

Recent Development in Sexual Harassment Law in Malaysia: Whither the Victim's Protection?

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Abstract

Before 2012, there was no law on sexual harassment in Malaysia. However, when the Employment Act 1955 was amended in 2012, employers must inquire into sexual harassment complaints, failing which a criminal penalty will be imposed. Unfortunately, the new law did not allow a complainant to claim damages from the harasser or the employer. After more than two decades of campaigns by women's rights groups and NGOs, the Anti-Sexual Harassment Bill 2021 (hereinafter 'the ASHB 2021') was finally enacted and passed in July this year. Given the novelty and absence of any academic research, this paper seeks to examine the provisions of the Bill critically to understand its scope, coverage and broader implications for sexual harassment victims. The paper employs a qualitative research methodology, adopting a doctrinal approach and content analysis of the primary source, the ASHB 2021, that would provide a deeper understanding of the legislation. The authors contend that despite being regarded as a victim-centric law, the Bill is half-baked and inadequate to protect sexual harassment victims due to its failure to include significant provisions on the sexual harassment definition, the protection against victimisation and employers' obligations to prevent and address such conduct.

Keywords: Sexual Harassment, Online Sexual Harassment, Tribunal, Complaint, Malaysia

Introduction

Harassment, particularly sexual harassment, is a worldwide phenomenon, and with the advent of information and communication technology (ICT) and advances in the #MeToo movement, such behaviour has attracted more attention. Harassment is defined as offensive, abusive, insulting, belittling, humiliating, threatening or intimidating behaviour directed at a person or group (Stevens et al., 2021; Rosli et al., 2021). Furthermore, given the technological advancement in modern times, recent literature has expanded its meaning to include impersonation, making physical threats, asking the third party to attack the victim, and spreading false stories about the victim (Basu et al., 2021).

It was reported that between 2013 and 2017, the Royal Malaysian Police (PDRM) received 1,218 sexual harassment cases, and 79 per cent involved women victims while 21 per cent involved male victims (WAO, 2017). However, a recent survey by Women Aid Organisation (WAO) in 2022 showed that 62 per cent of women had experienced such harassment in the workplace. Despite such prevalence, victims in Malaysia are reluctant to report their harassment, consequently leading to under-reporting of such conduct. Furthermore, the local figures via a survey in 2022 by Omnibus revealed that half of the victims kept quiet and did not report the incidents to the police due to embarrassment (54 per cent), thinking that no action would be taken (38 per cent) and fearing repercussions (26 per cent) (The New Straits Time, 2022).

With the global consumption and usage of the Internet and social media platforms such as Twitter, Facebook and Instagram, sexual harassment has transcended cyberspace as the traditional sexual harassment in the real world morphed into online sexual harassment (Renuat et al., 2022; Scarduzio, 2022; Basu et al., 2021). The Malaysian Communications and Multimedia Commission (MCMC) figures showed that from 2016 to 2021, MCMC received 15,238 complaints of online harassment over the past five years. Such complaints covered bullying, sexual harassment, threats, misuse of personal data and private pictures to victimise or humiliate the targets. Nine hundred sixty-three (963) cases were investigated under Section 233 of the Communications and Multimedia Act (CMA) 1998, out of which sixty were brought to Court, resulting in 241 charges (MCMC, 2022; Babulai, 2021). A person can be jailed for a maximum of one year, fined up to RM50,000, or both, upon conviction.

However, despite these alarming figures, it is surprising that no legislation curbing harassment, let alone sexual harassment or stalking, was established until late 2021. The lobby for such a law began in 1999 in Penang by the Women's Centre for Change (WCC) after the absence of any law to prevent or deal with several workplace sexual harassment complaints (Indramalar, 2022). In addition, the Code of Practice on the Prevention and Eradication of Sexual Harassment, created in 1999, was ineffective and was not made mandatory. (Indramalar, 2022). Furthermore, public concern about the crime's prevalence and the lack of legal response and redress for sexual harassment complaints in the employment or administrative spheres have been mounting ever since. Hence, there was a dire need for the authorities to consider a separate Act specifically to deal with sexual harassment as a way forward to promoting a more conducive workplace (Hassan & Lee, 2015). Finally, after the emergence of the #MeeToo movement in 2018 and after more than two decades of advocacy and lobbying by women's rights activists, civil society, government officers and politicians alike, the Anti-Sexual Harassment bill was passed by the Lower House of Parliament (Dewan Rakyat) in December 2021 in the First Reading and in July 2022 in the Second Reading.

