

## **Paper on "Combating Sexual Harassment: The Way Forward"**

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### **1.0 Introduction**

Sexual harassment is one of the most common forms of violation of a person's body and dignity, yet it is the least exposed. Indeed, the past twenty years have witnessed an increasing awareness of the phenomenon of sexual harassment as a legitimate workplace issue. While there has been no standard definition of sexual harassment per se, what is universally agreed upon is that it is unwanted and unwelcome sexual conduct which often leads to a hostile and intimidating working environment.

The fact that sexual harassment complaints are seldom made is not indicative of the absence of sexual harassment incidences. Rather it is most likely due to the absence of complaint avenues and mechanism for redress.

In Malaysia, the Ministry of Human Resources (MOHR), has defined sexual harassment as unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment:

*that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/his employment; or that might, on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to her/his well-being, but has no direct link to her/his employment (Ministry of Human Resources, 1999).*

Based on the above definition, two categories of sexual harassment emerge - sexual coercion and sexual annoyance. Sexual coercion is defined as 'sexual harassment that results in some direct consequence to the victim's employment', mainly within a superior-subordinate position. Whereas sexual annoyance is seen as 'sexually-related conduct that is offensive, hostile or intimidating to the recipient, but nonetheless has no direct link to any job benefit' which may occur by an employee against a co-employee or a client to an employee. The Malaysian Code further identifies five forms of sexual harassment - verbal, non-verbal, visual, psychological and physical.

Sexual harassment is a very old phenomenon in a somewhat new guise. Although most of the studies on sexual harassment have been conducted in the west, such behaviour has long been recognised by many sectors in Malaysian society as a problem. For example, early signs of the struggle to have sexual harassment recognised as workplace misconduct were seen when as far back as 1939, the call against sexual molestation of female workers by Europeans and 'Black Europeans' emerged in the strike organised by the Klang Indian Association. Again in 1950, 106 women and men rubber tappers from

Panavan Karupiah Estate in Perak went on strike against sexual molestation (Rohana, 1988).

Studies have found that women experience a disproportionately higher rate of sexual harassment, with survey figures ranging from 40 percent to as high as 80 percent of female employees reporting sexual harassment on their jobs by their male colleagues or supervisors (Aggarwal, 1992; Earle and Madek, 1993; ILO, 2001). In Malaysia, the first survey on sexual harassment was conducted by the Women's Section of the Malaysian Trades Union Congress (MTUC) in 1987. The study reported that 11 to 90 percent of the female respondents experienced sexual harassment in the workplace (cited in Sabitha, 2000). In the 1990s, a survey of 586 public administrators (422 men and 164 women) in the northern states of Peninsular Malaysia reported that 43.4 percent of the men and 53 percent of the women faced at least one form of sexual harassment (Sabitha, 1999).

Sexual harassment is not about personal relationships between men and women. Sexual harassment is a manifestation of abuse of power. Sexual harassment as gender violence and as a violation of human rights, is shaped by the distribution of social, political, economic and legal power in which women are still far from being empowered nor equal. As women increasingly enter the workforce the ubiquitous nature of sexual harassment in the workplace is a reflection of the unequal power relations in society whereby women are seen as secondary labour.

Given the above, what have been the policy and legal approaches in combating sexual harassment in the workplace? Thus far, various approaches have been - from Codes of Practice to anti-discrimination or labour laws to specific legislation on sexual harassment. At the United Nations level, the 1995 Beijing Platform of Action has noted sexual harassment as a form of violence against women, calling for member states to take measures to actively combat this act of violence.

This paper aims to examine and evaluate the policy and legal approaches taken in Malaysia to address sexual harassment, particularly in the workplace. After the introduction, the second section discusses the existing legal avenues in dealing with sexual harassment in Malaysia. This is followed by a presentation of the research findings on the implementation of the Code of Practice on the Prevention and Eradication of Sexual Harassment, mooted by the MOHR in August 1999. In both these sections, the strengths and limitations of these approaches will be identified. The next two parts will put forward the proposal by the Joint Action Group Against Violence Against Women on the need for a Sexual Harassment Bill as well as the responses of the state to legal reforms regarding sexual harassment. The sixth and concluding section suggests the way (s?) forward so that sexual harassment will be properly addressed in the Malaysian context.

## **2.0 Legal Approaches to Sexual Harassment**

### ***Categories of Sexual Harassment***

Sexual harassment is generally legally categorized into two forms. The first is *quid pro quo*, in other words, the "put up or get out" demand made of an employee by someone with the power or apparent authority to hire, promote, fire or otherwise cause an adverse employment decision. The second form is the "hostile environment," where the employee may have suffered no tangible adverse employment action but was required to endure offensive behavior.

