

SEXUAL HARASSMENT AWARENESS IN THE WORKPLACE



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Code of Practice For The Prevention And Eradication On Sexual Harassment In The Workplace

Malaysia has no specific legislation on sexual harassment. In September 1999 the Ministry of Human Resources issued a Code of Practice For The Prevention And Eradication On Sexual Harassment In The Workplace. The Industrial Court takes guidance from this Code.

ARTICLES 4 & 5- CODE

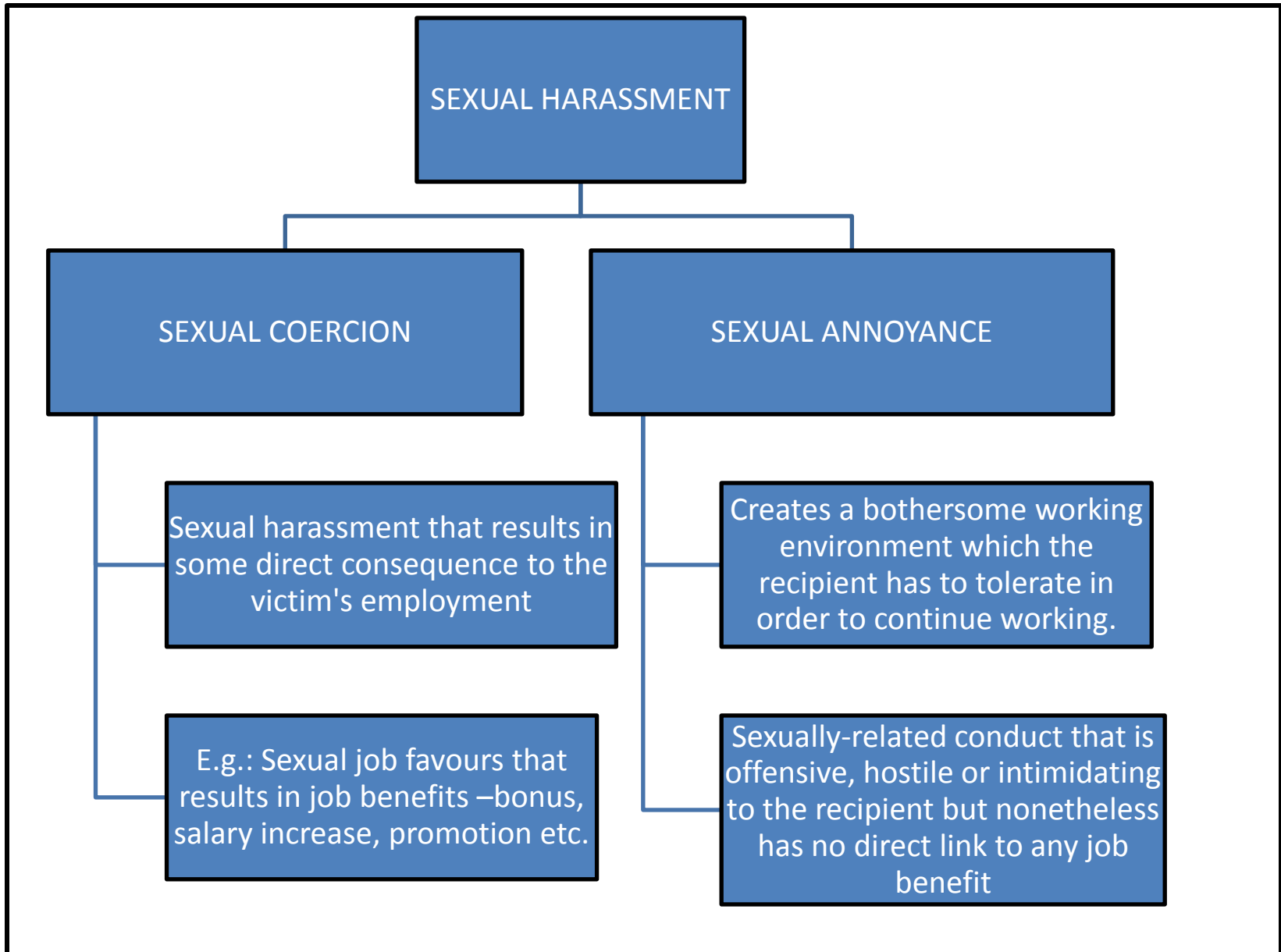
SEXUAL HARASSMENT means:

Any unwanted conduct of *a sexual nature* having the effect of verbal, non-verbal, visual, psychological or physical harassment.

