

Sexual Harassment in the Workplace: An Overview over the International Law and Current Law and Practice in Malaysia¹

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Abstract

Sexual harassment in the workplace is a hazard encountered in the working place across the world. It reduces the quality of working life, jeopardizes the well-being of both working men and women, and imposes costs on firms and organizations. The issue pertaining to sexual harassment in the workplace has been addressed by several international groups like the United Nations (UN), the International Labour Organization (ILO), the European Union (EU), the Caribbean community (CARICOM), and the organization of American States (OAS) as a human right violation, a form of violence, and discrimination. Since sexual harassment in the workplace pollutes the working environment and can have a devastating effect upon the health, confidence, morale and performance of the workers, laws and policies that specifically address the problem of sexual harassment in the workplace have been developed by national governments around the world including Malaysia. In Malaysia, the issue of sexual harassment in the workplace has become one of a matter of national concern. It had been dealt under varieties of law in the country. However, due to the complex and sensitive characteristics of the cases of sexual harassment in the workplace, the victims complaints may not necessarily been properly and adequately handled under the existing laws and practice. This paper will focus on what is being done at the in Malaysia in order to prevent and combat the issue of sexual harassment in the workplace.

1. Introduction

Sexual harassment in the workplace pollutes the working environment and can have a devastating effect upon the health, confidence, morale and performance of those affected by it in the working place. The anxiety and stress produced by sexual harassment in the workplace may lead to those subjected to it taking time off from work due to sickness and stress, being less efficient at work or leaving their job entirely to seek work elsewhere. Employees often suffer the adverse consequences from the harassment itself and the short and long term damage to their employment prospects if they are forced to forego promotion or to change jobs. Sexual harassment in the workplace may also have a damaging impact on employees not themselves the object of unwanted behaviour but who is witness to it or have knowledge of the unwanted behaviour. There are also adverse consequences arising from sexual harassment in the workplace for employers. It has a direct impact on the profitability of the enterprise where staffs suffer from the harassment will take sick leave or resign their posts because of the harassment.

2. An overview over the international law over the issue of sexual harassment in the workplace

A range of initiatives to combat sexual harassment in the workplace have been devised at the international levels.² At the international levels, the issue of sexual harassment in the workplace had been taken seriously by the United Nations (UN) and the International Labour Organizations (ILO).

¹ This paper been presented at the 10TH Asian Law Institute (ASLI) Annual Conference at the National Law School of India University on 23 – 24 May 2013.

² See Ian Brownlie, *Basic Documents in International Law*, 2nd Edition, Oxford: Clarendon Press, 1972 at 1.

Although the international conventions have not specifically addressed the issue concerning sexual harassment in the workplace, many fundamental human rights and international law principles have been applied to prohibit sexually harassing conduct, like the right not to be subject to sex discrimination, the right to dignity in the workplace, and the right to a healthy and safe work environment.³ United Nations conference and committees have treated sexual harassment in the workplace as a form of sex discrimination prohibited under United Nations conventions as a violation of human dignity, and a violation of health and safety rights guaranteed to workers under International Labor Organization treaties. The United Nations Commission on Human Rights has created a number of special rapporteurs and working groups that address specific human rights violations or regions. Special rapporteurs can have either thematic mandates, such as violence against women, or regional mandates. Working Groups may focus on drafting international law or on certain human rights issues, such as the right to development. These mechanisms have been very effective in bringing urgent human rights issues to the attention of the UN and the international community. In 1994, the Commission on Human Rights appointed Radhika Coomaraswamy, from Sri Lanka, to the position of Special Rapporteur on Violence Against Women, Including Its Causes and Consequences. The Special Rapporteur collects and analyzes data on violence against women in order to recommend measures to be taken at the international, regional and national level. The United Nations Special Rapporteur has recognised sexual harassment in the workplace as one of the principal forms of violence against women around the world. However, it is the researcher observation that there is still no clear definition of sexual harassment in the workplace at the international level. Most of the initiatives taken only conceptualize sexual harassment as a form of sex discrimination and violence against women.

