

JOINT ACTION GROUP FOR GENDER EQUALITY (JAG)

Press Statement

1 October 2010

Short-changed by the Amendments to the Employment Act on Sexual Harassment

The Joint Action Group for Gender Equality (JAG) is highly concerned about the proposed amendments to the Employment Act which have been tabled for the first sitting without much consultation with labour and civil society organisations. What is most disconcerting are the piecemeal amendments introduced to deal with Sexual Harassment (SH), especially in comparison with existing standards and procedures as set by the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (the Code). Ironically, the Code was launched by the same Ministry of Human Resources in 1999.

JAG strongly urges the Ministry of Human Resources to halt the second reading of the amendments and to conduct proper consultations as the reforms do not provide adequate protection for victims of sexual harassment.

The following are the problematic areas which the amendments have not dealt with adequately or have left out.

A. Definition of SH

The definition of SH under the Code is as follows:

Whereas a definition on sexual harassment is already clearly spelt out in The Code viz: *any **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 his/her employment**; or that might, on reasonable grounds, be **perceived by the recipient as an offence or humiliation**, or a threat to his/her well being, **but has no direct link to his/her employment***

The definition of SH under the proposed S2(f) is as follows:

“sexual harassment” means any unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is

offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment”

This definition under the Code was accepted as the standard during the development of the Code by the government and civil society. More importantly, it defined SH from the perception of the harassed, which is missing from the amendment. Frequently, sexual harassment is treated as a frivolous joke but when there are clear guidelines, this captures the act of harassment and allows employees or employers to report and/or act against harassers. There is no reason to deviate from the better definition of SH under the Code.

Our recommendation:

- To adopt the Code definition of SH. .

B. Persons covered under the Employment Act

The Employment Act only covers strict employer-employee relationships whereas in reality today’s workplaces include workers such as contract workers, consultants, interns,, trainees and volunteer workers who may not be protected under the Act. Other sectors such as contract and subcontract work are increasingly becoming workplaces particularly for women but yet these kinds of work relationships are ignored in the proposed amendments.

Therefore, The Code not only clearly defines SH but broaden the definition of a workplace to include indirect-work related situations (vicarious liability), e.g., a sub-contractor driver harasses workers from the hiring company or teacher and student relationship.

Our recommendation

To include a comprehensive definition to cover a wide range of workplaces to ensure that every working individual is protected from sexual harassment.

- C. **Burden of Proof.** The burden of proof is on the complainant and it is difficult to prove intent by the harasser. In addition, the 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 the court of law. This process is expensive and may prove inaccessible to most complainants.

Our recommendation

- To establish a Tribunal comprising persons with legal and relevant expertise and experience which shall conduct the inquiry expeditiously and with as little formality as possible.
- In view of nature of harassment, the burden of proof shall be on the basis of “Balance of Probability” as practiced in domestic inquiry and industrial relations cases, rather than “Beyond Reasonable Doubt” practiced in criminal cases.

D. Complaints Mechanism

Grievance procedure. Although it is useful for Section 81 B [1] to deal with the establishment of a complaints procedure for sexual harassment, the amendments fail to realise that normal grievance procedures, as proposed, do not take into account the complexities of sexual harassment and in particular the tri-partite relationship between the complainant, the harasser and the management.

Grievance mechanisms must specify the mechanisms in which victims can come forward, without fear and intimidation. The mechanisms have to be take into account the sensitive nature of sexual harassment and guarantee that victims will be protected so that investigations can be carried out in a just manner and where appropriate, discipline to be meted to the harasser.

Investigation Process. Section 81B(5) places the prerogative of an SH investigation in the hands of the employer. However, in sexual harassment cases, the harassers can also be the employers themselves. Section 81B(5) (b) should be deleted as all complaints of SH must be investigated. How else can the employer come to a conclusion that a complaint is “frivolous, vexatious or is not made in good faith”? If after investigation the employer finds that the complaint was frivolous, vexatious or was not made in good faith”, then the employer should dismiss the complaint.

Powers of the Director General of Labour. Under Section 81B (7), it states that the Director General of Labour (DG) has the authority to decide on investigations. The power to decide on whether to proceed with a sexual harassment case should not lie with the DG but in the independent committee as proposed by Empower. Investigating sexual harassment cases is only one aspect in dealing with the offence. The aim of the Code is to “*to ensure that **adequate procedures are available to deal with the problem and prevent its recurrence. The Code thus seeks to encourage the development and implementation of policies and practices which will ensure a safe and healthy working environment in every place of employment where individual employees, irrespective of status or position, are treated with dignity and free from any form of harassment,***”

humiliation and intimidation of a sexual nature.” [<http://www.mohr.gov.my/prevention.htm>]

Our recommendation

- To establish an independent sexual harassment committee which comprises management and employees with equal gender representation, whose functions includes accepting, investigating and resolving sexual harassment complaints, where possible. Decisions to investigate or to take actions will rest on the committee,
- To include a clause that will provide better protection for the harassed. For example, the Philippines Anti-Sexual Harassment Act, 1995 [Republic Act No. 7877] states that:
*When a member of the Committee is the complainant or the person complained of in a sexual harassment case, he/she **shall be disqualified** from being a member of the Committee.*

E. Penalties for Harassers

The penalties under Section 81C do not distinguish the degree of gravity and seriousness of the offence.

Our recommendation

- For light and less grave offences, the proposed fine or suspension without pay will suffice. However, for grave offenses, which include aggravating circumstances, e.g., repeated offences, the harasser should be dismissed.

Nonetheless, JAG is pleased to note that the amendments take the employers to task, with a fine of not more than RM10,000 if employers fail to take up sexual harassment cases.

It must be noted that as per Section 81D(3) in relation to the DG inquiring into cases where there is a sole proprietor involved, Section 81E only provides that if sexual harassment is proven the contract of service is deemed to be broken. It should also be listed as an offence under Section 81F as a form of a punitive penalty to sole proprietors as they do not face any form of disciplinary action.

F. Sexual Harassment Training

A number of States require sexual harassment training to ensure employers take all steps necessary to prevent sexual harassment from occurring. Studies have proven it decreases incidences of sexual harassment.

- Include a clause for mandatory sexual harassment training once a year for all employees which affirmatively raises the subject, expresses strong disapproval, explains the appropriate sanctions, informs employees of their right to raise and how to raise the issue of harassment, and develops methods to sensitize all concerned.

However, in trying to eradicate a problem as pervasive as sexual harassment, the state should not introduce piecemeal reforms as it will not only fail to deal with the cases fairly but may also act as a deterrent for victims to come forward.

The Joint Action Group for Gender Equality (JAG), has been calling for legislation on SH since 2000. JAG strongly urges the government to enact a comprehensive Sexual Harassment Act that encompasses every person and not just those covered under the Employment Act. This new Act could ensure that every person is given adequate protection against sexual harassment and will be able to incorporate specific powers such as the setting up of special tribunals and discretion of carrying out disciplinary actions.

Signed by the Joint Action Group for Gender Equality, comprising:
Persatuan Kesedaran Komuniti Selangor (EMPOWER)
Women's Aid Organisation (WAO)
All Women's Action Society (AWAM)
Women's Centre for Change (WCC)
Sisters in Islam (SIS)