Apart from the above two categories of sexual harassment, there is yet another form of insidious harassment which similarly requires attention, namely that by an employee of his employer's customer, charge or by a client of an employee providing services. Examples of the former include the harassment by a coach of his athletes, by a bus driver of his passengers and by a doctor of his patient and of the latter include by a patient of his nurses.

### ***Quid pro quo***

Undeniably, sexual harassment is a difficult issue to tackle as it generally involves someone of higher position making it difficult for the sexually harassed victim to raise the issue. Due to this it takes a lot of courage for women who are sexually harassed to speak out.

One of the most common reasons for women not voicing out against sexual harassment is the fear of retaliation by the person complained against. Women have been demoted, their job assignments changed, their work which was satisfactory or even exemplary prior to their complaints publicly criticized and admonished and/or they themselves ultimately discharged.

### ***Hostile Environment***

Experience has shown that sexual harassment is caused not only by a superior repeatedly abusing his position by sexually harassing his subordinate but may be caused also by a group of workers in order to create a hostile environment to compel an unwanted female employee to leave.

For example, several men may make derogatory comments in her presence and during her presentations or subject her to offensive and unwelcome touching thereby affecting her work performance.

Many jurisdictions address sexual harassment as a discrimination / equal opportunity issue and thus is incorporated into legislations dealing with discrimination and equal opportunity. In some jurisdictions special commissions or tribunals are set up to hear such cases.

In Malaysia, the Ministry for Human Resources have asked the public to lodge sexual harassment complaints with them. Unfortunately the ministry or its offices cannot officially intervene unless the victim is dismissed from work. Labour Officers can only advise the employers to investigate the case as a misconduct. Sometimes employers flatly refuse to do anything even when the officers ask them to hold an inquiry.

If the complainant reports to the police, the most likely sections that will be used is the Penal Code provisions on outraging or insulting of modesty (e.g. molest cases or other sexual offences if the case warrants it. See ss 354 or 509). Making sexual harassment a police case may be ineffective because the police can only investigate if it is "serious" i.e. if it involves physical violence for which there is clear evidence of bruises and injury. Otherwise the police may not investigate and may refer the case directly to the magistrate or the deputy public prosecutor, who may issue an order to investigate for the police to begin investigations.

If sexual harassment involves repetitive acts which if viewed individually is "not serious" but together becomes quite traumatising, then it is difficult to overcome the above procedure. This is because criminal law looks at separate incidences individually, not cumulatively. Therefore the cumulative effect of sexual harassment is not taken into account.

Apart from that, there is only the tort of assault.

### **3.0 The MOHR Code of Practice**

As a result of the campaigns by unions and women's groups on the need for policies and legislation on sexual harassment, in August 1999, the MOHR launched the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (henceforth The Code of Practice or The Code). The launch of the Code of Practice was the first attempt by the government to define and address sexual harassment in the workplace. It also provided a set of minimum guidelines for a comprehensive in-house mechanism for companies to adopt in their place of work. These are:

1. A policy statement prohibiting sexual harassment in the organisation;
2. A clear definition of sexual harassment;
3. A complaint/grievance procedure - in this case a separate complaint procedure with time frames should be developed as the normal procedure is often unsuitable for sexual harassment complaints;
4. Disciplinary rules and penalties against the harasser and against those who make false accusations;
5. Protective and remedial measures for the victim - these measures should ensure maximum confidentiality to the victim so as to minimise embarrassment; and
6. Promotional and educational programmes to explain the company's policy on sexual harassment and to raise awareness of sexual harassment and its adverse consequences among the company's employees, supervisors and managers. Special training

programmes should be provided for supervisory and management staff, especially those who are assigned to function as investigators and counselors.

In addition, the Code also points out that joint and consultative employer/trade union action in combating sexual harassment should take place in order to effectively prevent, handle and eradicate sexual harassment. Trade unions are also urged to conduct their own education and awareness programmes among their members.

The Code, of course, is not compulsory. Its effectiveness relies on the persuasive power of the MOHR and the compliance of management. As of July 2000, the Department of Labour has embarked upon an extensive programme to promote the Code, attended by mainly human resources managers and representatives from various companies. By June 2001, 20 workshops had been conducted all over the country (Daily Express, 15 June 2001). As a result of these workshops, 4,500 companies have since adopted the Code and implemented their own policies in the workplace (New Straits Times, 21 March, 2001). However, as noted by the Deputy Minister himself, these companies comprise approximately only 1.125 percent of the 400,000 employers registered with Perkeso.

What has been the impact of the Code thus far? The following sections summarise the findings of the AWAM and WDC research on the implementation of the Code of Practice by six pioneer companies in Malaysia.

### ***3.1 Incidence and Impact of Sexual Harassment***

About 35 percent of the 1,483 respondents surveyed reported that they had experienced one or more forms of sexual harassment in their place of work. A significantly higher percentage of female respondents (38 percent) than male respondents (32 percent) indicated that they had experienced such harassment. The most common form of harassment encountered was verbal, followed by physical harassment.

