

## Chapter 2

### The Legal Framework

ILO officials explain that although conditions vary greatly among countries, agriculture tends to be excluded from the provisions of many national labour laws and is not subject to any comprehensive international standards. Where regulations exist, they are often sporadically applied because the effective observance is poor due to inadequate legal provisions, low unionisation among workers and insufficient labour inspection. The other shortcomings faced by the agricultural sector include the use of multiple complex chemicals and technology, dispersal of workforce in remote rural areas, the variety of jobs performed by agricultural workers, environmental factors beyond human control, and the inadequate application of safety measures in agriculture.

At the global level, the International Labour Organisation (ILO) through its Global Programme on Safety and Health at Work (SAFEWORK) aims to protect workers' health, prevent and reduce occupational accidents, injuries, occupational and work related diseases by improvements in working conditions and environments. Another multi-country programme, the ILO/FINNIDA Asian-Pacific Regional Programme on Occupational Safety and Health is designed to strengthen occupational safety and health through information and training in 20 countries of the Asia Pacific region, including Malaysia.

In Malaysia, the Department of Occupational Safety and Health, formerly known as the Factories and Machinery Department, is the government body entrusted with the enforcement of occupational safety and health policies. The Ministry of Human Resources is also responsible for the enforcement of occupational safety and health policies at the national level. Training activities are conducted in cooperation with the National Institute of Occupational Safety and Health (NIOSH).

### The Occupational Safety and Health Act (OSHA), Malaysia 1994

The Occupational Safety and Health Act (OSHA) Malaysia, 1994, provides the legislative framework to promote, stimulate and encourage high standards of safety and health at work, and is possibly relevant to the concerns of the women plantation workers. The Act aims to promote safety and health awareness and establish effective safety practices through self-regulation, the long-term goal being to create a healthy and safe working culture and environment in Malaysia.

OSHA 1994 was implemented after much delay and pressure from vested groups including a number of pesticide companies to 'tone' down the law. The process for formulation of OSHA was first initiated several years ago and in early 1986, the Director-General of the then Factories and Machinery Department (FMD) had stated that a new Act on Occupational Safety and Health was being drafted. The Act was finally enforced with the promise that the Department of Safety & Health (DOSH, formerly FMD) would be upgraded in line with its expanded role and the Act would be made more comprehensive.

#### Contents of the Act

The OSHA 1994 consists of 15 sections that may be referred to, to establish mechanisms for the greater protection of women workers in the plantations. Among the major provisions are:

- General duties of employers, manufacturers, employees, the self-employed, designers, importers and suppliers;
- Appointment of enforcement officers;

- Establishment of a national council for occupational safety and health;
- Formulation of the organisation's policy and arrangements to secure the safety, health and welfare of people at work as well as the surrounding community and the environment; and
- Powers of enforcement and investigation, and liability for offences.

## Regulations and Codes of Practice

Other than regulations, the OSHA also provides where appropriate, approved codes of practice which have a special legal status. Industry codes of practice may be gazetted as guidance in compliance with the Act. Although codes of practice are not statutory requirements, they may be used in criminal proceedings as evidence that the statutory requirements have been contravened. Promulgation of industry codes of practice can be initiated by the industry, the government or other interested parties.

## General Duties

The general duties of employers and employees are clearly defined under this Act. The relevant ones are as follows:

### a. Duties of Employers

Employers, including estate managers must safeguard so far as is practicable, the health, safety and welfare of the people who work for them. Risks to health from the use, storage or transportation of substances must be minimised. To meet these aims, all practicable precautions must be taken in the proper use and handling of any substance likely to cause a risk to health.

**Safety Policy** – an employer in the plantation must prepare a written statement of his general policy, organisation and arrangements for safety and health at work, keep it up-to-date by revision and bring it to the notice of his employees.

**Safety Information, Instruction, Training and Supervision** – it is the duty of estate employers to provide the necessary information, instruction, training and supervision in safe practices, including information on legal requirements.

### b. Duties of Employees

Employees have a duty under the Act to take reasonable care to avoid injury to themselves or to others in their work activities, and to cooperate with employers and others in meeting statutory requirements. An employee is protected from being discriminated or injured or have his position altered to his disadvantage, if he makes a complaint on a matter, which he considers is not safe, or becomes a member of a safety and health committee or exercises his function as a committee member.

