

Sexual Harassment in the Workplace: Let the Conversation Begin!

Jambar/GLC CLE Seminar

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1. INTRODUCTION

University of Maryland women's studies professor, Trinidadian Michelle Rowley puts it this way, 'Sexual harassment is about demarcation'. She adds, 'It is a memo that is sent to remind the victim of her/his place, to enforce the script for 'appropriate' gender performance, to plot with precision the topography of institutional power.'¹

Twenty years ago Elizabeth Thompson, then a new attorney-at-law in Barbados, later Minister of the Physical Environment, and now Executive Coordinator for the United Nations Conference on Sustainable Development gave a talk on gender equity, and 'the topography of institutional power', in the legal profession. Sexual harassment figured prominently in that narrative. She said that it took women lawyers longer to get jobs, clients preferred male lawyers, seniors invited male juniors to work with them more often, male seniors paid them less and clients did not pay women lawyers as readily. She said male attorneys' requests for sex were as varied in style as their individual personalities. Female attorneys were physically chased by male ones, locked in rooms while being prevailed on for sex, groped, touched and kissed.

Not at all uncommon, she found that women would press on against the odds, and this was not talked about at bar association level or groups.² That sexual harassment is on the agenda of this seminar is a sign of progress! I am suggesting we start the discussion with

- a. What do we know about sexual harassment in the Caribbean?
- b. what has been the response at the regional level from legislatures and judges?
- c. Why do we need legislation?
- d. What sorts of legislative responses should we be considering?
- e. In crafting legislation, how do we define the harm, who should be responsible and for what, how do we define the 'workplace' and who should decide disputes?

¹ Michelle Rowley, *Feminist Advocacy and Gender Equity in the Anglophone Caribbean: Envisioning a Politics of Coalition* (Routledge, New York 2011) 157.

² Elizabeth Thompson, "Gender Equity in the Legal Profession", Paper presented at Conference: *Engendering Justice: Gender and the Rule of Law in the Commonwealth Caribbean*, December 1990.

The upshot is that we do have enough evidence that sexual harassment is a serious problem that is under-regulated. As we will see, the problem is worst in workplaces where gender inequalities are pronounced and visible. Without a legislative framework, there is underreporting and impunity. While the Trinidad and Tobago Industrial Court has shown a willingness to develop common law rules in response to cases of sexual harassment that come before it, this is not a general trend, and the need for appropriate legislation remains: to clarify the boundaries of what is prohibited, to encourage prevention (through sexual harassment policies), to provide an early response mechanism within workplaces, to ensure fair treatment of workers during disciplinary proceedings and ensure just and effective relief.

My analysis below encourages us to think less about *sexual* harassment and more about gender harassment and hostility that need not be sexual. I also think that crafting a legislative response will present considerable challenges since the boundaries of workplaces are so fluid, making regulation all the more difficult to achieve. The appropriate legislative response in Jamaica should be influenced by the existing industrial relations law as well as broader understandings of rights and justice. The way we define sexual harassment must resonate with others and have meaning in the context of Jamaica.

A. The Empirical Evidence

There isn't a wealth of empirical research on sexual harassment in the Caribbean, but there is enough to paint a clear picture that it is a serious concern for workers and especially for workers in strongly gender segregated workplaces—whether it is professions dominated by men like the police force or ones dominated by women with male managers, as is the case with some factories or elite professions that might be growingly feminised at the lower levels.

B. Perceptions of sexual harassment in Jamaica

Contrary to some public perception, many Jamaican workers identify sexual harassment as a problem in the workplace that warrants a firm response by employers and appropriate statutory intervention. In a 1999 survey among public sector employees in Jamaica, 33% reported that they had been subjected to sexual harassment.³ Only 13% reported this to someone.⁴ The vast majority, some 76%, thought that a worker guilty of sexual harassment should be disciplined.⁵ A 2005 survey of organizations in the private sector and government and a few nongovernmental organizations, found that only 5 of the 44 respondents had a sexual harassment policy, but most of the same organizations supported the enactment of sexual harassment laws. Jimmy Tindigarukayo explains that that there is underreporting of sexual harassment because of the absence of legislation and the sense victims have that appropriate action will not be taken against the perpetrators.⁶

³ Jimmy Tindigarukayo, 'Perceptions and Reflections on Sexual Harassment in Jamaica' (2006) 7 *Journal of International Women's Studies* 90, 100.

⁴ *ibid.*

⁵ *ibid* 101.

⁶ *ibid* 103.

C. Sexual harassment in male dominated workplaces

Workers in sex segregated industries tend to experience higher levels of sexual harassment because sexual harassment is a form of gender hostility that is often used to keep women in their place or out of certain workplaces. A number of studies point to women in the security services industry and in the police force —male dominated professions—experiencing high levels of sexual harassment.