In terms of occupational categories, the findings were again significant whereby a larger proportion of production operators (39 percent) and clerical workers (36 percent) said they experienced sexual harassment compared to the supervisory (34 percent) and management (23 percent) levels. The data confirm the existing literature that those who are harassed are generally in subordinate positions and in gender-specific occupations. The men who reported being harassed were also generally from the lower occupational groups. In addition, the younger age cohort who had the least number of working years experience reported a significantly higher incidence of sexual harassment, once again supporting the literature that new and younger entrants to the workforce are the most vulnerable and likely to be sexually harassed. In-depth interviews with key informants revealed that the perpetrators were mainly male superiors or co-workers of the victims, with some male harassers even lower in rank than their female victims.

It was found that most of the victims of sexual harassment, irrespective of whether they lodged formal complaints, encountered adverse consequences in the workplace. Such negative impact ranged from their personal security being threatened to experiencing

stress at work, as well as emotional and psychological trauma. A quarter of the survey respondents who were harassed reported facing an intimidating and hostile work environment, resulting in them being less productive and effective in their work. Another 20 percent stated that they felt that their employment opportunities were threatened. As a result they felt stressed, worked less effectively or changed their pattern of work, while some considered changing their jobs. This situation reveals that a substantial proportion of sexual harassment victims felt that they were working within an environment which was hostile and unsupportive, giving rise to serious implications on work, productivity and organisational relations in the company.

### ***3.2 Differential Perceptions***

What was also interesting was the differential gender perceptions towards sexual harassment, an issue underscored by the literature and reinforced in the study. What constitutes sexual harassment is a bone of contention between men and women, with men consistently noticing less sexual harassment than women do. Women rate a wider variety of sexual behaviours at work as sexual harassment while men tend to rate only the more extreme actions. As one of the male informants told us, 'touching from the shoulders up is alright'. Male informants in our study generally perceived sexual harassment as 'normal male behaviour' resulting in women having no choice but to accept such behaviour as so common that 'we are already immune to it'.

In addition, the literature points out that men are more likely to view the victim as contributing to their own harassment, the typical response being the way she dresses, or by not being able to handle 'normal' and 'harmless' sexual attention and banter. In this study, many male and some female informants also internalised this position that women could provoke sexual harassment by the way she dresses. Basically this position, also taken in relation to rape, merely excuses the harasser and justifies the harassment. However, there were also differing opinions with a significant number of women and a minority of men who asserted that no one deserves to be harassed on account of the way they dressed. According to them, sexual harassment was a form of power relationship whereby men used such behaviour to intimidate and humiliate women whom they viewed as subordinate in society.

### ***3.3 Policy Impact***

What has been the impact of the companies' sexual harassment policy? The survey reported that only 47.6 percent of the total respondents were aware of the sexual harassment policy in their company, reflecting a relatively low awareness of the existence of the policy. Nonetheless, those companies that were more committed to distributing their policies registered a much higher level of awareness compared to those companies which were less interested.

Another indication of the relative effectiveness of the policy would be the confidence respondents had in the complaint procedure. In other words, would victims report to the channels provided by Human Resources and would they trust that their grievances be

justly addressed and redressed? While two-thirds of the respondents (who were aware of the company policy) were satisfied with the grievance procedure, only about 40 percent of them indicated that they would use these formal channels if they experienced sexual harassment. This figure dips even lower when only 22-25 percent of the victims themselves would actually report to their supervisors or to Human Resources. The findings show a lack of confidence in the grievance procedure underscoring the importance of companies to build up more rapport with their employees. To be sure, this lack of confidence reflects a deeper issue of employer-employee relations in the companies, particularly in the context of industrial relations.

### ***3.4 Application of the MOHR Code of Practice***

A policy is effective only if, besides awareness, it is properly understood and applied according to clear guidelines and measures - in this case if all the elements suggested by the MOHR Code are adopted.

The study showed that by each adopting a sexual harassment policy, the pilot companies have generally shown their seriousness in combating sexual harassment in their workplace. What is important is the commitment of the top leadership in ensuring that the policy is disseminated and understood by all the staff, as was done by some companies in the study. On the other hand, one company apparently did not receive instructions from its parent firm while in another, the expatriate director only duplicated the policy for management for fear of disturbing the 'hornet's nest' resided by the vast majority of production operators. This type of commitment was also conditioned by the current economic downturn whereby productivity was a more important consideration, particularly in the manufacturing sector.

Given these reasons, it is not surprising that not all the recommendations contained in the MOHR Code of Practice have been adhered to in the implementation of the company policies. Different procedures and features are apparent, reflecting a lack of uniformity in the implementation of the said Code. One clear difference was the lack of a standardised or even average time frame in carrying out the complaint procedure with the total period lasting from as short as 16 days to as long as 112 days.