## Medical Surveillance

The Minister may through regulations, require industry operations which may pose risks to health of workers to undergo medical surveillance by persons registered with the Director-General of DOSH (Department of Occupational Safety and Health). This should be especially applied with regards to the aerial spraying of pesticides in the country.

## Safety Committee

An employer of 40 or more persons, or when directed by the Director-General, must establish a safety and health committee at the workplace. The committee's main function is to keep under review the measures taken to ensure the safety and health of persons at the workplace and investigate any related matters arising.

## Safety and Health Officer

An occupier of a workplace must also employ a competent person to act as a Safety and Health Officer whose job is to ensure compliance of the Act and the promotion of safe conduct at the workplace. It is a common norm however that in most plantations, a safety officer is not present in the day-to-day operations of pesticide spraying in the estate.

## Notification of Accidents and Occupational Diseases

The employer or Estate Manager must notify the nearest occupational safety and health office of any accident, dangerous occurrence, occupational poisoning or disease which has occurred or is likely to occur at the workplace.

Every registered medical practitioner or medical officer excluding Hospital Assistants attending to, or called in to visit a patient whom he believes to be suffering from occupational poisoning or occupational diseases listed in the Factories and Machinery Act 1967 or named in any regulation or order made by the Human Resources Minister under this Act, must also report to the Director-General.

## Enforcement and Liability

Enforcement of the Act is carried out by Occupational Safety and Health Officers appointed by the Minister. If an occupational safety and health officer discovers a contravention of one of the provisions of the Act or its related legislation, he can:

- Issue a prohibition notice, if there is a risk of serious personal injury, to stop the activity giving rise to this risk until the remedial action specified in the notice has been taken.
- Issue an improvement notice, if there is a legal contravention of any of the relevant statutory provisions, to remedy the fault within a specified time.
- Prosecute any person contravening a relevant statutory provision instead of, and/or in addition to serving a notice. In any legal proceedings for offences consisting of failure to comply with a duty or requirement to do something so far as is practicable, the onus of proving the limits of what are practicable is on the accused.

If a person on whom an improvement or prohibition notice is served fails to comply with it, he is liable to prosecution. Failure to comply with the improvement or prohibition notice could lead to a maximum fine of RM50,000 or imprisonment for a term not exceeding five years or both.

## The Present Scenario

Industrial accidents (including the acute poisoning of workers from pesticide exposure) and occupational diseases (including those which result from the chronic poisoning of victims from a similar cause) bring suffering, pain, loss of limb, death and economic losses to the victims and their families. The incidence of industrial accidents has increased from 83,338 cases in 1998 and until June 1999, 52,505 cases (SOCSCO, 2000). The Department of Occupational Safety and Health reported that in 1998 there were 1,248 cases and until October 1999 there were 1,237 cases related to industrial accidents, disease and hazardous occurrences (<http://www.jaring.my/ksm/key.htm>).

## Strengths of the OSHA Act

The major provisions in the Act that are favourable towards pesticide risk reduction in the plantations are:

### a) More Comprehensive Coverage

OSHA 1994 covers workers in almost all sectors including agriculture, forestry, fisheries, mining, quarrying and public utilities and only excludes workers on board ships, aircrafts and those in the armed forces (Section 1.2

and 1.3 of the Act). This is deemed as a major improvement as the agriculture, forestry and fishing sectors have relatively high incidences of accidents and fatalities.

### **b) Extends Duty to Other Employers**

The Act extends the duty of employers and self-employed persons to provide a safe working environment not only to their own employees but to independent contractors as well as any employee of the independent contractor (Section 15). Under the Factories and Machinery Regulations 1986 (Building Operations and Works of Engineering Construction Safety), the principal employers escaped liability when they engaged independent contractors who in turn hired the necessary employees to perform the various tasks.

### **c) Covers Public Safety**

The Act provides that employers have a duty to conduct their respective undertakings in a safe manner and not risk the health of persons who are not employees. This probably means members of the public who may be affected by the operations of the particular industry. The employer is further required to provide information to the public on the industry's operations that may impact upon their health and safety (Section 17).

## **Weaknesses of the OSHA**

OSHA 1994 is based on a British legislation, revised to suit the local work environment. The Act's underlying principle is that maintaining health and safety should be the responsibility of those who create the hazards and those who work with them. Although the Act offers better protection than the previous Factories and Machinery Act 1967, some shortcomings have been identified. These are as follows:

### **a) Wide Interpretation**

Many provisions in the Act are qualified by the phrase "so far as is practicable" (Sections 15 and 17). In defining the word "practicable", the Act in turn takes the following factors into account:

- i) The severity of the hazard or risk in question.