- i) that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/his employment.
- ii) that might, on reasonable grounds, be perceived by the recipient as an offence or humiliation or a threat to her/his well-being, but has no direct link to her/his employment.

Forms of Sexual Harassment

- Verbal harassment (e.g.: comments, jokes);
- Non-verbal/gestural harassment (e.g.: hand signal, sign language);
- Visual harassment (e.g.: showing pornographic materials, drawing sex-based sketches);
- Psychological harassment (e.g. : repeated unwanted social invitations);
- Physical harassment (e.g. : inappropriate patting, pinching).



- Sexual harassment of an employee by an employer would constitute repudiatory conduct on the part of the employer such as would entitle the employee to bring the contract of employment to an end.
- Where the sexual harassment is by a co-employee the employer is contractually obliged to act appropriately upon receiving complaints and failure to respond to *bona fide* complaints of sexual harassment is a breach of the said implied term entitling the aggrieved employee to walk out of her job and claim constructive dismissal.

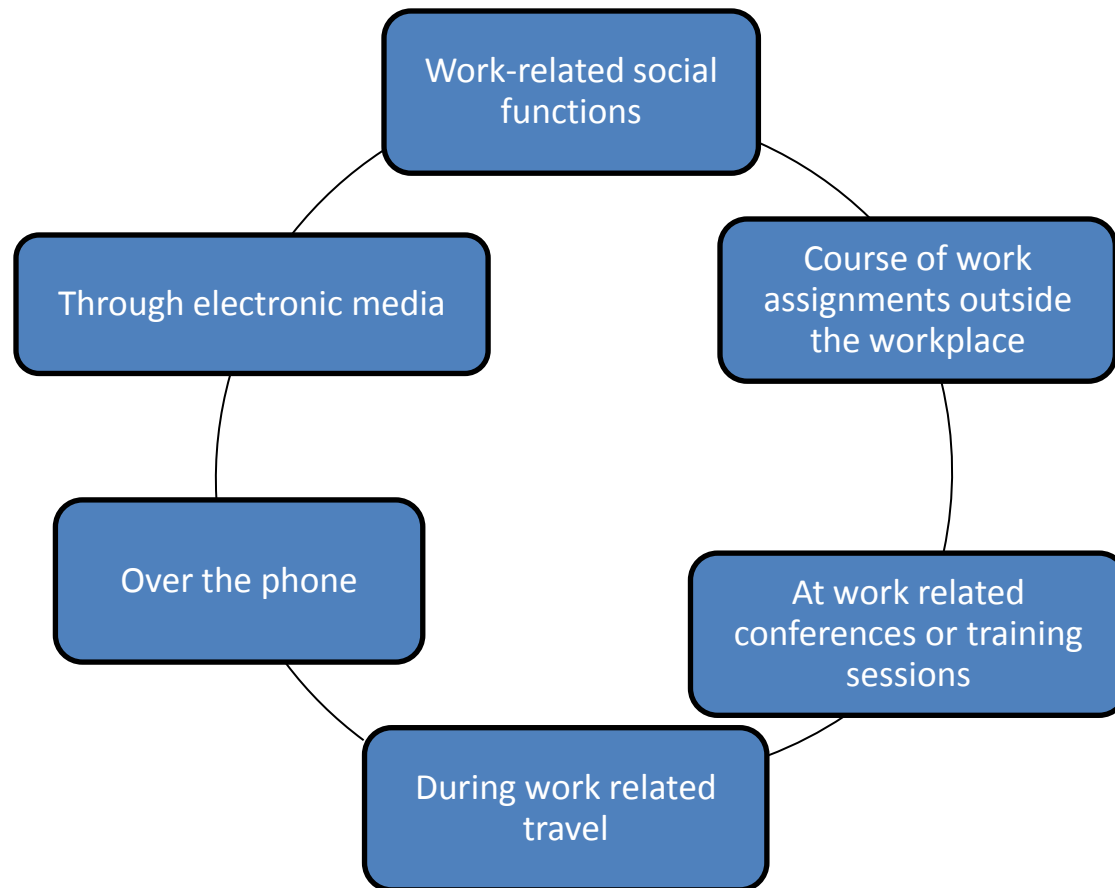
KNOWING YOUR RIGHTS, OBLIGATIONS AND LIABILITIES AS AN EMPLOYEE AND AN EMPLOYER

Certain terms are implied into employment contracts, one such being an obligation of the employer to maintain a relationship of trust between employer and employee. The English Employment Appeal Tribunal (E.A.T) has treated a failure to deal with a female employee's complaint of alleged sexual harassment as a breach of this type of implied term - ***Bracebridge Engineering Ltd v. Darby [1990] I.R.L.R. 3.***