Companies have also adopted different complaint processes. For example, in one company, five opportunities are given to the harasser before s/he is charged while in another company the officer in charge is to take up the case, allowing for a written apology if both parties are agreeable to reconcile. However, the harasser is immediately charged if it is the second offence. In another company, if the perpetrator is from management, s/he is immediately fired.

Another important consideration is the lack of counseling facilities available to both the complainant and the perpetrator. Except for one company, which has an excellent counselling programme, the other companies do not have trained counsellors to handle sexual harassment complaints although they speak of the need for counselling.

The measures to protect the complainant against retaliation are also found wanting. While every company asserts that they would maintain confidentiality regarding sexual harassment reports and would protect the complainant, concrete and clear measures are not spelt out. Only one company would deny the bonus or demote the guilty party breaching confidentiality while two companies would warn the harasser not to threaten the complainant. There is no clause ensuring the complainant that s/he would not lose her job – a fear of most potential complainants.

To summarise, while the Code sets out exemplary procedures and encourages the establishment of comprehensive in-house mechanisms to prevent and eradicate sexual harassment in the workplace, it is clear that not all these in-house mechanisms exist. In the first place, there is the assumption that a proper and well-established dispute resolution mechanism exists in all Malaysian companies, and that this mechanism can accommodate the sensitivities of sexual harassment cases. In addition, it is assumed that employees are aware and knowledgeable about what constitutes sexual harassment and will readily report to management if they are sexually harassed. The research findings point out that these assumptions are not necessarily true.

Based on the above, it is clear that it is important that a nationally accepted clear definition is stated to determine sexual harassment, with coherent procedures and sanctions in place to ensure fair treatment of both complainants and perpetrators. With legislation, employers would have to comply to take action against sexual harassment (Rohani, 2001). To be sure, most of the informants interviewed were of the opinion that legislation was important if the Code of Practice were to be more effective and to be taken seriously by employers and employees alike.

#### **4.0 Why Legislate?**

As the first official definitive document by the Government to address the problem of sexual harassment, the Code sent a clear message that sexual harassment is unacceptable. The Code was influential in creating awareness that sexual harassment violates a person's dignity and safety. It gave victims, mainly women, a sense of hope that their sexual harassment complaints would receive redress. It gave them the courage to speak out against sexual harassment.

As already discussed, the Code stops short of compelling employers to adopt it. Nor does it provide details on grievance procedures to be adopted when dealing with sexual harassment complaints. So what do we have? On the one hand, we have awareness; this creates hope and courage. But when it comes to the crunch, there is no redress.

This is the frustration of dealing with the Code of Practice. It is only a voluntary code and cannot be enforced. That means it need not be implemented and at worst can be ignored. Women continue to lose their jobs, promotions, raises or other employment opportunities and benefits because of sexual harassment by supervisors or co-workers.

Trade unions and women's groups have called for laws specifically to combat sexual harassment at the workplace since the 1980s.<sup>2</sup> Malaysian through petitions<sup>3</sup> as well as a newspaper survey<sup>4</sup> also indicate that they overwhelmingly support legislating against sexual harassment. Legislation on sexual harassment must address two fundamental points. Firstly it must require employers to pro-actively prevent sexual harassment and secondly, it must provide victims of sexual harassment with meaningful access to legal redress.

### ***The Need for Prevention***

Many employers in Malaysia have little experience in dealing with sexual harassment complaints, do not have effective policies or complaint procedures for addressing sexual harassment, and even fewer provide training or other information on sexual harassment to employees.

An explicit statement, providing a clear definition of what is prohibited and making clear the employer's commitment to creating and maintaining a sexual harassment-free workplace (supported by training and education) would serve to acquaint everyone with the employer's sexual harassment policy. The chances of harassment occurring are reduced when everyone is aware of the rules.

### ***Legal Redress***

The essence of legislation is its ability to compel employers to abide by a standard process in handling sexual harassment complaints. It allows complaints to be handled in-house by management but at the same time, ensures that the procedures are transparent, fair and just and that all parties are held accountable for their behaviour.

All complaints should be investigated. Effective procedures reduce the need for "self-help" measures. When harassment goes unchecked, victims may resort to external agencies like the police, the labour department, service bureaus and the media in the hope of stopping the harassment thereby making public the complaints to the employer's detriment and embarrassment. Individuals may try to stop the harassment by intervening on the victim's behalf in ways that may pose risks to everyone, including physical violence.

Besides identifying specific sanctions against harassers, the complaint procedure should also provide for effective remedies, including counselling and protection against retaliation for victims and witnesses.