The issue of sexual harassment in the workplace has been expressed as manifestation of both sex discrimination and an act of violence against women.⁴ According to Nancy Wyatt,⁵ many western societies considered sexual harassment as a form of discrimination because it is used to keep women out of the workplace. Sexual harassment is a violation of fundamental principles of international human rights.⁶ Although the International Bill of Human Rights, which consists of the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948,⁷ and its implementing covenants, the International Covenant on Civil and Political Rights (ICCPR),⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁹ (both entered into force in 1976), does not explicitly mention sexual harassment, it does contain provisions that apply to sexually harassing conduct. However, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, has since dealt with the issued on sexual harassment in the workplace.¹⁰ The Convention is been described as an international bill of rights for women, it came into force on 3 September 1981. As of July 2011, 187 states have ratified or acceded to the treaty, countries over ninety percent of the members of the United Nations are party to the Convention. By accepting this convention, states commit themselves to undertake a series of measures to end discrimination against women in all forms, including: to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women, to establish tribunals and other public institutions to ensure the effective protection of women against discrimination, and to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

³ Refer to Abdul Ghafur Hamid, *Cases and Material on International Law: A Malaysian Version*, Vol. 2, Kuala Lumpur: Univision Press Sdn. Bhd., 2002 at 77.

⁴ Deirdre McCann, n. 8 at 11; See also Lee Woodyear, *Violence and getting the story: journalists at work*, Geneva: International Labour Office, 2003.

⁵ Nancy Wyatt was the former Associate Professor of Communication Arts and Sciences from the Pennsylvania State University, United States.

⁶ See article 2 of the Universal Declaration of Human Rights (UDHR) 1948. See also Tunku Sofiah Jewa, *Public International Law: A Malaysian Perspective*, Vol. 1, Kuala Lumpur: Pacifica Publication, 1996 at 468.

⁷ The International Bill of Human Rights protects rights “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Sexual harassment also violates the right to “just and favourable conditions of work”. In addition, the failure to provide a remedy to victims of sexual harassment violates the right to an effective remedy for the violation of fundamental human rights.

⁸ See article 2, 4, and 26 of the International Covenant on Civil and Political Rights (ICCPR).

⁹ See article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

¹⁰ See P. R. Ghandi, n. 44 at 87 and 94; Patric Mzolisi Mtshaulana, John Dugard, Neville Botha, n. 44 at 219.

The United Nations Committee on the Elimination of Discrimination against Women (CEDAW) is charged in monitoring the convention. It is an expert body established in 1982, which composed of a number of experts on women's issues from around the world. The Committee's mandate is very specific namely it watches over the progress for women made in those countries that are the states parties to the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹¹ A country becomes a state party by ratifying or acceding to the convention and thereby accepting a legal obligation to counteract discrimination against women. The committee monitors the implementation of national measures to fulfill this obligation.¹² In 1992, the Committee adopted on general recommendation 19, which requires national reports to the Committee to include statistical data on the incidence of violence against women, information on the provision of services for victims, and legislative and other measures taken to protect women against violence in their everyday lives such as sexual harassment in the workplace, abuse in the family and sexual violence. The Committee General Recommendation of 1989, accepted sexual harassment as a form of violence against women.¹³ Three years later, in General Recommendation No. 19 of 1992, the Committee characterized gender – based violence as a type of sexual discrimination and therefore a breach of the convention itself.¹⁴ The committee has describes sexual harassment in the workplace as:

“such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”¹⁵

The 1993 General Assembly Declaration on the Elimination of Violence against Women defines violence against women to constitute sexual harassment in the workplace.¹⁶ The World Conference on Human Rights, held in Vienna in 1993, identified sexual harassment as a human rights violation.¹⁷ Article 2 (b) of the Vienna Declaration and Programme Action stated that violence against women to encompass physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution.