- Within this context, this paper seeks to examine the new Bill against sexual harassment, comprising mainly the Tribunal mechanism, which would facilitate the victim to make a complaint against the perpetrator. However, as the law has just been enacted this year, no academic research has been conducted on its instrumental provisions or effectiveness. Therefore, it is submitted that the legal explanation and analysis below could contribute to a better understanding of the scope and the coverage of new legislation on sexual harassment in Malaysia.

The first part of this paper examines the methodology adopted in this paper. The second part reviews the literature on sexual harassment in varied contexts. The third part, which is the crux of the paper, critically examines the new ASHB 2021 provisions. Lastly, the fourth part concludes the paper and contends that the long-awaited law is half-baked and not comprehensive enough as it does not clarify the definition of sexual harassment. Furthermore, The ASHB 2021 is not only silent on the legal protection for the sexual harassment survivor/victim against victimisation but also on the employer or organisational duty to prevent and address sexual harassment in their workplaces.

Methodology

This paper adopts a qualitative research methodology, which provides a deeper understanding of the newly created legislation on sexual harassment in Malaysia (Silverman, 2013). Secondary data is employed, in which the primary source of this paper is the ASHB 2021. The secondary sources include textbooks, journal articles, newspaper articles and online databases or sources. The doctrinal approach is adopted for data analysis, employing a literature review on the broad concept of harassment and narrow aspects of sexual harassment. Furthermore, a legal doctrinal approach and content analysis are also conducted on the new legislative instrument, the ASHB 2021, passed last July 20, 2022, during the Second Reading in the Malaysian Parliament.

Conceptualising Sexual Harassment

In general, harassment, which is a contested concept, has different meanings in different contexts and countries (Fitzgerald & Ormerod, 1991; Rosli et al., 2021). Sexual harassment has been defined as any form of unwanted sexual conduct, be it verbal, non-verbal, visual, psychological or physical harassment that the recipients might reasonably perceive as putting a condition of sexual nature, an offence or humiliation, or a threat to their well-being (Mohamed, 2011). Such harassment may take several forms, such as cat calls, wolf whistles, curb crawling for sexual solicitation in the street, sexual jokes, and comments that offend the affected employee if made within the workplace (Basu et al., 2021).

In the global context, the extant literature on harassment could be seen in different contexts, such as the workplace (Abarna et al., 2022; Steven et al., 2021), educational institutions and schools involving bullying (Basu et al., 2021), cyberspace (Scarduzio, 2022), and sports (Sitheravellu, 2022). However, the main focus of the sexual harassment literature is the employment setting and attempts to define such conduct. For example, Fitzgerald and Omerod (1991) define sexual harassment in the workplace as the sexualisation of a professional relationship, unwanted and unwelcome verbal and non-verbal behaviour, and a continuum from sexist remarks to seductive non-verbal gestures to sexual assault. On the other hand, Mcewen et al (2021) contend that sexual violence against women in the workplace remains rife and poorly addressed due to the perpetrator's higher organisational position and imbalance of power relations.

Similarly, local literature suggests that harassment in Malaysia varies and extends from the workplace (Choo & Tham, 2021) to harassment in schools and higher educational institutions (Karim & Endut, 2016), during interaction with the police at roadblocks, against children (Razali & Nawang, 2022), those conducted in cyberspace Tharshini et al (2022); Babulai (2022), and in sports (Sitheravellu, 2021).

In cyberspace, online sexual harassment may cover a range of behaviours: from less severe utterances, such as sending inappropriate or unpleasant sexual messages, images or videos, to more severe forms of hate speech, harm and threats (Jatmiko et al. (2021; Nadim & Fladmore, 2019) or online stalking (Scarduzio, 2022; Barak, 2005; Van Royen et al., 2015) or what Scarduzio (2022) would term as sexual coercion. However, most writers define online sexual harassment as using the Internet to solicit and intimidate another person sexually (Renuat et al., 2022; Scarduzo, 2022; Basu et al., 2021; Ahuja & Priyanka, 2021; Wan Rosli et al., 2021). For example, a recent case of online sexual harassment, which is currently being tried before the Court, involves a well-known Muslim preacher charged with eleven counts of sexual harassment under sections 509 and 354 of the Penal Code and section 233 of the CMA for allegedly sending obscene messages to the victim's mobile telephone via WhatsApp between March and June 2021 (Bernama, 2021).

