

# NEWSLETTER

APRIL EDITION  
2022

The NABC is pleased to present the first edition of our newsletter for 2022.

The National Association of Bargaining Councils (NABC) was formed in 1993 to unite industrial councils and serve as a platform to articulate common challenges faced by both labour and business representatives.

Section 27 of the Labour Relations Act (LRA) allows for the forming of bargaining councils by employer organisations and trade unions for the purpose of seeking solutions to labour disputes, managing collective agreements, and putting forward labour law and policy recommendations, in addition to establishing relevant schemes.

In this issue we provide feedback on NABC Training initiative, feedback on the PSCBC Public Service Summit an article on Workplace codes of good practice to ensure employees keep their hands to themselves and a Trio of employment law developments in South Africa and the New code on vaccination in the workplace.



## **NABC: Zoom Advanced Training**

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The COVID 19 pandemic has ushered in unprecedented changes to the global economy and the world of work, catapulting the need to conduct work in a virtual environment. One of the core functions of the NABC is the provide training to its member Councils. The NABC identified the need to initiate training and upskill members on the Zoom video communication platform. The training was held on the 07 February 2022 in a hybrid format.

## **Bargaining Councils that participated:**

The following NABC members councils took part in the Zoom Advanced training:

1. Bargaining Council for the Restaurant, Catering and Allied Trades (BCRCAT)
2. Furniture Bargaining Council (FURNBED)
3. General Public Service Sectoral Bargaining Council (GPSSBC)
4. National Bargaining Council for the Chemical Industry (NBCCI)
5. National Bargaining Council of the Leather Industry of South Africa (NBCLI)
6. Public Service Co-Ordinating Bargaining Council (PSCBC)
7. The Bargaining Council for the Civil Engineering Industry (BCCEI)

## **Program Outcomes:**

### **Account Users and Roles**

- Roles and Responsibilities

### **Drawing Reports**

- How to access reports

### **Session Recordings**

- How to record sessions
- How to access recorded sessions

### **Meeting Transcripts with Otter.AI**

- How to set up live transcripts

### **Advanced Screen Sharing & Background**

- How to share screen
- How to change your background

### **Keyboard Shortcuts**

- Important steps
- Navigating keyboard shortcuts

### **SSO**

- Configuring SSO
- Enabling SSO

### **App Integration**

- How to integrate apps with Zoom



The training was well attended by members and measures carried out by the NABC with this training initiative have been largely successful in upscaling the attendees technical skills. The NABC looks forward to hosting many more training programmes that assists members with their training needs.

# Public Service Summit on Collective Bargaining

## Public Service Co-Ordinating Bargaining Council (PSCBC)

The Public Service Summit brought together stakeholders across government and organised labour to discuss, debate, and improve the existing approach to collective bargaining in the public service. The theme of the summit was “Strengthening and defending centralized collective bargaining to advance economic development, social justice, a capable and developmental state, labour peace and the democratization of the workplace.”

The discussions began on 28 March and concluded on 31 March 2022 with the declaration of the summit. The summit saw presentations by heads of organised labour, the Minister of Finance as well as the Minister of Public Service and Administration. The talks which were conducted at Convention Centre at Emperors Palace was attended by approximately 500 delegates from the State as well as the Trade Union parties.

All parties present re-emphasised, as reflected in the declaration, their commitment to collective bargaining and safe guarding against any attacks on collective bargaining.

Some of the key agreements between parties include that the PSCBC should review the collective bargaining structures in the public service through a collaborative venture with the ILO as to be guided by international best practices and for this review to give due consideration to expanding the definition of the public service to include public administration that will be inclusive of state agencies, entities and non-commercial parastatals, including a methodology to overcome legislative challenges.

In addition to that, a task team will be set up to rigorously audit of all collective agreements since 2010 to identify areas of non-implementation and agree on a clear process for the implementation of the outstanding areas.

Parties also resolved that the PSCBC must review its constitution to reinforce the principles of centralised collective bargaining and Sectors must align their Constitutions in line with that of the PSCBC. The PSCBC should set up a cross-sectoral task team to undertake this process.

Parties looked into the practice of outsourcing in government and resolved that there should be a reversing of the fragmentation of the public service through the privatization of service delivery and outsourcing of functions.

