

# **Sexual Harassment and the Need for Legislation**

## **Briefing Notes**

**by the Joint Action Group Against Violence Against Women (JAG)**  
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In Malaysia, the occurrences of sexual harassment at workplace have become a worrying trend as more and more women join the workforce. While men may be sexually harassed, the majority of sexual harassment victims are women.

### **The Code of Practice**

In August 1999, the Ministry of Human Resources launched the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace as a first concrete step towards recognising the seriousness of the issue.

The Code basically defined sexual harassment and recommended a comprehensive in-house mechanism to be set up in combating sexual harassment. This required companies to:

- i. Formulate policies prohibiting sexual harassment
- ii. Set up a grievance mechanism to deal with sexual harassment, complete with disciplinary rules and penalties
- iii. Put in place protection and remedial measures for the victim; and
- iv. Carry out promotional and educational programmes to raise awareness of sexual harassment at the workplace

The Code aims to provide guidelines in preventing and eradicating sexual harassment at the workplace.

### **Why the Code does not work**

The Code has been effective in creating some level of awareness on the seriousness of sexual harassment at the workplace. Unfortunately, it is a voluntary code and the Ministry cannot compel companies to adopt it. The response from companies has been very low. As of March 2001, only 1.12% of companies have adopted the Code. The recent study conducted by the Women's Development Collective and the All Women's Action Society revealed that not all elements recommended by the Code have been implemented by pioneer companies which had their own sexual harassment policies.

### **Current Forms of Redress**

Currently a victim can take the following types of actions:

1. Complain to her/his employer;
2. File a police report; and/or
3. Complain to the Labour Department. If unfairly dismissed, s/he can file a complaint to the Industrial Relations Department
4. Sue the harasser in tort (a civil wrong) for damages and obtain an injunction

## Employer

When a woman is sexually harassed, she wants the harassment to stop and the harasser held accountable for his behaviour. When the victim complains to her superior/management about sexual harassment, she wants appropriate action to be taken against the harasser.

Many employers lack the experience on how to handle sexual harassment cases. Sexual harassment is different from other cases of misconduct. Sexual harassment involves three parties - the complainant, the employer and the harasser. Unless the company commits to the setting up of an in-house mechanism for sexual harassment, such cases are dealt with in an arbitrary manner by the management.

JAG's experiences indicate that the victims' complaints have not been taken seriously and are usually left unattended. Sometimes, they were blamed for "causing the harassment", or told to put up with the harasser's behaviour.

When the victim does not receive appropriate redress, she then resorts to external help.

## Ministry of Human Resources

**Labour Department:** A victim can go to the Labour Department to file a complaint. The Labour Department will then request the employer to look into the complaint. The Department may ask for a domestic inquiry or a meeting with the employer. Yet, the Department is not empowered to compel the employer to take any action.

In addition, the Employment Act 1955 also excludes a significant group of employees, such as contract workers, management and domestic workers who can approach the Department for help.

**Industrial Relations Department:** Should the victim's contract be terminated, she can then go to the Industrial Relations Department and file a complaint for unfair dismissal under the Industrial Relations Act 1967. The matter is then treated as a case of unfair dismissal and not as sexual harassment.

## The Police

When the victim files a police report, the police will commence a criminal investigation.

Currently, there is no crime of sexual harassment per se. The Penal Code provides for the offences of assault (S351), outraging of modesty (S354), rape (S376), outraging of decency (S377-D), criminal intimidation (S503) and using words or gestures to insult the modesty of a woman (S509).

Under the Penal Code, several difficulties arise. The most difficult is the standard of proof. The Prosecution has to prove that sexual harassment occurred **beyond a reasonable doubt**. This creates an almost insurmountable barrier as sexual harassment often happens when there is no one else around to witness it.

Another difficulty is that the Prosecution has to **prove the harasser's intention**, with the victim acting as the principal witness.

