



To: HE Mr. Mohammad Ashraf Ghani, President of Islamic Republic of Afghanistan
Office of the President, Kabul - Afghanistan
Date: 19, February, 2017

PETITION NOT TO RATIFY THE ANTI-SEXUAL HARASSMENT LAW

DATED 19 AKRAB 1395 / 9 NOVEMBER 2016

PURSUANT TO THE AFGHANISTAN CONSTITUTION

A. THE PETITION

1. On behalf of the Afghanistan Women's Network, Medica Afghanistan submits this Petition to Your Excellency's Office to bring to your urgent attention, the Anti-Sexual Harassment Law ("the Petition").
2. The law which comprise 3 Chapters and 29 Articles, was approved by a Parliamentary majority and passed by the Wolesi Jirga on 19 Akrab 1395 (9 November 2016), pursuant to Articles 24 and 54 of the Constitution (the "Law"). We were informed that the law has been submitted to Your Excellency's Office for formal assent, pursuant to Article 64(16) of the Afghanistan Constitution.
3. We humbly petition Your Excellency's Office not to ratify the law on the basis that the law is incomplete, replete with errors and largely unenforceable. Further, it is likely to lead to mishandling of complaints and cause harm to survivors who are depending on the law for redress and justice.
4. This Petition concerns a matter of constitutional importance. The freedom to live, work and move without being sexual harassed is a constitutional right under the Afghanistan Constitution. It is a matter of:
 - (a) Preserving human dignity and protecting human rights (Article 6);
 - (b) Observing international human rights treaties (Article 7);
 - (c) Upholding equality and non-discrimination between men and women (Article 22);
 - (d) Upholding the right to liberty and dignity (Article 24);
 - (e) Upholding the right of work (Article 48);
 - (f) Upholding the right of education for women (Article 44);

- (g) Creating a healthy administration, realizing reforms in the administrative system and performing duties with complete neutrality (Article 50);
 - (h) Compensating individuals for harms caused by the State without due cause (Article 51).
5. Women and children in Afghanistan are sexually harassed daily, causing them to fear their surroundings, suffer mental trauma, resign from their jobs and drop out of school and social activity. To combat sexual harassment, it is imperative that the law is (1) precise, (2) complete, (3) comprehensive, (4) enforceable, and, (5) that proper mechanisms, procedures and remedies are created to meet their needs.
6. It is on this basis that we submit this Petition for reasons, explained as follows:

B. MATERIAL TERMS IN THE LAW HAVE NOT BEEN DEFINED

1. We refer to Article 3 (Definitions) of the law which defines 6 terms namely: (1) harassment, (2) unlawful desire, (3) physical contact, (4) verbal harassment, (5) non-verbal harassment and (6) public spaces.
2. The definitions section of a law is foundational to the interpretation of the law. However, some of the definitions in Article 3 overlap. One term, namely “unlawful desire” is defined but it is not used in the law, making its definition unnecessary. Other material terms which affect the meaning and application of the law are absent. Of concern, the crime of harassment is defined differently in Articles 3 and 24 respectively. These issues raise a concern that the scope of the law has not been properly thought through.
3. We submit that material terms in the law must be precisely defined and scoped to aid the interpretation of the law. Further, the acts which constitute the crime of sexual harassment must be precisely stated so that it is discernible when an act constitutes a crime under the law.
4. To give another example, we refer to Article 7 which states:

“[A]administrations shall have the obligation to create Women and Children Anti-Harassment Committees in their organizational structures”.

5. The term “**administration**” is a material term but it is not defined in Article 3, raising two questions:
 - (a) Does “**administration**” refer to all 25 Ministries of the Afghanistan Government or the 8 mentioned in Article 5 (Members of the High Commission for the Prevention of Harassment) and Articles 9 to 15 (Duties of Ministries) of the law?
 - (b) And does “**administration**” include the private and informal sectors such as corporations, domestic homes, transportation, service providers, educational institutions and sports/recreational institutions and complexes? This question is valid as Article 2 (Objectives) makes reference to the prevention of sexual harassment in

work, education and health sectors, without qualifying the sectors to government sectors only.

6. If it is presumed that “**administrations**” refer to all 25 Ministries, this must be clearly defined in Article 3. If not, the omission of the remaining Ministries (in Articles 5 and 9 to 15) can be interpreted to mean that the said Ministries are exempted from basic prevention duties under the law - which is unconstitutional.
7. The above example demonstrates that when material terms are not defined, it leaves the law exposed to multiple interpretations. The law must make it clear for stakeholders to know what their obligations are under the law. The law must define and set out the kinds of institutions, public and private, formal and informal, which are responsible and/or liable under the law.

C. THE LAW FAILS TO VEST EXECUTIVE POWERS IN THE ANTI-SEXUAL HARASSMENT COMMITTEES

1. We refer to Article 8 of the law which sets out the duties and authorities of the Women and Children Anti-Harassment Committees (“Committees”).