Parties agreed that government should conduct a spending review on the costs of at least three selected agencies vis-à-vis departmental divisions and a further spending review of at least three selected large outsourcing contracts where outsourced functions could be insourced.

Parties expressed their concern with the slow implementation of the Government Employees Housing Scheme



(GEHS) that directly impacts on the human dignity of Public Servants and that the PSCBC Committee on GEHS will approach the GEPF and PIC to conduct a feasibility study on a funding model for affordable and accessible housing products for public servants.

Parties agreed that product development in GEMS must improve the health care benefits of its members and funding for those benefits should be prioritized from the savings incurred by the scheme. Parties further mandate GEMS to undertake a study on ensuring a staff complement suitable to build capacity and capability to insource its administrative functions that would result in cost savings for the scheme.

On the professionalization of the public service, parties agreed to the introduction of pre-employment training and development of all aspiring public servants at managerial level and in relevant professional occupations, similar to aspirant attorneys first having to pass the relevant board exams before they are allowed to practice.

It was also agreed upon by parties that the public service sector much forges association with professional bodies linked to specific occupational classes where such bodies exist.

Parties resolved that the organizational structures of departments must be reviewed to ensure public servants will be able to deliver services by reducing overlapping functions and for the PSCBC to undertake a study on key frontline public services, comparing the levels of pay between equivalent professional occupations in the public and private sectors, with a view to close the gaps, to retain experienced personnel and attract suitably qualified professionals into the public service.

During the discussions, parties recognized the need to enhance the public service through optimal use of the 4th Industrial Revolution and digitization in the public service.

Importantly, parties also agreed to recognize the role of women, youth and people with disabilities in the workplace, providing the necessary support to allow for equal opportunities and eradicating of practices of discrimination, harassment, and victimization. Furthermore, to recognize the role of women in being the primary care giver of their families through the implementation of a basic childcare policy. Additionally, the summit recognizes the ILO Convention on Violence and Harassment.





# New

## workplace codes of good practice to ensure employees keep their hands to themselves

Let's be clear, an employee would certainly have been dismissed for misconduct in most jurisdictions for slapping the presenter of an award show, or anyone else for that matter. Employee conduct at social gatherings and events generally does not escape the reach of their employer's right to discipline and terminate for cause. Employees are routinely disciplined and even have their employment terminated for poor conduct at staff year-end functions or client events. Acting poorly (pardon the pun) in front of a global television audience certainly aggravates the matter.

In South Africa, the Minister of Employment and Labour recently released subordinate legislation, the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (Code). South Africa promulgated this legislation in compliance with its obligations as a member state of the International Labour Organisation. As the name suggests, this Code serves to guide employers and employees in managing the scourge of harassment at work. It clarifies that the use of physical force or power is a form of harassment, albeit not its only manifestation. Permitting it to continue has a high likelihood of resulting in social injustice, as well as economic, physical and psychological harm. It has no place in the modern workplace.

### **Discrimination vs arbitrary harassment**

The Code further confirms the statutory prohibition against harassment (as found in section 6(1) and 6(3) of the Employment Equity Act). However, harassment in terms of the EEA presupposes that the unwanted conduct (harassment) is related to one or more of the protected grounds against which discrimination is prohibited. If one employee bullies another because of the colleague's race, ethnicity, gender, sex, marital status, sexual orientation or other protected characteristics (or any arbitrary ground), the offending employee has patently committed harassment as prohibited in the EEA and the Code. But what is the situation where one employee bullies or harasses another for non-discriminatory reasons?

The protected grounds cover arbitrariness as well. Where an employee harasses another for an arbitrary reason, the misconduct could still qualify as the type of harassment prohibited in the EEA and the Code. Our



courts have held that excluding permanent residents from permanent teaching positions - merely because they were not South African citizens - constituted unfair discrimination on an arbitrary ground. Similarly, discrimination on the basis of Type 1 diabetes status was held to be akin to discrimination on the basis of HIV. The court even found that, on particular facts, pay differentiation on the basis of provincial or geographical location constituted unfair discrimination. Does it mean, though, that a complainant must show that harassment or bullying was arbitrary if the misconduct was not motivated (directly or indirectly) by a protected characteristic?

