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Submission to the Committee on Human Resource Development, Rajya Sabha

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This submission has been prepared by a group of postgraduate law students and Law Faculty members from the University of Oxford, under the auspices of Oxford Pro Bono Publico ('OPBP').

OPBP is a group of law postgraduate and Law Faculty members dedicated to the practice of public interest law on a pro bono basis. Specifically, the function of OBBP is to assist in the preparation of research briefs, expert opinions, amicus curiae and policy submissions, generally under the direction of practicing solicitors and barristers who are themselves acting on a pro bono basis. We have worked over the last five years on a number of diverse, high profile human rights and public interest cases. These include providing litigation research support to lawyers pursuing habeas corpus petitions in the United States Supreme Court concerning the detention of prisoners in Guantanamo Bay; collaborating with the Refugee Studies Centre at Oxford to produce a draft General Recommendation for the Committee on the Elimination of Discrimination against Women on the particular impacts of statelessness and displacement on women; preparing a research memorandum for the Legal Resources Centre in South Africa analysing the right to education in European and Indian case law and setting out the various remedies that have been awarded in the decisions in those jurisdictions; and contributing a submission to the Iraq Inquiry on the legality of the 2003 invasion of Iraq.

This submission is made by OPBP in its own capacity. Several participants on this project are Indian students, with additional expertise provided by postgraduate students and Faculty members from diverse common law jurisdictions like Australia, Canada, India, South Africa and the United Kingdom.

The aim of this submission is narrow and specific. Given the extensive comments received by the Ministry of Women and Child Development on the draft Protection of Women Against Sexual Harassment at the Workplace Bill, 2007 and the expertise and interests of the students and Faculty involved in the preparation of the submission, we considered that the most valuable and appropriate contribution that OPBP could make would be to provide a comparative survey of the legislation and case law on sexual harassment in comparable common law jurisdictions like Australia, Canada, the United Kingdom ('UK'), the United States of America('USA') and also the European Union('EU'). The experience of these other countries should offer valuable insight as India attempts to successfully implement similar measures. This report therefore compiles relevant aspects of the law relating to sexual harassment in the abovementioned countries, on the basis of which it suggests changes to the Indian bill, focusing on the definition of sexual harassment and the effectiveness of the remedies provided.

We hope that this submission is of assistance to the Committee.

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Introduction

This submission has been prepared by a group of postgraduate law students and Law Faculty members from the University of Oxford, under the auspices of Oxford Pro Bono Publico ('OPBP').

This submission has focused on providing a thoroughly researched report on the law relating to sexual harassment- both statutory and judicially developed- in common law jurisdictions like Australia, Canada, the UK, the USA, and also the EU. Specifically, this legislative brief sets out the different ways in which 'sexual harassment' is defined in these jurisdictions, as well as the remedies in place in these countries in order to offer valuable lessons for India in its attempt to successfully enforce a law relating to the protection of women from sexual harassment at the workplace.

These jurisdictions have been chosen on the basis of a combination of factors- comparable common law backgrounds, the comprehensiveness of their laws on sexual harassment and the expertise of the students and professors of the Law Faculty of the University of Oxford. The report sets out recommendations for the Indian bill, supporting the changes suggested with examples from the jurisdictions surveyed. The report is conscious that the cultural context significantly influences legislation in areas like sexual harassment; therefore, it does not recommend the wholesale transplantation of provisions from the other jurisdictions into the Indian bill. Instead, it seeks to make recommendations keeping in mind the unique position of women in Indian society.

The report focuses on the following main issues- introducing a subjective element into the definition of sexual harassment, extending the liability of employers to include failure to address conditions which have the purpose or effect of creating a hostile work environment, extending the protection of the bill in a gender-neutral manner, integrating remedies for sexual harassment with existing labour laws, deleting s. 14 of the bill which punishes 'false and malicious' complaints, and introducing in its place an anti-retaliation provision. The report also makes recommendations concerning the composition of the complaints committees, the procedures adopted by them and the representation available to women.

The report begins with an Executive Summary listing the recommendations with brief explanatory notes setting out the reasons in support of them. A lengthier justification for the recommendations is provided in the latter part of the report in the form of a comprehensive survey of the relevant law in Australia, Canada, the UK, the USA and the EU.

Oxford Pro Bono Publico, University of Oxford, 25 January 2011

Executive Summary

A **summary of the recommendations** made in this submission and a brief explanatory note outlining the reasons in support of them are set out below. An appendix illustrating acts of sexual harassment is also set out at the end of this report.

Recommendation 1: The Perspective of the Woman Should be Predominant in determining whether Conduct constitutes Sexual Harassment

An 'Explanation' should be introduced in s 1(m) of the bill to clarify the 'unwelcome' nature of the sexually determined behaviour as follows:
'Explanation: **Whether the sexually determined behaviour is unwelcome or not shall be judged *prima facie* from the perspective of the aggrieved woman.**

Reasons: The definition of sexual harassment in the bill does not make it clear from whose perspective the 'unwelcome' nature of the sexually determined behaviour must be judged. Given the often dismissive attitude of Indian law enforcement officials and a tendency to trivialize complaints of sexual harassment, it is recommended that the bill contain an explicit reference to the impact of the behaviour on the victim, rather than on the perpetrator's intent.
This is in keeping with the position in other jurisdictions, which also contain a combination of subjective and objective elements. The perspective of the woman generally forms the first and predominant step in judging the nature of the conduct, while a safeguard against frivolous complaints exists in the form of a 'reasonable person' standard. However, a 'reasonable person' standard is not appropriate in the Indian context, lest it become a substitute for the male attitude that expects women to 'grin and bear' acts of sexual harassment.
The use of the phrase 'prima facie' strikes a balance between taking into account the woman's sensibility and guaranteeing fairness to the accused. The introduction of this Explanation will place the burden of proof on the accused, without making the woman's characterisation of the conduct determinative.

Recommendation 2: Prohibiting Punishment for Women making a 'False' or 'Malicious' Complaint

S 14 of the bill, which permits action to be taken against a woman who has made a 'false' or 'malicious' complaint should be deleted.

Reasons: The current provision in s 14 of the bill which leaves open the possibility of punishing a woman for making a 'false' or 'malicious' complaint is so harsh that it is likely to defeat the actual protective purpose of the bill. Given the general reluctance of Indian women to report sexual harassment, the chilling effect of this provision is likely to greatly outweigh the possibility of frivolous complaints or blackmail. This type of provision does not have a parallel in any other jurisdiction.

Recommendation 3: Introducing an Anti-Retaliation Provision

Instead of s 14, an anti-retaliation provision along the following lines should be introduced:
S. 14 No woman who proposes to make a complaint under s 9, or who is in the process of making such complaint or who has already made such complaint, shall directly or indirectly, be intimidated or threatened or otherwise subjected to detrimental treatment in her employment, whether or not her allegation is ultimately proved. Any person indulging in such intimidating or threatening conduct may have action initiated against him under

the Indian Penal Code or any other law for the time being in force.

Reasons: Legislation in other countries contains provisions safeguarding the rights of women who are bold enough to make complaints against their co-workers or employers. Such anti-retaliation /anti-victimisation provisions are essential to create a safe environment for women to vindicate their rights.

Recommendation 3: Making the Bill Gender-Neutral and Introducing a Dignity Element

The title of the bill should simply read **Protection Against Sexual Harassment at Workplace Bill, 2010.** All references to 'woman/women' should be replaced by 'person/persons', except for those provisions of the bill stipulating a proportion of women on the Internal and Local complaints committees.
Further, a dignity element in the characterisation of sexual harassment should be introduced by amending s 3(iv) to read as follows:
3. No person shall be subjected to sexual harassment at any workplace which may include, but is not limited to-
(iv) conduct of any person which interferes with his/her work or *has the purpose or effect of violating the dignity of the person* or which creates an intimidating or offensive or hostile work environment for him/her.

Reasons: Sexual harassment is an offence against the dignity of a person, irrespective of his/her gender. In all the jurisdictions surveyed in this report, sexual harassment is treated as discrimination on the prohibited ground of sex, operating equally across gender lines. This extends protection to homosexuals as well, a community that is particularly vulnerable to sexual harassment. It is not recommended that the Indian bill be amended to define sexual harassment as a form of sex discrimination- in fact, the stand alone claim of sexual harassment independent of a discrimination regime avoids the problems caused by discrimination claims in that there is no need to constantly to point to a male comparator. Instead, the substitution of 'woman' by 'person' is sufficient to extend the ambit of the bill without encountering the pitfalls of equality legislation. However, since the Indian bill is not founded on an equality argument, the 'dignity' component of sexual harassment ought to be strengthened by the amendment suggested to s 3, which in turn demands that its protection be extended irrespective of gender.

