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Introduction

Aware of intentions to pass a Sexual Harassment Bill, we are calling for considerations and making our own recommendations. This document features several recommendations; all are short and focused on specific areas of the bill. We ask that the individual recommendations that we make are taken seriously.

Our recommendations are stated clearly on the penultimate page of this document, whereas the body of the document outlines our reasons for making such recommendations.

Who We Are

LANDS is an emerging grassroots movement that aims to build a network of political cadres and non-political community clubs to discuss current affairs, national problems, and the problems being faced by people in communities, in order to come up with democratic solutions. We were founded in November 2016, and most of our members and observers are youth.

Over 130 persons are involved in LANDS. We have multiple groups that meet on their own schedules; we have held over 80 meetings this year alone. We have sent delegations to international events hosted by grassroots movements, labour unions, political parties, and governments.

Considerations

We appreciate that the bill gives a clear outline of how a dispute is handled in terms of what the possible results of processing a complaint are, and a clear set of guidelines on what needs done in a workplace setting to settle a dispute involving an employee. We also appreciate that the definition of "worker" is broad enough to include employees in both the private and public sector, domestic workers, contract workers, subcontractors, trainees, interns, students gaining work experience, volunteers, and more.

There is an entire section of the bill – Section 9 – that addresses tenants and landlords, and it covers a lot of important things like the possibility of a landlord giving a tenant the impression that they can get a discount on rent in exchange for sexual favours; this shows an understanding of economic coercion, and we appreciate that it is in the bill.

We see the legislation as a positive step forward. We had concerns, including fears by employees and tenants that their employers and landlords may do underhanded things to seek reprisal if they make complaints.

We think that the bill sufficiently addresses the fear of reprisal, but the bill overall doesn't address street harassment. Street harassment is a much more difficult issue to tackle with legislation, so we appreciate this piece as an important stepping stone, but we still need to do something about street harassment at some point.

Despite appreciating the bill and its scope, we had 6 main areas of concern after reviewing it:

1. The Court
2. Sexual Harassment of Clients by Workers in Businesses
3. Sexual Harassment of Workers by Clients
4. Companies' Internal Sexual Harassment Policies
5. The Definition of "Sexual"
6. "Frivolous" Claims

1. The Court

1.1. The 2015 version of the bill allowed the Sexual Harassment Division of the Industrial Disputes Tribunal to handle cases of sexual harassment in the workplace or among persons who share a workplace, while allowing the Court to handle cases involving potential victims of Sexual Harassment who are not workers, i.e. tenants, students, residents, wards, inmates, patients, or members of institutions.

1.2. The new bill seems to have all cases handled by the tribunal, which may not be ideal for cases in tenant-landlord relationships, teacher-student relationships, caregiver-ward relationships, caregiver-patient relationships, and so on.

1.3. We would like clarification on why all cases would be handled by the tribunal rather than some being handled by the Court. If the Court is to handle some cases, we believe that the Sexual Harassment Division of the Industrial Disputes Tribunal can still handle workers' cases while maintaining the same legal protection that the other categories of persons would get when their cases are being handled by the Court; this is not a new suggestion, as it was already like this in the 2015 version of the bill.

This was addressed; the committee and legal advisors informed us that the "tribunal" in the 2019 version of the bill refers to a sovereign Sexual Harassment Tribunal rather than the formerly proposed Sexual Harassment Division of the Industrial Disputes Tribunal.

2. Sexual Harassment of Clients by Workers in Businesses

2.1. The bill doesn't seem to account for the possibility of clients of private sector businesses being sexually harassed by the staff of those businesses. Section 8(1) and Section 8(3) both make reference to anyone who is "a student, a resident, a ward, an inmate, a patient or a member" of an institution, and the definition of "institution" in Section 2 does not include private sector businesses that don't have a membership system. The definition doesn't seem to cover walk-in clients of typical private sector businesses who may be harassed by persons who work or hold positions in those businesses. A client isn't necessarily a "member" of an institution that they are doing business with.

2.2. There are instances of persons who work in businesses taking the personal information of clients and contacting them outside of business hours to flirt or make sexual advances that may be unwelcome. In such cases, the person usually takes the personal information from a form or something that the client left for business use, not knowing or expecting that a staff member would take the personal information for other use.

2.3. Some types of businesses (including banks, insurance companies, remittance services, furniture stores, courier services, utility companies, etc.) collect information like residential addresses, and even more types of businesses collect phone numbers as contact information. In the case of a courier service or utility company, some workers in a business will inevitably need to use a person's residential address for business use, but workers who don't need to use this information may also access it (if the information is processed in an office, for example, by someone who won't need to actually visit the client's home).

2.4. We therefore propose that the definition of "institution" be expanded to add common private sector businesses, and that "clients" be added to the list of categories of persons who workers in an institution should not harass.

