

When The Law Is Half-Baked: A Critique Of The New Anti-Sexual Harassment Law In Malaysia

Zaiton Hamin^{1*}, Saslina Kamaruddin², Wan Rosalili Wan Rosli³

^{1*}Faculty of Law, Universiti Teknologi MARA (UiTM), Shah Alam, Selangor, Malaysia

²Faculty of Management and Economics, Universiti Pendidikan Sultan Idris (UPSI), Tanjung Malim, Perak, Malaysia

³Faculty of Management, Law and Social Science, University of Bradford, Bradford, United Kingdom

Corresponding Author: zaiton303@uitm.edu.my

Abstract

Before the 1955 amendment to the Employment Act, sexual harassment was not considered illegal in Malaysia. However, the amendment now requires employers to investigate any harassment or sexual harassment complaints and imposes criminal penalties for non-compliance. Unfortunately, victims of sexual harassment outside of the workplace have little legal protection under the Penal Code or the Communications and Multimedia Act 1998. Finally, in October 2022, the Anti-Sexual Harassment Act 2022 was enacted after over two decades of advocacy by women's rights groups and NGOs. However, this paper aims to critically examine the 2022 Act, which is still very new and has not been extensively studied academically. Using a qualitative research methodology, including a doctrinal and comparative legal approach and content analysis of the primary source, the 2022 Act itself, the authors argue that despite being a victim-centric law, the 2022 Act is inadequate in protecting victims of sexual harassment due to its failure to include significant provisions on the definition of sexual harassment, protection against victimisation, protection against a hostile environment, and employers' obligations to prevent and address such conduct.

Keywords: Sexual Harassment, Hostile Work Environment, Employer's Duty, Critiques, Victim Protection

INTRODUCTION

Received: 15 September 2023

Accepted: 13 December 2023

Published: 31 December 2023

Harassment, both sexual and cyber, has been on the rise globally and has garnered more attention due to advances in communication technology, the impact of the #MeToo movement, and the COVID-19 pandemic (Tharshini et al., 2022). It can manifest as stalking, cyberstalking, bullying, and cyberbullying and is characterised by repeated, unwanted behaviour that may be offensive, abusive, belittling, threatening, or intimidating towards an individual or group (Hamin et al., 2022; U.N. Women, 2012; Stevens et al., 2021; Wan Rosli et al., 2021; Chew & Tham, 2021). The meaning of harassment has also expanded in the age of technology to encompass impersonation, physical threats, enlisting third-party attackers, and spreading false information about the victim (Hamin & Wan Rosli, 2018 & 2020; Basu et al., 2021).

Unfortunately, it is too familiar to experience sexual harassment on social media platforms like Twitter, Facebook, and Instagram (Azizul et al. et al., 2023). According to

the Malaysian Communications and Multimedia Commission (MCMC), between 2016 and 2021, there were 15,238 complaints of online harassment, including bullying, sexual harassment, threats, and misuse of personal data. Private pictures are also frequently used to victimise or humiliate individuals. Of these complaints, 963 cases were investigated under Section 233 of the Communications and Multimedia Act (CMA) 1998, and 60 were brought to court, resulting in 241 charges. The penalty for online harassment can include a maximum sentence of a one-year one year of imprisonment, a maximum fine of RM50,000, or both.

From 2013 to 2017, the Royal Malaysian Police (PDRM) received 1,218 reported cases of sexual harassment, with most cases (79%) involving women, as reported by Solhi (2021). A Women's Aid Organisation (WAO) survey conducted in 2022 found that 62% of women had experienced sexual harassment in their workplace. Unfortunately, many victims are hesitant to report such incidents to the police, leading to underreporting these crimes. According to The New Straits Times (2022), reasons for this trend include feeling embarrassed (54%), believing that the police will take no action (38%), and fearing repercussions (26%).

Before December 2021, there were no laws to protect individuals from sexual harassment or stalking. However, after years of advocacy and activism from women's rights groups, civil society, government officials, and politicians, the Anti-Sexual Harassment Bill was finally passed by the Dewan Rakyat. The Bill underwent its First and Second Readings in December 2021 and July 2022, respectively, and was gazetted as an Act in October 2022. Although sections 1, 2, 24, 25, and 26 were enforced in March 2023, key provisions relating to the establishment, jurisdiction, and proceedings of the Tribunal for Anti-Sexual Harassment remain unenforced (Hamin et al., 2022; Chin, 2023).