Recommendation 4: Liability for Employers

The employer should be made ultimately responsible for compensating the victim in the event of the inability of the respondent to pay the amount. To this end, a 'Proviso' should be added to s 13 (3) (ii) of the bill to read as follows:
'Provided further that in the event of the failure of the respondent to pay compensation to the aggrieved woman, the employer shall directly make such payment.
The employer should be made responsible for failure to comply with the duties under s 19, not necessarily with penal provisions, but through orders requiring him to cease a particular practice or adopt a particular plan to ensure a safe working environment. To this end, s 25 of the bill should include an additional sub-section as follows:
S. 25 (3) 'Where the employer fails to carry out his duties under s 19, he shall be directed to fulfill them in such manner as may be prescribed, which may include, but is not limited to, the cessation of certain practices or the adoption of certain plans to ensure a safe working environment.'

Reasons: The spirit of the judgment in *Vishaka v State of Rajasthan* is the creation of responsibility

for employers not only to protect employees from, but also to prevent sexual harassment at the workplace. With this emphasis on prevention, penal liability for employers is not the most effective way of ensuring a safe working environment. Neither is the motive or intent of the employer relevant. Thus, the liability that ought to be imposed on employers is similar to that outlined by the Canadian Supreme Court in *Robichaud v Canada.* This case recognises the power of the employer to remedy undesirable effects and thus rejects fault-based liability, in favour of imposing responsibility on the employer to take carefully designed steps to create a safe work environment.

Recommendation 5: Effectiveness of Remedies

The complaint system under the bill should be bypassed and normal procedures under labour laws like the Industrial Disputes Act, 1947 and the Industrial Employment (Standing Orders) Act, 1946, should be followed for the relatively small set of employees that they are applicable to. For example, appropriate relief may be obtained from a Labour Court or Tribunal if a worker has been wrongly dismissed or discharged for non-compliance with the employer's sexual demands.

For other women who cannot resort to procedures under labour laws, the following set of recommendations is suggested to make the complaint process easier and fairer.

Non-governmental/public interest organisations should be permitted to make a complaint on behalf of the aggrieved woman, by including them within the meaning of 'such other person as may be prescribed in s 9(2) of the bill.

The aggrieved woman should be permitted representation (legal or otherwise) to aid her in an inquiry before the Internal or Local Complaints Committees. The establishment of a permanent body similar to French and German anti-discriminatory authorities to provide such aid should be considered.

The bill should clearly provide the aggrieved woman the option to bypass the Internal Committee, and approach the Local Committee if she fears victimisation or bias.

A minimum time period should be specified for the setting up of Committees with the coming into force of the bill.

A minimum amount of fine should be stipulated for failure by the employer to take the steps required of him under s 25 of the bill, including setting up Committees.

The duties of the employer under s 19 of the bill should also be extended to the District Officer.

An SC/ST member should be nominated on the Local Committee.

Once a finding of sexual harassment has been made, the 'aggrieved woman' ought not to have to submit to a second inquiry before appropriate action under the applicable service rules is taken under s 13 (3)(i) of the bill. Evidence collected by Complaints Committees should be treated as evidence in a court of law.

Under s 13(3)(i) of the bill, the Complaints Committees should be empowered to make recommendations over and above those prescribed in the applicable service rules, when the latter are insufficient to provide appropriate relief to the aggrieved woman. Remedies available in other jurisdictions and set out in this report should be considered.

Reasons: The internal complaint mechanism set up under the bill does not have the same independence as commissions, tribunals and ordinary courts of law that provide relief in other jurisdictions. Therefore, it is recommended that redress under this bill be integrated with normal employment procedures under the Labour Courts and Tribunals, where applicable. Where the aggrieved woman must resort to the internal complaint system, the above recommendations aim to provide aid to her in the presentation of her case, make committees more representative, overcome the apathy of employers in constituting committees, simplify the procedure before them and empower them to recommend remedies that are in keeping with the relief available in other jurisdictions.

I. SUBJECTIVE-OBJECTIVE ELEMENTS IN THE DEFINITION OF SEXUAL HARASSMENT

1. Introduction

Most definitions of sexual harassment contain criteria on the basis of which it is judged whether the conduct in question is offensive/humiliating/unwelcome/demeaning. These criteria are usually a mixture of subjective and objective elements ie the conduct is judged from the perspective of the victim, with the additional requirement that a reasonable person in similar circumstances would also have judged it to be so. This dual standard ensures that the sensibilities of the victim are treated with the consideration and urgency they deserve, while simultaneously guaranteeing fairness to the accused by discouraging trivial complaints.

The Indian bill does not explicitly contain subjective and objective elements ie it is unclear from whose perspective the 'unwelcome' nature of the sexually determined behaviour must be judged. It is recommended that the bill contain an explicit reference to the impact of the behaviour on the victim, rather than on the perpetrator's intent, for the reasons below.

A. Attitude of Law Enforcement Officials

Indian law enforcement officials have often been accused of trivializing complaints of sexual harassment[1] and exhibiting apathy in bringing perpetrators to book. Trivialization of the offence leads to an inappropriate response to complaints of sexual harassment, such as

(a) The initial complaint is disbelieved and action is contemplated only after a value judgment as to whether or not the woman deserves appropriate police response,
(b) The woman is discouraged from pursuing a complaint,
(c) Intensive bullying, callous interrogation and aggressive and sexist questioning by the police officers,
(d) If a medical examination is required, it is delayed and conducted in unpleasant and threatening surroundings,
(e) The victim is not supplied with basic information about her legitimate rights and support services available to her.

B. S. 195 of the Indian Penal Code and Societal Tendency to Trivialise

The importance of making the subjective element explicit in the definition of sexual harassment is highlighted by the well known case of *Rupan Deol Bajaj v KPS Gill*.[2] In this case, a senior government officer, Rupan Bajaj was slapped on the posterior by the Chief of Police of Punjab (Gill) at a dinner party in July 1988. Rupan Bajaj filed a suit against him. One of the major lines of defence pursued – and accepted by the state High Court – was to invoke s.195 of the Indian Penal Code, which states that: 'Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known

[1] Qualitative interviews with police officers, conducted by the National Commission for Women in India, reveal that there exists the misconception that sexual harassment in the workplace should be thought of as trivial sounding 'eve-teasing' which is supposedly fun and enjoyed by women. (available at http://ncw.nic.in/pdfreports/Gender%20Justice%20Forging%20Partnership%20with%20Law%20Enforcement.pdf, last accessed 24 January 2011).
[2] AIR 1996 SC 309.

to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm'. This argument was eventually rejected by the Supreme Court, but it is indicative of both the tendency to blame women for creating a needless fuss, and also the societal pressure on them to 'grin and bear it'.

It is because of this tendency that the incorporation of a 'reasonable person' standard in addition to the subjective element is not recommended in the Indian context, unlike other jurisdictions, lest it become a substitute for the dominant, dismissive male attitude towards sexual harassment.[3] Instead of a 'reasonable person' standard, it is recommended that the 'unwelcome' nature of the sexually determined behaviour be judged 'prima facie' from the perspective of the aggrieved woman. The phrase 'prima facie' places the burden of proof on the accused, without making the woman's assessment of the conduct conclusive. Thus, it strikes a balance between taking into account the woman's sensibility and guaranteeing fairness to the accused.

Finally, introducing a subjective element into the definition of sexual harassment in s 1(m) of the bill is in keeping with s 3(iv) of the bill which provides that no woman shall be subjected to sexual harassment, which includes 'conduct of any person … which creates an intimidating or offensive or hostile work environment *for her*.' (emphasis added). Thus, it is recommended that the following 'Explanation' be introduced in s 1(m) of the bill to clarify the 'unwelcome' nature of the sexually determined behaviour.

Recommendation 1: The Perspective of the Woman Should be Predominant in determining whether Conduct constitutes Sexual Harassment

An 'Explanation' should be introduced in s 1(m) of the bill to clarify the 'unwelcome' nature of the sexually determined behaviour as follows:
'Explanation: **Whether the sexually determined behaviour is unwelcome or not shall be judged *prima facie* from the perspective of the aggrieved woman.**

This recommendation is in keeping with the definition of sexual harassment in other jurisdictions, which contain a balance of subjective and objective elements. The next part highlights this balance by setting out the relevant statutory provisions and their interpretation by the judiciary in these jurisdictions.