A study on Guyana security services found that the main problem faced by female security guards related to sexual harassment from the supervisory staff. This took the form of jokes, references to women's inability to perform and sexual overtures in exchange for relief of duties. It was freely acknowledged by men that this was a problem for women in the industry, but it was dismissed as natural and expected behaviour.⁷

Gladys Brown-Campbell, then a detective sergeant, in her study of patriarchy in the Jamaica Constabulary Force noted that many women on the force repulsed male advances and were punished by being given consecutive night duties, their names were left off promotion lists and they were transferred to remote areas.⁸ Michelle Rowley's study on the Royal Barbados Police Force, which comprised 14% women in 2005, found that women recognised sexual harassment as a 'somewhat intrinsic aspect of being in an atypical profession'.⁹

D. Sexual harassment in female dominated/male led workplaces

Anthropologist Kevin Yelvington studied factories in Trinidad where there were large numbers of women working on the production floor and mostly male supervisors.¹⁰ He observed that the pervasive sexual harassment in that setting was not simply about sex, but about power and control over the lower ranked female employees. He suggested that the alienation that occurred as a result might explain the lack of interest women had in trade unions, which they saw as benefiting men.¹¹

Research conducted by anthropologist, Carla Freeman, in the early 1990s on the data processing industry in Barbados concluded that sexual harassment was a familiar aspect of work conditions for many women.¹² A top female trade unionist explained that 'there is a lot of sexual harassment especially in the areas where there are a lot of women, like here in data entry.'¹³

E. Sexual harassment in 'prestige' professions

The available information on sexual harassment in 'prestige' professions like law in the Caribbean is thin, though it is still worth mentioning. I have already offered Thompson's views as a young

⁷ D. Alissa Trotz, "Guardians of our Homes, Guard of Yours? Economic Crisis, Gender Stereotyping and Restructuring of the Private Security Industry in Georgetown, Guyana" in Christine Barrow (ed.) *Caribbean Portraits: Essays on Gender Ideologies and Identities* (Ian Randle Publishers: Kingston, 1998) 29 at 46.

⁸ Gladys Brown-Campbell, *Patriarchy in the Jamaica Constabulary Force: Its Impact on Gender Equality* Canoe Press 1998, 27.

⁹ Michelle Rowley, *Feminist Advocacy and Gender Equity in the Anglophone Caribbean: Envisioning a Politics of Coalition* (Routledge, New York 2011) 167.

¹⁰ Kevin Yelvington, "Gender and Ethnicity at Work in a Trinidadian Factory" in Momsen (ed.) *Women and Change in the Caribbean* (1993) 263.

¹¹ *Ibid* 271.

¹² Carla Freeman, *High Tech and High Heel Shoes in the Global Economy* (2000).

¹³ *Ibid* 182-3.

attorney in Barbados. A study on blacks in business in Trinidad interviewed a female entrepreneur who complained about male business associates who wanted ‘to play carnival everyday’:

“I have problems dealing with Black men in business. You are dealing with them at a business level and they will always have to let some sort of sexual thing come into it. It is as if we have not grown up and realise business is business and something else is something else. We have to play carnival everyday. You speak to a man on the telephone and address him as Mr. X and he in the middle of the conversation will call you ‘dear, sweetheart’. When you stop him, he will get very upset and we immediately get to a point where he is saying: ‘Weh you playing? You believe you so special that ah cahn call you sweetheart’.”¹⁴

The backdrop for sexual harassment is gender inequality at the workplace. Despite the strides made by Caribbean women in the labour market, women’s unemployment tends to be higher than that of men. In January 2011, 163, 500 persons in Jamaica were unemployed. 98,500 were women. Not only does gender segregation in employment persist, the average earnings in the industries dominated by women are much less than that in industries dominated by men.¹⁵ And on average women need more education to achieve comparable incomes.

2. UNDER-REGULATED WORKPLACES AND TOPSY-TURVY JUSTICE

CARICOM produced model legislation in relation to advance women’s rights in the Caribbean over twenty years ago. The domestic violence model law influenced the enactment of legislation in the region throughout the 1990s, including in Jamaica. Today every CARICOM country has such legislation, and a few like Trinidad and Tobago, Belize, the Bahamas and Jamaica now have second generation domestic violence laws. The model law on sexual offences has also been influential in law reform around the region—Trinidad and Tobago, Antigua and Barbuda, Dominica, Barbados, the Bahamas, St. Lucia, Guyana and Jamaica.

Despite the guidance, albeit now out of date, of CARICOM model legislation, we have had scarce progress towards sexual harassment laws. In the Commonwealth Caribbean, only Belize has stand-alone sexual harassment legislation.¹⁶ St. Lucia and Guyana provide protection against sexual harassment at work in their anti-discrimination legislation. Arguably so does Trinidad and Tobago.¹⁷ In these laws, sexual harassment is a form of sex discrimination. In the Bahamas and St Lucia, modest protection is offered against sexual harassment as a sexual offence.¹⁸ Barbados has been in discussions about sexual harassment legislation for over a decade and Jamaica a little less than that.

In the meantime, in this under-legislated terrain, Caribbean employers have responded to concerns about sexual harassment in a haphazard way. Too few employers seek to prevent sexual

¹⁴ S. Ryan, L. A. Barclay, *Sharks and sardines: Blacks in business in Trinidad and Tobago* (St. Augustine, Trinidad: Institute of Social and Economic Research, UWI) 125.