'Hazard' is defined as "a situation that may give rise to injury or damage to health" and 'risk' as "the chances of exposure to a hazard, coupled with consequences." The word "practicable" allows an employer to assess whether a situation they create, that may lead to injury or damage to health of workers, should be eliminated or mitigated. Employers can therefore find a certain amount of workers' exposure to such hazards acceptable if it falls below their understanding of the severity of risk. In reality however, every preventable hazard should be overcome. In dealing with precious human life, there is no such thing as 'acceptable risk'.

- ii) The state of knowledge about the hazard/risk and methods of removing or mitigating it.

The employer may claim that he was unaware of the hazard or risk in question or that it cannot be eliminated or mitigated. Ignorance should not be an excuse as the employer can obtain information on chemicals and hazards from manufacturers' Material Safety Data Sheet (MSDS) and pesticide databases operated by the National Poison Centre. Employers can therefore easily use the phrase "as far as practicable" to defend their inaction, claiming limited knowledge and resources.

- iii) The availability and suitability of ways to remove or mitigate the hazard or risk.

Again, the pesticide manufacturers from small and medium industry may claim certain avenues are not available to them as opposed to big companies and multinationals, due to factors such as 'limited manpower' and 'low turnover'. All employers must therefore be committed towards creating a 'safety culture' in the workplace and taking such measures such as hazard identification, risk assessment and prevention, hazard management, monitoring and review.

- iv) The cost of removing or mitigating the hazard or risk.

The provision allows employers to weigh the cost of risk reduction or elimination against profits. An employer can therefore cite financial constraints or the prevailing market situation as an excuse not

to undertake safety measures. In other words, removing or mitigating the hazard or risk is only practical for the employer if he can still make money. The law should take into account the employer's "access to resources and expertise" in occupational safety and health as well as relevant policies, which are issued by companies to govern the conduct of the employer. These additions are crucial in order to ensure that the local subsidiaries of TNC pesticide manufacturers do not practise double standards in Malaysia by using banned or restricted technology, work processes and substances in their undertakings when they have access to the resources and expertise of their parent companies.

#### **b) Strong Orientation Towards Industry**

OSHA 1994 states that the Director-General may appoint and pay a person or an independent inspecting body "from any of the industry" to advise or assist him in carrying out the objectives and purposes of the Act. For example, the Government may assign an employee of industry to contribute towards the development of occupational health and safety. It is these very industries that are creating hazards to their workers and end-users; it is highly likely that their contributions would suit their self-interests. Therefore, it would be more appropriate to assign competent persons such as industrial hygiene consultants, academics etc. who are not linked to the industry to assist the Director-General.

#### **c) Compromises Workers' Interests**

The Act provides for the establishment of a National Council for Occupational Safety and Health (see section 8 of new Act). Section 11.2 empowers the Council to investigate and make reports and recommendations to the Minister as regards to matters relating to the objects of this Act.

The Council is to be composed of representatives from industry, workers and related government bodies and organisations or professional bodies (section 9). A serious concern is the proposed presence of industry representatives, who are known to have a much more powerful lobby than workers' representatives. This may compromise the interests of the workers. More representation from independent public organisations and non-governmental organisations should be included to ensure a balanced representation.

#### **d) Dearth of Information**

The Act provides that manufacturers, importers or suppliers of pesticides have a duty to ensure that the substance is safe and without risks to health when used as directed (Section 21.1). Again, the phrase "as far as is practicable" is used and inadvertently gives room for abuse. What is specifically required is for manufacturers, suppliers, importers to obtain and make available all MSDS (with the full information on chemical contents and the known and suspected hazards) as well as warning labels on containers denoting probable hazards under foreseeable conditions of use.



Pesticide containers and spray equipment kept in the kitchen area of a worker's home, could pose health risks to the family involved. Photo: Tenaganita, 2002.

#### **e) No Coverage for Work at Fair Grounds**

Companies stage or participate in fairs such as Pesta Pulau Pinang to promote their products. Accidents can happen at fair grounds but the Act only covers designers, manufacturers, importers or suppliers to factories for use at work (Section 20.1 of new Act). Fair grounds are again omitted in Section 20.3, which requires the person who erects or installs any plant for use at work to ensure, as far is practicable, that it poses no risk of injury or ill health to workers when properly used. Workers employed by companies to operate counters or machinery at exhibition fairs are at risk to industrial accidents and other hazards, but are not covered by law.