2.5. We recognise, however, that there are particularities with the entities that are defined as "institutions" in the bill, with the persons who are served there being more vulnerable than a walk-in client of a normal business. With that said, an alternative would be to add "company" or "businesses" and define them separately from institutions in the bill, and to add a section that addresses the possibility of workers of companies/businesses sexually harassing clients.

3. Sexual Harassment of Workers by Clients

3.1. The bill doesn't seem to account for the possibility of workers being harassed by clients. Section 8(1) says that "A person who is a member of staff or in a position of authority at an institution shall not sexually harass a person who is a student, a resident, a ward, an inmate, a patient or a member" of an institution or anyone "who is seeking admission to the institution" but it doesn't seem to make any reference to or provisions for the workers themselves who may be harassed by the persons that an institution serves.

3.2. Furthermore, as explained in Section 2.1 of this document, the definitions in the bill are very specific about what an "institution" is and the types of persons that an institution serves, and makes no reference to the case of anyone who may be a client of a business or company without being "a student, a resident, a ward, an inmate, a patient or a member" of that business or company.

3.3. Section 4(1)(a) mandates that every employer adopts policies "concerning the prevention of sexual harassment in the business" and Section 4(3)(b)(i) states that workers are entitled to an environment that is free of sexual harassment, but there are no legal provisions for serious actions to be taken against clients who may sexually harass workers. The most a business can do is to withdraw its services from a customer/client, but there is no explicit provision for a worker to take action against an employer who refuses to do this, or any mechanism for an employer or employee to take legal action against a client or customer who sexually harasses a worker. Sanctions against a client are better enacted by the state rather than the employer.

3.4. We propose that the bill includes a provision for workers to be protected from sexual harassment by customers and clients of companies and businesses. It is possible for customers and clients to make "sexual suggestions or sexual innuendos" - as the bill includes in the definition of "sexual harassment" in Section 2 - towards workers.

3.5. It is also possible for a student of an institution to sexually harass a member of staff, especially at institutions where the students are adults, like universities; universities are included in the definition of an "institution" in Section 2 of the bill. The staff of an institution, like a medical facility for example, may also be harassed by the family/visitors of a ward or patient. We believe that the bill should include protection for these workers.

3.6. In businesses, a worker may fear retaliating when sexually harassed because of expectations or pressure to maintain good customer service. According to an article in the Gleaner this year, "Staff members at some of Jamaica's top hotels are reportedly being sexually harassed by guests, while their managers turn a blind eye or threaten them with dismissal if they speak out"[1]. The most vulnerable workers in this case are in businesses that serve food, provide entertainment, and/or accommodate tourists.

The committee's response to this proposal was mixed. At first, Delroy Chuck said that this was not in the scope of the bill according to his best understanding. Despite us saying that we would want action to be taken against the clients or customers who sexually harass staff, Delroy Chuck and Frank Witter said that employers can't be held responsible; the bill itself says that employers are responsible for ensuring that the workplace is free from sexual harassment.

In response to the comments by Delroy Chuck and Frank Witter, that our proposal was not in the scope of the bill and that it shouldn't be included because it's too difficult to implement, an MP and 3 Senators (Angela Brown-Burke, Donna Scott-Mottley, Sofia Frazer-Binns and Kerensia Morrison) all argued that it should still be included in the legislation. Kerensia Morrison said that it may not be easy to implement in the real world, but that it was her opinion that a customer who walks into a business place and sexually harasses a worker should face the law. The others who were mentioned in brackets had openly said that they supported our proposal.

Senator Scott-Mottley consulted the legal experts on whether certain provisions in the bill would address our concerns; those legal provisions make the employer responsible for preventing sexual harassment in the workplace and also for taking necessary measures against it if/when it happens, contrary to what Delroy Chuck's interpretation of the bill was.

While we accepted that the bill does offer some protection for workers from customers, we believed that a provision should be more explicit in this regard, possibly allowing customers to be brought before the tribunal since places of business are more controlled than the open street.

We did not take kindly to Delroy Chuck's mockery of our concern for workers, when he asked if we want employers to put up signs to say not to harass their workers. Different business places have ways that they deal with things like shoplifting or disorderly conduct; in many business places, it is possible for a security guard to reprimand a customer who harasses a worker. Where such a person is identifiable, it could even be possible to bring them before the tribunal.

[1] Five-Star Horror! …Hotel Staff Fed-Up With Sexual Harassment By Unruly Guests (Robinson 2019)

4. Companies' Internal Sexual Harassment Policies

4.1. Section 4 requires companies to have internal policies on sexual harassment; this may be difficult for small businesses, so we appreciate that Section 4(4) of the 2015 version of the bill clarified that the requirement only applies to entities that have 20 workers or more; this doesn't seem to be in the 2019 version of the bill.

4.2. With or without an exception given to small businesses that would not necessarily have written internal policies, it may be useful for the government to offer one or a few templates that businesses and organisations can copy and modify to use as their own internal policies.