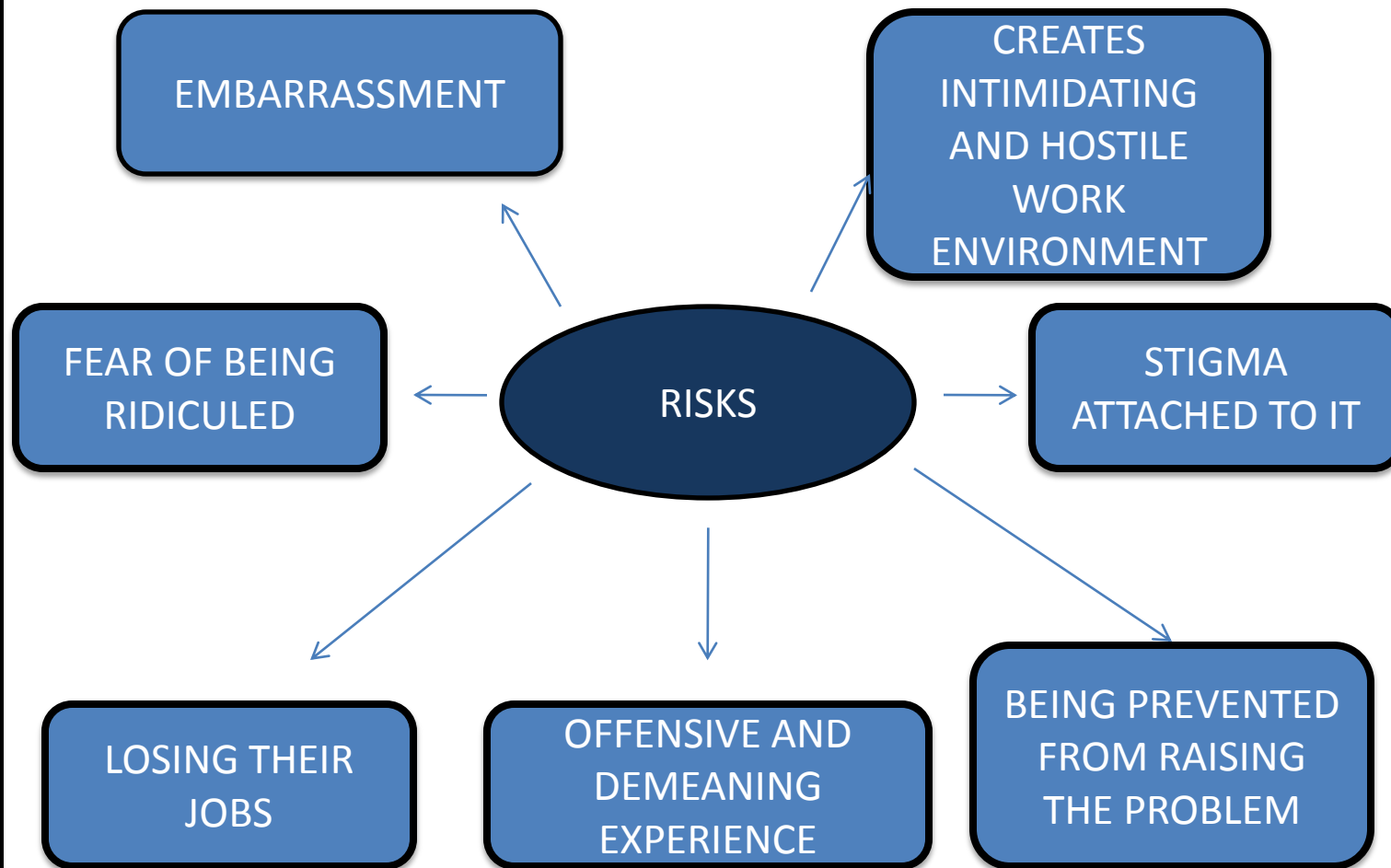
EMPLOYEE'S RIGHTS

A safe and healthy working environment where individual employees, irrespective of status or position, are treated with dignity and free from any form of harassment, humiliation and intimidation of a sexual nature.