¹⁵ Jimmy Tindigarukayo, ‘Gender Differentials in Education and Labour Force in Jamaica’ (1996) 27 *Canadian Journal of Development Studies* 449.

¹⁶ Protection Against Sexual Harassment Act 1996 (Belize).

¹⁷ Anti-discrimination Act 2001 (BVI); Prevention of Discrimination Act 1997 (Guyana); Equality of Opportunity and Treatment in Employment and Occupation Act 2000 (St Lucia).

¹⁸ Bahamas Sexual Offences and Domestic Violence Act 1991 (Bahamas); Criminal Code 2004 (St. Lucia).

harassment through a policy that is clear and well publicised and allows victims to have their grievances addressed. Some handle allegations of sexual harassment poorly, ignore them or fail to adopt the correct procedures for discipline. Many victims of sexual harassment find their interests severely undermined by employees who fail to protect them through a clear policy and a commitment to gender equality, but then turn around to use their allegations to catch the proverbial Quaku's shirt, having been unable to catch Quaku himself. Employers who 'over-respond', use sexual harassment as the new buzzword without addressing its underlying concern with gender equality, and fail to recognise the due process rights of those accused of sexual harassment, can do as much injury to victims as those who do nothing in the face of such allegations.

In this environment, the earliest cases to reach the courts were brought by employees dismissed for sexual harassment, not victims of sexual harassment. Courts struggled to determine whose interests were preeminent. Since sexual harassment usually involves fellow employees, unions find themselves representing both sides of the fence in the cases that come before the courts.

Bico v Jones

Bico Ltd v Jones,¹⁹ an appeal from the magistrate's court in Barbados, is one of the first known cases. Carlyle Jones was summarily dismissed from Bico Ltd, an ice cream company in Barbados, for sexual harassment. The company had hired three women on its production floor to pack ice cream cones as an experiment to introduce women to the production area of the factory. There were no facilities for the women to change into their work overalls. The manager intended to construct such facilities for the women if the experiment was a success, however, in the meantime, the women had to use the ladies room in the office section. The women did this for almost two weeks, but they lost valuable work time because the production area started work before the office section and the women had to wait for the office section to be opened. Importantly, their wages were calculated based on how many cones they packed.

When arrangements were made for them to change in a manager's office in the production area after he left his office in the mornings, their isolation as the only women in the production area justifiably increased their sense of vulnerability. They even developed a system of warning persons in the adjoining office when they needed privacy by knocking on the separating glass window, indicating they were about to change and then waiting for a while before changing.

Jones, a technician in charge of quality control, worked in the laboratory that was located next to that manager's office. He deliberately came into the office on a number of mornings while they were changing. He would talk to the women "about girls and sex and things like that".²⁰ He touched the leg of one of the women on one occasion and remarked to her that "he liked his women tough with nuff meat like that".²¹ When one of the women complained to Jones about his behaviour, he

¹⁹ (2 August 1996) BB 1996 CA 27.

²⁰ *Ibid.* at 2.

²¹ *Ibid.*

responded by telling her that “you have the most mouth in here and you have a small nooksie”,²² a reference to her vagina.

The women spoke to the production manager who made arrangements for the women to change elsewhere by having a key cut for the ladies room in the office section. The matter reached the attention of the managing director in a circuitous way. The harassment appears to have become known to a number of employees at the company. An attorney-at-law wrote a letter on Jones’ behalf to a fellow employee urging that the latter desist from accusing Jones of peeping on these women while they were changing. The employee who received the letter requested that it be brought to the attention of the managing director, who then asked the women, in the presence of Jones, to state their complaints. Jones was given an opportunity to respond and he was summarily dismissed thereafter.

The decision of the magistrate, that Jones’ behaviour was disrespectful and reprehensible and merited firm discipline, but did not warrant dismissal, was upheld by the Barbados Court of Appeal. The Court of Appeal ruled that the punishment was too harsh given over ten years of loyalty and service and his ‘unblemished record’. The term ‘sexual harassment’ appears only once in the *Bico* case, and this is at the end of the decision. There, the Barbados Court of Appeal said that sexual harassment should not be treated differently from other types of misconduct for the purposes of dismissal. Though no serious regard was given to the implications of sexual harassment in the workplace, acknowledging that it was a form of misconduct had some value.

What was left unresolved and unaddressed was the textbook gender hostility and intimidation shown towards these women entering a male dominated workforce and the failure of the employer to provide basic facilities for the women—a changing room—as they did for men, as well as the absence of a proper policy on sexual harassment that provided a mechanism for dealing with grievances and complaints. The employer’s ‘over-response’ to Jones’ deflected attention away from the structural inequality at the company.

3. AN EMERGING REGIONAL JURISPRUDENCE²³

A. Expanding common law understandings: A safe system of working

In the absence of an adequate legislative framework, some judges have turned to the common law to develop a response to sexual harassment. Around the same time the *Bico* case was decided, the Trinidad and Tobago Industrial Court decided in *Bank Employees Union v. Republic Bank Limited*²⁴ that sexual harassment by Deolal Mohess, an employee of the bank, was within the ‘corridor of dismissable misconduct’. Deolal Mohess was dismissed following an investigation of the allegations made by three women that he made unwelcome physical contact with them, touching their bottom,

²² *Ibid.* at 3.