¹¹ C. Chinkin and K. Workman K., “Committee On The Elimination Of Discrimination Against Women”, “Convention on the elimination of all forms of discrimination against women and women's human rights, Minneapolis, Minn., 1993. *The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol: handbook for parliamentarians*, Geneva: Inter-parliamentary Union, 2003.

¹² See *Gender and human rights in the Commonwealth: some critical issues for action in the decade 2005-2015*. London: Commonwealth Secretariat, 2004. Afkhami M.Faith, *Freedom: women's human rights in the muslim world*, Syracuse, N.Y: Syracuse University Press, 1995. H. Lemaire, *Women's rights: a framework for human rights and democracy*, Brussels, 1993; *Bringing international human rights law home : judicial colloquium on the domestic application of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child*, New York: United Nations, 2000.

¹³ General Recommendation No. 12 (8th session, 1989) on Violence against Women. *Resolution and Decisions Adopted by the General Assembly of the United Nations for its annual session*, United Nations Department of Public Information, New York. See the *Convention on the elimination of all forms of discrimination against women*, New York, 1990; *Convention on the elimination of all forms of discrimination against women*, Canberra: Government Publishing Service, 1986.

¹⁴ General Recommendation No. 19 (11th session, 1992) on Violence against Women. See the *United Nations report on violence against women*, Geneva, 1995.

¹⁵ Please refer to Article 11 of the General Recommendation No. 19 (11th session, 1992) on Violence against Women.

¹⁶ Declaration on the Elimination of Violence against Women, General Assembly Resolution 48/104 of 20 December 1993, 85th Plenary Meeting.

¹⁷ No. 18 and 38 of the Vienna Declaration and Programme Action, UN Document A/CONF.157/23 12 July 1993; See Follow-up to the World Conference on the Human Rights: Human Rights Questions: comprehensive implementation of and follow-up to the *Vienna Declaration and Programme of Action*: United Nations by the Secretary General, New York: United Nations, 1998

In 1995, the United Nations Fourth World Conference on Women: Action for Equality, Development and Peace has defined sexual harassment as gender based violence.¹⁸ The Conference was participated in by 189 Governments and more than 5,000 representatives from 2,100 non-governmental organizations. The principal themes were the advancement and empowerment of women in relation to women's human rights, women and poverty, women and decision-making, the girl-child, violence against women and other areas of concern. The resulting documents of the conference are the Beijing Declaration and Platform for Action.¹⁹

In 1995, Malaysia has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) with reservations to some of its provisions. The original reservations read as follows "The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Shariah law and the Federal Constitution of Malaysia. With regards thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 2 (f), 5 (a), 7 (b), 9 and 16 of the aforesaid convention. In relation to article 11, Malaysia interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only. On 6 February 1998, the Government of Malaysia notified the Secretary-General of a partial withdrawal as follows "The Government of Malaysia withdraws its reservation in respect of article 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h)". Due to some reservation still made by the government over CEDAW many women's human rights groups in Malaysia have since the CEDAW review in 2006 sent several memorandum to the government, attended numerous meetings with the Malaysian Ministry of Women, Family and Community Development and issued many press statements calling for the full and effective implementation of the CEDAW Convention. Notably, in July 2010 the government removed its reservations to CEDAW Articles 5(a), 7(b) and 16(2).

However reservations still remain on five CEDAW Articles 9(2) on states parties shall grant women equal rights with men with respect to the nationality of their children, 16(1)(a) where states parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women for the same right to enter into marriage; 16(1)(c) on the same rights and responsibilities during marriage and at its dissolution, 16(1)(f) on the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount and 16(1)(g) on the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation. However, it is important to highlight that the CEDAW convention provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life. States parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms. Countries which have ratified or acceded to the CEDAW convention like Malaysia are legally bound to put its provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations. However, full implementation of the any international convention including CEDAW should have its limitation. For Malaysia which have a very complex society which include society from different religious and cultural background some reservations is needed. However, having such says it shouldn't go against the basic or the fundamental principle or idea of CEDAW convention in the first place which is the protection and equal opportunity given to women.

