence which is directed against a woman because she is a woman or that affects women disproportionately’, and, as such, is a violation of their human right”. The Committee noted that, “For more than 25 years, in their practice, States parties have endorsed the Committee’s interpretation. The *opinio juris* and State practice suggest that the prohibition of gender based violence against women has evolved into a principle of customary international law”.

References to violence against women as a human rights violation can also be found in several other legal instruments.

#### **States’ obligation to promote a zero tolerance environment (paragraph 7)**

The Office has added “and practices” after “behaviours”. This makes the text consistent with the definition in article 1.

#### **Recognition of the role of governments, social partners and labour market institutions in responding to and addressing domestic violence (paragraph 12)**

Some governments and employers may seek to remove this reference from the preamble on the argument that domestic violence has no link with situations occurring at work. The preambular paragraph notes that domestic violence has an impact on the world of work, health and safety and productivity. It recognises that social partners and governments can take practical steps to mitigate and minimise these impacts in relation to the world of work. It does not mandate action to be taken in respect of domestic violence.

## I. DEFINITIONS

### **Article 1**

In line with the majority of responses from governments and workers’ organisations, the Office has retained a single concept for the definition of violence and harassment, whilst clarifying through a new article 1(2) that separate definitions of violence and harassment may be adopted at national level. This would allow governments to maintain or introduce separate pieces of legislation dealing with, for example, bullying, sexual harassment, stalking or forms of psychosocial risks and hazards. The Workers’ Group may wish to express strong support for this clarification.

Introducing separate definitions of violence and harassment would be more constraining and prescriptive - and more likely to require governments to amend legislation which does not recognise a strict line of separation between violence and harassment.

A few governments suggested replacing “unacceptable” with “unwanted” or “unsolicited” in article 1(1)(a). Whilst this may be suitable for definitions regarding sexual harassment, it may be less adequate in relation to other forms of violence and harassment, which includes practices as well as behaviours. The current definition in article 1 would not prevent governments from defining sexual harassment as unwanted or unsolicited conduct or behaviour at national level.

Some questions have been raised concerning the inclusion of “economic harm” in the definition. This inclusion is important, given that victims of violence and harassment may find themselves dismissed after raising a complaint or may see no alternative but to leave their employment in order to escape the violence and harassment.

## II. SCOPE

### **Article 2**

#### ***Coverage and protection***

Whilst there was wide consensus that the instruments should afford protection to all individuals in the world of work, so as to “leave no one behind”, views differed on the definition of worker in the adopted Conclusions. Employers and several governments were of the view that the definition was “too broad” and posed an obstacle to ratification. The Office therefore adopted a proposal from the employers to split the chapter on “Definitions and Scope” into two different chapters and to move this provision to the chapter entitled “Scope”. The Workers’ Group may wish to welcome this as a solution to concerns raised about the definition of worker, which nonetheless assures a broad coverage of persons to be protected.

For greater clarity, the Workers’ Group may wish to consider an amendment to article 2, which would split the article in two and read:

Article 2(1): “This Convention covers workers, including employees as defined by national law and practice, persons working irrespective of their contractual status, [and other persons, including] persons in training such as interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants”.

Article 2(2): “[This Convention applies] in all sectors, both in the formal and informal economy, and whether in urban or rural areas”.

#### **Outcomes of the informal tripartite meeting of experts:**

In their reply to the brown report and during the informal meeting, employers suggested including “employer” within the provisions of Article 2. Based on the outcomes of the informal tripartite meeting held in March 2019, employers may seek to extend the scope of protection in article 2 to “employers as natural persons” or “employers in their capacity as natural persons”. The qualification of “natural persons” would be intended to distinguish from employers as “legal” persons. The Workers’ Group may wish to oppose such amendment on the basis that individuals who are representatives of employers, such as managers or supervisors, are already covered by the non-defined term “worker”. The amendment would therefore add no value to the existing text and may give rise to confusion. Should further precision be deemed necessary, the Workers’ Group may wish to consider adding [managers and supervisors] to the provisions of article 2.

### **Article 3**

#### ***World of work***

The employers and some governments considered the scope of the world of work to be overly broad, covering situations beyond employers’ direct control. Article 3 relates solely to situations “*occurring in the course of, linked with or arising out of work*”. In this regard, article 3 adopts the broader concept of the world of work that can be found when addressing risks to occupational health and safety or in the duty of care owed by employers. In 17 per cent of the countries studied for the ILO Law and Practice report V (1), the scope of “workplace” in legislation addressing violence and harassment is explicitly wider

than just the physical place of work. ILO Convention 155 concerning Occupational Safety and Health and the Working Environment defines workplace as all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer.