#### ***4.1 JAG's Proposal for Sexual Harassment Act***

Legislation can either lag behind or set standards in society. It is already obvious that the legal definition of work and workplaces has not kept up with current notions. Because of this inserting a few clauses into the Employment Act (which utilises the legal definitions), the Industrial Relations Act and the Occupational Health and Safety Act may

not be a viable option. The parameters of the needed protection is bigger than that offered by the these Acts.

The proposed Sexual Harassment Act (hereinafter "the Bill") is meant to be a progressive legislation that not only re-defines legal concepts to reflect the dynamism of society but also educate and set new standards of conduct and understanding. Some of the more salient processes under the Bill are as follows:-

### ***In-house Mechanisms***

With legislation, employers are compelled to implement in-house mechanisms to create a sexual harassment-free workplace. A proper policy would serve to raise awareness on this issue and its consequences. A strategy of prevention promises to be a more effective and economical strategy for sexual harassment than post-harassment legal redress. Once an incident of sexual harassment occurs, the damage is done, not only to the victim, but also to co-workers, supervisors, managers and the employer. When this happens, the integrity of the workplace is compromised and the morale and productivity of workers are also harmed.

\* To this end, the Bill provides for the formulation of sexual harassment policies by employers.

Grievance mechanisms must be designed to encourage victims to come forward, protect the victim, bring out the facts and where appropriate, discipline the harasser. Normal grievance procedures do not take into account the complexities of sexual harassment and in particular the tri-partite relationship among the complainant, the harasser and the management. Hence it is unable to adequately address the problems. A preferable approach would be to develop specific guidelines for domestic inquiries that are sensitive to the problem of sexual harassment.

\* To this end, the Bill provides for the establishment of a sexual harassment committee which comprises management and employees with equal gender representation which functions include accepting, investigating and resolving sexual harassment complaints, where possible.

### ***Redefining Work Relationships***

The current laws pertaining to employment do not take into account that sexual harassment at the workplace may involve complaints by or against people not strictly in legal employment situations but are nevertheless in working relationships. Neither is the workplace necessarily a physical space. This sector which includes contract and subcontract work and voluntary work are increasingly becoming workplaces particularly for women. A comprehensive definition to cover as wide a range of workplaces will ensure that every working individual is protected from sexual harassment.

\* To this end, the Bill broadens the concept of work and the notion of a workplace.

### ***Designated Official***

As a serious offence, sexual harassment must be constantly checked by officials with sufficient authority and power. These officials must be entrusted with not only duties in receiving complaints but must also be able to propose proper guidelines and mechanisms in order that the law may be effectively implemented.

\* To this end, the Bill provides for the appointment of a Director *inter alia* to promote the recognition and approval of acceptable attitudes, acts and practices, to prepare guidelines for the avoidance thereof, to receive sexual harassment complaints and conciliate them, where possible;

### ***Establishment of a Tribunal***

The present laws are inadequate. While the Penal Code contains sections that cover certain aspects of sexual harassment, these are insufficient. The burden of proof is on the complainant and it is difficult to prove intent by the harasser. In addition, complainants often merely want the harassment to stop rather than have the harasser criminalised. The alternative redress process is for the complainant to commence a civil suit against the harasser in a court of law. This process is expensive and may prove inaccessible to most complainants

\* To this end, the Bill provides for the establishment of a Tribunal comprising persons with legal and relevant expertise and experience which shall conduct the inquiry expeditiously and with as little formality as possible.

Therefore the Bill's mechanism is three-prong. Firstly it has a strong preventive angle. Secondly it promotes self-regulation by employers. Thirdly it promotes amicable resolution, both internally by way of domestic inquiry and at conciliation conference convened by the Director. Fourthly it makes redress more accessible to victims/survivors. For an executive summary of the Bill, please see Annexure 1.

## **5.0 Response From the Government**

The Government appears sensitive to the need of eventually legislating against sexual harassment. In discussions with ministers and their officials there seems to be a realisation that sexual harassment must be combated although the responses on how it is to be undertaken has been varied; from offering incentives for employers to adopt the Code to amending present legislations to provide for sexual harassment.

## **6.0 Conclusion**

In trying to eradicate a problem as old and as pervasive as sexual harassment, Malaysia has to look for the best practice model to not only protect those who work and contribute towards nation-building but also to discharge our obligations under international

instruments like the United Nations Convention against the Elimination of All Forms of Discrimination against Women to which Malaysia is a signatory.

Legislation alone however will not result in the eradication of sexual harassment at the workplace without a more comprehensive action plan. There needs to be other efforts like education, training and outreach programmes. Many women still think that sexual harassment is the price that must be paid for mobility. So they suffer in silence and lose out on performance and productivity. This way employers as well as employees are affected.

Legislating on sexual harassment is only one of the steps, albeit a crucial step towards ensuring that neither women nor men will have to run a battery of sexual abuse in return for the privilege of being allowed to work and earn a living.