²³ See generally, T Robinson, “Naming and Describing It: The First Steps towards the development of laws relating to Sexual Harassment in the Caribbean” (1999) *Carib L B* 50.

²⁴ (25 March 1996) TT 1996 IC 13.

hips and kissing them on the cheek. After the first allegations, a supervisor spoke to him. The employer wrote to him and asked him to respond to the various allegations. He admitted some of the behaviour but said his actions were innocent.

His Honour Mr. Cecil Bernard giving the opinion of the Industrial Court, described that 'sexual harassment' as 'an idea which has come into public consciousness',²⁵ even though the term is 'yet to define a precise "offence"'²⁶ The court said it was not relevant what his intentions were, simply that he acted voluntarily and his conduct was unwelcome. He added that an employer is required to take into account the degree of seriousness of the conduct and the relative positions of the parties in the organisation in determining the appropriate discipline. In this case, the court noted that the employer was a commercial bank who should demand such behaviour amongst its employees that would inspire the confidence of its customers.

His Honour Bernard articulated the problem with sexual harassment in terms of a common law duty on employers to provide a safe system of working.

"There is a common law obligation on an employer to provide for his employees a safe system of working. In the modern commercial office that obligation may well not be limited to the provision of a workplace and a system of working which protect the employees against physical harm. That obligation may well extend to the provision of a work environment which is free of the threat or application of sexual coercion by one employee towards another."²⁷

Even without a legislative framework, the Industrial Court established that employers had a duty to protect their employees from harm at work, and that this includes sexual harassment.

B. Duty to not damage the relationship of trust and confidence between employer and employee

It is now generally accepted that there is also an implied term which places on the employer an obligation not to "without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."²⁸ This further anchors the duty of the employer to address sexual harassment in his or her workplace, though no Caribbean judge has elaborated on this principle yet in relation to sexual harassment.

C. The extent of the employer's duty to take care of his or her employees

It has also been recognised that an employer has a duty to take care of his or her employees.²⁹ If an employer knows that acts being done by employees during their employment may cause physical or mental harm to a particular fellow employee and he or she does nothing to supervise or prevent such acts, when it is in his or her power to do so, it is arguable that such a breach of duty occurs. If the employer can foresee that such acts may happen and if they do, that physical or mental harm

²⁵ *Ibid.* at 12.

²⁶ *Ibid.*

²⁷ *B.E.U. v. Republic Bank* at 15.

²⁸ *Woods v. W M Car Services (Peterborough) Ltd* [1981] ICR 666 at 670.

²⁹ See generally T. Robinson, K. Clarke and N. Walker, "Sexual Harassment and the Law in Barbados" (CASH 2003).

may be caused to an individual, the employer may also be in breach. This arose in the case of a female police officer who claimed to have been raped and buggered by a fellow officer. She said she made complaints about it but no proper investigation took place and she was subject to a campaign of harassment and victimisation because she spoke about it. The English House of Lords ruled that she was entitled to bring an action for negligence against the Commissioner of Police.³⁰

D. The duty to ensure equality at work and just and effective remedies

The Trinidad and Tobago Industrial Court has advanced its own jurisprudence on sexual harassment with reference to the constitutional and internationally accepted principle of gender equality. *Banking, Insurance and General Workers Union V. ACCSYS Limited*³¹ may be one of the first Caribbean sexual harassment cases to involve the harassed person and not the harasser.

In this case, the employee was a receptionist. She said that she made complaints to her immediate supervisor at the accounting firm she worked at about several acts of sexual harassment by a male senior officer. Her supervisor promised to speak to the employee but what happened next was 'subtle work pressures' on her thereafter by the harasser and continued unwanted conduct. She was then called into a meeting with the harasser, her supervisor and the principal of the firm and dismissed for using obscene language, evidently a ruse for getting rid of her. When she advised the principal in the firm that she had made complaints against the harasser, he insisted that he could not allow her to make that allegation except in the presence of the harasser.

The Industrial Court took the view that having regard to the nature of the accusations she had made against the senior employee, the involvement of the said employee in her dismissal, and her junior status relative to the three men, her boss ought to have given her a hearing without fear of intimidation or duress or management's power. A dismissal in these circumstances was harsh and oppressive.

The Court described the sexual harassment allegations as being of a 'very serious and delicate nature and needed to be resolved expeditiously.'³² It also pointed out that the Industrial Relations Act was aimed at improving industrial relations and the court had a duty by virtue of the Act to ensure sexual harassment does not go 'unchecked and unabated' and to send a 'very strong message to employers and fellow workers.'³³ The Industrial Court acknowledged sexual harassment as implicating the fundamental right guaranteed against discrimination on the grounds of sex.³⁴ It also noted that ILO conventions address the prevention of and sanctions for sexual harassment in the workplace.³⁵ In these two decisions, the Trinidad and Tobago Industrial Court

³⁰ *Waters v Commissioner of Police* [2000] 4 All ER 934.

³¹ (10 March 2008) TT 2008 IC 37.

³² *ibid* 28.

³³ *ibid*.

³⁴ *ibid* 29.