Moreover, article 3 concerns not only employers, but also governments and other persons referred to in article 2. It does not attribute responsibility or liability for any particular actor. In this way, article 3 is linked not only to article 10 of the Convention (setting out employer responsibility) but also to other relevant provisions requiring action on the part of other actors.

In response to concerns regarding the inclusion of the commute to and from work, the Office has introduced “so far as is reasonable practicable” in subparagraph (f). The Workers’ Group may wish to consider whether this additional qualifier is necessary, particularly in light of the above.

#### **Outcomes of the informal tripartite meeting of experts**

The Workers’ Group may wish to consider supporting a potential amendment to article 3(d), so that it reads: “through work-related communications, [including those] enabled by...”. This would clarify that non-electronic workplace communications are also covered by article 3.

#### **Article 4**

The Workers’ Group may wish to consider proposing the deletion of article 4(a) or, alternatively, to move article 4(a) to the Preamble. Article 4(a) does not add any normative value to the text of the Convention and simply states that anyone can be victim or perpetrator. It is inconsistent with article 2, which lists the persons to be protected from violence and harassment. Further, when read together with article 5(3), article 4(a) could suggest equivalent, if varying, responsibilities for the different actors in the world of work, including individual workers. It could unnecessarily create a source of confusion.

Given the importance of addressing third party violence against workers, the Workers’ Group may wish to retain article 4(b) as a new article 4. A further amendment could be introduced to delete “in accordance with national law and practice”, so that article 4 would read: [Perpetrators of violence and harassment in the world of work can be third parties], including clients, customers, service providers, users, patients and members of the public.

### **III. CORE PRINCIPLES**

#### **Article 5**

The Office has introduced a new paragraph 5(3) aimed at recognising that all actors in the world of work have a role and responsibility in eliminating violence and harassment. The primary responsibility for preventing and redressing violence and harassment at the level of the enterprise must rest with employer. In order to underline the differences in roles and responsibilities, the Workers’ Group may wish to consider an amendment to 5(3) so that it reads “...taking into account the [differences in the] nature and extent of their respective responsibilities”.

#### **Article 7**

The text of article 7 (point 10 of the proposed Conclusions) was the result of heated debates in June 2018. Point 10 had contained a list of groups disproportionately affected by violence and harassment, due to discrimination and inequality. A number of governments voiced strong opposition to the list, based on the inclusion of LGBTI workers. The Workers’ Group originally insisted on maintaining the list, with the inclusion of LGBTI workers. After lengthy discussions and informal consultations, the Workers’ Group agreed to work towards generic language, but only on the basis that this would nonetheless be understood to include **all** the groups originally listed in paragraph 10.

Given the polarised nature of the discussions in June 2018, the Workers’ Group may wish to support the compromise reflected in article 7. As the purpose of the original list was to emphasise the link between experiences of discrimination and inequality and violence and harassment and require appropriate

measures be taken, the Workers' Group may wish to consider adding [to discrimination and inequality, including on the basis of multiple and intersecting identities] immediately after "...groups in situations of vulnerability".

#### IV. PROTECTION AND PREVENTION

##### **Article 8**

Article 8 requires governments to adopt laws and regulations prohibiting (gender-based) violence and harassment in the world of work. The Office has previously clarified that where existing national legislation is in conformity with the Convention, governments will not need to adopt new laws or regulations upon ratification. It would be important to maintain this provision. A small number of governments have proposed its deletion.

##### **Article 9**

It is suggested that the Workers' Group support the text as it is.

##### **Article 10**

Article 10 requires governments to adopt laws and regulations setting out the obligations on employers to prevent violence and harassment in the world of work. Article 10 does not in itself determine whether an employer will be liable for failing to prevent violence and harassment. Ultimately, that will be decided through national courts and tribunals, taking account of all relevant circumstances, including a failure to take steps as outlined in article 10.

Employers and a few governments have expressed concern that the obligations on employers in article 10 are overly burdensome, particularly when read together with article 3, imposing responsibilities on them to take steps in relation to areas beyond their direct control. The employers also proposed to delete references to psychosocial risks and measures to prevent and control risks and hazards.

During the first discussion, the qualifier "as far as is reasonably practicable" was introduced as an amendment to the chapeau, in order to address concerns about the extent of employers' liabilities. The Office has moved this qualifier to the end of the chapeau. This makes it clearer that the qualifier relates to the nature of the steps to be taken, rather than the requirement to take steps in the first place, and is consistent with the views expressed during the first discussion. The Office has also replaced the phrase "a policy on all forms of violence and harassment" with "a workplace policy on violence and harassment" in article 10(a), to better delineate the obligations to be imposed on employers.

The duties that governments are required to impose on employers through article 10 are not onerous. They reflect the nature of the duty of care that employers generally have towards their workers and other persons under employment law, occupational safety and health law and civil law of tort or negligence.