¹⁸ Paragraph 114 (b) of the Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995). See *the Follow-up to and implementation of the Beijing Declaration and Platform for Action: addendum: update of the synthesized report on national action plans and strategies for implementation of Beijing Platform for Action*, New York: United Nations, 1999; *Report on the fourth world conference on women* (Beijing, 4-15 September 1995), Geneva: International Labour Office, 1995.

¹⁹ In 1995, the Fourth World Conference on Women adopted the Beijing Declaration and Platform for Action for Equality, Development and Peace (BPfA). The BPfA is an agenda for women's empowerment. It reaffirms the fundamental principle whereby the human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights. As an agenda for action, the BPfA seeks to promote and protect the full enjoyment of all human rights and fundamental freedoms by women throughout their lives. The BPfA addresses twelve critical areas of concern requiring particular action towards the advancement of women which include violence against women.

3. Current law and practice to combat the issue of sexual harassment in the workplace in Malaysia

Currently, there is no specific legislation to combat the issue of sexual harassment in the workplace in Malaysia. However, the issue relating to sexual harassment in the workplace has been considered under various types of legislations. There include amongst others the administrative regulation, circular, code of practice, standing order, criminal law and labour laws. These various legal instruments provide the victim of sexual harassment in the workplace a legal avenue to make a case of sexual harassment in the workplace.

3.1 The implementation of administrative regulation, circular, code of practice and standing order to combat the issue concerning sexual harassment in the workplace in Malaysia

Malaysian workers consist both in public and private sectors. For the public servants, they can be charged for sexual harassment in the workplace when they act in such a way as to damage or blemish the name of the public service. Regulation 4 (2) (d) of Part II on the Code of Conduct of the Public Officers (Conduct and Discipline) Regulations 1993 clearly stated that an officer shall not conduct himself in such a manner as to bring service into disrepute or bring discredit to the public service. Later on an amendment was made by adding regulation 4A. This particular regulation provided that an officer shall not subject another person to sexual harassment by making any sexual advance or request for sexual favours to another person (*Quid pro quo*). This includes the doing of an act of sexual in nature to another person by way of making of a statement either orally, writing or in any other manner. An officer also shall not do any act of a sexual nature to another person in circumstances in which a reasonable person, having regard to all the circumstances would be offended, humiliated or intimidated (Hostile working environment). This regulation also provides that the doing of such act is not limited in the workplace or during working hours. As long as the doing of such act brings the public service into disrepute or bring discredit to the public service it is still considered as breaking the regulations. If an officer is found guilty of such disciplinary offence, any one or any combination of two or more of the following punishments depending upon the seriousness of the offence may be imposed on the officer namely a warning,²⁰ fine,²¹ forfeiture of emoluments,²² deferment of salary movement,²³ reduction of salary,²⁴ reduction in rank²⁵ or dismissal.²⁶

However, since the introduction of this regulation in 1993, only one case has come up for consideration.²⁷ Due this reason, in September 10, 2005 the Public Service Department (hereinafter referred to as “the PSD”) had issued circular a more comprehensive guidelines for handling sexual harassment in the workplace for the civil servant in the country (hereinafter referred to as “the Circular”).²⁸ The former Chief Secretary to the Government, Tan Sri Samsudin Osman said that the PSD issued the guidelines as a preventive measure against sexual harassment in the workplace. He further added that, “maybe before this, civil servants were not so clear on what constitutes sexual harassment”. The guidelines spell out actions deemed as sexual harassment in the workplace. These include ogling, hugging without the other person’s consent, showing tongue in a suggestive manner, lewd hand signs,²⁹ sending dirty text messages like SMS, MMS, e-mail, letter or any forms of communication sexual in nature,³⁰ sexual jokes, passing remarks on other person’s clothing, body or behaviour that could make that person feel threatened, insulted, or leads to mental or emotional distress³¹ and asking for sexual favours³².

²⁰ Regulation 38 (a) of the Public Officers (Conduct and Discipline) Regulations 1993.

²¹ Regulation 38 (b) of the Public Officers (Conduct and Discipline) Regulations 1993.