2. Australia

A. Definition

The various statutory definitions of conduct which constitutes sexual harassment are fairly similar across Commonwealth, States and Territories anti-discrimination legislation.[4] Sexual harassment, contained in s 28A(1) of the *Sex Discrimination Act 1984* (Cth), is as follows:

1) For the purposes of this Division, a person sexually harasses another person (the person harassed) if:
   a. the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the

[3] Some commentators have noted that 'a "reasonable person" standard imports male norms, and fails to acknowledge that women's experience may lead to them being more sensitive to certain types of conduct.' *See* Linda Clarke, 'Harassment, sexual harassment, and the Employment Equality (Sex Discrimination) Regulations 2005' 2006 *Industrial Law Journal* 161.
[4] It should be noted that the Commonwealth government has recently commenced a process of harmonising Australia's anti-discrimination laws at Commonwealth, States and Territories levels into a single legislation. Attorney-General Hon Robert McClelland MP and Minister for Finance and Deregulation Hon Lindsay Tanner MP, Media Release: Reform of Anti-discrimination Legislation, Parliament House, Canberra, 21 April 2010.

person harassed; or

b. engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

2) In this section:

'conduct of a sexual nature' includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

B. Subjective Elements

The relational nature of the conduct in this definition ie the requirement that the 'unwelcome sexual advance' or 'unwelcome request for sexual favours' be directed to 'the person harassed', as well as the requirement that 'other unwelcome conduct of a sexual nature' occur 'in relation to the person harassed' means that the respondent's sexual advance, request for sexual favours, or other conduct of a sexual nature must be 'unwelcome' – from the perspective of the complainant rather than from that of an ordinary, or reasonable, person. In order to be 'unwelcome' the conduct must not be 'solicited or invited' and the complainant must regard the conduct as 'undesirable or offensive'.[5] The term 'unwelcome conduct' is broad and encompasses a 'poisoned work environment'[6] which is imbued with unwelcome overtly sexual material or behaviour such as nude photos, access to 'adult' websites, sexually provocative emails and sexual pranks.

C. Objective Elements

The complainant must also show the objective element which evaluates the behaviour in question from the perspective of the reasonable person. It is necessary to for the complainant to establish, in addition to the subjective element, that the conduct took place in circumstances which would have caused a reasonable person to anticipate that she would be 'offended, humiliated or intimidated'. However, keeping in mind the attitude towards sexual harassment in India described above, it is not recommended that the *complainant* be required to establish that a reasonable person would have judged the conduct 'unwelcome.' Instead, this burden ought to be placed on the accused.

It is not entirely clear from the wording of the definition of 'sexual harassment' in the *Sex Discrimination Act 1984* (Cth) whether the perspective from which the conduct is to be assessed is that of the reasonable bystander or that of the 'reasonable' perpetrator. It is strongly arguable that it should be the former interpretation if one considers the underlying policy of the legislation and that the intent of the objective element is to measure the respondent's behaviour against a general community standard.[7] Few cases have turned on this question. In most cases, 'once unwelcome sexual behaviour is found to have occurred, the issue of reasonableness is rarely in dispute'.[8]

3. Canada

Sexual harassment is defined in the *Canadian Human Rights Act*. S 14 reads as follows:

'*Harassment:*

(1) It is a discriminatory practice,

(a) in the provision of goods, services, facilities or accommodation customarily available to the general public,

(b) in the provision of commercial premises or residential accommodation, or

(c) in matters related to employment,

to harass an individual on a prohibited ground of discrimination.

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[5] *Aldridge v Booth* (1988) 80 ALR 1, 5.

[6] See *Daniels v Hunter Water Board* (1994) EOC ¶92-626; *Horne v Press Clough Joint Venture* (1994) EOC ¶92-591.

[7] Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press 2008) 500.

[8] F Pace, 'Concepts of "Reasonableness" in Sexual Harassment Legislation: Did Queensland get it right?' (2003) 3 *QUT Law and Justice Journal* 1, 13.

Sexual harassment
(2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

A. Significance of Result/Effect, not Motive/Intention

Since the amendment of the *Candian Human Rights Act* in 1983 to explicitly include sexual harassment as harassment on a prohibited ground of discrimination, as well as the pronouncement by the Canadian Supreme Court in *Janzen v Platy Enterprises*[9] that sexual harassment constituted a form of sex discrimination, the observations of the apex court in *Robichaud v Canada (Treasury Board)*[10] about the nature of an anti-discrimination statute assume greater significance, especially in relation to the weight to be given to the subjective element in the definition of sexual harassment. The Court, in *Robichaud* held that it is '*the result or the effect of the action complained of which is significant. Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns.'*

Thus, the prohibition of sexual harassment as part of a broader anti-discrimination statute indicates legislative intent to accord greater weight to the impact of the discriminatory practice on the victim.

B. Combination of Subjective and Objective Elements

Although sexual harassment is not explicitly defined in the *Canadian Human Rights Act,* the Human Rights Codes of some provinces as well as the Canadian Labour Code contain detailed definitions. For example, in the case of *Janzen v Platy Enterprises* mentioned above, the provision in question was s 19(2) of the *Manitoba Human Rights Code*, which states that '*harassment means (a) a course of abusive or unwelcome conduct or comment undertaken or made on the basis of any characteristic referred to in subsection 9(2); or (b) a series of objectionable and unwelcome sexual solicitations or advances; or (c) a sexual solicitation or advance made by a person who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or (d) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance.'* (emphasis supplied). [11]

The *Canadian Labour Code* defines sexual harassment as '*any conduct, comment, gesture or contact of a sexual nature that (a) is likely to cause offence or humiliation to any employee; and (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on a opportunity for training or promotion.'*

Another example of a more descriptive definition of sexual harassment in Canadian law is illustrated by the quotation of Professor Cumming in *Giouvanoudis v. Golden Fleece Restaurant*[12] and cited in *Janzen v Platy Enterprises* as follows:

'From a factual standpoint, sexual harassment can be considered to include: Unwanted sexual attention of a persistent or abusive nature, made by a person who knows or ought reasonably to know that such attention is unwanted ... or Implied or expressed threat or reprisal, in the form either of actual reprisal or the denial of opportunity for refusal to comply with a sexually oriented required; ... or Sexually oriented remarks and behaviour which may reasonably be perceived to create a negative psychological and emotional environment for work.'

Thus, the various definitions of sexual harassment under Canadian law also strike a balance between the subjective and objective elements. By employing the standard of the 'reasonable person' who ought to have known of the 'unwelcome' nature of his conduct, the provisions indicate that the initial determination of the offensive/humiliating character of the conduct must be made from the perspective of the victim. It is only once the conduct has been characterised as 'unwelcome' can the

[9] [1989] 1 SCR 1252.
[10] [1987] 2 SCR 84.
[11] A similar provision is contained in s 7(3) of the Ontario Human Rights Code.
[12] (1984), 5 C.H.R.R. D/1967 (Ont. Bd.) ¶ 16819.

additional determination -that a reasonable person ought to have recognised it as such-be made. This is in keeping with our recommendation for the Indian bill which suggests that the unwelcome nature of the sexually determined behaviour be judged *prima facie* from the perspective of the aggrieved woman.

4. The European Union

EU equal treatment and sexual harassment laws find their legislative basis in EU directives. In September 2002, the European Parliament and Council adopted Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.[13] This 2002 Equal Treatment Amendment Directive, (Directive 2002/73/EC) introduced the concepts of 'harassment related to sex' and the concept 'sexual harassment' into EU law.

Article 2(2)(c) of the 2002 directive states that 'harassment' occurs:

'where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.'

Article 2(2)(d) states that 'sexual harassment' occurs:

'where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.' (emphasis supplied)

Article 2(3) then states that:

'Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.'

The inclusion of 'effect' in Articles 2(2)(c) and (d) strongly supports a victim-oriented perspective. This is reinforced by Council Resolution (1990) on the protection of the dignity of women and men at work,[14] on which the Directive was based. This Resolution affirms that:
'conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, constitutes an intolerable violation of the dignity of workers or trainees and is unacceptable if:
(a) such conduct is unwanted, unreasonable and offensive to the recipient;
(b) a person's rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions; and/or
(c) such conduct creates an intimidating, hostile or humiliating work environment for the recipient; (emphasis supplied)

Although this resolution merely represents the soft law approach of the EU prior to the enactment of the various directives, it may indicate that the European consensus tends towards a subjective assessment. The underlined portions of the Council Resolution above highlight in particular, the relational nature of the conduct.

5. The United Kingdom

[13] It may be noted that in August 2006, EU Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (re-cast version) came into force. However it should be noted that the definition of sexual harassment and harassment related to sex remains unchanged.
[14] 29th of May 1990, *Official Journal C 157, 27/06/1990 p. 0003 – 0004.*

In the UK, complaints related to sexual harassment, which were formerly brought under the Sex Discrimination Act, 1975 (SDA), now come under the purview of the *Equality Act, 2010*, most of which came into force on 1 October 2010. Harassment is now covered under Part 2 (Equality: key concepts), Chapter 2 (Prohibited Conduct), with s 26 being the governing provision.

S 26 contains the same elements as Article 2(2)(c) and Article 2(2)(d) of the European 2002 Equal Treatment Amendment Directive, with an additional provision setting out the standard by which it will be judged whether the unwanted conduct in question has the effect of violating the victim's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Thus, s 26(4) states that each of the following must be taken into account:
'(a) the perception of B [the victim];
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.'