The issue of sexual harassment has been predominantly explored through social sciences research rather than legal studies. While there is limited legal literature available, it has tended to focus on the challenges of proving harassment claims in court (Hassan & Lee, 2015), the gendered nature of such harassment in the workplace, and the possible remedies that female victims might seek (Bhatt, 2007; Arief, 2017; Ayub & Yusof, 2018). Given the recent introduction of laws in this area, there has not yet been an opportunity to evaluate their effectiveness through academic research. This paper aims to examine the

new Malaysian law on sexual harassment and the criticisms it has faced to gain a more comprehensive understanding of its scope.

The first part of this paper, the introduction, explains the concept of harassment broadly and the extent of sexual harassment problems before 2022. The second part explains the methodology adopted in this paper. The third part delved further into the 2022 Act by analysing its legal history, objectives, and provisions. The fourth part, which is the crux of the paper, examines the critiques of the Act from the normative and instrumental aspects. Lastly, the fifth 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, is silent on the legal protection for the survivor/victim and on the employer or organisational duty to prevent and address sexual harassment in their workplaces.

METHODOLOGY

This study examines the current laws on anti-sexual harassment in Malaysia, with particular attention given to the 2022 Anti-Sexual Harassment Act. Qualitative research methods use secondary data and sources, including critical analysis of the 2022 Act, relevant textbooks, journal articles, newspaper articles, and online databases. A doctrinal and comparative legal approach is employed to evaluate the Act's provisions. Furthermore, a content analysis is conducted to make practical and ethical assessments of the Act. Silverman's (2021) work is crucial in understanding the methodology of this study. This approach facilitates both instrumental and normative critiques of the Act.

THE ANTI-SEXUAL HARASSMENT ACT 2022

Legislative History

Implementing the new law has a deep legislative history spanning over two decades. In 1999, Penang's Women's Centre for Change (WCC) began advocating for this law due to the absence of legislation that adequately handled workplace sexual harassment complaints (Indramalar, 2022). The Code of Practice on the Prevention and Eradication of Sexual Harassment 1999 was also deemed ineffective and non-mandatory (Hamin et al., 2022; Indramalar, 2022). Since then, public concern surrounding the

258

prevalence of this crime and the lack of legal response and redress for sexual harassment complaints in employment or administrative settings has been on the rise (Hassan & Lee, 2015). Consequently, women's groups and NGOs commenced lobbying for sexual harassment laws in the early 2000s, extensively engaging with the Government and members of Parliament to effect change.

The Deputy Minister of Women, Family and Community Development, Datuk Siti Zailah Mohd Yusoff, introduced the Anti-Sexual Harassment Bill 2021 for its First Reading in Dewan Rakyat on December 15, 2021. The Bill received minor amendments following feedback from stakeholders and the public and was passed on July 20, 2022, later receiving approval from Dewan Negara on August 11, 2022. It was ultimately granted royal assent on October 8, 2022, and gazetted for enforcement on October 18, 2022. The Ministry of Women, Family and Community Development announced on March 28, 2023, that implementing the Anti-Sexual Harassment Act 2022 would be made in stages.

The Objectives and Contents of the 2022 Act

The primary objectives of the 2022 Act are multifaceted: to establish a platform for victims of sexual harassment to seek justice, to create the Tribunal for Anti-Sexual Harassment, to raise public awareness about sexual matters, and to prevent such behaviour from occurring (Hamin et al., 2022). Sexual harassment is defined as any unwanted sexual behaviour, be it verbal, non-verbal, visual, gestural, or physical, that is reasonably offensive or humiliating or threatens an individual's well-being (as per Section 2). Unlike the Employment Act 1955, which solely covers workplace sexual harassment, the 2022 Act provides a solution to anyone who has been a victim of sexual harassment in any domain of life (Hamin et al., 2022). Regrettably, the Act does not explicitly specify sexual harassment as a criminal offence, and offenders have no penalties (Hamin et al., 2022).

