

Memorandum on the Government's Proposal to Amend Existing Labour Laws and the Penal Code to Combat Sexual Harassment

28 April 2005

Honourable Ministers,

We the members of the Joint Action Group against Violence against Women (JAG-VAW) are disappointed to note that the government has decided not to provide a specific legislation to combat sexual harassment, mainly of women, at the workplaces.

In 2000, members of JAG-VAW presented petitions signed by over 12,000 individuals and 64 organisations representing thousands more urging the government to provide effective legislation against sexual harassment. In 2001 JAG-VAW also endeavoured to provide the government with a draft bill on sexual harassment.

This draft bill was the result of many months of research into the responses of other countries to the issues regarding sexual harassment. Experts from the International Labour Organisation (ILO), the University of Hong Kong, the New Zealand Human Rights Commission, and the Philippines were invited to comment on the draft bill. Local participants from the Attorney General's chambers, the police, your esteemed Ministries were also part of this consultative process.

Copious lessons from other countries were studied. Lessons on the difficulty by the courts in grappling with the many computations of scenarios in which sexual harassment had arisen were analysed. For example, in the United States an apprentice who was sexually harassed was denied remedy because the relevant legislation did not apply to her. Furthermore, like Malaysia, the European Union initially provided guidelines to combat sexual harassment but later realised that such guidelines were insufficient. In 2002, the European Union Parliament decreed that member states must formulate laws against sexual harassment at the workplace.

All these lessons were shared with the government and JAG-VAW made several addresses to the Ministry of Women, Family and Community Development, who was then the Ministry studying the draft bill. These addresses were also made, on the invitation of the Ministry to representatives from the state agencies like the police, the unions, the Prime Minister's Department the Federation of Malaysian Manufacturers (FMM) and the Malaysian Employers Federation (MEF). In fact, even the FMM supported the draft bill.

JAG-VAW members undertook a detailed research to gauge the extent of sexual harassment in several companies and to review their implementation of the Code of Practice on the Prevention and Eradication of Sexual Harassment. The research revealed that 35% of the respondents reported that they had experienced some form of sexual harassment. Despite adoption of the Code, only 48% of them were aware of their companies' sexual harassment policy. In a public survey conducted by JAG-VAW members, an overwhelming 98% supported the enactment of a sexual harassment law to complement the Code.

JAG-VAW representatives also conducted extensive research on the cost of sexual harassment to employers. Estimates indicate that the failure by employers to arrest sexual harassment would cost millions of dollars in down time, low employee morale, absence from work and conflicts within the workplace. These statistics and research findings were presented to the Ministry for Women, Family and Community Development as well as to both the FMM and MEF.

In 2001 JAG-VAW members also made a courtesy call to the Director General of Industrial Relations to discuss the difficulties of women victims of sexual harassment

accessing remedies under the Employment Act and Industrial Relations Act. The Bar Council in its biennial law conference in 2002 also included a panel discussion on sexual harassment. All three speakers concluded that it is important that sexual harassment be addressed preferably in a specific legislation.

JAG-VAW has also prepared a short memorandum which we now invite the Honourable Ministers to consider. A copy of the Memorandum is annexed hereto.

Finally JAG-VAW understands that the amendments to the labour laws and the Penal Code on sexual harassment will be tabled at the forthcoming Parliamentary session in July. In the interest of transparency and accountability JAG-VAW would like to receive copies of the proposed amendments to be made available to us so that we can provide input to these changes which will affect the lives of millions of workers in Malaysia. As such we would like to request the Ministers to convene a special meeting to discuss this important issue.

Thank you.