Although the combination of subjective and objective elements that must be present before a finding of sexual harassment can be made has now been definitively outlined under the Equality Act, previous decisions of the Employment Appeal Tribunal regarding the appropriate test to be applied are still helpful. For example, in *Scott v Combined Property Services Ltd*[15], it was held that 'the conduct complained of must at least be capable of, on an objective test, being categorised as offensive. In cases where the conduct might be regarded as neutral or such as to be regarded by some people as offensive but not by others, the subjective element comes into the equation in order to assess the reaction of the victim.'

6. The United States of America

Sex discrimination in the USA, and by implication also sexual harassment, is governed by a combination of Title VII of the Civil Rights Act of 1964, subsidiary regulations under that legislation, and state laws. Since the state laws differ widely they are not considered in this report.

Section 703 of the Act does not expressly prohibit sexual harassment. On its face, the section merely prohibits discrimination in the workplace 'because of… sex' (or any of the other proscribed characteristics listed in that section, which notably do not include sexual orientation). However, some of the limitations of Title VII have been overcome by judicial development of this area of the law. The Supreme Court held that the Act does have the effect of prohibiting sexual harassment in two cases in 1986 and 1993.

In the 1986 case of *Meritor Savings Bank, FSB v Vinson*[16], the Supreme Court set out two different types of sexual harassment which would contravene Title VII. They are 'quid pro quo' harassment, where career advancement or reciept of other benefits is conditional upon submission to sexual behaviour, and 'hostile environment' harassment, where unwelcome sexual advances have the purpose or effect of creating a difficult or abusive work environment. The inclusion of hostile environment claims was reached on the basis that:
'[t]he phrase "terms, conditions, or privileges of employment" evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment.'

To be actionable, the environment, when viewed in the light of all circumstances, must be one that 'a reasonable person' would find hostile, and that the complainant subjectively perceived as hostile.[17] This amalgamated subjective-objective standard was laid down in a succession of Supreme Court

[15] *Scott v Combined Property Services Ltd* E.O.R. D.C.L.D. No. 32, p. 4.
[16] (1986) 477 US 57.
[17] 'Jurisdictional comparisons of sexual harassment law' 2003 *European Lawyer* 36.

Cases like *Meritor Savings Bank, FSB v Vinsion, Teresa Harris v Forklift Inc* [18] and *Faragher v. City of Boca Raton.*[19] The effect of these pronouncements is similar to the standard laid down in the UK Equality Act. Thus, it requires not only an '*objectively hostile or abusive environment*' (one that a reasonable person would find hostile or abusive), but also '*the victim's subjective perception that the environment is abusive*.' Further, *'whether the environment is sufficiently hostile or abusive to be actionable requires consideration of all the circumstances, not any one factor.'* The conduct requires a degree of 'severity' and 'pervasiveness' before it can be said to create an objectively hostile or abusive work environment.

II. PUNISHMENT FOR 'FALSE' AND 'MALICIOUS' COMPLAINTS AND AN ANTI-RETALIATION PROVISION

1. Introduction

S 14 of the bill which permits the Internal committee or the Local committee to recommend to the employer or the District Officer that action be taken against a woman who has made a 'false' or 'malicious' allegation strikes a jarring note in a statute whose primary purpose is the protection of women at the workplace. This provision does not take into account the traditional reluctance of Indian women in making allegations of a sexual nature. Its unduly harsh framing is likely to create a deterrent effect which will defeat the aim of the statute ie to encourage women to obtain redress for wrongs which are often difficult to prove beyond reasonable doubt. Moreover, none of the other jurisdictions surveyed in this report contain a penal provision of this type. It is therefore recommended that s 14, in its current form, be deleted from the bill.

Recommendation 2: Prohibiting Punishment for Women making a 'False' or 'Malicious' Complaint

S 14 of the bill, which permits action to be taken against a woman who has made a 'false' or 'malicious' complaint should be deleted.

More detailed reasons for this recommendation are set out below.

A. Nature of Acts of Sexual Harassment

Acts of sexual harassment are often conducted in an implicit or clandestine manner, concealed in vague words of actions pregnant with covert meaning. It is difficult to prove such acts beyond reasonable doubt as may be possible with physical injury or other crimes. To label a charge with no proof as weak, or as bogus or fake, is insulting to the victim.[20]

B. Traditional 'Modesty' of Indian Women

The false complaint clause operates on the misogynistic presupposition that women will file wrong cases to settle scores with male seniors or colleagues. However, it must be kept in mind that in a society where 'honour' is a woman's most prized asset, women think a thousand times before placing themselves in the public eye over an issue with sexual underpinnings. [21] As Anuradha Saibaba puts it, the culture and legal milieu of the Indian setting prompts the female

[18] (1993) 510 US 17.
[19] (1998) 524 US 775.
[20] Amrita Nanda, 'Sexual Harassment at the Workplace Bill: Justice or a Cruel Joke?' (December 2010) <http://southasia.oneworld.net/opinioncomment/sexual-harassment-at-the-workplace-bill-justice-or-cruel-joke> accessed December 16, 2010.
[21] Ibid.

victim to be always on trial (instead of the accused).[22] With Indian society placing much emphasis on chastity and purity, and discussions on contraceptives, sex, and abortions almost being taboo, it is a daunting task for a woman to confront the sexual predator and discuss it openly in the office, court, or society. The fear of being tainted with allegations over her 'loose' character and conduct often forces harassed women to hush up such misdeeds. The criminal justice system requires a change in attitude more than a structural overhaul for accommodating voices of female victims in such cases. [23] So while the chances of women filing false cases will continue to be slim, the chances of women not being able to prove harassment and thus being penalised for a 'false' complaint may be more likely. S.14 has correctly been described as a 'chilling provision where a woman could be punished doubly if she lies about a crime that she as an ideal - coy, virtuous and feminine - woman should ideally be hiding'. [24]

C. Deterrent Effect

To expect the victim to either be able to establish the painful and insulting act or be ready for penalties for false charges may deter harassed women from seeking help rather than deter men from misbehaving with women workers. This 'particularly regressive provision'[25] creates enormous space for employers to manipulate the committee and the evidence to be stacked up against the woman. It will only ensure that women will desist from making complaints due to the fear that employers or the committee could act against them.

According to the Workplace Sexual Harassment survey conducted by Centre for Transforming India, [26]a non-profit organisation, among 600 female employees working in the IT sector across India, as many as 50% women reported to have been subjected to abusive language, physical contact or had superiors seek sexual favours; 47% female employees did not know where to report sexual harassment and 91% did not report for fear of being victimised. That a victim fears reporting a crime speaks volumes of the realities of women's lives. To add a clause of prosecution for women in the Bill is a definitive strategy to strengthen women's fear and ensure silence.[27]

D. Adequate safeguards in the Indian Penal Code

Furthermore, the need for s.14 is obviated by the existence of a general perjury provision in the Indian Penal Code, which could be used to cover situations of a false or malicious prosecution, or of giving false evidence.[28] Similarly, forgery and misrepresentation are also offences under the Indian Penal Code. [29]To create a new offence to use specifically against women reeks of a misogynist culture that punishes a woman who dares to seek justice. [30]

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[22] Anuradha Saibaba Rajesh, 'Women in India: Abysmal Protection, Peripheral Rights and Subservient Citizenship' 16 New England Journal of International and Comparative Law 111, 140 (2010).
[23] Ibid.
[24] Supra n. 20.
[25] Mridul Eapen, 'Sexual Harassment: Not Fitting the Bill" 45 Economic and Political Weekly 20, 21(2010).
[26] **'**The Power Game: India's first "Workplace Sexual Harassment Survey" reveals startling revelations' <http://www.release-news.com/index.php/society/47708-indias-first-workplace-sexual-harassment-survey-reveals-startling-revelations.html> accessed 4 January, 2011.
[27] Amrita Nanda, 'Sexual Harassment at the Workplace Bill: Justice or a Cruel Joke?' (December 2010) <http://southasia.oneworld.net/opinioncomment/sexual-harassment-at-the-workplace-bill-justice-or-cruel-joke> accessed December 16, 2010.
[28] S.191 of the Indian Penal Code reads: 'Giving false evidence. -- Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence. Explanation 1.- A statement is within the meaning of this section whether it is made verbally or otherwise. Explanation 2.- A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.'
[29] Chapter XVIII, Indian Penal Code, 1860.
[30] Supra n. 20.

2. Anti-Retaliation Provision

Instead of a penal provision along the lines of s 14, other jurisdictions contain provisions which protect women complaining of sexual harassment from reprisals. These provisions are set out below and it is recommended that the Indian bill delete s 14 and insert a similar anti-retaliation provision.

Recommendation 3: Introducing an Anti-Retaliation Provision

Instead of s 14, an anti-retaliation provision along the following lines should be introduced
S. 14 No woman who proposes to make a complaint under s 9, or who is in the process of making such complaint or who has already made such complaint, shall directly or indirectly, be intimidated or threatened or otherwise subjected to detrimental treatment in her employment, whether or not her allegation is ultimately proved. Any person indulging in such intimidating or threatening conduct may have action initiated against him under the Indian Penal Code or any other law for the time being in force.

