

SEXUAL HARASSMENT BILL - EXECUTIVE SUMMARY
Joint Action Group Against Violence Against Women (JAG)
June 2002

Introduction

On March 30, 2001, the Joint Action Group Against Violence Against Women (JAG)[1] presented the Deputy Minister of Human Resources, Dr. Abdul Latiff Ahmad with a Proposed Sexual Harassment Bill. JAG is concerned that sexual harassment remains a pervasive problem in the Malaysian workplace and that victims of sexual harassment have little recourse for action.

Existing laws and procedures do not adequately protect complainants of sexual harassment. The Penal Code is limited by the difficult obstacle of proving intent of the alleged harasser, the length of the court process, and the often grueling task of being a witness in cases of a sexual nature. Suing the alleged harasser is an expensive and lengthy process. The Ministry of Human Resources is not empowered to compel employers to take action on sexual harassment complaints nor to undertake independent action itself. The Employment Act 1955 excludes a significant group of employees, such as contract workers, management and domestic workers. The Industrial Relations Act 1967 provides a remedy only for employees who are wrongfully dismissed.

The 1999 Code of Practice for the Prevention and Eradication of Sexual Harassment in the Workplace (the Code), while recommending useful guidelines, does not provide appropriate and independent grievance procedures for sexual harassment complaints. As of March 2001, it has been adopted by only 1.25% of employers in the country.

The Proposed Sexual Harassment Bill addresses two fundamental points: firstly, it requires employers to prevent sexual harassment and secondly, it provides victims of sexual harassment with timely and meaningful access to legal redress.

If passed, the Bill will bring about significant changes. It will require employers to create their own in-house mechanisms to address sexual harassment. Employers who do not respond to these requirements or who do not act on complaints will be held liable. 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 not appropriate, or fails, the complaint will be forwarded to an independent, specialised Tribunal. The Tribunal will then look into the matter and, if required, hold an inquiry. This system of reconciliation is designed to provide a safe, effective and sensitive response to complaints of sexual harassment.

Proposed Sexual Harassment Bill

The Bill is divided into seven parts:

§ Part 1 is a preliminary section that outlines definitions used in the Bill.

§ Part 2 addresses the various forms of sexual harassment that are prohibited under the Bill.

§ Part 3 states that victimisation of those who make complaints, and anyone who assists them, is prohibited. It also contains the vicarious liability sections, stating that employers who do not formulate their own in-house mechanisms to prevent sexual harassment or adequately address complaints will be held liable.

§ Part 4 addresses the positions and duties of the Director and Tribunal.

§ Part 5 outlines the complaints process, from the laying of a complaint to its resolution. Each process must be completed within a set timeframe (Please see flowchart in Appendix A). It also covers miscellaneous issues, including the Bill's relation to dismissals and the Industrial Relations Act, 1967.

§ Part 6 deals with offences under the Bill.

§ Part 7 includes general issues such as areas of non-application of the Bill, actions of corporations, liability issues and the making of regulations.

1. Who the Bill Covers

The Bill broadens the definition of "employees" to include contract and subcontract workers, and domestic workers. It also applies, among others, to students, club members, athletes, and volunteers.

2. In-House Mechanisms

With this Bill, employers will have to ensure that their employees have a safe and healthy workplace. It is the employer's duty to take preventive measures through the creation of in-house mechanisms to achieve a sexual harassment-free workplace (Section 23(1)).

In order to overcome the significant problem of underreporting of sexual harassment, employers will create their own written policies on sexual harassment to meet the needs of their workplace. Workplaces with more than 40 employees will be obliged to set up their own sexual harassment committees (Sections 23(3) and 24).

2.1 Formation of Sexual Harassment Committee

The purpose of such a committee is to create an avenue sensitive to cases of sexual harassment. Normal grievance mechanisms fail to take into account the complexities of sexual harassment cases, especially the tripartite relationship that often exists between the complainant, the alleged harasser, and the management. Furthermore, typical grievance mechanisms do not respond to the unique needs of sexual harassment complainants. In order to respond to these needs, the committee should consist of an equal number of men and women and reflect the general membership of the workplace.