4.3. Additionally, regarding public sector institutions, legislators could consider clarifying whether it is the responsibility of the management of each institution or the government to set sexual harassment policies.

There wasn't much controversy on this topic; it was a simple suggestion to have templates designed by the Ministry of Labour to help companies to align their internal policies with the goals of the legislation on sexual harassment. In the in-person presentation, we said that there could even be different templates; a general template could exist as a default, while specific sectors (like tourism/entertainment, retail, banking/insurance, tertiary education) could have templates more tailored to them.

We didn't spend time on Section 4.3 of our submission, where we sought clarification for who is responsible for setting the sexual harassment policies in public sector institutions.

5. The Definition of "Sexual"

5.1. We are concerned about the terms "sex" and "sexual" which appear multiple times in definitions in Section 2 of the Sexual Harassment Bill, because other legislation defines sex and sexual acts in a very genital-specific way. This may cause complications in the interpretation of the Sexual Harassment Bill and how it should be applied.

5.2. Section 2 of the Sexual Offences Act specifically defines "sexual intercourse" as "the penetration of the vagina of one person by the penis of another person"[2] and this may limit interpretations of "sexual advances" and "sexual innuendos" to interactions between a person with a penis and a person with a vagina.

5.3. One consequence of the definition of sexual intercourse in the Sexual Offences Act is that someone using his penis to penetrate someone's anus is not considered "sexual intercourse" and doing that without consent is not considered "rape" by our laws.

5.4. The pedantry, around the words "sex" and "sexual" in our laws, makes it necessary for us to ask whether this bill will cover instances of men flirting or making unwanted advances on other men. If a male employer flirts with a male employee and makes suggestions or innuendos about penetrating that male employee's anus, is that considered to be "sexual" or not? If a male employer demands to penetrate a male employee's anus, is that considered "a demand or request for sex" in Section 2, or not? These questions are important because they may determine whether something is a "sexual advance" or "sexual innuendo" according to our legislation, and therefore determine whether a male employee in such a situation is able to bring a complaint to the Tribunal.

There were allusions to intentions to make the bill gender neutral, but we didn't receive any solid response on this topic. With the very specific definition of sex, sexual, and sexual intercourse in other legislation, we are worried about how protected a worker or tenant would be from sexual advances and outright invitations to sex or sex-like activity by someone of the same sex.

[2] Sexual Offences Act (2009, 6)

6. "Frivolous" Claims

6.1. Section 27(1) states that the Tribunal will cause an investigation to be conducted into a complaint if the complaint appears "to be well founded and is not frivolous or vexatious," and it continues.

6.2. We are very concerned that this may cause legitimate claims to be dismissed due to the potentially changing temperament of the Tribunal.

6.3. Section 28 already outlines an outcome where the Tribunal can find "that there is no evidence of sexual harassment" if it is the case; determining this should not be done without a hearing, so dismissing a claim because it seems to be "frivolous" – without hearing it – seems unfair.

6.4. We propose that these conditions for hearing a claim in Section 27(1) be changed from "is not spiteful or malicious" rather than "is not frivolous or vexatious" – or that these conditions be removed entirely, because:

- This will cut down the number of legitimate claims being dismissed due to the potentially changing temperament of the Tribunal.

- Section 28 already outlines the possibility of an outcome where the Tribunal can find "that there is no evidence of sexual harassment" which would be determined during a hearing rather than without one entirely.

Summary of Recommendations

In summary, we recommend that the members of the Joint Select Committee offer explanations or that the necessary legal provisions in the Sexual Harassment Bill be created or amended to:

1. Clarify why the Sexual Harassment Division of the Industrial Disputes Tribunal will handle cases involving persons who are not necessarily employees, i.e. tenants, students, residents, wards, inmates, patients, or members of institutions (see page 5). – Withdrawn

2. Make provisions to protect clients of private sector businesses – that do not fit in the existing definition of an "institution" in the bill – from sexual harassment by the workers of those businesses (see page 6).

3. Make provisions to protect workers from sexual harassment by clients or persons who are served by the business (see page 7). – Debated at length by committee

4. Clarify whether it is the responsibility of the management of each public authority or the government overall to set Sexual Harassment policies in public sector workplaces (see page 9).

5. Clarify whether "sexual advances" and "sexual innuendos" are gender-specific, and ensure that employees and tenants are protected from being preyed on and harassed by employers and landlords of the same sex (see page 10).

6. Remove "frivolous" from the criteria for claims that the Court can choose to not hear, and require the court to declare and prove that a claim is malicious if it is to dismiss it (see page 11).

References

Robinson, Corey. 2019. "Five-Star Horror! …Hotel Staff Fed-Up With Sexual Harassment By Unruly Guests." *Jamaica Gleaner*, August 25. Accessed August 2019. http://jamaica-gleaner.com/article/lead-stories/20190825/five-star-horror-hotel-staff-fed-sexual-harassment-unruly-guests.

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