#### **f) Safety Committees Only at Large Workplaces**

It is unfortunate that the Act has been watered down with regards to the establishment of safety committees in the work place. Originally, a Safety Committee was to be formed when there are 20 or more workers in an establishment. The present requirement is for workplaces employing 40 or more workers (Section 30.1). If the safety and health of workers is to be safeguarded, then the above-mentioned provision should be amended to apply to all establishments employing 20 or more workers.

#### **g) The Delay in Notification and Investigation of Accidents**

Section 32.1 of the Act requires the employer to notify the nearest DOSH office about any accident, poisoning or occupational disease, which has occurred or is likely to occur at the place of work. However, there is no time limit stipulated either for the notification by employers, or for the holding of an investigation by the authorities into the incident. This is a serious omission as early notification may help prevent the recurrence of mishaps or occupational health problems.

Section 32.2 requires doctors to report occupational diseases and this augurs well for women in plantations. Nevertheless, the problem of under-reporting remains rampant, as many doctors are either not trained to recognise and diagnose occupational diseases or are reluctant to link the illness to work and therefore claim ignorance about the real nature of the health problem.

A time limit for notification and investigation of industrial accidents and occupational health problems is essential to ensure that violations are not perpetuated with the excuse that reporting was planned in the future. More skilled and trained occupational health specialists for identification of occupational diseases, and a mechanism where workers can get a second opinion about their medical condition from an independent occupational health physician chosen by them, should be established. This will give workers more confidence in the occupational health system in the country and reason to trust the medical findings.

#### **h) Unfair Penalty for Workers and Trade Unions**

Of grave concern are provisions that impose penalties on workers for not complying with the law (Section 24 of new Act). It is well recognised that it is the employer who controls the conditions of the work process and penalising workers is unfair and subject to abuse. For example, employers may create a hazardous, dusty and hot environment that makes wearing of ear plugs or gloves uncomfortable. The onus must be on employers to ensure that all protective gear provided not only fit the workers but also are comfortable to wear in a well ventilated environment. Penalties for workers not wearing protective gear should be removed.

Section 53 of the new Act allows trade unions to be punished for violations of the Act. Trade unions do not control the work environment and so it is unfair to penalise them.

Section 25 provides that anyone who misuses protective equipment or anything else provided to them will be liable to a maximum fine of RM20,000 or to two years in jail or both. This section is open for abuse by employers, and hence safeguards are necessary to protect workers from being blamed for mishaps. An employer's economic capability to pay fines should not be compared to that of a worker. Instead of penal provisions to get workers to better regard safety and health measures, employers and authorities should promote safety education and training and allow workers to participate in the decision making process for a safer and healthier working environment.

### ***i) Insufficient Deterrence***

In Section 51, for general liability, an individual may face a fine not exceeding RM10,000 or imprisonment for a term not exceeding one year or both. It is therefore ironic that Section 56 provides that, where a corporate body or trade union is guilty of an offence, only a fine is imposed. This is not an adequate punishment for management officials of a corporate body that intentionally compromises safety at the workplace. Companies can easily afford to pay fines due to their financial resources. Trade unions on the other hand face much pressure and victimisation by the industry and authorities, making them practically ineffective.

### **Overall Weakness**

One major weakness of the Act lies in its strategy on implementation and enforcement. Focus has been given to the issue of SAFETY—especially within a closed environment. This focus on SAFETY is limited in scope since it emphasises the reduction of work related accidents, and the number of work related accidents, rather than the longer term effects of dealing with hazardous chemicals or a hazardous working environment resulting from the use of chemicals. As such, enforcement and training on enforcement also focuses on this aspect of SAFETY. Aspects surrounding health hazards and long-term systematic impacts, like diseases arising from hazardous materials like chemicals, are neglected.

### **The Pesticide Act 1974 of Malaysia**

The Pesticide Act, 1974 of Malaysia regulates the labelling, registration, importation, manufacture, advertising, sale and storage of pesticides. It also provides regulations to control the presence of pesticide residues in food and the reporting and investigation of accidents and injuries caused by pesticides. This Act would also bolster The Hydrogen Cyanide (Fumigation) Act, 1953, which controls the fumigation of premises and ships (enforced by the Ministry of Health); and The Environmental Quality Act, 1974, which controls pesticide effluents from factories (enforced by the Department of Environment).