²² Regulation 38 (c) of the Public Officers (Conduct and Discipline) Regulations 1993.

²³ Regulation 38 (d) of the Public Officers (Conduct and Discipline) Regulations 1993.

²⁴ Regulation 38 (e) of the Public Officers (Conduct and Discipline) Regulations 1993.

²⁵ Regulation 38 (f) of the Public Officers (Conduct and Discipline) Regulations 1993.

²⁶ Regulation 38 (g) of the Public Officers (Conduct and Discipline) Regulations 1993.

²⁷ See Cecilia Ng, Zanariah Mohd Nor, and Maria Chin Abdullah, *A Pioneering Step: Sexual Harassment and The Code of Practice in Malaysia*, Petaling Jaya: Women’s Development Collective and Strategic Information Research Development, 2003 at 50. See also Deborah Loh, “Only one case reported so far in civil service”, *New Straits Times*, September 11, 2005.

²⁸ See Hamidah Atan, “Sexual harassment: Don’t even think about it”, *News Sunday Times*, 20 November, 2005.

²⁹ See regulation 6.1 (b) and (d) of the Circular.

³⁰ See regulation 6.1 (c) of the Circular.

³¹ See regulation 6.1 (a) and (e) of the Circular.

³² See regulation 5.1 (a), (b), (c), and (d) of the Circular.

The circular, issued by PSD also recommend civil servants to keep offensive emails, text messages or other documents as proof, and record the time of the offence.³³ The victims can also request the presence of a staff counsellor if they choose to confront the perpetrator.³⁴

Unlike the civil servant where the Public Officers (Conduct and Discipline) Regulations 1993 and the 2005 circular guidelines for handling sexual harassment in the workplace had provided them with a preventive measure against sexual harassment in the workplace along with the remedies, the workers in private sector in Malaysia have only been equipped with a code known as Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (hereinafter referred to as “the Code”). The state-drafted Code was introduced by the Ministry of Human Resources³⁵ way back in August 17, 1999.³⁶ The aim of the Code is to ensure that sexual harassment in the workplace does not occur and, if it does occur, adequate procedures are available to deal with the problem and prevent its recurrent.³⁷ The introduction of the Code has shown the seriousness on the part of the government in dealing with the issue of sexual harassment in the workplace.³⁸ In 26 November 2012, the Malaysia Parliament has accepted a proposal to bar the lawmakers from making sexist remarks during debates through the existing Standing Order.³⁹ The original Standing Order 36 (4) reads: “It shall be out of order for Members of the House to use offensive language.” The amendment to Standing Order 36 (4) will append the phrase “or make a sexist remark.”⁴⁰ Such approach is taken due to many incidents involving the vulgar and offensive words uttered by the Member of Parliament’s towards each other.

3.2 The use of criminal law to combat the issue concerning sexual harassment in the workplace.

According to the Malaysian Royal Police, if there is a report of crime concerning sexual harassment in the workplace, it normally being investigated under four main sections under the Malaysian Penal Code (Act 574)⁴¹ namely section 354 which provides for assault or use of criminal force to a person with intent to outrage modesty, section 355 which provides for assault or criminal force with intent to dishonour a person, otherwise than on grave provocation, section 375 which provide for rape and section 509 which provides for word or gesture intended to insult the modesty of a women. In 2006, major amendment had been made towards the Penal Code concerning the issue of sexual harassment in the workplace where a new sub – section had been added under section 375 it strongly states that a man is said to commit “rape” if: with her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her.

³³ See regulation 8.1 (a) (iv) (B) of the Circular.

³⁴ See regulation 8.1 (b) of the Circular.

³⁵ This Ministry includes the Departments of Labour in West Malaysia and Sabah and Sarawak and other Departments which deal with employment, industrial relations and social security. Its functions include worker’s welfare, skills development and increasing employment opportunities.

³⁶ See *New Straits Times*, 18 August, 1999; “Ministry to release code on sexual harassment”, *Business Time*, 14 August, 1999 and “Guidelines to curb sexual harassment at workplace”, *New Straits Times*, 23 June, 1999.