The sexual harassment committee has a number of functions as outlined in Section 25. It is to review the measures taken to promote and create a sexual harassment-free environment. It is to accept sexual harassment complaints, and where the complainant consents, to attempt to resolve the complaint through conciliation. It is to record any agreement reached, and finally it is to refer the complaint to the employer for further action.

2.2 Liability of Employer

Employers and principals face vicarious liability for sexual harassment carried out by their employees, unless they can prove that they took reasonable steps to prevent the harassment and that they took appropriate action when they received the complaint (Sections 21-22).

The employer owes a further duty to employees who make a complaint, as well as those who assist them in their complaint. Section 17 states that the victimisation of complainants is prohibited. Section 18 outlines that victimisation includes subjecting, or threatening to subject, someone to harm because they, or someone associated to them, has made a complaint, brought proceedings or given evidence under this Bill.

3. Making a Complaint to the Director

If the alleged harasser and complainant do not work for the same employer, or if an employer does not address a complaint adequately, a report may be filed with the Director of sexual harassment. The Director will assist the complainant in writing her/his report.

Any recipient or witness of sexual harassment or victimisation (or her/his authorised representative) may make a complaint to the Director. Complaints must be made in writing within 24 months of the last incident (although the Director has discretion to expand the time limitation). It is not necessary for complainants to exhaust in-house mechanisms first, although the Director may require complainants to provide reasons for not doing so (Sections 34-35).

After a complaint has been lodged, the Director will carry out an investigation, which must be completed within 30 days (Section 41). Following that, the Director will attempt conciliation within two months of completing the investigation (Section 43).

3.1 Conciliation Process

The Director will meet privately with the complainant and alleged harasser for the conciliation conference. Each person represents her/himself at the private conference, along with any necessary interpreters. The complainant may also be accompanied by a person who is not an advocate, adviser, or consultant but that person has no right of address and must respect the confidentiality of the proceedings. Anything said in the conciliation conference cannot be held against either person in later proceedings. If an agreement is reached, it will be recorded and will be enforceable by the courts (Sections 42-45).

Currently, few women report sexual harassment for fear that their jobs might be affected. The prohibition of victimisation and the emphasis on confidentiality are designed to protect complainants and those who assist them.

Role of the Director

The Director of sexual harassment has a broad range of powers and duties outlined in Section 27 of the Bill. The Director will have the general direction, control, and supervision on all matters relating to sexual harassment. In brief, the Director has the following functions:

§ To assist a complainant in writing his/her complaint and to notify the alleged harasser of the complaint;

§ To investigate and seek to conciliate sexual harassment complaints;

§ To advise and make recommendations to the Minister regarding matters relating to sexual harassment and reforms to further the Bill's objectives; and

§ To promote the recognition and approval of acceptable attitudes, acts and practices relating to sexual harassment through research, education and the publication of guidelines.

Under Section 29, the Director has wide powers to carry out her/his functions, including the ability to determine the procedure to be followed during the investigation or conciliation. The Director can also intervene, with permission, before the Court or Tribunal in proceedings that involve issues relating to sexual harassment. These functions and powers may be delegated in writing by the Director.

The Bill is designed so that it will be continually reviewed and improved. The Minister may approve or revise guidelines and codes of practice recommended by the Director. To

ensure ongoing communication, the Director will provide the Minister with an annual report, to be tabled in each House of Parliament (Section 31). Parliament may also request a report on a specific aspect of the Bill at any time (Section 32).

4. Inquiry Before the Independent Tribunal

If conciliation is not appropriate, or if it fails, the complaint will be referred to a Tribunal for an inquiry. The Director will assist the complainant in writing a statement of the case, which will accompany the referral and be provided to the alleged harasser. The process is designed to be user-friendly and provides assistance to the complainant throughout.

The Bill calls for the creation of an independent, specialised Tribunal to hear all sexual harassment inquiries as there is currently no official body equipped to deal with such cases. The Tribunal inquiry process provides sexual harassment complainants with accessible remedies within a reasonable timeframe. It is anticipated that this process will encourage more complainants to come forward and will contribute to the overall reduction of sexual harassment in the workplace.