A. Australia

S. 94 of the *Sex Discrimination Act 1984(Cth)* provides for a penalty for victimisation. A person is deemed to commit an act of victimisation against another person if he '*subjects or threatens to subject, the other person to any detriment on the ground that the other person:*

(a) has made, or proposes to make, a complaint under this Act or the Australian Human Rights Commission Act 1986; or

(b) has brought, or proposes to bring, proceedings under this Act or the Australian Human Rights Commission Act 1986 against any person; or

(c) has furnished, or proposes to furnish, any information, or has produced, or proposes to produce, any documents to a person exercising or performing any power or function under this Act or the Australian Human Rights Commission Act 1986; or …

(e) has appeared, or proposes to appear, as a witness in a proceeding under this Act or the Australian Human Rights Commission Act 1986; or

(f) has reasonably asserted, or proposes to assert, any rights of the person or the rights of any other person under this Act or the Australian Human Rights Commission Act 1986; or

(g) has made an allegation that a person has done an act that is unlawful by reason of a provision of Part II [Prohibition of Discrimination];

or on the ground that the first-mentioned person believes that the other person has done, or proposes to do, an act or thing referred to in any of paragraphs (a) to (g), inclusive.

B. Canada

S14.1 of the *Canadian Human Rights Act* states that

'*It is a discriminatory practice for a person against whom a complaint has been filed under Part III[Discriminatory Practices and General Provisions], or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.*'

S 59 contains a further prohibition on intimidation and discrimination and provides that

'No person shall threaten, intimidate or discriminate against an individual because that individual has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Part, or because that individual proposes to do so.'

Finally, the *Canadian Human Rights Act* deals with false complaints in a manner much less harsh than s 14 of the Indian bill. Instead of punishing the woman making the complaint, the effect of s 41 of the Canadian legislation is merely that the Canadian Human Rights Commission will not deal with any complaint filed with it if the complaint is '*trivial, frivolous, vexatious or made in bad faith.'*

C. The European Union

Article 7 of Council Directive 2002/73/EC states that *'Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.*'

D. The United Kingdom

S 27 of the *Equality Act, 2010* contains the following provision on victimisation:
'*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2)Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4)This section applies only where the person subjected to a detriment is an individual.

(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.'

E. The United States of America

S 2000(e)- 3(a) is the anti-retaliation provision contained in Title VII. It reads as follows:
'Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
It shall be an unlawful employment practice for an employer to discriminate against any of his employees, or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.'
The leading case on this provision is *Burlington Northern and Santa Fe Railway Company v White.*[31]

[31] (2006) 548 US 53.

III. GENDER-NEUTRALITY

1. Introduction

The particularly vulnerable position of women in Indian society, highlighted by the Indian Supreme Court when it laid down guidelines in the landmark judgment of *Vishaka v State of Rajashtan,*[32] prompted the framing of this bill uniquely for the protection of women. Under Article 15(3) of the Constitution of India, the State is empowered to make special provisions for women, without falling foul of equality arguments. Nevertheless, there is nothing to indicate that the protection afforded to women under the current version of the bill would be weakened if its provisions were made gender-neutral and the prohibition on sexual harassment extended across gender lines. On the contrary, the judgment of the Delhi High Court in *Naz Foundation v Government of National Capital Territory of Delhi and others*[33] describes the particular sexual harassment that the homosexual community is subjected to. Since sexual harassment offends against the dignity of the 'person', its prohibition ought logically to be extended irrespective of gender.

Recommendation 3: Making the Bill Gender-Neutral and Introducing a Dignity Element

The title of the bill should simply read **Protection Against Sexual Harassment at Workplace Bill, 2010.** All references to 'woman/women' should be replaced by 'person/persons', except for those provisions of the bill stipulating a proportion of women on the Internal and Local complaints committees.
Further, a dignity element in the characterisation of sexual harassment should be introduced by amending s 3(iv) to read as follows:
3. No person shall be subjected to sexual harassment at any workplace which may include, but is not limited to-
(iv) conduct of any person which interferes with his/her work or *has the purpose or effect of violating the dignity of the person* or which creates an intimidating or offensive or hostile work environment for him/her.

This recommendation would bring the Indian bill in line with provisions in other jurisdictions, all of which treat sexual harassment as a form of sex discrimination and prohibit this discriminatory practice across all genders.

2. Gender Discrimination versus Human Dignity

The above recommendation for the Indian bill will ensure that it is not dragged into the debate, common in other jurisdictions, about the characterisation of sexual harassment laws. In Australia, Canada, the EU, the UK and the USA, as indicated by the provisions discussed in earlier parts, sexual harassment forms part of either a specific sex discrimination regime (the Australian *Sex Discrimination Act, 1984*) or a broader human rights/equality/anti-discrimination regime (the *Canadian Human Rights Act*, the UK *Equality Act, 2010* and the American *Civil Rights Act*, 1964). These statutes all use gender-neutral terms like 'person', 'individual' and in the case of the *Equality Act 2010*, illustrations, depicting the offender and the complainant/victim as 'A' and 'B'.

[32] AIR 1997 SC 3011.
[33] 160 (2009) DLT 277

In Europe, with the 2002 Equal Treatment Directive containing both a dignity and discrimination-based understanding of sexual harassment, there was a particularly keen debate about the nature of the laws relating to sexual harassment. Some argued that they should form part of the sex-discrimination mould ie recognizing that sexual harassment is inherently sex-based (like pregnancy), and, in that way, stands to equal sex discrimination. It is argued that this characterisation reflects the fundamental recognition of the existence of a systemic and sustained assault on the dignity of women at work.

However there are those who argue that the definition of sexual harassment as sex discrimination brings with it fundamental problems, problems that have shown themselves to be of practical import. These have included among others, the question of same-sex harassment and the issue of the 'obnoxious employer' (who treats both sexes equally badly). It is argued that such problems serve as constant reminders of the fallibility of the dogma that sexual harassment equals sex discrimination.

The counter solution suggested is for a stand-alone claim of sexual harassment independent of the discrimination regime. This removes any need to show 'different' treatment from the definition of harassment and involves the preferable approach of focusing on the harm to the victim rather than the motives of the harasser. In many European countries, this approach defines sexual harassment as a violation of the dignity of the human person as opposed to a violation of their gender identity.

Intensely aware of these two conflicting views, the EU has taken a pluralistic approach and incorporated both characterisations in its definition of sexual harassment. The 2002 directive maintains an inherently European concept of harassment as the 'violation of dignity,' (Article 2(2)(d)) but also includes the clearly expressed gendered nature of harassment (Article 2(2)(c)). It therefore prohibits both gender (nonsexual) and sexual harassment as sex discrimination.

This formulation of harassment is useful because it provides a gender-specific term clearly linking sexual harassment to gender inequality. The introduction of sexual harassment as a specific wrong has also generally been welcomed by commentators, who see the removal of the need for a male comparator as solving many of the problems posed by the 'discrimination' framework.[34]

The Indian bill has already avoided the pitfalls of equality claims by creating a stand-alone regime for sexual harassment. However, to cement this position and to strengthen the argument for extending the protection of the bill irrespective of gender, it is recommended that the Indian provision be grounded more firmly in the realm of dignity by amending the prohibition on sexual harassment in s 3 to include conduct which has 'the purpose or effect of violating the dignity of a person.'

3. Protection for Homosexuals

S 3 of the *Canadian Human Rights Act* lists sexual orientation as one of the proscribed grounds of discrimination for all purposes of the Act, which includes harassment under s 14. Similarly, s 12 of the UK *Equality Act, 2010*, lists sexual orientation as a protected characteristic, in relation to which unwanted conduct is prohibited as harassment under s 26. Moreover, in a case under the *Sex Discrimination Act, 1975* (SDA), before the coming into force of the *Equality Act, 2010,* the Employment Appeal Tribunal decided in *Chessington World of Adventures v. Reed*[35] that it was open to an English court to extend the protection of the SDA to cover transsexuals. Similarly, in *Smith v Gardner Merchant Ltd,*[36] the Court of Appeal confirmed that it was possible for a homosexual man to claim harassment on the grounds of sex, although he was required to show that a homosexual woman would be treated in a more advantageous manner.

[34] Linda Clarke, '*Sexual Harassment Law in the United States, the United Kingdom and the European Union: Discriminatory Wrongs and Dignitary Harms*' (2007) 26 *Common Law World Review* 79
[35] [1997] I.R.L.R. 556
[36] [1996] I.C.R. 790

In the USA, the protection of Title VII was extended to same sex sexual harassment in *Oncale v Sundowner Offshore Services, Inc.*[37] This question had previously been controversial with different lower courts divided on the issue of whether the harassment must be causally connected to sexual attraction.[38] *Oncale* settled the question, finding that the harasser does not need to be sexually attracted to members of the victim's gender for the conduct to constitute harassment. Thus, this paved the way for punishing harassers who were motivated by animus for the victim's sexual orientation. This type of interpretation is necessary in the Indian context, because of the widespread hostility towards homosexuality.