The Anti-Sexual Harassment Act of 2022 establishes a tribunal comprised of twelve members to address sexual harassment complaints made by individuals (section 4). This law is designed to be gender-neutral (section 7), and if the Tribunal is already hearing a complaint involving the same parties, the court lacks jurisdiction (section 8). However, there are exceptions to this rule. Legal representation is not automatically granted unless the complaint involves complex legal issues (section 13). All Tribunal

hearings are closed to the public (section 14), and a decision must be made within sixty days of the first day of the hearing (section 19(1)). Non-compliance with the Tribunal's decision will result in a fine or jail time (section 21). Parties may appeal the Tribunal's decision to the High Court, but only if serious irregularities affect the decision (section 23(1)). Finally, an Administrator is responsible for creating policies, issuing guidelines, promoting activities, and handling matters related to the prevention and awareness of sexual harassment (sections 24 & 25). The following section will analyse the Anti-Sexual Harassment Act of 2022 from both instrumental and normative perspectives.

THE CRITIQUES OF THE 2022 ACT

The Structure of the 2022 Act

In contrast to the English and Singaporean laws, the 2022 Act in Malaysia does not include provisions for stalking or cyberstalking. Such exclusion is because the Malaysian Government has separated these two connected crimes into two separate legislations. Harassment is governed by the Anti-Sexual Harassment Act 2022, which falls under the Women, Family and Community Development Ministry. On the other hand, stalking is addressed through an amendment to the Penal Code and the Criminal Procedure Code, which falls under the jurisdiction of the Prime Minister's Department. Following its Third Reading, the stalking law with the Penal Code amendment was passed in the Dewan Rakyat on October 3, 2022.

Ambiguous Definition of Sexual Harassment

In 2022, a long-awaited law was finally passed after being in development for over two decades. While this is undoubtedly a positive step, some legal loopholes still require attention. One such issue pertains to the definition of sexual harassment, which is currently too limited in scope (Hamin et al., 2022). Sexual harassment is typically categorised into two distinct types. The first type is *quid pro quo* (ILO Guide, 2010), which involves someone in a position of power demanding sexual favours in exchange for job-related benefits or threatening adverse employment outcomes. Women often experience this type of harassment in the workplace, where they are forced to tolerate it or risk losing their jobs. The second type of harassment involves sexually charged behaviour that is offensive and intimidating but is not necessarily linked to job-related benefits and can come from the company's clients. The definition of sexual harassment

must be expanded to provide better protection to victims (Hamin et al., 2022; ILO Guide, 2010).

Lack of Hostile Environment Avoidance Measure

A significant concern pertains to the absence of safeguards against a hostile workplace environment, where employees are subjected to offensive behaviour, such as sexually related conduct. For example, male coworkers may display pictures of nude women in their work areas, use nude women as screensavers, or make inappropriate sexual jokes in the presence of female colleagues. Although these actions may not be directed at a particular female coworker, they can still create an unwelcoming environment for women. The 2022 Act includes both definitions of sexual harassment. Still, it necessitates the complainant to prove that she was the direct recipient of the harassment and that others also found the behaviour to be humiliating, threatening, or offensive. The lack of protection against a hostile environment could be problematic, as a professor or teacher who regularly makes sexually explicit comments or jokes about women's sexuality in general but does not target a specific female student may not be open to a complaint. Similarly, if a general manager sends e-mails to all employees containing sexually derogatory or explicit comments about women, the victim may feel unable to report the incident. (Hasibuan & Romdoni, 2023).

Absence of Employer or Organisational Obligations

One concern regarding the 2022 Act is that it does not hold employers accountable for their employees' or clients' conduct while on the job. This issue was also not addressed in the Employment Act of 1955. For instance, employers are not required to establish reporting channels for sexual harassment (Cheah & Lim, 2022). Moreover, there is no prohibition against retaliation aimed at the complainant or whistle-blower. According to the ILO Convention of 2019, a law on gender-based violence, including sexual harassment, should prevent, prohibit, and protect against sexual harassment. This protection entails aiding complainants and whistle-blowers, providing remedies, and setting up support for victims or survivors of sexual harassment. However, the absence of provisions in the 2022 Act concerning sexual harassment in the workplace is problematic and could expose victim employees (ILO Convention, 2019).

Inadequate Protection for the Victims

As previously noted, the Tribunal has imposed a cap of RM250,000 on compensation or damages. This limitation seems to lack a clear rationale, as there are no constraints when the complainant pursues civil litigation (Cheah & Lim, 2022). Additionally, the orders currently available to the Tribunal may not fully redress the wrongdoing. For instance, the awarded compensation or damages may fail to deter future harassment of the victim complainant.