Members of the Tribunal

The Tribunal may be made up of one or more persons. At least one member will be appointed by the Yang Dipertuan Agong and will be a lawyer with no less than 7 years standing, a Sessions Court judge or a former judge. If there is more than one member, other members will be appointed by the Minister, chosen from a panel of employers, workers or employees, members of clubs/institutions, and people with experience and expertise relevant to the inquiry before the Tribunal. A Tribunal convened for any particular inquiry shall consist of at least one member of each sex (Section 33(5)).

4.1 The Inquiry Process

Before a formal inquiry, a private "directions conference" will be held for facts and issues to be identified (Sections 47-48). The inquiry will be held in public, unless the Tribunal orders otherwise (Section 53). Parties may have representation with the permission of the Tribunal. Several complaints may be heard together and other parties who aided or incited the harassment can be included in the inquiry. The Tribunal may also hear a "class action" complaint if it is satisfied that the complaint was made by a member of a group of persons against whom the alleged sexual harassment was similarly directed.

The Tribunal has the power to require any person to appear and give evidence (Section 53(2)). Unlike the criminal courts, the Tribunal decides matters based on a balance of probabilities. It is not bound by strict evidentiary rules, although it must follow rules of natural justice. The Tribunal may hear from non-party interveners through oral or written arguments to assist it in its decision-making.

4.2 Outcome of the Inquiry

The Tribunal has wide powers to make awards that it considers appropriate for each case. Under Section 60, the Tribunal may dismiss a complaint if the inquiry shows it is unsubstantiated. If the Tribunal finds that a complaint has been proven, it may make one or more of the following awards:

- (a) that the alleged harasser must not repeat or continue the sexual harassment;
- (b) that the alleged harasser must redress any loss or injury suffered by the complainant and caused by the alleged harasser's sexual harassment;
- (c) that the alleged harasser must employ, re-employ or promote the complainant;
- (d) that the alleged harasser must pay to the complainant, within a specified period, an amount the Tribunal considers appropriate as compensation for any loss or injury suffered by the complainant and caused by the alleged harasser's behaviour, such amount to include but not limited to wages;
- (e) that the award includes a specified sum by way of exemplary damages;
- (f) that a contract or agreement is to be varied or declared void in whole or in part;
- (g) if the respondent's employer is a party, that the alleged harasser be disciplined, demoted or dismissed;
- (h) if the respondent's organisation, club, or educational institution is a party, that the alleged harasser be suspended or expelled;
- (i) that it would be inappropriate for any further action to be taken in the matter;
- (j) that either or both the complainant and respondent be referred to and receive counseling; and
- (k) any award it considers appropriate.

In addition to the above awards, the Tribunal will require the alleged harasser to apologise to the complainant and make any appropriate retractions. A person may apply to the High Court for review of a Tribunal decision (Section 65). If an award is not complied with after three weeks, the Director will file the award with the High Court, making it enforceable as if it were a High Court order.

Offences under the Bill

It is an offence under the Bill for someone to knowingly make a false or misleading statement, or to refuse (without a reasonable excuse) to provide information or

documents as required under the Bill. Those who give information under the Bill must be protected from liability. In addition, information that identifies or implies the identity of either the complainant or alleged harasser cannot be published.

Those who breach the Bill by an act (or failure to act) will generally be charged, and if found guilty, face a fine of up to RM10,000 and/or imprisonment for one year (Sections 73(1) and (2)). Proceedings for an offence under the Bill, or under any related guidelines, codes of practice, or regulations may be brought by the Director.

Conclusion

Sexual harassment is internationally recognised as a form of discrimination against women and as a human rights issue affecting both men and women. In 1995, Malaysia ratified the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). More recently, Article 8(2) of the Federal Constitution was amended to include gender, recognising women as equal citizens. As such, the Malaysian government is obliged to take appropriate measures to eliminate all forms of sexual discrimination.