That would seem to place too great an onus on complainants (and, by extension, employers seeking to rid their organisations of harassers and bullies). It cannot be expected of an employer to show that its troublesome employee's attack on another employee was motivated by the victim's race, gender, ethnicity or similar protected characteristics, or by the perpetrator's arbitrary conduct. Would the employer have to prove that slapping another employee out of rage constitutes harassment for arbitrary reasons? Surely, that cannot be the requirement as it will place too great a burden on employers to prove the misconduct.

### **Internal workplace rules**

Employers may determine their own reasonable workplace rules. These rules will generally reflect the views of the society within which the employer is located. In our society, where we say violence, harassment and bullying are unacceptable to us, the employer may readily adopt rules to prevent such conduct in the workplace. It can determine that employees may not harass or bully one another for any reason, irrespective of the motivation. The employer need not prove that a complainant committed statutory harassment before terminating an employee's service for workplace bullying.

The employer's internal rules can be more stringent than those suggested in the EEA and the Code. The company may instruct its staff that it is unacceptable to slander or malign a colleague, perform any act which humiliates, insults or demeans a colleague, withhold work-related information or supply incorrect information, ostracise or exclude the employee from work, or any of the other examples of harassment mentioned in item 4.7.5 of the Code.

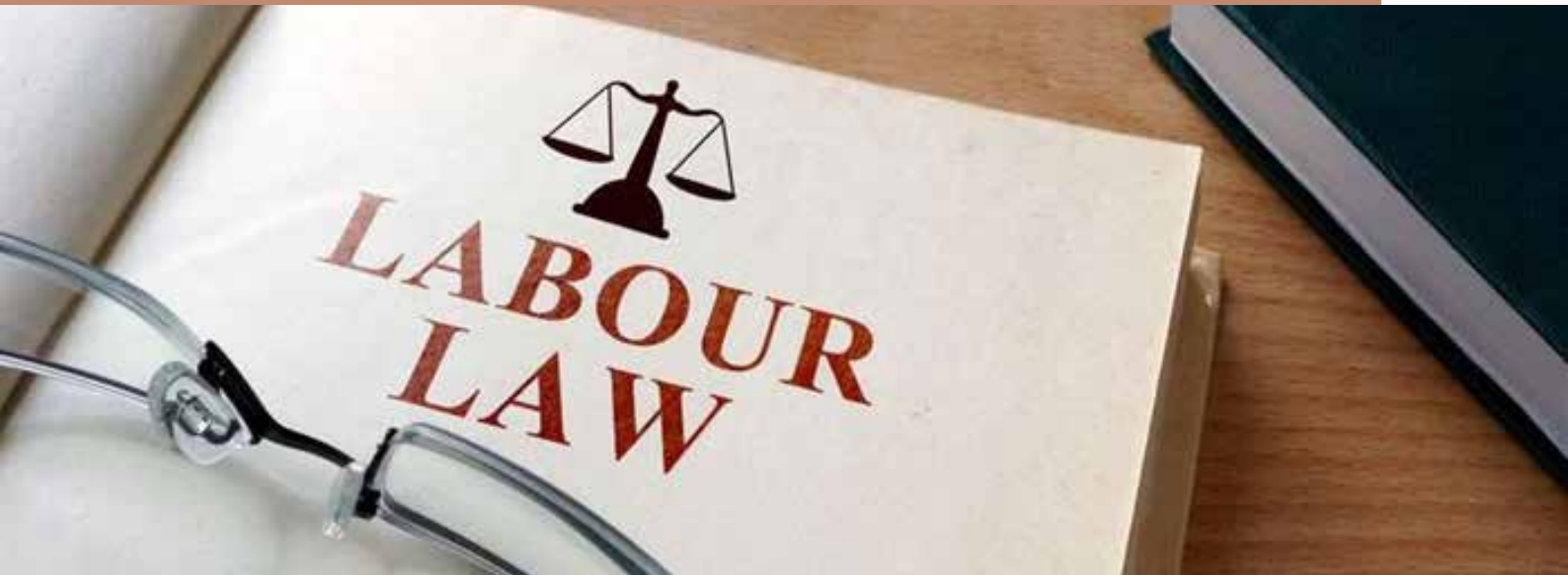
However, the employer may clarify that such conduct is prohibited irrespective of whether it constitutes discrimination or not - the mere act of committing such conduct will constitute workplace misconduct. Thus, where an employee assaults another because the employee was offended by a colleague's remarks, it would not matter that the victim's race, gender or other protected characteristics or any arbitrary grounds played no role in the perpetrator's motivation. The prohibited conduct need not constitute discrimination under the EEA and Code for it to constitute workplace misconduct.