³⁵ *ibid*.

has identified sexual harassment as a serious matter that compromises the right of an employee to a safe place of work and the right to gender equality at work.³⁶

We should expect more of the defensive cases in which victims of sexual harassment are marginal and the focus is on the alleged perpetrator and the appropriateness of the employer's response. But we should also see increasing numbers of cases in which victims assert their rights to safety and equality at work.

E. Harassment as a tort

Though not dealing with sexual harassment, the recognition that harassment amounts to a tort in Jamaican law will better anchor the claims of some in the absence of legislation. In *Needham v Senior*³⁷ Sykes J recognised the existence of a tort of harassment that would 'complete the circle of torts that deal with conduct directed at persons... [and] fill the gaps between assaults and the tort of intentional harm' [28]. It would be defined as "deliberate conduct directed at the claimant resulting in damage; the damage being anxiety and distress, short of physical harm or a recognised psychiatric illness.' [28]

4. WHY LEGISLATION?

In the United States, sexual harassment was not overtly legislated for initially. It developed as a subset of sex discrimination under Title VII which applies to all employers. Jamaica has no equivalent to Title VII or general antidiscrimination legislation. The Charter of Rights' peculiar new constitutional right in section 13(3)(i) 'to freedom from discrimination on the ground of being male or female' might bind natural and juristic persons (subsection 5), including private employers. Even if this is so, those who experience sexual harassment would be obliged to bring a constitutional claim and would only have access to more limited constitutional remedies, where more vibrant and specialised ones have developed in industrial relations law.

I argue that legislation can do the following:³⁸

I. Naming and defining sexual harassment.

Sexual harassment legislation will provide us with a definition of the prohibited conduct and give it a name with legal significance, immediately sending a signal that this is unacceptable conduct that we all have an interest in eradicating. Many of us remember when domestic violence was dismissed as 'cultural', 'man and woman business', even though most of the violations were already in theory crimes. The passage of legislation naming and defining domestic violence in law has played a key

³⁶ Compare with *Cadet v Deep Bay Development Co. Ltd* (21 December 1989) AG 1989 IC 12; *Titus v Sandals (Antigua) Limited* (4 February 2002) AG 2002 IC 1.

³⁷ JM 2006 SC 28 (24 March 2006).

³⁸ See T Robinson, "The value of sexual harassment legislation" *The Barbados Advocate* 23 October 2004, 15; T Robinson, "Why we need sexual harassment legislation in the Caribbean" *Starbroek* July 21, 2009.

role in altering the way we now understand and address domestic violence. Like the domestic violence law, the sexual harassment legislation will introduce crucial new remedies, and send a message about the seriousness of the violation. A definition also sets limits. It tells us what conduct is being regulated and by implication what is not. It provides guidance to men and women as to what is inappropriate conduct at work and, at the same time, it is a positive statement of our mutual commitment to work environments in which employees enjoy camaraderie, but are safe and productive. Some hard cases will arise about whether certain conduct amounts to sexual harassment. This is not sufficient reason not to enact legislation because our legal system has considerable experience in resolving difficult cases.

II. Prevention

Sexual harassment legislation provides a mechanism for **preventing** harassment. Legislation will require the employer to keep the workplace free from harassment, to clearly express a policy against it in the workplace and to bring the policy to the attention of all workers. The existence of a sexual harassment policy that is well known to workers, especially one that is the product of consultation with workers and accompanied by training, can play a crucial role in deterring sexual harassment in the workplace.

III. Early response

Second, even where sexual harassment does occur, legislation can contribute to an **early response**. The sexual harassment policy mandated by the legislation will articulate the employer's legal obligation to take immediate and appropriate action to address the sexual harassment and it will outline a complaints procedure. Supervisors will know their responsibilities in responding to the complaints and, in ideal circumstances, employees will develop confidence in the complaints procedure and hopefully use it at the early stages of harassing conduct, before it escalates.

IV. Fair treatment

Third, by insisting on a policy, sexual harassment legislation strengthens the internal resolution of sexual harassment cases within the workplace and contributes to the **fair treatment** of the harassed and the harassers in the workplace. Employees will know the seriousness of the prohibited behaviour and its disciplinary consequences and will have a greater sense of being treated fairly if the actions of the employer are consistent with a justifiable and well articulated policy.

V. Just and effective remedies

Ultimately sexual harassment legislation is critical to ending impunity by providing just and effective remedies for the conduct.

5. WHAT SORT OF LEGISLATIVE RESPONSE SHOULD BE CONSIDERED?

Even if we agree we need legislation, it is not obvious what form that law should take. Different approaches have been taken in the Caribbean. St. Lucia and Guyana tackle sexual harassment in

antidiscrimination legislation, the Bahamas and St Lucia make sexual harassment a crime and Belize alone has stand alone legislation.