³⁷ See paragraph 1 of the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace 1999.

³⁸ See “Silent of the Harassed”, *New Straits Times*, 6 March, 1999.

³⁹ Standing Orders are written rules under which Parliament conducts its business. They regulate the way Members behave, Bills are processed and debates are organised. Some Standing Orders are temporary and only last until the end of a session or a parliament.

⁴⁰ It is important to note that the Malaysian Federal lawmakers are permitted to speak on any subject inside Parliament without fear of censure. This privilege of parliamentary immunity, which is set out by Article 63 of the Malaysian Federal Constitution, does not apply to statements made outside the House. Exceptions to this rule are portions of the Federal Constitution, such as the Articles governing citizenship, Bumiputera (Malays and indigenous people) priorities, and the Malay language. All public questioning of these provisions is illegal under the 1971 amendments to the Malaysian Sedition Act, which Parliament passed in the wake of the May 13, 1969 racial riots. The Malaysian Member of Parliament’s are also forbidden from criticising the Yang di-Pertuan Agong (Malaysia King) and judges.

⁴¹ The Malaysian Penal Code (Act 574), is the Act relating to criminal offences is an elaborate legislation consisting of 511 sections. The Malaysian Penal Code (Act 574) is one of the oldest laws in Malaysia enacted as early as 1871, which was then known as Straits Settlement Ordinance No. IV of 1871. Subsequently this Ordinance was adopted as Federated Malay States (FMS) coming into force in different states and on different dates between 1905 – 1909. The Code became the Revised Edition of the laws of FMS as Cap 45 in 1927 and was extended to have effect throughout the Federation of Malaya on 18 December 1948. In 1997, the Penal Code (FMS Cap 45) was revised and published again as laws of Malaysia Act 574 and come into force on 17 August 1997.

The new sub – section 375(f) deals with new categories of rape, where sexual intercourse had with the consent of a woman will become rape if: (a) her consent was obtained by the offender “using his position of authority over her”, or (b) her consent was obtained “because of professional relationship”, or (c) her consent was obtained because of “other relationship of trust in relation to her”. The main objective behind this new sub – section is to nab offenders who abused their positions or trust in circumstances that would vitiate the consent and therefore amount to rape.

3.3 The utilization of labour laws to combat the issue concerning sexual harassment in the workplace.

There is various labour legislations which can be utilize by the victim of sexual harassment in the workplace to pursue with their case against the perpetrator. First is the Employment Act 1955. The Employment Act 1955 forms the primary legislation on employment in Malaysia, providing guidelines on minimum employment rules within which to operate businesses. The Act was recently amended with improvements in the areas of overtime benefits, payment of wages and salaries, welfare and maternity benefits and on protection of women against sexual harassment in the workplace. Before the amendment, the only part which the victim of sexual harassment in the workplace can hope for under this Act were section 14 (3) of the Employment Act 1955 where it states “An employee may terminate his contract of service with his employer without notice where he or his dependants are immediately threatened by danger to the person by violence or disease such as such employee did not by his contract of service undertake to run”. However, in early 2012, the Malaysian government has step up their effort in combating the issue of sexual harassment in the workplace in the country by adding new part under the Employment Act 1955⁴², this new part provides a complaint of sexual harassment in the workplace which means any complaint relating to sexual harassment made (i) by an employee against another employee; (ii) by an employee against any employer; or (iii) by an employer against an employee.⁴³ Where upon receipt of a complaint of sexual harassment, an employer or any class of employers shall inquire into the complaint in a manner prescribed by the Minister.⁴⁴ The new part added that any employer who fails (a) to inquire into complaints of sexual harassment; (b) to inform the complainant of the refusal and the reasons for the refusal as required; (c) to inquire into complaints of sexual harassment when directed to do so by the Director General from the Ministry; or (d) to submit a report of inquiry into sexual harassment to the Director General, commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.⁴⁵