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1 Zarizana Abdul Aziz, an advocate and solicitor and Chairperson of Law Reform Subcommittee of the Women's Crisis Centre (WCC) Penang, is also the Chairperson of the Joint Action Group Against Violence Against Women. Dr Cecilia Ng is the Director of the Women's Development Collective (WDC). Parts of the paper have been extracted from the research findings on sexual harassment conducted by the All Women's Action Society (AWAM) and WDC. See Ng, Cecilia and Zanariah Mohd. Nor (2001), Sexual Harassment and the Code of Practice in Malaysia: A Study of Pioneer Companies Implementing the Code.

2 In response to that call, the then Deputy Minister in the Prime Minister's Department (Women's Affairs), YB Dato' Dr Siti Zaharah said that her Department would monitor the situation and gauge if there is a need for stricter laws. She also asked for the submission of proposals and recommendations for the government's consideration.

3 On 15th May 2000, WCC launched a signature campaign to demand that the mechanism for dealing with sexual harassment including those already stipulated in the Code be given force of law where employers would be duty-bound to incorporate sexual harassment preventive measures and redress procedures at their workplaces. The campaign was then taken up by the Joint Action Group Against Violence Against Women (JAG), a coalition of women's groups consisting of the Women's Crisis Centre, Women's Development Collective, Women's Aid Organisation, Women's Candidacy Initiative, All Women's Action Society, Sisters In Islam and Persatuan Sahabat Wanita Selangor. Within 6 weeks, over 12,000 individuals and 64 organisations representing thousands more endorsed the campaign and the petitions were handed to the Honourable Minister for Human Resources, Dato' Dr Fong Chan on 30th June 2000.

4 The newspaper survey was conducted by All Women's Action Society in 3 major dailies the Star, Sin Chew Jit Poh and Utusan Malaysia from April - June 2001. 98.3% respondents support legislation on sexual harassment comprising 91% male respondents and 99.3% female respondents. There were 654 valid responses made.

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## Acts

Employment Act 1955

Industrial Relations Act 1967

Occupational Safety and Health Act 1994

## **Annexure**

### **SUMMARY OF SEXUAL HARASSMENT BILL**

#### **Definition of Sexual Harassment**

Sexual harassment is defined as unwelcome sexual advance or an unwelcome request for sexual favours to the other person, unwelcome conduct of a sexual nature towards the other person or 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 or 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.

#### **Prohibition of Sexual Harassment (hereinafter known as "Part 2")**

The purpose of this Bill is to cover occurrences of sexual harassment at the workplace and in circumstances where at least one party is working (whether in employment, contract for services, partnership, at or in training therefore). It also covers harassment at sporting activities, educational institutions, legislative bodies.

It also prevents victimization of the persons who brought a complaint and/or proceedings, gives evidence or information in connection thereto. (Part 3)

#### **Authorising or Assisting Sexual Harassment**

If a person does assist, induce, instruct or authorize another person to contravene Part 2 or 3 of the Bill and that person does indeed do an act to contravene the said provisions, then a complaint about the contravention may be lodged against either or both of them.

Both persons shall under this provision be taken to have contravened Part 2 and 3.

#### **Liability of Employers and Principals**

An employer or principal of a person may be held vicariously liable if a person in the course of employment or while acting as an agent contravenes Part 2 or 3 of this Bill.

In such an event a complaint on the alleged contravention may be lodged against the person and/or his employer or principal. Further in this circumstances, all references to the Respondent shall also mean to include where applicable the employer or principal.

It is a defence if the Employer or Principal proves on a balance of probability that reasonable precautions were taken to prevent the employee or agent from contravening the Bill and reasonable action was taken upon receipt of the complaint relating to sexual harassment.

### **Employer's Duty to Formulate Policy**

An employer under this Bill is compulsorily bound to formulate policy and to take reasonable steps to create a sexual harassment - free environment. Employers are also required to inquire into sexual harassment complaints and where appropriate take action against any person who contravenes or who requests, instructs, induces, encourages, authorizes or assists another person to contravene a provision of the Part 2 or 3. To ensure compliance with the above provision an Employer is to prepare or revise as may be appropriate a written statement of general policy governing the company in compliance with the guidelines and codes of practice which may from time to time be issued by the Minister upon recommendation by the Director.

Every employer shall also establish a sexual harassment committee at the work place, if there are forty or more employees or if directed by the Tribunal or the Director. The Committee shall consist of equal number of men or women as far as practicable and shall reflect the composition of employees or members, students (if any) of the employer.

The purpose of this committee is 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 to refer the said complaint to the employer for further action.

### **Appointment, Functions and Powers of the Director**

The Yang Dipertuan Agong shall appoint a Director or other Assistants to the Director, as he considers necessary and expedient. The Director shall have general direction, control and supervision on all matters relating to sexual harassment. A person appointed as a Director may hold this office in conjunction with any other office or position.