I. Included in antidiscrimination legislation

The Prevention of Discrimination Act 1997 of Guyana defines sexual harassment as “unwanted conduct of a sexual nature in the workplace or in connection with the performance of work which is threatened or imposed as a condition of employment on the employee or which creates a hostile working environment for the employee.’ The Act provides in section 8 that if an act of sexual harassment is committed by an employer, managerial employee or co-worker, it will constitute unlawful discrimination based on sex. Unlawful discrimination is described as any distinction, exclusion or preference, the intent or effect of which is to nullify or impair equality of opportunity or treatment in employment or occupation, which is based on sex. Curiously, the Act makes discrimination an offence that gives rise to a fine and other possible relief like damages or an order for reinstatement.

General antidiscrimination legislation has been the most attractive solution for the few Caribbean countries that have dealt with sexual harassment through legislation. I think it is for this reason: It would be perverse for us to conceive of sexual harassment as a form of sex discrimination and enact legislation to that effect in a context where there is no antidiscrimination legislation! To the extent we see sexual harassment as a problem of gender inequality, it becomes harder to explain why ordinary legislation does not address this broader concern of inequality. Furthermore, it is difficult to explain why the law should address gender discrimination and not other forms like race, ethnicity and disability, to name a few.

II. A sexual offence

Both the Bahamas and St. Lucia make sexual harassment a crime, a sexual offence in fact. Section 139 of the St. Lucia Criminal Code deals with ‘soliciting sexual favours in the workplace’. The offence is committed by a supervisor or an employer who makes it reasonably appear to the employee that the prospects or working conditions of the employee are dependent upon the acceptance or tolerance by the employee of sexual advances or persistent sexual suggestions from the employer or supervisor. It carries a maximum term of imprisonment of a year. Like St. Lucia, the Bahamas proscribed quid pro quo sexual harassment in its 1992 Sexual Offences and Domestic Violence Act. It required the permission of the Attorney General to prosecute the crime.

Some forms of sexual harassment and violation are crimes and should be prosecuted as such, but the route of criminalising sexual harassment is a non starter for generally addressing sexual harassment in employment. What we need is legislation that speaks clearly to employers and advises them of their duties and provides recourse for the victims. The criminal law will not achieve these goals.

III. Stand-alone legislation covering more than employment

Belize in 1996 was the first Caribbean country to enact comprehensive sexual harassment legislation and it covers employment, education and accommodation. The Belize also includes

places of “learning and training, prisons, places for custody of minors and the elderly, and medical and mental institutions”.³⁹ It imposes duties on employers and persons in charge of institutions to keep the places they control free from sexual harassment.⁴⁰

It is difficult to draft coherent stand alone legislation that covers a range of fields because the employment context is *sui generis* and has developed specialized duties, liabilities and remedies. Some requirements, remedies and methods of dispute resolution will be more appropriate in the employment context than the accommodation one, for example.

A. Defining the Harm?

The old paradigmatic case of sexual harassment was *quid pro quo*: a senior male employer demanding a sexual favour ‘or else some disadvantage will befall you, or if you wish to secure some benefit. That was expanded to include instances where the effect of the harassment was to create a *hostile work environment* for the worker and this often involved a pattern of behaviour by fellow employees.

Recognizing what sexual harassment includes does not tell us what it is. Below I consider the frameworks of violence against women, gender discrimination and dignity to understand the harm. There is no right answer to which one or ones we should prefer. Our answers should be influenced by questions such as: How does this society think of and characterise injustice in general and this type of injustice? Would they use language like inequality, indignity or disrespect? What concepts does existing law use to legislate against injustice, especially in the workplace?

Violence against women

In international human rights law, sexual harassment has been conceptualised as violence against women and discrimination against women. The Inter-American Convention on Violence Against Women, referred to as the Belem do Para Convention, defines violence against women as including sexual harassment in the workplace. Entered into force in 1995, Jamaica ratified this Convention in 2005. Ratifying states commit to eradicating sexual harassment and to enact appropriate legislation to address it. A central plank of the Inter-American human rights system is that the ratifying state must ensure victims have access to ‘just and effective’ remedies. The association between harassment and violence is not a new one to Jamaica. The Domestic Violence Act 1995 assumed that harassment is a form of domestic violence.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which Jamaica has ratified, does not explicitly mention sexual harassment as a form of discrimination against women, but the Committee on the Elimination of All Forms of Discrimination Against Women, the monitoring agency for the Convention, in its recommendations at the 11th session in 1993, General Recommendation 19, said that sexual harassment was a form of gender-based

³⁹ Protection Against Sexual Harassment Act, s.2(1).

⁴⁰ Although, while an employer must take appropriate action to correct sexually inappropriate conduct at his workplace, with the possible penalty of an employee bringing a complaint against him if he does not (see section 4 of the Act); a complaint cannot be lodged against a person in charge of an institution, who is only obliged to express a clear policy against sexual harassment (see section 8(1) of the Act).

violence and that every state should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence including penal sanctions, civil remedies and compensatory provisions to protect women against sexual harassment in the workplace.

These Conventions make a powerful link between sexual harassment and women's human rights and between violence against women and gender inequality. Sexual harassment and the absence of an appropriate legal framework for recourse implicates, among others, the right to have her physical, mental and moral integrity respected, the right to personal liberty and security, the right to equal protection of the law and the right to simple and prompt recourse to a competent court for protect against acts that violate her rights.⁴¹

The 'harassment=violence' approach has some limitations. It does not entirely capture the *who* and *how* of sexual harassment. To the extent it speaks only to women as victims it is underinclusive since some men experience gender harassment as well. 'Violence' too has its constraints. It is a powerful label for 'an unjust or unwarranted exertion of force or power'. Harassment expands our understanding of violence but it has distinct meanings in domestic law that point us to criminal law, not civil remedies, as the first stop for recourse, which would be a quite blunt tool in guiding employment law reform.