The literature worldwide indicates that sexual harassment and abuse against women athletes are rife and occur in many sports (Brake, 2013; Sitheravellu, 2021) due to the gendered nature of sports and power relations between those managing and the athletes (Brackenridge, 2013; Kirby and Demers, 2013). For example, in the local setting, a Malaysian national diver, Pendelela Rinong, recounted her unfortunate experience of being bullied by her former diving coach when she confronted him about lewd and rape jokes he made in front of her and other swimming athletes. The same coach was eventually embroiled in a rape investigation involving a national diver (Sitheravellu, 2021).

The literature on sexual harassment also shows that the stereotype of perpetrators of any harassment is male. Yet, at the same time, the female would be the victim of such conduct (Women, 2012; Collins, 2010; Karim & Endut, 2016). Moreover, the multiple effects of such harassment on women employees, including their physical performance and mental health, such as embarrassment, shame, depression, and a decrease in self-esteem, job satisfaction and safety (Choirunnisa et al., 2021; Rosli et al., 2019). Other adverse effects of sexual harassment include illnesses, lack of commitment, absences, low-quality performance, and resignation (Rosli et al., 2019; William, 2012).

Much of the sexual harassment literature is derived from a social science perspective rather than the legal one. However, the scarcely available legal literature tends to analyse decided cases and the problem of proving the harassment in the courts for the plaintiff (Hassan & Lee, 2015) and the gendered view of workplace sexual harassment and remedy for female employees (Bhatt, 2007). Furthermore, the legal literature suggests that despite legal response to such conduct in many countries, the problem of sexual harassment has not diminished and remains under-reported. For example, Hersch (2015) contends that sexual harassment violates human rights and is a form of sex discrimination. He states that although seventy-five countries have legislation prohibiting sexual harassment in the workplace, it remains pervasive and under-reported.

The New Anti-Sexual Harassment Bill 2021

The Objectives of the ASHB 2021

The ASHB 2021 preamble stated several objectives of the Bill, including the law is to provide a right of redress to any victims who have been sexually harassed, the establishment of the Tribunal for Anti-Sexual Harassment and the promotion of awareness of sexual matters, and

provide for related matters. However, during the parliamentary debate at the Second Reading, these last two objectives have been replaced by the aims to raise awareness and prevent the occurrence of such conduct.

Meaning of Sexual Harassment

The Act of sexual harassment is envisaged to be gender neutral as it covers all individuals irrespective of gender. Under Clause 2 of the ASHB 2021, sexual harassment is defined as any unwanted conduct of a sexual nature, in any form, whether verbal or non-verbal, visual, gestural or physical, directed at a person, which is reasonably offensive or humiliating or a threat to his well-being. This definition is slightly broader than that in the E.A. 1955 with the addition of the word 'reasonably.' Such a word would suggest that an objective standard, as opposed to a subjective one, is envisaged and would allow changing societal norms and values to be considered in the future. Unlike the Protection from Harassment Act in the U.K., Singapore or New Zealand, the ASHB is not a criminal statute; hence, there is no criminal offence and penalty for the harassers being created.

The Tribunal's Establishment

The AHSB 2021 creates a quasi-judicial body to handle sexual harassment complaints. Such cases will be dealt with by a twelve-member Anti-Sexual Harassment Tribunal to be set up for the purpose (Clause 4). Initially, the Tribunal will be set up in the Klang Valley. However, the Tribunal can sit and hear more than one case, which can be held at any venue. The Tribunal's composition will comprise a president and deputy president, appointed from among judiciary members, who the Minister will appoint (Clause 4 (1)(a)). The remaining members will be former members of the judiciary or experienced practising lawyers and those with the knowledge or practical experience in matters relating to sexual harassment (Clause 4 (1) (b) (c)).