SITUATIONS WHEN EMPLOYMENT RELATED SEXUAL HARASSMENT MAY OCCUR:-



RISK OF EXPOSURE AND LIABILITIES



CONTRACTUAL RIGHTS WHEN TERMINATED **BY AN EMPLOYER**

Section 20
Complaint at
the Industrial
Relations
Department –
Dismissal
Without Just
Cause & Excuse



Attend
Conciliation
Meetings to
either settle
the matter
amicably or if
settlement
fails, Minister
decides
whether fit and
proper case to
be referred to
the Industrial
Court.



If matter
referred, trial at
the Industrial
Court.
Employee has
to adduce
sufficient
evidence to
corroborate
allegation of
sexual
harassment
that resulted in
termination.

EMPLOYER'S DUTIES

- Duty of mutual trust and respect
- Duty to provide safe place of work
- Duty to enquire into allegations of misconduct

Melewar Corporation Bhd. v. Abu Osman [1994] 2 ILR 807

Employer owes a contractual obligation to his employees, female or otherwise to ensure that he provides a safe and conducive working environment in which they can function.

Employer would be in breach of a fundamental and essential term of the contracts of employment existing between the employer and his employees if he failed to take steps to put a stop to acts of sexual harassment which had been duly brought to his attention.

Employees who had been sexually harassed are entitled to call in aid the doctrine of constructive dismissal and to seek their remedies in law.

Breach would be basis for employees who have been sexually harassed to down tools and leave their jobs. They would then have had the right to deem that the employer had, by his repudiatory breach, constructively dismissed them from their employment.

Melewar Corporation Bhd. v. Abu Osman
[1994] 2 ILR 807

“Finally and before making its ruling the Court would add that an employer who had received credible information or complaints that one of its employees is engaged in sexual harassment of another of his employees has the duty to inquire into the allegations of misconduct. If, pursuant to a due inquiry, the allegations of sexual harassment are found to have been proven, the employer has the duty to act firmly against the errant employee.”

IN-HOUSE MECHANISM TO COMBAT SEXUAL MECHANISM IN THE WORKPLACE

- Policy statement prohibiting sexual harassment in the organisation;
- Clear definition of sexual harassment;
- Complaint'/grievance procedure;
- Disciplinary rules/penalties against the harasser and against those who make false accusation;
- Protective and remedial measures for victim;
- Promotional and educational programmes to explain the Company's policy on sexual harassment ;
- Raise awareness of sexual harassment and its adverse consequences among the Company's employees, supervisors and managers.

DISCIPLINARY RULES & PENALTIES

- To ensure that a policy and mechanism to prevent sexual harassment is effective, offenders must be disciplined;
- disciplinary rules should set out the penalties to which the harasser will be liable if the offence is committed. The nature and type of penalty should depend upon the severity of the offence;
- since sexual harassment is a form of misconduct, any disciplinary action against the accused employee should be preceded by a proper domestic inquiry;
- To deter false and fabricated accusation against any person, the rule should also set out disciplinary penalties against those who make such accusations.

PROMOTIONAL AND EDUCATIONAL PROGRAMMES

■ Preventive measures include:-

- communication;
- Education; and
- Training

■ Dissemination of the policy and mechanism amongst employees in the organisation.

■ Programme for education in the area of sexual harassment.

■ Training for supervisory and managerial staff to train them to recognise potential problems and learn how to deal with them as and when they arise (mainly for those who are investigators and counsellors).