Gender discrimination

If sexual harassment is a form of sex discrimination and conduct that is on the basis of sex, the question is why. Columbia Law School professor, Katharine Franke identifies problems with the usual ways of making this assumption: '(1) it is conduct that would not have been undertaken but for the plaintiff's sex; (2) ... it is sexual in nature; and (3) it is conduct that sexually subordinates women to men.'⁴² I take each of the three in turn and Franke's critique:

The 'but for sex' argument and its focus on sexual desire

The first traditional argument can be simplified to mean the woman would not have been harassed had she been a man, or were 'members of one sex ... exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'⁴³ Franke shows how this collapses into an argument that you can only sexually harass members of the class of persons you desire.

Sexualised conduct or just gender based?

The problem with the second approach that she and others note is the focus on sexual conduct. Sexism and sex should not be conflated. There is gender based harassment that is not an expression of sexual desire or even sexual.⁴⁴ Some sexual behaviour, such as heterosexual man harassing a man thought to be gay is designed to humiliate and intimidate not show desire.

⁴¹ Belem do Para Convention.

⁴² Katherine Franke, 'What's Wrong with Sexual Harassment' (1996-1997)49 Stan. L. Rev. 691 .

⁴³ *Harris v Forklift Systems Inc* 510 US 17, 25.

⁴⁴ See Vicki Schultz, 'Reconceptualizing Sexual Harassment' (1998) 107 Yale Law Journal 1683.

In the case of the Guyanese security guards Alissa Trotz studied, non-sexualised hostility and abuse were part of the gender-based harassment they experienced. These women experienced offensive comments about their sexuality but also taunts about their work performance. The women said that they were not being fully integrated in the industry, that they were being pressured to perform twice as well as men to justify their positions. Some cited instances of men refusing to have women work on a site with them. Many were reluctant to be considered for promotions out of a fear that subordinates would not be willing to take orders from them. Most men said that the women were performing a job that did not come naturally to them.⁴⁵ After taking up security jobs several women interviewed by Trotz said they experienced intensified physical and emotional abuse by their partners.

The subordination of women argument and the problem of men as victims

And the final category that focused on men's subordination of women ignores gender based harassment which women are not the target of and men the perpetrators of. I have always liked Franke's reformulation of sexual harassment as a 'regulatory practice that feminizes women and masculinizes men, renders women sexual objects and men sexual subjects.'⁴⁶ This is a more persuasive way of explaining its connection to sex discrimination.

Injury to Dignity

While the Americans think of sexual harassment as a form of discrimination on the basis of sex, Europeans have preferred to explain the harm of sexual harassment with reference to human dignity or a right to respect.⁴⁷ This turns attention away from structural inequality and pays closer attention to the individuality of the person. Human dignity is a core principle of Jamaica's Charter of Rights and notions of respect have always been part of the vernacular of justice in the Caribbean.

The CASH definition

I was a founding member of the Coalition Against All Forms of Sexual Harassment in Barbados (CASH) formed in 2003 and we produced a draft sexual harassment statute that has influenced the ongoing development of legislation in Barbados. We saw sexual harassment as a form of gender based hostility that can be expressed in sexual terms but need not be sexual. We adopted both ideas of discrimination and dignity in our framework. Our preamble reads:

AND WHEREAS because sexual harassment is a product of gender-based hostility which perpetuates and enforces stereotypes of women and men in the workplace, protecting against sexual harassment involves challenging social norms that are based on these stereotypes or the idea of the inferiority or superiority of either sex insofar as these norms violate the dignity of the human person, bearing in mind however that interaction in the workplace that is sexual or related to sex is sometimes healthy and desirable,

AND WHEREAS as a form of gender based hostility sexual harassment is often, but not always, sexual, and it is often, but not always, by a man against a woman,

⁴⁵ See Trotz, at 45-47.

⁴⁶ Franke 691.

⁴⁷ Susanne Baer, 'Dignity or Equality? Responses to Workplace Harassment in European, German and US Law', in C. MacKinnon, R Siegel (eds.), *Directions in Sexual Harassment Law* (New Haven, Yale University Press 2004) 582.

The definition in clause 5 focuses on unwelcome conduct that is sexual in nature or based on sex and affects the human dignity of the recipient. Some conduct is presumptively an affront to dignity.

5 (1) Sexual harassment means any unwelcome physical, verbal or non-verbal conduct, whether of a sexual nature or based on sex, which affects the human dignity of the recipient. It includes a comment, gesture, contact or display of a graphic picture.

(2) Conduct is unwelcome if—

- (a) it is persisted in once it has been made clear that it is regarded by the recipient as offensive; or
- (b) it is a serious affront to the dignity of the recipient, whether or not it has occurred more than once.