The overseeing of adherence to the Pesticide Act, 1974, which falls under the purview of the Pesticide Board, is facilitated by the Department of Agriculture. The FAO Code (adopted in 1985) as the international code of conduct on the distribution and use of pesticides serves as a point of reference particularly until such times as countries have established adequate regulatory infrastructures for pesticides (Arumugam, 1992). It would appear that the Malaysian Pesticide Act was well formulated in terms of regulatory laws and publications pertaining to pesticides (Laws of Malaysia Act 149, Pesticides Act 1974: *Panduan Pelesenan Premis-Premis Menjual dan Menyimpan Racun Makhluk Perosak*, 1988; The A-Z Guide to the Pesticide Act 1974, 1989).

An independent study by Gerwien and Bauer (1989) (which was a comparison of Malaysian laws and enactment, to the German law in consideration of the relevant Regulations of the European Community and the FAO) revealed several shortfalls to the Pesticide Act 1974 of Malaysia. Whereas the FAO Code demands that pesticides be used only without unacceptable hazards to human health, plants, animals, wildlife and the environment, the Pesticide Act 1974 of Malaysia specifies only human beings and animals. They further pointed out many contraventions of the FAO Code, like: factory workers not wearing protective clothing; factories located in residential areas and residents subjected to emissions; sales personnel and applicators of pesticides not competently educated nor informed of the danger and good agricultural practices concerning pesticides; no warning against re-use and safe disposal of containers.

Local campaign and advocacy groups have ON VARIOUS OCASSIONS raised these issues and recognised the need to:

1. Evaluate and review registered pesticides and carry out numerous studies in scientific and academic departments on the impact of pesticides on health and the environment.
2. Monitor pesticides impact on human health and the environment, the impact on non-target organisms, monitoring pesticide residues in food and groundwater.

3. Provide farmers and workers with training on reducing risks.
4. Provide health services for poisoned workers and farmers.
5. Study the impact on future generations.
6. Make available information from the monitoring of pesticides on health and the environment known to the public and especially public interest and workers' groups.
7. Stop the use of WHO Class I pesticides which are highly toxic chemicals under the conditions of application found in most of the plantation sector and even in rice and vegetable farming, where their use is haphazard and sprayers are exposed.

In the cost benefit analysis to evaluate the use of pesticides, the social and environmental impacts are mostly ignored. In addition, in evaluating the cost of monitoring and the impact of pesticides on human health and the environment for example, the monitoring of pesticide residues are costs that are paid by tax payers not by the users and polluters. These direct and indirect costs are subsidies to the industry. The question of *who* benefits and *who* bears the cost, not only in terms of dollars but in terms of poisonings, are often ignored.

The Pesticide Act 1974 now includes the following regulation (Anon., Pesticides Control Division, Department of Agriculture, Kuala Lumpur, 1997), namely: -

- Pesticides (Registration) Rules 1976.
- Pesticides (Labelling) Regulations 1984.
- Pesticides (Importation for Education and Research Purposes) Rules 1981.
- Pesticides (Licensing for Sale and Store for Sale) Rules 1988.
- Pesticides (Highly Toxic Pesticides) Regulations 1996.
- Pesticides (Advertisement) Regulations 1996.

A set of guidelines on aerial application of pesticides has been drawn up and implemented with the Department of Aviation. The Pesticides Advertising Regulations are designed to further tighten the compliance of advertising pesticides within the FAO Code. Under the new regulations, all advertisements must be approved by the Pesticides Board, unless they do not make claims to efficacy and safety. In 1991, 19 people were charged with violating the Pesticides Act. Common offences were adulteration of pesticides by shopkeepers and manufacturers and production of sub-specification pesticides (The Pesticides Trust, 1993).

In addition there is a need for monitoring of banned pesticides as well as of illegal pesticide importation, sale and usage, since such pesticides have been reported to have found their way into Malaysia from neighbouring countries. While this is not very rampant, it is still a dent on the Malaysian government's efficiency in ensuring the safety of its citizens and environment.

## **The Food Act 1983**

The Food Act 1983, which covers the issue of pesticide residues in food, is administered by the Ministry of Health.

Some non-legislative actions being undertaken to reduce the health threats from pesticides include:

- Post-registration monitoring of pesticide usage to include environmental impacts.
- Education for pesticide users.
- Risk reduction programmes including research on bio-pesticides, Integrated Pest Management (IPM) and alternative pest control measures.
- Improvements in pesticide application technology, methods and promotion of rain shelters for vegetables.