Nevertheless, there is no provision to explain how such a person is to be determined, except that the Minister will decide on the matter. It is worrying for some women's groups that the Tribunal alone is empowered to deal with sexual harassment complaints as the Tribunal is allowed to set its procedures. Furthermore, it is contended that since such cases would involve the evaluation of evidence, the Court or a judge would be in a much better position to deal with them. However, under Clause 17, the Tribunal has the discretion to refer to a High Court judge a question of law if it deems the question is sufficiently important to merit such reference.

The Tribunal's Jurisdiction

The jurisdiction of the Tribunal is broad as it is empowered to hear and determine any sexual harassment complaint made by any person (Clause 7). However, the ASHB does not provide for making sexual harassment complaints on behalf of another person; hence, it is ambiguous whether such acts would be allowed. The ASHA will operate prospectively as the Tribunal's power to hear the complaints is restricted to those after its enforcement (Clause 7 (2)). The revised version of the ASHB 2021 included and introduced a limitation period in Clause 7(3) for sexual harassment complaints, whereby such complaints to the Tribunal are subject to the Limitation Act 1953. Hence, such a period would mean time starts to run six years from such harassment. Under Clause 27, the complainant has not been precluded from lodging a police report despite making the complaint of sexual harassment to the Tribunal.

Exclusion of the Court's Jurisdiction

Clause 8 excludes the Court's jurisdiction when a sexual complaint involving the same parties is lodged with the Tribunal. However, several exceptions under Clause 8(1) (a)(b)(c) were provided, such as when the Court's proceeding was commenced before the complaint was made to the Tribunal; the complaint involved criminal conduct under any written law; or when the complaint to the Tribunal is withdrawn or struck out by the Tribunal. In addition, if the victim complains to the Tribunal, they are not allowed to go to Court in the same matter, even though sexual harassment arises during the Court's hearing instead of being the cause of action itself. Hence, Clause 8 would prevent the victim or complainant from recourse to the Tribunal and the courts in the same matter simultaneously.

Legal Representation

The original first version of ASHB 2021 provided that the parties at a sexual harassment complaint hearing are not allowed legal representation. However, the new version in July 2022 under Clause 13(2) provides that legal representation is not allowed as a general rule. Nevertheless, such a representation will be allowed if the Tribunal views the matter in question involves complex legal issues. Although the Tribunal would offer a speedier mechanism to redress the complaint, the lack of automatic right to legal representation might hinder sexual harassment victims from complaining for fear of facing the harasser alone without legal counsel at the hearing. Moreover, without such representation, they might find it daunting, challenging and intimidating, mainly when the respondent is their superior or a person in a position of power. The presence of their lawyers at the hearing could level this power imbalance dynamic. The revised version in 2022 also provides that if one party (the complainant) is allowed legal representation, the other party (the perpetrator) will also be entitled to engage a lawyer. Hence, both the complainant and the harasser have the right to be represented during the proceedings. In addition, a party who is a minor or a person under disability may be represented by his next friend or guardian *ad litem* (Clause 13(4)).

The Tribunal's Hearing

Clause 14 provides that all Tribunal hearings shall be closed to the public. Such a closed-door hearing may protect the victim/complainant from the trauma and social stigma associated with such harassment and keep their identities confidential. Conversely, it would protect the harassers' reputation irrespective of the Tribunal's finding. Clause 9 (3) also empowers the Tribunal with the discretion to determine its procedures, make an interlocutory order and summon parties to the proceedings or any other person to attend the hearing to give evidence. Finally, clause 9 (5) provides that the standard of proof to determine sexual harassment is akin to the civil standard on the balance of probabilities. Additionally, it is interesting to note that Clause 12 (2) states that each panel sitting of the Tribunal must consist of at least a woman member. Such an inclusive panel membership would ensure that any female victim or complainant would be at ease when attending the hearing and giving their evidence before the panel.

Negotiation for Settlement

Clause 16 (1) provides a built-in negotiation mechanism whereby the Tribunal may assess and decide whether it should assist the parties in negotiating a mutual settlement. If a settlement is achieved, the Tribunal must approve and record the settlement, which shall take effect as if it is an award from the Tribunal (Clause 16(3)).