Making the bill gender-neutral, in the absence of explicitly proscribed discrimination on the grounds of sexual orientation would enable the judicial development of the law, as in the USA, to extend the protection of the bill to the vulnerable homosexual community.

IV. LIABILITY OF EMPLOYERS

1. Introduction

The Indian Supreme Court, in *Vishaka v State of Rajasthan*, laid down guidelines for employers to protect women from and ultimately to prevent sexual harassment at the workplace. The spirit of the judgment, which clearly imposes wide-ranging responsibilities on employers, is not adequately reflected in the bill. The aim of the bill ought to be to secure justice to the victim, while simultaneously creating conditions that will prevent the recurrence of sexual harassment. It is the effects of the offending conduct or omissions to address such conduct that are relevant, not the purpose or intent of the employers.

Although s 13 requires the payment of compensation to the aggrieved woman by the employer through the deduction of the wages, the only remedy available in case such deduction cannot be made (in case of absence from duty or cessation of employment) is for the employer to direct the respondent to pay the aggrieved woman. The financial inability of the respondent to pay the compensation is not envisaged (although it is taken into consideration when determining the amount of compensation under s 15). In case of such an event, the aggrieved woman ought not to suffer; instead, the employer ought ultimately to be directed to pay such sum.

2. Prevent Recurrence, not Punish

This is in keeping with the notion of employer liability outlined by the Canadian Supreme Court in *Robichaud v Canada*. In this case, the Court considered that theories of employer liability developed in the context of criminal or quasi-criminal conduct are not relevant to sexual harassment. It was pronounced that the *'remedial objectives of the Act would be stultified if its remedies … were not available against the employer.'* Further, the Court recognised that '*only an employer can provide the most important remedy-a healthy work environment.'* This shifted the focus from fault and punishment to carefully crafting remedies to prevent the recurrence of sexual harassment.

S 25 of the bill contains penal provisions for the failure of the employer to constitute an Internal Committee or to act upon the recommendations of the Internal Committee in relation

[37] (1998) 118 US 998.
[38] See Sonya Smallets, 'Oncale v Sundowner Offshore Services: A Victory for Gay and Lesbian Rights? (1999) 14 *Berkeley Women's Law Journal* 136.

to a complaint of sexual harassment. Contravention or the abetment of contravention of any of the provisions of the bill, in conjunction with the abovementioned offences is also subject to a fine. Although the failure of the employer to carry out his duties under s 19 of the bill might conceivably constitute a contravention of the bill, this is not immediately clear from the current provision. Moreover, keeping in mind the remedial purpose of legislation relating to sexual harassment, penal provisions might not be the most effective method of ensuring that the employer carries out his duties under s 19. Instead, as indicated in *Robichaud v Canada*, orders directing the employer to adopt a '*special program, plan or arrangement'* to prevent a similar discriminatory practice from recurring in the future might be more apposite.

In the light of these considerations, the following recommendation is suggested for the Indian bill.

Recommendation 4: Liability for Employers

The employer should be made ultimately responsible for compensating the victim in the event of the inability of the respondent to pay the amount. To this end, a 'Proviso' should be added to s 13 (3) (ii) of the bill to read as follows:
'Provided further that in the event of the failure of the respondent to pay compensation to the aggrieved woman, the employer shall directly make such payment.
The employer should be made responsible for failure to comply with the duties under s 19, not necessarily with penal provisions, but through orders requiring him to cease a particular practice or adopt a particular plan to ensure a safe working environment. To this end, s 25 of the bill should include an additional sub-section as follows:
S. 25 (3) 'Where the employer fails to carry out his duties under s 19, he shall be directed to fulfill them in such manner as may be prescribed, which may include, but is not limited to, the cessation of certain practices or the adoption of certain plans to ensure a safe working environment.'

The Supreme Court in *Robichaud v Canada* indicated that it wished to distinguish the statutory liability of employers under the *Canadian Human Rights Act* from the traditional notion of vicarious liability in so far the latter concept would not treat sexual harassment as within the confines of the job that a person was engaged to do. Nevertheless, it did conclude that this statutory liability was somewhat similar to vicarious liability in tort in as much as it placed responsibility *'for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions.'*

A similar concept of vicarious liability is contained in s 106 of the Australian *Sex Discrimination Act* which provides that where the employee or agent of a person performs an unlawful act in connection with the employment or with the duties of the agent, the provisions of the Act will apply in relation to the person as if the person had also done the act.

S 109 of the UK *Equality Act, 2010* also states that :
'(1)Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
(2)Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
(3)It does not matter whether that thing is done with the employer's or principal's knowledge or approval.'
However, this provision does not apply if the employer demonstrates taking all reasonable steps to prevent the doing of a thing. Nor does it apply to offences under the Act.

In the USA, employers are vicariously liable for sexual harassment committed by supervisors towards other employees where conduct by the supervisors results in 'tangible employment action'

against those employees, such as dismissal, reassignment or failure to promote.[39] In the absence of 'tangible employment action' employers will not necessarily be vicariously liable, but they will be so if the presumption of negligence is not rebutted. *Faragher and Burlington* established an affirmative defence for employers who could show both that they made reasonable efforts to prevent and redress workplace sexual harassment, and that the alleged victims knowingly chose not to avail themselves of remedies or protections which were available to them.

Thus, most jurisdictions have introduced some form of vicarious liability for employers in matters relating to sexual harassment. The suggested recommendation will make the Indian bill compatible with such legislation, besides giving effect to the judgment of the Indian Supreme Court in *Vishaka v State of Rajashtan.*

V. EFFECTIVENESS OF REMEDIES

1. Introduction

Other jurisdictions do not require aggrieved persons to obtain redress in the same environment in which they are subjected to sexual harassment. Thus, in Australia, complaints of unlawful discrimination, including sexual harassment, are made in the first instance to the Australian Human Rights Commission (AHRC). The AHRC may conduct an investigation seeking more information, which may be followed by an informal, confidential process of conciliation. If the AHRC considers that the complaint cannot be resolved, is lacking in substance or has already been dealt with, the complaint will be terminated. Although the complainant is not allowed to bypass the AHRC and commence proceedings directly in court, on the termination of the complaint by the AHRC, he/she may choose to proceed to the Federal Magistrate Court of the Federal Court of Australia for a formal hearing.

Similarly, in Canada, the *Canadian Human Rights Act* is administered by two independent bodies called the Canadian Human Rights Commission (CHRC) and the Canadian Human Rights Tribunal (CHRT). It is the CHRC that first reviews and investigates the claim and then attempts to mediate a solution between the two parties. If mediation fails, the case is referred to the CHRT, which functions as an informal court with its own rules and procedures. It hears arguments from both sides and renders a decision as to whether a violation of the *Act* has taken place and if so, the remedy that is to be provided. A party may appeal the decision of the CHRT to the Federal Court, as well as the Supreme Court of Canada.

In France, in 2004, a new institution called the High Authority against discrimination and for equality (*Haute Autorité de Lutte contre les Discriminations et pour l'Egalité, HALDE*) was created. The HALDE is an independent administrative body and its mandate covers all forms of direct and indirect discrimination prohibited by French legislation or in international agreements ratified by France. Victims of discrimination may directly present their case before HALDE. Without replacing the traditional channels for redressing discrimination within the legal system, HALDE can identify discriminatory practices. It can also help victims make a case against agents of discrimination and, thanks to special powers, carry out an investigation and demand explanations from defendants, by conducting hearings and collecting other evidence, including the gathering of information on site. It can issue recommendations and publish them thus encouraging the defendant to follow them. HALDE may equally engage in mediation between

[39] *Faragher v City of Boca Raton; Burlington Industries Inc v Ellerth* (1998) 524 US 742. See also Carolyn Marie DeGroff, 'Extra! California's FEHA: A Chink in the Armour of Employers Who Wage War on Sexual Harassment to Avoid Title VII Liability?' (2001) 29 W St UL Rev 315.

the victims and the defendant.

In Germany, it is the labour courts that play a dominant role. The German labour is court system comprises three levels (a) labour courts of the first instance (b) appellate labour courts and (c) the Federal Labour Court. These courts become involved in disputes on the initiative of employees or their representatives. The two-step process in labour courts is divided into conciliatory hearings before the presiding judge, and in the case of failure to reach an amicable settlement, further hearing involving non-professional judges, at the end of which the Court issues a judgment.

In Ireland, cases are referred in the first instance to the Equality Tribunal, and in the case of the gender ground only, to the Circuit Court. A recommendation of the Equality Tribunal may be appealed to the Labour Court, while there may be appeals on points of law to the High Court.