GRIEVANCE PROCEDURE

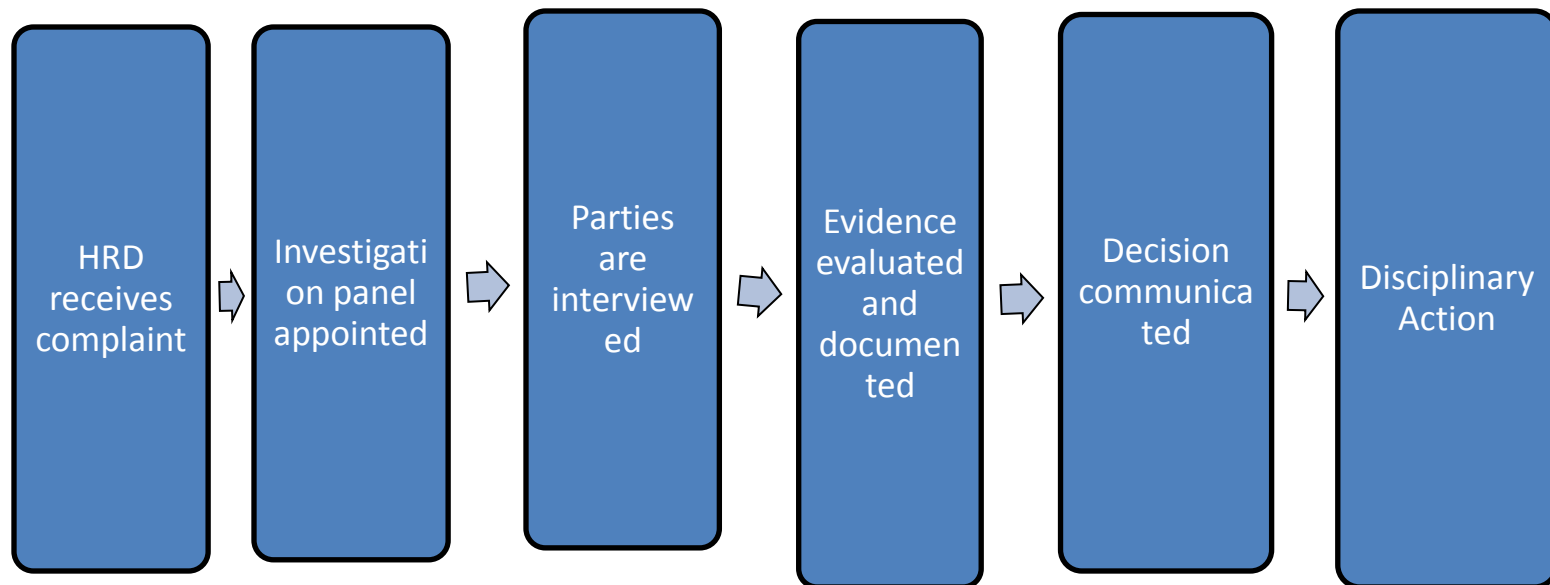
- Normal procedure usually unsuitable for complaints;
- Due to the sensitive nature, employer should develop a separate complaint procedure;
- Should provide for measures to protect victims from further embarrassment.

Complaint procedure should at least contain the following:-



COMPLAINT
MECHANISM:
HANDLING &
INVESTIGATING AN
ALLEGATION

INVESTIGATIVE METHODS:-



DOCUMENTING TRAIL **SEXUAL HARASSMENT CLAIMS**

- 1) Correspondences
 - memos
 - emails
 - letters

- 2) Company Policies/ Handbook/Manual
 - handbook at that time

- 3) Findings during internal investigations.

PROTECTIVE AND REMEDIAL MEASURES **FOR THE VICTIM**

- To encourage victims to report sexual harassment;
- There should be adequate measures to ensure maximum confidentiality so as to minimise embarrassment to the victim (especially at the time of reporting & course of investigations);
- In cases where victim suffered loss (e.g. demotion)- it is appropriate to restore such a person to his/her original position on the job;
- Victim should be compensated for any monetary loss arising out of a denial of employment-related benefits which were rightfully due;
- Where complaint is found to be unjustified & baseless, appropriate remedy should be granted to the accused person if there has been any loss suffered by such person.

METHODS OF COUNSELLING

- Confidential Consultation
 - for those who wish to be discreet about the incidences that took place whilst still looking for a way out

- Direct Communication
 - for those who wish to confront the perpetrator directly

Damages that can be Awarded by the Industrial Court:-

Second Schedule Industrial Relations Act 1967

- (i) 24 months backwages from the dates of dismissal;
- (ii) probationer- 12 months backwages from the date of dismissal;
- (iii) deduct % of post dismissal earnings;
- (iv) take into account contributory misconduct.

Jennico Associates Sdn Bhd v Lilian Therera De Costa [1996] 2 ILR

Facts :

The claimant was subjected to fault finding and sexual harassment by the offender who later demanded for her voluntary resignation due to the fact that she rejected him during one of the incidences in which she was molesting her. The claimant therefore refused to continue working and claims to be constructively dismissed and/or forced to resign by the managing director(the offender).

*Jennico Associates Sdn Bhd v Lilian Therera De
Costa [1996] 2 ILR*

Held :

The general principle in the trial of criminal sexual offences is the rule of prudence, the Court normally looks for some corroboration of the testimony of the complainant's testimony to satisfy it's conscience that the complainant is telling the truth and that the accused has not been falsely implicated....the Court however, notes, the statement in the same work to effect that minimum corroboration is required where a complainant's evidence makes a deep impression of veracity.

~THANK YOU~



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