Briefly, the Director's functions is inter alia to investigate and seek to conciliate complaints made in relation to sexual harassment, to advise and make recommendations to the Minister as to reforms, whether of legislative nature or otherwise that will further the objects of the Bill including publishing guidelines and codes of practice for the avoidance of attitudes of sexual harassment, to undertake research, disseminate information, conduct educational programs to promote acts and attitudes against sexual harassment and to inquire into discrimination and the effects of sexual harassment.

The Director also has wide powers to do all things necessary for the performance of his or her functions; in particular to determine the procedure to be followed during investigation or conciliation and to intervene with leave in proceedings before the court

or Tribunal that involves issues on sexual harassment. The functions and powers of the Director may be delegated in writing by the Director to any other person to act on his behalf.

The Minister may upon recommendation of the Director approve guidelines and codes of practice as are necessary or proper to ensure compliance with the requirements of the Bill and shall cause the same to be published in the Gazette. The guidelines and codes of practice may be revised from time to time by the Minister upon recommendation by the Director.

The Director is to submit to the Minister an annual report on the specified date. At the same time, the Minister may also direct the Director in writing to report on certain matters in the annual report. Any directions by the Minister are to be included in the annual report. The said report is then to be tabled in each House of the Parliament, as soon as it is in session. The Minister may also require the Director to present a special report on any aspect of the operation of the Bill, which may be included in the annual report, if the Minister so determines.

### **Establishment of a Tribunal**

A Tribunal shall be established. If the Tribunal consists of only one member, the said member shall be appointed by the Yang Dipertuan Agong from the following persons; that is a legal practitioner of not less than 7 years standing or a magistrate or a former judge.

If the Tribunal consists of 2 or more members, one of the members shall be the chairperson of the Tribunal and shall be appointed from the following persons that is a legal practitioner of not less than 7 years standing or a magistrate or a former judge. The other members shall be appointed by the Minister from a panel representing the employers; workers or employees; members and other persons with the experience and expertise in the subject of the complaint. Further if a Tribunal is convened for any particular inquiry, it shall consist of at least a woman.

### **Making a Complaint**

Two or more people may make a complaint jointly. The Complainant need not have sought remedy from his or her employer or any committee set up by the employer before making a complaint to the Director.

The Complainant has to lodge a written complaint with the Director setting out details of the alleged contravention. A complaint has to be made within 12 months after the last incident of sexual harassment and the complaint will only include incidents occurring 12 months before the last incident. The Director may exercise his discretion to accept a complaint made after 12 months if it is reasonable to do so but the Director shall not accept complaint of any incident occurring 36 months prior to the complaint.

## **Procedure upon Receiving a Complaint**

The Director is to notify and provide the Respondent with a summary of the complaint within 14 days upon receiving the complaint. The Director shall then within 30 days investigate the complaint in any manner deemed appropriate and proceed to hold a conciliation conference.

Subsequently the Director shall by written notice direct the Complainant and the Respondent, to attend a conciliation conference, which will be held in private. The Complainant and Respondent shall represent themselves. The Director shall attempt to resolve by conciliation within 60 days from the completion of the investigation. If an agreement is reached, the Director will record the terms of the agreement and the record is to be signed by both parties. The said agreement is enforceable as an award of the Tribunal set up under the Bill. Any evidence adduced during the conciliation conference shall be privileged and shall not be taken into account during any subsequent proceedings held in relation to the complaint.

However if the Complainant fails to respond to any request of the Director pertaining to the complaint, the Director may dismiss a complaint and by written notice inform the Complainant and Respondent of the same.

Further if the Director believes that the complaint cannot be resolved by conciliation or if the attempt to conciliate parties was unsuccessful or if the nature of the complaint is such that it should be referred to an Inquiry, then the Director is to refer the complaint to the Tribunal. However, if within 3 months after accepting the complaint the investigation or conciliation has yet to be completed the Director is still required to refer the complaint to the Tribunal for Inquiry.

A referral is to be accompanied by a Statement of Case that the Director shall assist the Complainant in drafting before serving the same on the Complainant and Respondent.

The Director will before an Inquiry, subsequently proceed to arrange a Directions Conference, which will be held in private. A Directions Conference is held, to establish facts, identify admitted facts, decide on the witnesses to be called and documents to be provided and produced. The Director may also by written notice require any person to attend the said conference and to produce specified information and documents during the conference. Subsequent to this conference, a report is to be prepared by the Director on matters addressed at the Directions Conference. This report is then to be circulated to each member of the Tribunal, the Complainant, the Respondent and any other person who is a party.

If the Complainant does not attend the Directions Conference without reasonable excuse, the Director may dismiss the complaint and award costs to be paid by the Complainant to the Respondent.