### **Misconduct is misconduct**

Where employees misbehave because their conduct is motivated by or influenced by their base views of people of different categories than themselves, such conduct should be eradicated from the workplace with the full might that the EEA and Code offers employers. However, employers should not hesitate to exit employees from the workplace who assault, bully or harass others under circumstances where it may be difficult to prove that the reason constitutes unfair discrimination. Employers may rely on their own workplace rules, the common law and various other guidelines on unacceptable behaviour to frame the allegations against the employee. Misconduct by any other name would dismiss as sweetly.



# Trio of employment law developments in South Africa



The Minister of Employment and Labour in South Africa (Minister) has recently published three important legal developments affecting South African employers and employees - the Draft National Labour Migration Policy and Employment Services Amendment Bill, the Code of Practice for Managing Exposure to Sars-CoV-2 in the Workplace 2022, and the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace.

## **The Draft National Labour Migration Policy and Employment Services Amendment Bill (Draft Bill)**

The Draft Bill is currently open for public comment and aims to amend the Employment Services Act, as set out below.

### **Employment of foreign nationals**

The main thrust of the proposed changes includes the Minister's right to set maximum quotas for the employment of foreign nationals as employees or workers in any sector. The Minister may set a quota

to apply by sector, occupation, region or nationally. An employer will only be entitled to exceed this maximum quota if they have applied for and been granted an exemption, or if the foreign national fills a position for which critical skills are required.

The Draft Bill entitles the Minister to make regulations regulating the employment of foreign nationals, including:

- measures employers must take to confirm that there are no suitable persons for the role within South Africa
- requirements for employers to use a public employment service or private employment agency to assist employees to recruit suitable candidates
- requirements for the preparation of a skills transfer plan
- the criteria and procedure to apply for an exemption from the Minister
- the records employers must keep in respect of foreign nationals.

## Introduction of digital labour platforms and workers

The legislature proposes a new section to make provision for work or service provided to digital labour platforms. A digital labour platform is defined as “an electronic entity that enables the provision of work or services to any other person in the Republic”. A platform which meets this definition is considered an employer of the person who performs the services or work, for the purpose of the Draft Bill. The person performing the services is classified as a worker, which is defined as “any person who works for another and who receives, or is entitled to receive, any payment for that work, whether in money or in kind”.

A digital labour platform will be considered to be the employer of the workers if (1) the digital labour platform determines the payment and/or terms and conditions of the work or services provided; and (2) the digital labour platform remunerates the worker. The definition of worker will apply only in the context set out in the Draft Bill. The result of the inclusive nature of this definition is that the Minister may set the maximum quotas for the engagement of foreign nationals as platform workers.

## Definition of private employment agency

The requirement for a private employment agency to provide employment services “for gain” has been removed. Therefore, a company that provides employment services to any other company will need to be registered and licensed to operate as a private employment agency, should the Draft Bill be enacted in its current form.

## The Code of Practice for Managing Exposure to Sars-CoV-2 in the Workplace 2022

The Code of Practice for Managing Exposure to Sars-CoV-2 in the Workplace 2022 (Covid Code) will take effect when the national state of disaster in South Africa is lifted. Among other things, the Covid Code reiterates an employer’s right to implement a vaccine mandate and clarifies the grounds on which employees can refuse the vaccine. The Covid Code creates a legal framework for managing the pandemic and its impact in the workplace. The rules now make specific provision for employers to ascertain their employees’ vaccination status.

Employers will no longer be required to screen employees daily for Covid-19 symptoms or report such information. Employees will only be obliged to inform employers when they have Covid-19 symptoms. Employers will be entitled to request a negative Covid-19 test to allow the employee to return to the office.