By

Joint Action Group against Violence Against Women (JAG) of:

- Women's Centre for Change Penang (WCC) - Organising Chair
- Women's Development Collective (WDC)
- All Women's Action Society (AWAM)
- Women's Aid Organisation (WAO)
- Malaysian Trades Union Congress (MTUC) Women's Committee
- Sisters In Islam

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Problems with the Employment Act

The Employment Act is very limiting in its application. It covers only the strict employer / employee relationships and even then, not everyone is protected under the Act. The Act does not apply to those earning above RM1,500 or to those who are deemed as contractors (and not employees). It does not cover persons who are undergoing training like apprentices. We know sexual harassment can happen to judges and parliamentarians. Research in other countries indicates so. They are not covered under the Employment Act.

Today, the variety of activities in which we engage to generate income is wider than the traditional employer - employee concept. Therefore it may be helpful to widen the application of the Employment Act to capture the reality of the variety of activities in which men and women engage in to earn a living.

So if an airline stewardess or a nurse who earns more than RM1,500 is harassed, then who do they turn to? Worse still, nurses complain that they are sexually harassed by patients. Journalists complain that they are harassed by those they interview. Employers must take action by protecting their employees. For example, the hospitals must tell the patients that they do not tolerate sexual harassment and if patients sexually harass the nurses, then they will have to leave the hospital. If the proposed amendments do not apply to such women, and if employers are not compelled to take action when their employees are harassed, whether by other employees, the customers or contractors, then any proposed amendment will be ineffective.

That is why JAG wanted a separate bill and had been liaising with the esteemed Ministry of Women and Family Development for the last few years. This was because we already anticipated that if the government merely amends the Employment Act, it would only help limited numbers of women and men and not every woman / man who is out there earning a living.

Therefore when both the Ministry for Human Resources as well as the Ministry for Women and Family Development declared that the government shall not provide a separate legislation against sexual harassment, JAG's greatest fear is that what remedy the government provides would be beneficial to only some of the women and leave the others to continue fending for themselves.

Apart from the above, we also urge the government to consider the following problematic areas which have been recognised by jurisdictions (both the courts and State legislative bodies) worldwide as deserving special attention.

Definition of Sexual Harassment

Sexual harassment occurs in many different forms. In its most severe form, it constitutes sexual assault and in less severe behaviours, it could be unwelcome sexual advances for request for sexual favours.

Thus any definition of sexual harassment should be succinct and clear and takes into account the reaction of a reasonable person in order to bring objectivity to the definition. JAG proposes the following:-

“If a person:-

- a) makes an unwelcome sexual advance or an unwelcome request for sexual favours to the other person;
- b) engages in any other unwelcome conduct of a sexual nature towards the other person;
- c) engages in any other conduct of sexual nature towards a third person in the presence of the other person;

-in circumstances in which a *reasonable person* would have known or should have known that, the other person would be offended, humiliated, intimidated or ridiculed, it amounts to sexual harassment.

Further, if any person does any act listed under (a), (b) or (c) in circumstances in which submission, rejection, tolerance or intolerance of conduct affects a person’s employment, interferes with a person’s work performance or creates an intimidating, hostile or offensive work environment, then for the purposes of the Bill such conduct amounts to sexual harassment.

The definition of “*conduct of a sexual nature*” is not exhaustive. It generally includes acts of physical intimacy or contact; making oral or written remarks; making gestures, actions or comments with sexual connotations to a person or about a person in his or her presence or it is made in a manner where it is communicated to that person by any means whatsoever.

Prohibition of Sexual Harassment

As stated above, legislation must address sexual harassment during the course of a person being engaged in income generating activities and in particular:-

- a) widening the definition of “*Employer*” must include a person who engages another under a contract of service or a contract for services or where remuneration is based on commission or as a trainee, pupil, apprentice or a volunteer. An “*Employee*” includes a person employed under a contract of service or contract for service or a trainee, pupil, apprentice or a volunteer;
- b) Sexual harassment by other than an employer against an employer e.g. by a partner towards another partner in a firm or a person seeking admission as a partner, by a student, an employee or a member towards another student, employee or member of an educational institution;

- c) Sexual harassment occurring in connection with obtaining admission into any industrial or professional organisation, occupational qualification;
- d) Sexual harassment by a person in the course of providing or receiving goods and services or offering accommodation to the other person (this would apply to nurses being harassed by patients);
- e) Sexual harassment in relation to a person being engaged in a sporting activity (this includes coaching or a person being coached, persons involved in the administration of a sport, organized sporting competition or in a function relating to a sport. Incidences of sexual harassment in sports have been widely reported in the media)

We also note that sexual harassment has been reported by persons engaged in judicial services as well as in respectable bodies such as parliaments.