In the UK, s 119 of the *Equality Act, 2010* gives powers to the country and sheriff courts hearing claims under the *Act* to grant any remedy that the High Court or Court of Session in Scotland can grant in proceedings in tort or in a claim of judicial review. Employment tribunals may also hear cases under the *Act*.

Unlike the Indian bill, none of the above jurisdictions sets up an initial complaint mechanism comprising members of the workplace where the aggrieved person was subjected to sexual harassment. The forum of first instance in all these jurisdictions is an independent agency, tribunal or court. There also exist provisions for appeal to normal courts of law. The Internal Complaints Committees set up under the bill do not provide the same assurance of independence and integrity as the bodies constituted under these other jurisdictions. Therefore, it is recommended that claims of sexual harassment be redressed via normal procedures under labour laws, wherever applicable.

Further, the bill does not clearly provide the aggrieved woman the option of approaching the more independent Local Complaints Committee instead of the Internal Complaints Committee, in case she fears victimisation or bias. S 6(2) does provide for the constitution of a Local Committee where the complaint is against the employer himself, but it may be the case that the aggrieved woman may prefer another forum even if the complaint is not against the employer, but against someone close to the employer, by reason of which she may not be confident of an impartial hearing before the Internal Complaints Committee. Therefore, it is also recommended that the bill explicitly provide the aggrieved woman with the option of bypassing the Internal Complaints Committee.

Recommendation 5: Effectiveness of Remedies

The complaint system under the bill should be bypassed and normal procedures under labour laws like the Industrial Disputes Act, 1947 and the Industrial Employment (Standing Orders) Act, 1946, should be followed for the relatively small set of employees that they are applicable to.
For example, appropriate relief may be obtained from a Labour Court or Tribunal if a worker has been wrongly dismissed or discharged for non-compliance with the employer's sexual demands.

The bill should clearly provide the aggrieved woman the option to bypass the Internal Committee, and approach the Local Committee if she fears victimisation or bias.

2. Adequate Representation for the Aggrieved Woman

Within the EU, paragraph 20 of the 2002 Equal Treatment directive requires that
'Persons who have been subject to discrimination based on sex should have adequate means of legal protection. To provide a more effective level of protection, associations, organisations and other legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf of or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.'

In addition, Article 8A of the Directive provides that
'(1) member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
(2) Member States shall ensure that the competences of these bodies include:
(a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 6(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;'

As mentioned above, in France, the independent administrative body called HALDE can help victims make a case against agents of discrimination, while in Germany, there is a general anti-discrimination authority at the federal level, since 2006 called the *Antidiskrimminierungsstelle des Bundes.* This body informs individuals claiming to have been discriminated against and the public in general of the legal means available in case of discrimination, although it has no power to support individuals in anti-discrimination suits.

The Indian bill should contain similar provisions for providing aid to the aggrieved woman. Given the wide standing accorded to non-governmental organisations under public interest litigation (PIL) in India, there is no obstacle to permitting such organisations to make complaints on behalf of the aggrieved woman, in addition to her legal heir. This aid should extend not only to the presentation of a complaint, but also to providing representation for the aggrieved woman during the process of inquiry before the Complaints Committees. Local Complaints Committees also ought to be more representative in order to make the inquiry more comfortable for the aggrieved woman. In this light, the appointment of a member of the Scheduled Castes/Scheduled Tribes, especially in rural and tribal areas ought to be considered.[40]

Finally, the inquiry procedure before the Complaints Committee ought not to subject the aggrieved woman to unnecessary questioning. For example, a recent case demonstrated that women at public sector undertakings are required to cross unnecessary hurdles- in spite of a finding by the internal complaints committee that sexual harassment had taken place, the woman was required to face yet another inquiry under the disciplinary rules, on the basis of powerful arguments from public sector employees that they could be removed only by a disciplinary committee, not an internal complaints committee.[41] Although s 13 of the bill provides that action ought to be taken in accordance with the applicable service rules, this ought not to mean that the aggrieved woman be submitted to a second inquiry.

In the light of these considerations, the following recommendations are suggested:

[40] Supra n 25.
[41] Indira Jaising, Cover Story, Business Today, 13 October, 2010, available at http://businesstoday.intoday.in/bt/story/9237/1/indira-jaising.html

Recommendation 6:

Non-governmental/public interest organisations should be permitted to make a complaint on behalf of the aggrieved woman, by including them within the meaning of 'such other person as may be prescribed in s 9(2) of the bill.

The aggrieved woman should be permitted representation (legal or otherwise) to aid her in an inquiry before the Internal or Local Complaints Committees. The establishment of a permanent body similar to French and German anti-discriminatory authorities to provide such aid should be considered.

An SC/ST member should be nominated on the Local Complaints Committee.

Once a finding of sexual harassment has been made, the 'aggrieved woman' ought not to have to submit to a second inquiry before appropriate action under the applicable service rules is taken under s 13 (3)(i) of the bill. Evidence collected by Complaints Committees should be treated as evidence in a court of law.

3. Duties of the Employer and District Officer

Practical experience indicates that there have been no sanctions against employers for failure to set up Complaints Committees. At present, according to s.25 of the bill, if the employer fails to constitute an Internal Committee, or to take action under sections 13, 14 and 22, or contravenes or attempts to contravene or abets contravention of the Act or Rules, he shall be punishable with fine which may extend to fifty thousand rupees. However, while the maximum limit of Rs 50,000 seems rather low, it is important to note that no minimum limit has been stipulated for this fine. This loophole can result in employers being fined negligible amounts for such contravention, especially given the culture of trivialization that often dominates the discourse of sexual harassment. Furthermore, if the employer is later convicted of the same offence, he shall be liable to 'twice the punishment, which might have been imposed on a first conviction, subject to the punishment being maximum provided for the same offence.'[42] Thus, the amount of fine imposed the first time around is instrumental in providing a sufficient deterrent to the employer from brazenly continuing to flout the legal provisions of the 2010 Bill. It is thus necessary that a minimum amount of fine be fixed by the legislation for such offences.

There should also be a minimum time period (such as 60 days after the 2010 Bill comes into force as an Act) stipulated within which all employers must set up Internal Committees.

Finally, if the benefits of the Local Committee are meant to reach the unorganised sector women workers, the constitution and functions of these committees need to be fleshed out in greater detail, particularly in terms of ensuring a sensitive organisational policy – training workers and senior staff and raising awareness about the problem which is critical to prevent sexual harassment. However, the language of the 2010 Bill is still couched in terms of organised sector establishments, for instance, Chapter VI of the 2010 Bill is entitled 'Duties of Employer'. Chapter VI and Chapter VII should thus be merged into a single Chapter entitled Duties of Employer/District Officer and the duties of the employer under s 19 should explicitly be extended

[42] s. 25 (2) (i), 2010 Bill.

to the District Officer in relation to workshops and training programmes for sensitizing the members of the Local Committees.

Thus, the following recommendations are suggested in relation to employers and remedies provided under the bill:

Recommendation 7:

A minimum time period should be specified for the setting up of Committees with the coming into force of the bill.

A minimum amount of fine should be stipulated for failure by the employer to take the steps required of him under s 25 of the bill, including setting up Committees.

The duties of the employer under s 19 of the bill in relation to workshops and training programmes for sensitizing members of the Local Committee should also be extended to the District Officer.

4. Types of Sanctions/Remedies

Unlike other jurisdictions, the Indian bill does not contain an exhaustive list of the sanctions that may be applied against offenders or remedies available to the victims of sexual harassment. Instead, s 13 (3)(i) of the bill merely requires the Complaints Committees to recommend to the employer the taking of action in accordance with the applicable service rules once a finding of sexual harassment has been arrived at. It also includes a provision for the payment of compensation. This part sets out the range of remedies and sanctions available in various jurisdictions, with the aim of recommending that the Complaints Committees be empowered to recommend similar measures, over and above those prescribed in the applicable service rules, when the latter are insufficient to provide relief to the aggrieved woman.

In Australia, pursuant to s 46PO(4) of *Human Rights and Equal Opportunity Commission Act 1986* (Cth), the remedies that the Federal Court of Australia and the Federal Magistrates Court can order include:

(a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;

(b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;

(c) an order requiring a respondent to employ or re-employ an applicant;

(d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;

(e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;

(f) an order declaring that it would be inappropriate for any further action to be taken in the matter.

Damages are the most commonly sought and awarded if the complainant is successful. The assessment of damages is generally based on tort principles – designed to place applicants in the position in which they would have been if there had not been an act of unlawful discrimination against them. Special damages covering economic loss may be awarded where there is a financial loss (e.g. loss of earning capacity) directly attributable to the unlawful discrimination. General damages covering non-economic loss such as for hurt, humiliation, injury to feelings may also be awarded. Exemplary or aggravated damages may be awarded in limited circumstances where an

extra element of malevolence or ill will in the respondent's conduct (even after complaint made, up to time of hearing and even during proceedings) added to the applicant's distress and hurt.