*A digital labour platform is defined as “an electronic entity that enables the provision of work or services to any other person in the Republic”.*



According to the new rules, employees would no longer have to limit their refusal to vaccinate to constitutional or medical grounds. Where employees base their refusal on a contraindication to the vaccine, the employee must produce a medical certificate confirming this. The employer may then request that the employee be medically assessed to confirm their medical status, which the employer must pay for. Employers must reasonably accommodate employees who refuse vaccination.

In recent cases at the CCMA, the employment tribunal has upheld numerous employers' decisions to dismiss or suspend employees who refused to get vaccinated or take regular tests. Taking into consideration the Covid Code, the updated regulations and a recent decision by the labour court, employers could implement an admission policy, which would require employees to present either a vaccination certificate or a negative Covid test (at the employees' expense) in order to enter the office.

## **Employment Equity Act - Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace**

In March 2022, the Minister published the Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work (Code) in the Government Gazette. This Code, which is now in effect, has been guided by various conventions adopted by the International Labour Organisation, including the convention and recommendation on eliminating and preventing Violence and Harassment in the World of Work (Convention 190, 21 June 2019).

The Code replaces the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, as amended (Code of Good Practice). In addition, the new Code expands substantially on the different types of violence that an employee may experience in the workplace and what steps employers are required to take to deal with these forms of violence.

**The Code lists four forms of violence and harassment in the workplace. These are:**

### **Sexual violence and harassment**

This includes any conduct that the person knows (or should know) is not welcome, offends the complainant or makes the complainant feel uncomfortable, and interferes with work. The Code lists various forms of conduct which would amount to sexual violence and harassment, including unwanted sexual attention and quid pro quo sexual harassment.

The Code also compels employers to consider further factors in a matter involving sexual violence and harassment. These factors include whether the conduct was unwelcome; the nature and extent of the conduct; and the impact of the conduct.

### **Racial, ethnic, or social origin violence and harassment**

In terms of the Code, racial violence and harassment are types of conduct which demean, humiliate or create a hostile or intimidating work environment for a complainant. This may include conduct which (1) intends to induce submission based on actual or threatened adverse consequences for the complainant and (2) relates to a person's membership of a group. Abusive language and racist jokes, racially offensive material, racist name calling, negative stereotyping, offensive behaviour creating hostility, exclusion from workplace interaction and activities, and marginalisation and threatening behaviour fall under this form of violence and harassment.



## Workplace bullying

Workplace bullying is unwanted persistent conduct (or a single incident), which is serious and demeans, humiliates, or creates a hostile or intimidating work environment. This conduct includes a wide range of insulting, demeaning or intimidating behaviours that lower the self-esteem or self-confidence of an employee. Some examples of workplace bullying include harassing; offending, professionally or socially excluding someone, or negatively affecting their work tasks.

## Protected disclosures

The Code sets out when a whistle-blower should be protected. This is determined using four stages of the Protected Disclosure Act, namely: (1) whether the disclosure includes information regarding one of the categories of impropriety; (2) whether the disclosure is protected; (3) whether the whistle-blower suffered an occupational detriment; and (4) what remedy should be awarded.

## What should employers do?

Employers should take heed of the possible implementation of quotas on employing foreign nationals when considering workforce planning and consider the implications of the impending change on existing foreign employees.

Employers must also ensure that their policies and practices are compliant with the Code of Good Practice (which is already in force) and the Covid Code (soon to be in force). Forward thinking employers of the modern workforce have already implemented, or are in the process of updating, policies that comprehensively outline Covid-19 health and safety guidelines for employees, as well as procedures that ensure all employees feel safe and protected from all forms of harassment and bullying in the work environment.





# New code on vaccination in the workplace

A code of practice will replace the current Covid directions when the National State of Disaster lapses.

- A new code on managing Covid in the workplace will come into effect when the current directions under the National State of Disaster lapse.
- The code makes mandatory vaccination permissible and workers will be required to disclose their vaccination status.
- Businesses must develop Covid risk containment plans according to the new code.

The recently gazetted “code of practice” for managing exposure to Covid in the workplace requires workers to disclose their vaccination status and produce a certificate if they are asked to do so. Every employee has to comply with the risk assessment plan.

This is in order for employers to conduct a proper assessment of the risk of exposure and control measures required to limit infection, transmission and mitigate the risk of serious illness or death.