An Inquiry is to be conducted with little formality, as it is not bound by the rules of evidence or procedure but in accordance with equity and good conscience and the substantial merits of the case. The Tribunal has the power to direct and do all things that are necessary or expedient for the expeditious determination of matters inter alia, take evidence on oath, by written notice require any person to appear before it to give evidence; join a person as a party to the Inquiry; grant permission to any person to intervene as a friend of the Tribunal for the purpose of rendering assistance to the Tribunal. The Tribunal may also in its discretion amend any complaint if it considers just to do so, and order subject to any condition it thinks fit that the oral or documentary evidence or any information pertaining to the identification of a party or witness is not to be published.

Lastly, if a complaint is substantiated the Tribunal shall require the Respondent to apologize to the Complainant and make such retractions as the Tribunal may consider appropriate. In addition to that the Tribunal may also grant any awards as listed under Section 60(1)(a) to (i) of the Bill or any other award it considers appropriate. Conversely the Tribunal may dismiss a complaint if it is unsubstantiated and make an award for costs where the proceedings are frivolous and vexatious. The Tribunal shall make its award without delay and shall state in writing its finding of facts and reasons for the award or dismissal.

### **Withdrawing a Complaint**

A Complainant may apply to the Director to withdraw a complaint, stating reasons for the application. The Director is to investigate the circumstances of the withdrawal and if the Director is satisfied that the withdrawal was voluntary, grant the application or record any agreement reached. Alternatively the Director has powers to continue investigation into the complaint if he is satisfied that the complaint was not withdrawn voluntarily and it is in public interest to do so.

If the Complainant intends to reinstate a complaint, the Complainant may apply to reinstate any complaint withdrawn, within 3 months of the date of such withdrawal. But a person who has withdrawn a complaint may not make another complaint in relation to the same matter without the approval of the Director.

### **Enforcement of Award and Review**

If an award made under Bill is not complied within 3 weeks, the Director shall enforce the award by filing a certified copy of the award together with an affidavit stating the extent the award was not complied, free of charge in the High Court. Once the documents are filed, an award made by the Tribunal is enforceable by the High Court as if it were an order of the High Court.

A person may also apply to the High Court for a review of an award granted by the Tribunal as well as for a review against dismissal of the complaint or appeal against a determination on a question of law.

## **Proceedings under the Industrial Relations Act 1967 (IRA)**

A person dismissed from employment may bring proceedings in respect of that dismissal under Section 20 of the IRA. Where these proceedings are determined, that person cannot institute proceedings under the Bill in respect of that dismissal. This provision does not apply where proceedings instituted under IRA are dismissed on a ground that does not relate to sexual harassment of that person.

On the same note, a person who brings proceedings under this Bill in respect of dismissal from employment and these proceedings are determined, that person cannot institute proceedings under Section 20 of the IRA in respect of that dismissal. This provision does not apply where proceedings instituted under the Bill are dismissed on a ground that does not relate to sexual harassment of that person.

## **Offences**

The following situations amount to an offence under this Bill:

1. a person must not knowingly make a false or misleading statement, or without reasonable excuse refuse or fail, to furnish information or documents when so required under the Bill.
2. a person shall also not hinder any proceedings under this Bill, obstruct or insult a person exercising any power or performing any function under this Bill or do any act or thing in relation to the Tribunal which may amount to a contempt of court.
3. a person shall not publish any information, which identifies the Complainant or the Respondent or the employers of either party.

Contravention by act or omission of any of these provisions or any other provision, guidelines, regulations, codes of practice prescribed under the Bill amounts to an offence and proceedings may be brought by the Director. If the Bill specifically prescribes no other penalty, the person committing the offence shall on conviction be liable to a fine not exceeding ten thousand ringgit or imprisonment for a term not exceeding one year or both. In the case of a continuing offence, to a fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

Except as expressly provided by this Bill, there are no further consequences for contravention of this Bill.

## **General**

1. The Bill does not apply to incidences of sexual harassment, which took place and concluded before the commencement of the Bill.

2. For the purposes of the Bill, conduct or an act done on behalf of a body of persons whether corporate or unincorporated shall be deemed to be the act or conduct of the said body.
3. A complaint or other proceedings under this Bill against an unincorporated association may be instituted and carried on against the said association in the name of its president, secretary or other similar officer.
4. An employer shall ensure that its members, officers, employees and agents are made aware of the sexual harassment to which this Bill relates and that they do not engage in, repeat or continue such a conduct.
5. A person lodging a complaint or producing any document or giving any information or evidence is not personally liable for any loss, damage or injury suffered by the other person by reason only of that act.
6. The Director, member of a Tribunal, a person acting under the direction and authority of the Director or Tribunal is not liable to an action or proceedings for damages in relation to an act done or omitted to be done in good faith and in exercising any function or power prescribed under the Bill. The Minister may make regulations as are necessary and expedient and prescribe penalties for the breach or non-compliance of any provisions of this Bill or any regulation.