In Malaysia, victims of harassment are legally protected, while in the U.K., civil injunctions are an available option. The U.K. has a lower burden of proof based on the balance of probabilities, and the Home Office provides injunctions to protect victims from harassers or stalkers. Victims can also seek damages for any anxiety or financial loss caused by the harassment (Home Office U.K., 2011). Additionally, the Crown Prosecution Service consults with victims before making bail decisions (Crown Prosecution Service, 2014), and the Custody Officer will liaise with the victim before making any bail orders. However, the 2022 Act in Malaysia does not currently offer protection through injunctions or restraining orders.

CONCLUSION

Critics have pointed out that the 2022 Ani-sexual Harassment Act lacks clarity in defining what falls under the umbrella of sexual harassment and does not offer adequate legal protection against retaliation for survivors. Moreover, it falls short of mandating employers and organisations to address and prevent sexual harassment in the workplace. Nevertheless, the law is set to significantly impact various stakeholders, including victims, non-governmental organisations, civil society, and government agencies.

The implications of the 2022 Act for victims and survivors of sexual harassment are significant. By acknowledging the trauma they have experienced, the Act shows that the Government empathises with them. Furthermore, it sanctions those who have committed sexual harassment and offers remedies to victims. Implementing this Act may finally provide some measure of justice for victims who have previously endured a lonely journey with few avenues to report or discuss their experiences. Regrettably, their employers or organisations often dismiss their harassment, leaving them feeling re-victimised.

The recent legislation on sexual harassment carries significant weight for women activists who have dedicated themselves to its creation for a considerable amount of time. Although it is a remarkable accomplishment, it is not without its complexities. While the triumph of their efforts must be invigorating, it is disappointing that the law has notable gaps they attempted to resolve through various means, including memorandums, meetings, and petitions before the Dewan Rakyat assembly in July 2022. Consequently, the 2022 Act falls short of being all-encompassing and has been subject to discussion regarding its limitations.

The 2022 Act is aligned with the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Article 8 of the Federal Constitution, which advocates for gender equality. Nevertheless, the Government has only introduced two amendments to the initial version in December 2021, potentially overlooking crucial concerns raised by civil society advocates.

It is disconcerting that the Government missed an opportunity to prevent and address various forms of harassment, such as bullying, cyberbullying, body shaming, psychological harassment, and discriminatory harassment based on race, age, skin colour, nationality, or academic level. Additionally, while stalking is a form of harassment, the current legislation addresses it separately under a different law and ministry. This division is regrettable because other countries like the United Kingdom, Singapore, and New Zealand have exceptional anti-harassment laws that Malaysia could learn from and adopt as a model to address all forms of harassment, not just sexual harassment. Ultimately, only time will reveal if the new law does enough to safeguard the rights and well-being of sexual harassment victims and provide them with the justice they deserve.

Acknowledgements

The authors thank the Faculty of Law, Universiti Teknologi MARA(UiTM) Shah Alam, Selangor, who facilitated the writing and publication workshop.

Funding

This paper is funded by the Faculty of Law, Universiti Teknologi MARA(UiTM) Shah Alam, Selangor.

Author contributions

While Dr Hamin is the principal author, Dr Saslina Kamaruddin and Dr Wan Rosalili Wan Rosli helped with the writing and research for the paper.

Conflict of interest

No conflict of interest is associated with this publication.

References

- Abdul Hamid, H. B. (2022). Combatting Sexual Cyberviolence Against Women in Malaysia, 3 *MLJ* ccxxx.
- Arief, H. H. (2017). Sexual Harassment: Legal Protection Against Workers in Malaysia. *Al-Adl: Jurnal Hukum*, 9(1), 135-142.
- Ayub, Z.A., Yusoff, Z.M. (2018). "Right of Online Informational Privacy of Children in Malaysia: A Statutory Perspective", *Universiti Utara Malaysia Journal of Legal Studies* (UUMJLS), vol.9, no.1.
- Azizul, F., Kamarudin, D., Zakaria, H., Mutalif, A. Z. A., & Abdullah, A. (2023). Sexual Harassment at Workplace: Awareness Among Employer And Employees In Pekan, Pahang. *International Journal of Entrepreneurship, Business and Technology*, 1(1).
- Babulai, V. MCMC Records 15,238 Online Harassment Complaints Since 2016. The New Straits Time Retrieved from <https://www.nst.com.my/news/nation/2021/12/752112/mcmc-records-15238-online-harassment-complaints-2016>.
- Basu, P., Singha Roy, T., Tiwari, S., & Mehta, S. (2021, September). Cyber Police: Classification of Cyber Sexual Harassment. In *EPIA Conference on Artificial Intelligence* (pp. 701-714). Springer, Cham.