The new code limits the legal grounds that people can use to refuse to be vaccinated, and it gives clearer guidelines for workers who cannot be vaccinated for medical reasons.

Legitimate medical exemptions are extremely rare and the code gives the employer the right to request a confirmatory medical certificate from a medical professional of its choosing.

The code specifically allows for mandatory vaccination in the workplace.

The new code, published by Employment and Labour Minister Thulas Nxesi, after consultation with the National Economic Development and Labour Council (NEDLAC), will come into effect when the National State of Disaster (currently extended until April 15, 2022) expires and the existing directions cease to have legal effect.

While those directions also required employers to develop risk assessments plans, and possibly mandatory vaccine policies, this had to be done “bearing in mind employees’ Constitutional rights to bodily integrity and right to freedom of religion, belief, and opinion”. The new code is silent on this.

Labour lawyer Michael Maeso said, “Refusal to be vaccinated on constitutional grounds is not specifically mentioned and must be covered by the general provision dealing with refusal to be vaccinated. The employer only has to take steps to reasonably accommodate the employee.”

But he noted that the code makes provision for employees who, for medical reasons, cannot be vaccinated. "If the employee produces a medical certificate showing contra-indications for vaccination, and if a second opinion confirms the contra-indications, the employer must accommodate the employee in a position that does not require the employee to be vaccinated."

"This is a significant departure from previous regulations. The word 'must' is peremptory and no provision is made for circumstances if the employer is simply unable to accommodate the employee".

"It is assumed that on this basis, the employer can still dismiss on grounds of incapacity. This remains open to interpretation, and it will be interesting to see how the courts will interpret this," Maeso said.

He said the code also made a "bold statement" regarding how it should be viewed in terms of employment law.

While other codes were merely guidelines, this one dictated that it was the policy of the minister and must be applied "unless reversed by a decision of the court".

The code confirms that those employees identified in the risk assessment that are required to be vaccinated must be notified and, if necessary, counselled on the issue of the need for work-place vaccination.

It also states that an employee may refuse to perform any work if there is a serious risk of exposure to the virus.

The employer is obliged to tackle any such complaint and, if necessary, bring in an inspector from the Department of Employment and Labour to resolve any dispute.

The code is underpinned by the Occupational Health and Safety Act, which requires the employer to provide a safe working environment, and the Hazardous Biological Agents regulations, which lists Covid.

In recent weeks, both the CCMA and the Labour Court have confirmed the lawfulness of dismissals of employees who refused to be vaccinated.



# NABC MEMBERS

Amanzi Bargaining Council

Bargaining Council for the Food Retail, Restaurant, Catering & Allied Trades

Bargaining Council for the Meat Trade, Gauteng

Bargaining Council for the Restaurant, Catering and Allied Trades

Furniture Bargaining Council

General Public Service Sectoral Bargaining Council

Motor Industry Bargaining Council

National Bargaining Council for Clothing Manufacturing Industry

National Bargaining Council for Sugar

National Bargaining Council for the Chemical Industry

National Bargaining Council for the Hairdressing, Cosmetology, Beauty and Skincare Industry

National Bargaining Council of the Leather Industry of South Africa

Public Service Co-ordinating Bargaining Council

The Bargaining Council for the Civil Engineering Industry

Transnet Bargaining Council



# BECOME A MEMBER

Organisation & Job Title	
Title	
Initials, Surname	
First name	
Physical Address	
City or Town	
Province/ Country	Postal Code:
Email	
Contact numbers	Work: Fax:
Cell number	
Previous NABC Member?	Yes No
Category of membership and fees	<p>Mega: R13,340 - over 100,000 members</p> <p>Large: R9,945 - between 50,000 - 100,000 members</p> <p>Medium: R6,642 - between 10,000 - 50,000 members</p> <p>Small: R3,335 - Up to 10,000 members</p>
Method of payment	<p>Direct deposit into Standard Bank, Hatfield (011545), current account number: 3703 583 33</p> <p><b><i>Please print your name as deposit reference and email the deposit slip to us</i></b></p> <p>Cheque (to be made out to NABC)</p>



# VISION

Uniting Bargaining Councils

# MISSION

To enhance bargaining councils by ensuring stakeholder presence and excellent service offerings through broad engagements and collaboration



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