(3) Without limiting the generality of paragraph (2)(b), if a person's rejection of or submission to the 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 or to employment, continued employment, promotion, salary or any other employment decisions, that conduct is a serious affront to the dignity of the person.

B. Who is responsible and for what?

Sexual harassment legislation will address the duties of employers and employees. More difficult questions arise in relation to third parties.

Employers' duties

Employers should ensure that there is no impunity for sexual harassment at work and a policy is essential for this objective. The employers' duties should include:

- a) To refrain from sexual blackmail
- b) To have a *clear written policy* against sexual harassment
- c) To present the policy to each employee at the beginning of employment
- d) To take appropriate disciplinary action if employer knows or is informed of sexual harassment

A written policy may not be practicable for small employers, though the vulnerability to sexual harassment may be great in these contexts, and there will be an even greater need for just and effective remedies beyond the employer.

Employees' duties

There should be a duty on the employee to keep the workplace free from sexual harassment. Most sexual harassment will be between co-workers. The tougher question is what duty does the employee owe to those served by his or her employer.

Harassment by a third party

Many work environments include clients, associates and independent contractors of the employer. Should an employer bear a duty to make every reasonable effort to ensure that no third party associate of the employer engages in sexual harassment against an employee? There are some familiar instances where this arises in the Caribbean: Should an employer of a domestic worker be

liable for not making every reasonable effort to ensure that a relative, or other person associated with her employer, does not sexually harass her employee? When should an employer be liable for the sexual harassment of construction workers or subcontracted security guards who harass their employees?

Harassment of a third party

The problem of third parties also arises in the context of services provided in an employment context. Should there be a statutory duty on an employer to make every reasonable effort to ensure no client is subjected to sexual harassment by an employee? This would mean that if the employer's business includes serving the public in some way, that employer should make it clear in its policy that employees are expected to refrain from sexual harassment both in respect of fellow employees and others who they deal with in the line of employment. The question is can we ethically introduce legislation that demands that a tertiary institution, for example, implement a sexual harassment policy that prohibits sexual harassment of a member of staff but that does not also require those employees to refrain from harassing the main clients of that workplace, the students.

At yet another public forum on sexual harassment this year,⁴⁸ to advance the agenda for legislation, a member of CASH put this question in stark terms. It was during the wide debates about two incidents in which it was alleged that Jamaican women had been sexually violated by public officers. This member of CASH asked, how can we discuss sexual harassment as a problem between workers and ignore what workers do in the course of their work to vulnerable third parties. In other words, the police officers who alleged raped a woman in custody should have as much a duty to her as to a fellow police officer.

The workplace invariably includes as part of its normal activities third parties. I don't think they should be excluded from the ambit of legislation of this kind. Undoubtedly, establishing the liability of an employer in such circumstances might be more difficult than in the typical cases and finding appropriate remedies becomes a more challenging undertaking, but it should be within the ambit of legislation.

C. Where is work?

A fundamental question that has already been alluded to is *where is work?* 'Work' is increasingly not a single place. With ever increasing methods of communication, the workplace has become less physically bounded. Many employees are given smart phones from their employers and are expected to respond to and address work matters wherever they happen to me and outside traditional work hours. Legislation must cover sexual harassment in this wider 'work' environment by focussing on relationships and conduct not venues.

Another challenge is that many of the people we 'work' with we have no formal employment relationship to. This is especially true of the legal profession. Sexual harassment occurs in this

⁴⁸ See <http://www.nationnews.com/index.php?print/index/13999>.

context and can do serious harm. How does the profession build systems of accountability and ensure equality within these loose working arrangements and work with clients?

6. WHO SHOULD DECIDE? DISPUTE RESOLUTION

In thinking about how sexual harassment cases should be resolved, you can consider, Who do people trust most to administer justice? Have industrial tribunals functioned well? The Belize legislation provides for complaints to be brought to a court of summary jurisdiction while other jurisdictions set up new tribunals or send these cases to already established industrial tribunals. Serious consideration must be given to how if at all conciliation would be used in sexual harassment cases given the imbalance in power relations that is often strongly present. In Barbados CASH has objected strongly to the central role of the Chief Labour Officer in effecting resolution of sexual harassment cases on the ground that this public servant is already heavily burdened and untrained in this area. It has not objected to the use of an Employment Rights Tribunal for sexual harassment cases but insists that this should be to the exclusion of exercising your action before the ordinary courts.

7. CONCLUSION

Sexual harassment is an important question for lawyers not only because the legal profession will guide the development of legislation and the common law in this area but because the integrity of the legal profession depends on the extent to which it regulates itself to ensure equality within the profession and in serving others. The American Bar Association has said:

The legal profession cannot expect to maintain public respect and credibility if it cannot ensure compliance with legal standards and equal opportunity in its own workplaces. Lawyers who engage in harassment impose costs upon their clients as well. Moral fitness is a condition precedent to becoming a lawyer and a requirement for the able advocate and attorney. A client who cannot rely upon his or her attorney's character cannot fully trust that attorney's expertise or judgment either. All lawyers thus have a stake in promoting more effective responses to sex-based harassment.⁴⁹

⁴⁹ See <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=4920039>.