The police investigation and a court trial take a long time and can be stressful, frightening and demoralising. In the interim, there is no form of protection for the complainant and she will need to endure the presence of the harasser at her workplace.

Criminal prosecution also does not provide any form of redress for the complainant for her injured feelings, humiliation and loss of dignity, not to mention the more tangible losses such as loss of income and negative consequences on her career.

### **Civil action**

A sexual harassed victim can hire a lawyer and bring a civil action against her harasser under the Law of Torts for trespass to her person or against her employer for failure to provide a safe workplace. The woman, however, must have the means to engage a lawyer which is a costly and lengthy exercise. In the meantime, as is the case with criminal action, the victim continues to face the harasser.

### **JAG's Proposed Sexual Harassment Bill**

The above existing laws and procedures have not adequately protected the victims. The victims' experiences are that they feel victimised for having reported the sexual harassment.

In response to this, the Joint Action Group Against Violence Against Women (JAG), spearheaded by WCC Penang launched a campaign for a sexual harassment law. On March 2001, JAG submitted a proposed Sexual Harassment Bill to the Ministry of Human Resources for the government's consideration.

The Bill serves two fundamental points: first, it requires employers to prevent sexual harassment and second, it provides the victims with meaningful access to legal redress. The Bill also aims to address the limited procedures that are currently available to the victims.

### **Significant Aspects of JAG's Bill**

The Bill ([www.wccpenang.org](http://www.wccpenang.org) see Sexual Harassment Bill) introduces important aspects to combat sexual harassment:

#### **In – house mechanisms**

- **Vicarious liability:** Compels employers to create their own in-house mechanism. to address sexual harassment. Employers who fail to take appropriate measures will be vicariously liable (Part 3). Prevention is a more effective and economical strategy than post-harassment legal redress.
- **Setting up of in-house Sexual Harassment Committees:** This is to encourage victims to come forward to receive due process of hearing. The tripartite complex nature of sexual harassment complaints cannot be dealt with like normal grievance procedures. The proposed sexual harassment committee will comprise management and employees with equal gender representation.

### Redefining Work Relationships

- Broadens the definition of "employees" to include contract and subcontract workers, students, club member, athletes and volunteers (Part 2). This takes into account that sexual harassment may occur at workplaces that do not strictly come under a worker-employer relationship. Increasingly, women are found in contract and subcontract work, voluntary organisations and institutions. As participants of the K-economy, they are involved in new modes of working, such as teleworking and E-commerce relationships.

### Designated Official

- While encouraging in-house resolution, the Bill also creates an independent system for complaints. A Director of Sexual Harassment will be appointed to assist complainants, and to investigate and attempt to resolve their complaints through conciliation. If conciliation is inappropriate, or fails, the complaint will be forwarded to an independent and specialised Tribunal. (Part 4)

### Establishment of a Tribunal

- The establishment of a Tribunal comprising persons with legal and relevant expertise and experience who shall conduct the inquiry expeditiously and with as little formality as possible (Part 4). The Tribunal would serve as a more amenable system of handling the cases rather than existing procedures. Currently, there are other administrative tribunals such as Rent Control Tribunal, Consumers Tribunal and recently under the Housing Act, a Tribunal for housebuyers to make small claims against developers.

### Conclusion

Sexual harassment is discriminatory as it denies a woman's basic right to work in a safe environment. When sexual harassment occurs, an unsafe and hostile working environment is created thus affecting career advancement, productivity and profitability. Sexual harassment is symptomatic of a larger problem of gender violence, i.e. violence against women.

Internationally, sexual harassment is recognised as a form of discrimination against women and as a human rights issue affecting both women and men by the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Malaysia has ratified CEDAW and in August 2001, Malaysia amended Article 8(2) of the Federal Constitution to include gender recognising women as equal citizens. It is time the nation takes concrete measures of which legislation is a critical step towards combating sexual harassment.

For further information, contact:

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