The Tribunal's Award and Orders

Clause 19(1) provides that where practicable, the Tribunal should make its award within 60 days from the first day of the hearing. The Tribunal may either dismiss the complaint as frivolous or vexatious (Clause 20(3)) or make an award which may include a) an order for the respondent to the sexual harassment complaint to issue a statement of apology to the complainant (Clause 20(1)(a)). In addition, if sexual harassment were done in public, the offender would be required to make a public apology (Clause 20 (1) (b)). The Tribunal is empowered to make an order for payment by the respondent as compensation or damages to the complainant not exceeding RM250,000 for any loss or damage suffered by the complainant (Clause 20(1) (c)). In addition, under Clause 20(1) (d), the Tribunal can order any parties to attend any programme as the Tribunal thinks fit. An award or order made by the Tribunal is akin to a court order, which is binding and enforceable (Clause 22). Failure to comply with the Tribunal's award is a criminal offence under Clause 21 that attracts a maximum fine of RM10,000 or maximum imprisonment of two years or both.

Non-Compliance with the Award

Clause 21(1) stipulates that non-compliance with the award after 30 days would constitute an offence which, upon conviction, is punishable with a fine (in the amount equivalent to two times the amount of damages awarded by the Tribunal if any compensation or damages is ordered or in the amount not exceeding RM10,000 if the Tribunal ordered no compensation or damages) or to imprisonment for a term not exceeding two years or to both. Furthermore, the continuing non-compliance with the award attracts a daily fine of RM1,000.

The Right to Challenge the Tribunal's Award

Under Clause 23 (1), any party to the Tribunal's proceedings can challenge the award to the High Court. However, this right is restricted only to 'serious irregularities' affecting the award. Such irregularities are defined under Clause 23(3) as those the High Court considers to have caused substantial injustice to the applicant, involving the Tribunal's failure to deal with the relevant issues and the uncertainty or ambiguity regarding the award's effect. However, the ASHB 2021 does not prescribe any time limit for the applicant to give notice of his challenge, which should be rectified in the future amendment of the Bill. Another procedural oversight of the Bill is that it is silent on the procedural mode to challenge the Tribunal's award, whether by judicial review, appeal or other procedures. If the applicant successfully challenges the award, the High Court may remit the award to the Tribunal for reconsideration or set aside the award (Clause 23 (2)).

The Creation of the Administrator

Apart from creating the Tribunal, the ASHB 2021 also introduced the Administrator, whose power and functions include formulating policies, issuing guidelines, promoting activities and administering any other matter on prevention or awareness of sexual harassment (Clause 24 & 25). However, it is ambiguous how the Administrator would have any effect in combating sexual harassment as the Minister or an officer from the Ministry could undertake the Administrator's function and role.

Conclusion

It is evident that the ASHB passed in July 2022 is in line with the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Article 8 of the Federal Constitution on gender equality. Moreover, this new Bill has been lauded as a momentous occasion for victims/survivors of sexual harassment, the NGOs and women's activists who had fought long and hard for its creation. Creating the Tribunal to address the victim's complaints would provide them with some remedies and justice since there have not been many avenues to report, talk about or see their harassers be accountable for their actions.

However, despite this, apparently, the Government merely made two changes to the original version in December 2021, indicative of the exclusion of some of the concerns raised by the civil society activists, who had lobbied and hoped for a detailed review of the Bill. Therefore, a review is imperative to ensure adequate, and victim-centric legislation against sexual harassment is created in Malaysia. In addition, such a review should address areas of concern, including the holistic definition of sexual harassment, legal protection against victimisation, and employers or organisational obligations to prevent and address such misconduct in all spheres of life.

Nevertheless, in addressing merely sexual harassment in the ASHB 2021, the Government has missed the opportunity to prevent and address all types of harassment, including personal harassment, bullying, cyberbullying, stalking, body shaming, psychological harassment, discriminatory harassment on the grounds of race, age, skin colour, nationality, academic level etc. Stalking as a type of harassment is currently addressed in separate legislation by a different ministry. Such oversight is glaring and unfortunate given that the existing anti-harassment legislation in the United Kingdom, Singapore and New Zealand, to name a few, are excellent ready-made legislative models for Malaysia to learn and benchmark in addressing harassment, not only for sexual harassment but also for all types of harassment. Only time will tell whether the Government have the political will to amend the new long-awaited yet half-baked law to be comprehensive enough to protect sexual harassment victims' rights and well-being and ultimately provide justice for them.

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