Prohibition of Victimisation

Often the complainant or anyone who supports her could also be victimized. At worst, they are dismissed. Legislation must provide that victimization is not to be tolerated.

Authorising or Assisting Sexual Harassment

Sometimes, sexual harassment is done in the open with encouragement by friends of the harasser. Legislation must similarly provide that if a person assists, induces, instructs or authorises another person to commit sexual harassment, that person should similarly be liable.

Employer's Duty to Formulate Policy

The Ministry should formulate a policy to compel employers to take reasonable steps to create a sexual harassment – free environment. Employers must also be required to inquire into sexual harassment complaints and where appropriate take action against any person.

Every employer should also establish a sexual harassment committee at the work place, like that required under the Occupational Safety and Health Act 1994.

The purpose of this committee shall be to review the measures taken to promote and create a sexual harassment – free environment; accept a complaint of sexual harassment; attempt to resolve the complaint amicably through conciliation with the Complainant's consent; record terms of any agreement reached and finally refer the said complaint to the employer for further action.

Liability of Employers and Principals

In many cases, due to the fact that the alleged harasser is a favoured employee, employers are reluctant or just refuse to take any action against the employee. The law must be able to intervene and take action against such employers.

In this regard, employers must be compelled to take reasonable precautions and reasonable actions upon receipt of sexual harassment complaints. As a preventive measure, employers must also be compelled to publish guidelines and codes of practice to avoid negative attitudes towards sexual harassment.

Establishment of Mechanism

Presently there is no avenue for the State to intervene unless and until an employee is dismissed. A mechanism should be established so that employees need not wait until they are dismissed in order to seek recourse under Section 20 of the *Industrial Relations Act*. The only other avenue available to the victim, apart from Section 20, is filing legal action or a police report. The former is expensive and therefore only available to women with means and the latter requires an employee to seek criminal proceedings.

What victims normally require is for the harassment to stop and for employers to show they are capable of providing a sexual harassment-free environment. Any mechanism established under the law must aim to provide these dual objectives.

Therefore, a mechanism that encourages an expeditious resolution of the issue without involving the technicality of a court process is to be preferred.

Addressing the complaint expeditiously has also proven to be advantageous to employers in order to maintain the morale and productivity of workers at the workplace.

Internal Mechanism

This should include compelling the employer to provide facilities to ease the trauma and embarrassment of lodging a sexual harassment complaint. Upon receipt of a complaint, an employee should be compelled to take immediate action to investigate and inquire into the complaint.

It is important for these internal mechanisms to have independent and objective persons to whom the complainant can go to. These officers must also be trained to be non-judgmental and gender sensitive.

This is because sometimes women do not complain because they think no one will believe them.

External Mechanism

External mechanisms that allow the state to inquire into complaints of sexual harassment and to provide remedies must be established so that the state may intervene to resolve the complaints. The mechanism should complement that set up under Section 20 of the *Industrial Relations Act* so that sexual harassment victims need not resign or be dismissed by their employers before they could seek redress.

This external mechanism should ensure that dedicated officers are available to investigate and seek to conciliate complaints made in relation to sexual harassment.

Conclusion

The above issues are by no means exhaustive but are areas that require special attention in the formulation of any legislative measures on sexual harassment. JAG-VAW hopes that they will be taken into consideration by the Parliament in formulating and debating legislation measures to combat sexual harassment in the workplace.

Thank you.