- Cheah, D. & Lim, A.(2022). Proving Sexual Harassment in Unfair Dismissal Claims, Retrieved from <https://dnh.com.my/proving-sexual-harassment-in-unfair-dismissal-claims/>.
- Chin, S. (2023). *Legal framework on gender equality in the workplace: Comparative study in Malaysia and India* (Doctoral dissertation, UTAR).
- Choo, E.Y. & Tham, S.P. (2021). Sexual Harassment in Workplace: A Literature Review, *The International Journal of Humanities & Social Studies*.
- Hamin, Z & Wan Rosli, W.R. (2018). Cloaked by Cyberspace: A Legal Response to the Risks of Cyberstalking in Malaysia. *International Journal of Cyber Criminology* 12(1)316-332.
- Hamin, Z, Hussain, F., Abdul Rani, A. R., Kamaruddin, S. & Wan Rosli, W.L. (2022) Recent Development in Sexual Harassment Law in Malaysia: Whither the Victim's Protection? *International Journal of Academic Research in Business and Social Sciences*, 12(11), 3089–3099.
- Hamin, Z. & Wan Rosli, W.R. (2020). Whither the Protection for Cyberstalking Victims? Some Evidence from Malaysia. *Environment-Behaviour Proceedings Journal* 5(11) 53-58.
- Hasibuan, K., & Romdoni, M. (2023). The Impact of the Legal Framework and Reporting Mechanisms in Eradicating Sexual Harassment in the Workplace in Indonesia. *The EastEast Journal Law and Human Rights*, 2(01), 9-16.
- Hassan, K. H & Lee, Y. (2015). Sexual Harassment in the Workplace: Selected Court Cases and New Legal Provisions in Malaysia. *Asian Social Science* 11(6) <http://asiapacific.unwomen.org/en/focus-areas/end-violence-against-women/evaw-facts-and-figures>.
<https://wao.org.my/sexual-harassment-statistics/>.
- Indramalar, S., The Anti-Sexual Harassment Bill: Over Two Decades in the Making (The Star, July 29, 2022).

International Labour Organisation (2010). Guide on the Prevention of Sexual Harassment in the Workplace. Retrieved from https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-beijing/documents/publication/wcms_157626.pdf

Jatmiko, M.I. , Syukron, M., & Mekarsari, Y. (2020). COVID-19, Harassment and Social Media: A Study of Gender-based Violence Facilitated by Technology During the Pandemic. *The Journal of Society and Media*, 4(2), 319-347.

Renuat, A., & Kusumaningtyas, R. (2022, May). Self-concept of Victims of Cybersexual Harassment on Instagram. *International Conference on Community Empowerment and Engagement (ICCEE 2021)* 25-32. Atlantis Press.

Scarduzio, J. A., & Walker, C. S. (2022). Disruptions to the Workplace Exploring the Policies and Legal Cases of Online Sexual Harassment: Policies and Laws About Online Sexual Harassment. *Research Anthology on Combating Cyber-Aggression and Online Negativity* (pp. 331-351). IGI Global.

Silverman, D. (2021). *Doing Qualitative Research*, Sage Publication Ltd.

Solhi, F. Police Harassment Cases Must Not Be Taken Lightly—the New Straits Time (February 15, 2021).

Stevens, F., Nurse, J. R., & Arief, B. (2021). Cyberstalking, cyber harassment, and adult mental health: A systematic review. *Cyberpsychology, Behaviour, and Social Networking*, 24 (6) 367–376.

Tharshini, N.K., Hj Mas'ud, F. & Hassan, Z.(2022). Level of Cybercrime Threat During the Outbreak of Covid-19 Pandemic: A Study in Malaysia. *International Journal of Academic Research in Business & Social Sciences* 12(5), 30–51.

U.N. Women (2012). Facts and Figures. U.N. Women, Asia and the Pacific. Retrieved from

Wan Rosli, W.R., Hamin, H., Abdul Rani, A.R. & Kamaruddin, S. (2021). Non-Criminalisation of Cyberstalking and Its Impacts on Justice for Victims: Some Evidence From Malaysia. *International Journal of Academic Research in Business & Social Sciences* 11(6) 1257-1266.

Women Aid Organisation (WAO), Sexual Harassment Statistics 2000-2017. Retrieved from