In Canada, S. 53 of the *Canadian Human Rights Act, 1984* sets out the range of remedies available to the Canadian Human Rights Tribunal, which may

'*make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:*
(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in the future (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or(ii) making an application for approval and implementing a plan under section 17; (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice; (c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; (d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and (e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

Special compensation
(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.'

In the EU, the 2002 Equal Treatment Directive focuses primarily on compensation. When unlawful harassment has been established, the 2002 Directive prohibits limits on the compensation payable to the victim. Reflecting past rulings by the European Court of Justice,[43] Article 6(2) requires Member States to introduce measures 'to ensure real and effective compensation or reparation ... for the loss and damage sustained by a person injured as a result of discrimination.' Moreover, the compensation should be 'dissuasive and proportionate' to the injury suffered. There can be no fixed prior upper limit to the compensation, except in one instance: when the employer can prove that the only damage suffered by a job applicant was the refusal to take the job application into consideration, and there was no other actual financial loss.

In France, any discriminatory actions by employers are regarded as null and void as of right, and the employee retains all previously held rights. In the context of a dismissal, this means that any dismissal on discriminatory grounds could be annulled as of right and a worker dismissed on a discriminatory ground (including harassment) can claim her/his reinstatement and he/she is regarded as never having left the job. This is a specific sanction for discriminatory acts.

In a case where the employee does not want to continue the employment relationship, he or she is eligible for a compensatory payment equal to at least the previous six months' wages as well as compensation granted for unlawful dismissal. In situations other than dismissal, the sanction is compensation that should entirely compensate the damage. Penal sanctions are also possible even if they are rarely used. Under the Penal Code, the employer additionally risks a maximum of three years' imprisonment and a fine of EUR 45 000 for certain more serious infringements. Article L. 1155-2 of the French Labour Code provides for penalties of up to one year's

[43] *Draehmpaehl* v *Urania Immobilienservice ohG* [1997] IRLR 538 ECJ and *The Marshall case* [1993] ICR 893, ECJ Case C-271/91.

imprisonment and a fine of 15,000 E for moral or sexual harassment. The courts may also order, as a secondary penalty, that the court ruling or extracts thereof be published in specified newspapers at the offender's expense, under the conditions stipulated in Article 131-35 of the Penal Code.

In Germany, the principal law covering gender discrimination in Germany is the *Allgemeines Gleichbehandlungsgesetz* (General Act on Equal Treatment, AGG). The AGG provides for a right to damages for discrimination. The remedies and sanctions for breaching the prohibition of gender discrimination differ according to the field of law. In labour and civil cases, the victim has a right to pecuniary compensation, but not to reinstatement or the fulfilment of the denied contract.

The German liability system focuses primarily on monetary damages. The damages due amount to a maximum of three months' salary and can be deemed dissuasive, especially because they are to be paid to every victim that brings a case. In cases of injury of body, health, freedom or sexual self-determination, Section 253 (2) of the German Civil Code provides for compensation for non-material losses, such as pain and suffering. Furthermore, according to the German Equal Treatment Act, in certain cases of discrimination and sexual harassment victims are entitled to demand compensation for material and non-material losses.

Additionally, if the employer does not take any obviously appropriate measures in order to prevent harassment or sexual harassment, the person concerned is entitled to cease working but still receive their wage. (Sec. 14 AGG).

In Ireland, the Equality Tribunal may order in respect of equal pay arrears of remuneration not earlier than three years prior to the date of reference of the claim with an order for ongoing equal pay, and an order for compensation for the effects of acts of discrimination or victimisation. In equal treatment cases, there may be an order for compensation up to a maximum of two years' remuneration and/or an order for a specified course of action. In dismissal cases, reinstatement, re-engagement or compensation up to a maximum of two years may be ordered. If the claim is referred to the Circuit Court there is unlimited compensation (for the effect of the discrimination for six years prior to the reference of the claim). Where the claimant is not an employee the maximum award is EUR 12 697.38. Interest may be awarded and the Circuit Court may award costs. There are provisions for enforcement and criminal sanctions.

The Equality Tribunal also has the power to issue other forms of redress such as arrears in pay and orders for particular courses of action. However, O'Sullivan and MacMahon[44] have noted that the emphasis in Employment Tribunal equality decisions in Ireland has been on compensating the individual rather than requiring unfairly discriminating employers to change their behaviour. In their report, they found that compensation and awards for loss of earnings were the most common forms of redress issued by the Equality Tribunal between 2001 and 2007 (130 cases). However, the Tribunal has also made orders for actions, which do seek to change the employers' behaviour though it is difficult to assess how effective these are. O'Sullivan and MacMahon found that the most common orders are for employers to introduce or review equality policies (30 cases), to improve selection and promotion procedures (26 cases) and to train employees in equality or interviewing (19 cases).

In the UK, the main remedies available are damages (including compensation for injuries to feelings), an injunction and a declaration. Section 124 sets out the remedies available to

[44] Michelle O'Sullivan Juliet MacMahon., "*Employment equality legislation in Ireland: claimants, representation and outcomes*" (2010) 39 Industrial Law Journal 384 .

employment tribunals hearing cases under the Act. An employment tribunal can make a declaration regarding the rights of the complainant and/or the respondent; order compensation to be paid, including damages for injury to feelings; and make an appropriate recommendation. The measure of compensation is that which applies in tort claims, for example claims of negligence, where the compensation puts the claimant in the same position, as far as possible, as he or she would have been in if the unlawful act had not taken place.

The above provisions indicate that the focus of sexual harassment legislation is not the punishment of offenders, but the eradication of undesirable social conduct. With the emphasis on prevention, holistic remedies such as declarations requiring employers to cease certain practices or to adopt preventive strategies assume greater significance than the merely punishing the offender. The Indian bill merely empowers the Complaints Committees to make recommendations in line with the applicable service rules. There is no indication of the range of remedies that will be available under these rules. In order to ensure that justice is secured to the aggrieved woman and the employer is encouraged to take proactive steps to create a safe work environment, it is recommended that the Complaints Committees, instead of being confined to the applicable service rules, be empowered to make a wider range of recommendations tailored to address the specific situation.

Recommendation 8:

Under s 13(3)(i) of the bill, the Complaints Committees should be empowered to make recommendations over and above those prescribed in the applicable service rules, when the latter are insufficient to provide appropriate relief to the aggrieved woman. Remedies available in other jurisdictions and set out in this report should be considered.

VI. APPENDIX

We considered it useful to outline, in this appendix, a non-exhaustive list of acts that might constitute sexual harassment to aid in the interpretation of sexual harassment under s 1(m) of the bill.

1) Attempted or actual sexual assault

2) Direct or indirect threats or bribes for unwanted sexual activity

3) Repeatedly asking for sex or for a date

4) Stalking

5) Jokes, conversations and comments, including:

- Unwanted jokes, gestures, offensive words on clothing, and unwelcome comments and repartee.
- Unwanted flirting.
- Telling lewd jokes, or sharing sexual anecdotes.
- Asking sexual questions, such as questions about someone's sexual history or their sexual orientation.
- Making offensive comments about someone's sexual orientation or gender identity.
- Rating a person's sexuality, either positively or negatively
- Making sexual comments about appearance, clothing, or body parts
- Spreading rumours about a person's sexuality
- Frequent jokes about sex or about males/females

6) Touching, including:

- Inappropriate touching and any other bodily contact, including pinching, patting, rubbing, punching, stroking, massaging, squeezing, tickling, grabbing an employee around the waist, or interfering with an person's ability to move, or purposefully brushing up against another person.

Example scenario: U is new in her job and does not yet how to do all the tasks required of her. She sometimes has to ask her line-manager S for guidance. The first few times U did this, S lent over very close to her to point at the computer screen, whilst putting his hand on her back. U does not feel comfortable with this, and now hesitates every time she needs help with her work, and is beginning to fall behind.

7) Other behaviour, including:

- Making inappropriate sexual gestures or sounds such as sucking noises, winks, or pelvic thrusts.
- Sending suggestive letters, notes, or e-mails
- Sharing sexually inappropriate images or videos, such as pornography, with co-workers
- Staring in a sexually suggestive or offensive manner, such as ogling or leering, or staring at a woman's breasts or derriere
- Whistling

- Pervasive displays of pictures, calendars, cartoons, or other materials with sexually explicit or graphic content
- Displaying sexually suggestive objects or playing sexually suggestive music.

Example Scenario: J is a courier who makes deliveries to various workplaces. Often he delivers to a shop where a group of four women frequently whistle "wolf calls" at him. To begin with J thought it was quite fun and enjoyed the special attention. After a while, when the women didn't stop, J began to feel embarrassed and uncomfortable. He no longer considered the attention special and began to also feel upset. He told them to quit it although they would laugh and continue. J didn't really know what to do. J just wanted to be left alone to make his deliveries.

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