



EMPLOYMENT:

THE ANTI-SEXUAL HARRASSMENT BILL – A WELCOME STEP TOWARDS WIDER PROTECTION

BACKGROUND

Sexual harassment is a violation of a person's rights and dignity, which causes mental and physical harm. In general, sexual harassment is unwelcome sexually related conduct that is offensive, humiliating, hostile or intimidating. Similarly, harassment in any form lowers the dignity and respect of the ones who get harassed, and the perpetrators who go unpunished will only intimidate, humiliate and traumatise the victims.¹ Since reputation of a person is protected by the Federal Constitution,² harassment, including sexual harassment results in the violation of the fundamental rights in gender equality and the right to liberty and life as enshrined in the Federal Constitution.³

In 2016, the Federal Court⁴ for the first time introduced the tort of sexual harassment into the Malaysian legal system. Apart from the fact that civil court procedures can be costly, lengthy and lacks confidentiality, the development of such tort is still in its infancy and remains vague to victims of sexual harassment, as the majority of them may be unaware of such a redress.

The issue lies in the inadequacy of existing legislations which have offences related to sexual harassment such as the *Penal Code*, *Employment Act 1955*, *Communications and Multimedia Act 1998*, and *Sexual Offences Against Children Act 2017* to combat sexual harassment cases in Malaysia due to their restrictive definition and coverage/applicability, the requirement of proof beyond a reasonable doubt and/or absence of remedy to the victims.

Evidently, Malaysia needs a gender-neutral, robust, comprehensive, and effective legislation to accord protection to persons from all walks of life who are faced with not only unwelcome and inappropriate sexual remarks or acts or violence but, also non-sexual harassment/violence such as bullying.

ANTI-SEXUAL HARRASSMENT BILL 2021

On 15.12.2021, the *Anti-Sexual Harassment Bill 2021* (the "Bill") was tabled for its first reading in the Dewan Rakyat. The Bill aims to establish a tribunal for the hearing of sexual harassment complaints. This article sets out the key commentaries to provisions of the current draft of the Bill.

¹ *Shaun Khee Tuck Keat v. Carigali Hess Operating Company Sdn Bhd* [2016] 4 ILR 112

² *Lembaga Tata tertib Perkhidmatan Awam Hospital Besar Pulau Pinang and Anor v. Utra Badi K Perumal* [2000] 3 CLJ 224; [2000] 3 MLJ 281

³ [2019] 2 LNS 2546

⁴ *Mohd Ridzwan Abdul Razak v Asmah Hj Mohd Nor* [2016] 4 MLJ 282

PURPOSE OF THE ACT

Once passed, the Act will be known as the Anti-Sexual Harassment Act 2021, and is described as: “An Act to provide for a right of redress for any person who has been sexually harassed, the establishment of the Tribunal for Anti-Sexual Harassment, the promotion of awareness of sexual harassment, and to provide for related matters.”

Commentary

The purpose of the Bill may prove too narrow as it only covers a right of redress for any person who has been sexually harassed and matters in connection thereto but, it does not cover a right of redress for other forms of harassment, which are non-sexual. It neither provides for the prevention and prohibition of harassment nor impose an obligation on organisations to include a mechanism/policy to prevent harassment, not limited to sexual harassment.

DEFINITION OF “SEXUAL HARRASSMENT”

The Bill defines “sexual harassment” as — “any unwanted conduct of a sexual nature, in any form, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is reasonably offensive or humiliating or is a threat to his well-being”.

Commentary

This definition is adopted from the *Employment Act 1955*, but without confining the act of sexual harassment to the workplace, and is worded in a wide manner to include unwanted conduct of a sexual nature in any form as well as, which is reasonably offensive or humiliating or is a threat to the person’s well-being.

The Bill should be expanded to also cover non-sexual harassment such as stalking, bullying and doxxing (i.e. the act of revealing someone's sensitive information online) that are equally invasive and more prevalent than sexual harassment similar to Singapore’s Protection against Harassment Act 2014 (POHA). POHA seeks to protect people from being targets of harassment or stalking, whether online or in real life by making it a criminal offence to engage in various behaviour that harasses, alarms or distresses a victim.

TRIBUNAL FOR ANTI-SEXUAL HARRASSMENT

A “Tribunal for Anti-Sexual Harassment” will be established, and the Tribunal will have the power to order: (1) a private or published apology; (2) compensation/damages up to RM250, 000; and (3) parties to attend a programme. Tribunal hearings will be closed to the public, no legal representation, a party who is a minor or mentally disabled are entitled to be represented by their guardian ad litem or their next friend subject to Tribunal’s discretion to impose conditions to ensure the unrepresented party is not substantially disadvantaged, sexual harassment complaints will be determined on the balance of probabilities, and non-compliance of the Tribunal award amounts to an offence with imprisonment.

Commentary

This is a commendable effort to afford accessibility to justice to victims through informal forum, which ensures privacy. However, the prohibition against legal representation may deter complaints of sexual harassment from being lodged with the Tribunal for fear of having to personally face the harasser or of having to comply with procedural requirements. Therefore, the option to seek permission of the Tribunal

for legal representation, similar to that provided in Industrial Relations Act 1967, should be made available to improve access to justice and ensure conformity with the principles of natural justice. Particular conduct/harassment is not recognised as an offence.

CONCLUSION

In the upshot, the Bill is undoubtedly a welcome step in giving the impetus to ensure the effective redressal of sexual harassment. However, the Bill should be expanded to also cover non-sexual harassment, and ensure that all persons, regardless of citizenship are free from harassment in private and public spaces.

In the interim, Government should also ratify the International Labour Organisation's Violence and Harassment Convention, which provides a framework for developing anti-harassment law which would aid Parliament. It would also send a clear signal to everyone that harassment will be punished.

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27 January 2022