##### **Outcomes of informal tripartite meeting of experts**

During the informal tripartite meeting, employers again expressed concern on article 10. They may support an amendment to further limit the extent of obligations to be imposed on employers so that the chapeau reads: "...requiring employers to take **appropriate** steps **commensurate with their degree of control** to prevent violence and harassment..."

The Workers' Group may wish to oppose any such amendment on the basis that it would be for national courts, tribunals and/or labour inspectors to determine whether, in all the circumstances, the steps taken by employers were commensurate with their degree of control. Legislating what is or is not within the degree of control of employers would be an almost impossible task for governments. Further, the extent of obligations to be imposed on employers in the provision is proportionate. It mirrors recent calls for clear obligations to be placed on employers in relation to bullying and/or harassment from bodies such as the United Kingdom's Equality and Human Rights Commission and the legal profession's International Bar Association.

## V. ENFORCEMENT AND REMEDIES

### **Article 11**

This article contains important provisions, which it is suggested the Workers' Group should broadly support. Some of the subparagraphs may give rise to debate, including:

**Article 11 (c) – privacy and confidentiality:** This subparagraph was moved from article 9 (Protection and Prevention) as it is more concerned with enforcement and remedy. The Office further modified the text in order to clarify that privacy is to be respected in relation to “individuals”, while confidentiality may concern, for example, data, procedures or information. Whilst the provisions concerning privacy and confidentiality are to be welcomed, measures to protect privacy and confidentiality should not prevent systemic issues of violence and harassment becoming known, nor should they amount to the misuse of non-disclosure agreements or “gagging” clauses. The Workers' Group may therefore wish to consider proposing a new subparagraph (d) to the effect that: [The requirements for privacy and confidentiality in article 11 (c) should not amount to the misuse of confidentiality clauses or non-disclosure agreements].

**Article 11(f) – effects of domestic violence:** It is likely that some governments and employers will seek to remove the references to the effects of domestic violence. This provision does not require employers to address the incidence of domestic violence itself. However, the **impacts** of domestic violence in terms of social and economic costs to workers and employers are increasingly recognised through measures to address them in national legislation, in collective bargaining agreements and in workplace policies. It would be important for the Convention to recognise and encourage this emerging good practice. The text of the Convention does not prescribe any measures to be taken in this regard, even when read together with paragraphs 4(a) and 18 of the Recommendation.

**Article 11(g) – danger due to violence and harassment:** This article gives workers the right to remove themselves from situations of imminent and serious danger, without penalty. It is consistent with ILO Convention 155.

### **Article 12**

Employers and some governments may seek to remove important references to national policies on occupational safety and health, equality and non-discrimination, and migration.

## 3. Observations concerning the proposed Recommendation

During the first discussion in June 2018, there was insufficient time to complete discussion on the Recommendation. The majority of paragraphs were therefore bracketed and will be discussed for the first time in June 2019. The Workers' Group may wish to bear in mind the available options, should there be insufficient time to discuss the Recommendation in its entirety:

- transmit the text of the Convention for adoption, and drop all of the proposed text of the Recommendation
- drop the remaining amendments on the Recommendation and accept the draft instrument as it appears in the blue report
- adopt a Resolution to plan a single discussion on the Recommendation at a future ILC.

With this in mind, the Workers' Group may wish to limit its amendments on the Recommendation to a bare minimum.

- **Paragraph 4(a):** Employers have suggested that the inclusion of collective bargaining **at all levels** would be an unacceptable interference with the right to enter freely into collective agreements. The text is important to maintain as it refers to the positive obligation on governments to promote the right to collective bargaining at all levels and the negative obligation to refrain from interference by seeking to limit collective bargaining to a particular level (e.g. enterprise level).

- **Paragraph 9** contains examples of sectors, occupations and work arrangements where exposure to violence is heightened and for which specific measures should be adopted. The Workers' Group may wish to propose adding the following sectors where violence and harassment is disproportionately high: [retail, hotel and catering] [agriculture and horticulture] and [journalist, media and workers in entertainment].
- **Paragraph 10** was originally paragraph 5 and has been moved to the section on protection and prevention. It is specific to migrant workers and should be maintained.
- **Paragraph 13** reintroduces the list that was originally in article 7 of the Convention. We can expect similar opposition is likely to arise in relation to paragraph 13. Some LGBTI+ organisations have expressed concern at being singled out during the discussion, whether for exclusion or inclusion. The Workers' Group may therefore wish to consider proposing inclusive language along the lines suggested during the 2018 discussion, such as "The vulnerable groups...referred to in article 7 [should include groups exposed to discrimination based on sex, gender, gender identity, age, ethnicity, race, nationality, religion, disability and multiple and intersecting identities]".