Women and Children Anti-Harassment Committee shall have the following duties and authorities:

- 1. Receive complaints regarding harassment of women in the relevant administration;*
 - 2. Review received complaints;*
 - 3. Inform, in writing, the defendant of the complaint within a maximum of three days;*
 - 4. Refer complaints requiring prosecution to the relevant prosecution office after approval of the supervisor;*
 - 5. Support the complainant in appointing a legal aid;*
 - 6. Follow up the complaints referred to the justice institutions to ensure timely adjudication of them;*
 - 7. Present quarterly reports to the Ministry of Women’s Affairs.*
2. Presently, the Committees are given duties but without the powers to carry out these duties. To properly review a complaint, however, the Committees must be vested with executive powers to:
 - (1) Compel attendance of a person and examine him/her;
 - (2) Discover and inspect documents and devices; and
 - (3) Receive and record evidence.

Without executive powers, the Committees’ hands are tied.

3. Of note, these powers must be vested in the Committees by law, i.e. the Committees cannot simply assume these powers (even pursuant to a regulation). The reason for this is that freedom and confidentiality of personal correspondences and communications are

constitutionally protected under Article 37 of the Constitution. As such, unless authorized by law, the Committees are not permitted to discover and inspect personal documents and devices. Similarly, individual liberty, freedom from self-incrimination and forced confession are constitutionally protected under Articles 24 and 29 of the Constitution, respectively. As such, unless authorized by law, the Committees are not permitted to compel the attendance of a person for examination and receive and record his/her evidence.

D. THE LAW FAILS TO VEST ADJUDICATORY POWERS IN THE ANTI-SEXUAL HARASSMENT COMMITTEES

1. Similarly, the Committees must be vested with limited adjudicatory powers. Presently under the law, the outcomes of a review are:

(1) **“Referral to authorities”**;

(2) **“Support for the complainant to obtain legal aid”**; and

(3) **“Following up with judicial authorities”**.

2. A Committee is a statutory-body. It should have an extensive mandate. Its work cannot merely duplicate the work of an NGO. Instead, its existence must add value to existing mechanisms. It must be designed to enable survivors to obtain redress outside of the court process.

3. The outcomes of a review must go beyond **“referrals”**, **“support”** and **“follow ups”**. The Committees must be vested with limited adjudicatory powers to give orders such as:

(1) Stop Orders

(2) Expulsion Orders

(3) Protection Orders

(4) Compensation Orders

to *really* help survivors and enable their return back to a safe environment without fear of retribution or re-offence.

4. The power to make such orders will be this law’s most important contribution to women and children who are at risk of sexual harassment. Indeed, in other countries, Committees serve quasi-judicial roles and exercise quasi-judicial powers to ensure that justice is convenient and expeditious.

E. THE LAW FAILS TO SET OUT A PROCEDURE FOR REVIEWING COMPLAINTS OF SEXUAL HARASSMENT

1. Lastly, we submit our objections to Chapter 3 of the law which purportedly sets out a procedure for the submission and review of complaints by the Committees.

2. Like other chapters of the law, Chapter 3 is incomplete and has several issues. Of note, we are concerned that there is no procedure for receiving, reviewing and adjudicating complaints. Article 18 states that “*complaints shall be addressed in accordance with the provisions of this law*”. However, there are no provisions in the law for *how* complaints are to be addressed, with the exception that they are to be addressed “*as soon as possible*” (Articles 20 and 21).
3. Of further concern, only women and children “**harassed in an administration**” can file a complaint with the Committees (Article 17).
4. We submit that *all* women and children should have the right to submit a complaint and be heard by a Committee, irrespective of the location of the harassment. The law must *equally* apply to women and children across all sectors - public and private, formal and informal and in the fields of education, health, sports, justice, work, transport and recreation, where sexual harassment is widespread and systemic.

F. CONCLUSION

1. The objective of a sexual harassment law is to criminalize all forms of sexual harassment against women and children and enact legal duties on State and non-state actors to prevent sexual harassment and provide redress.
2. In this Petition, we have raised some preliminary issues in the law, namely:
 - (1) **Material terms** must be **precisely defined** to aid the interpretation of the law;
 - (2) The Committees must be **vested with executive and adjudicatory powers** to carry out its duties;
 - (3) The law must set out a **procedure** for reviewing and adjudicating complaints;
 - (4) **All women and children** must have **equal access** to the Committees and have their complaints reviewed; and
 - (5) The law must hold **all institutions**, public and private, formal and informal **accountable** to survivors.
3. These issues are not exhaustive of all the issues in the law but they indicate that the objective, scope and application of the law have not been properly considered and necessitates further review.
4. We trust that we have presented a compelling case for our Petition to be heard and considered by Your Excellency’s Office.
5. As this law is a matter of constitutional importance, we urgently request Your Excellency’s Office not to ratify this law.

6. We remain guided by Your Excellency's decision.

Best regards | په درنښت | با احترام



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Women can make a change for women and society!