4. The efficiency and effectiveness the existing laws and practices to combat the issue concerning sexual harassment in the workplace in Malaysia

In 1999, the then Minister of Human Resources launched the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (hereinafter referred to as “the Code”). It must be pointed out that the Code only served as a guideline and advice especially to private companies and employees to set out a more detail and comprehensive guidelines within their workplace to handle with sexual harassment in the workplace cases. It is not compulsory for the private employers in Malaysia to implement the full recommendation highlighted by the Code or even adopt the Code entirely within their workplace. The absence of this legal value had been highlighted in several Malaysian cases like *Chua Choong Yin v Tan Boon Bak Trading Sdn. Bhd. & Anor.*⁴⁶ In this case, the appellant appealed against the dismissal of his employment with the first respondent which was held to be with just cause and excuse by the second respondent, by the Industrial Court. The first respondent raised the several preliminary issues namely amongst other that the appellant did not comply with Practice Direction No. 3 of 1992 because he failed to state the skeletal grounds of appeal and omitted to mention events not favourable to him in the Chronology of Events. However, it was held that the said Practice directions do not have the “force of law” but they are created for a specific purpose, namely, to regulate a systematic and consistent procedure governing the filing of an appeal.

⁴² Part XVA of the Employment Act 1955 title “Sexual Harassment”.

⁴³ Section 81A of the Employment Act 1955.

⁴⁴ Section 81B of the Employment Act 1955.

⁴⁵ Section 81F of the Employment Act 1955.

⁴⁶ [2002] 3 CLJ 357.

For this specific reason, the researcher also refers to few numbers of English cases which had stressed on this point. For instance, in the case of *Barworth Flockton Ltd v Kirk*,⁴⁷ it was stated that “The guidance given to employers in the Industrial Relations Code of Practice is not binding as a matter of law”. Although the Code of Practice has no legal value, it still provides a useful guidance in deriving legal decision. In the case of *Blake v Berkel Auto Scale Co Ltd*,⁴⁸ the court stated that “The Code of Practice is not binding on us but it does provide useful guide lines which we have to consider”. In *W Dacres (appellant) v The Walls Meat Co Ltd (respondents)*,⁴⁹ they have realised that the Code of Practice is not binding, although it is very important. It is only a guide, although it is a guide which ought in ordinary circumstances to be followed.⁵⁰ Since, the Code doesn’t have the binding force, it lack of teeth for the employers within the country to tackle the issue concerning sexual harassment in the workplace. Please refer to the following Chart 2. The chart gives a clear indication on the number of employers in private sector voluntarily adopting the Code within their workplace. The number up to 2010 only states the total number of 1,763 of employers in the private sector adopted the Code out of nearly half a million working places within the country since it was introduced in 1999. The remaining administrative regulation, circular as well as the recent standing order to deal with the issue, the problem remain the same namely it only applicable to certain group of people namely the public servant and member of parliament’s which only a portion of workforce in Malaysia.

Year	Number
1999	0
2000	0
2001	221
2002	240
2003	91
2004	73
2005	110
2006	490
2007	76
2008	138
2009	158
2010	166
Total	1763

Chart 2: Implementation of the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace amongst employers in private sectors. Sources: Ministry of Human Resources, Malaysia.

As for the using the criminal law to combat the problem concerning sexual harassment in the workplace, despite the 2006 amendment made in the Malaysian Penal Code, the researcher is of the view that there has been several weakness of using the Penal Code to settle the issue of sexual harassment in the workplace cases. Criminal law claims brought under general provisions are usually conducted according to the ordinary procedures, which are often criticized for being too public, too complex, isolating for the complainant and insufficiently responsive to the difficulties of proving sexual harassment in the workplace. The complainants are often left to their own devices and have to fight the battle themselves as best as they can. They are also exposed to humiliation and public embarrassment as the case is tried in an open court and the victim will be called to the dock to give evidence. The quantum of evidentiary requirements for proving the case is very high namely proving the offense beyond reasonable doubt.⁵¹ The criminal justice system also does not provide support to the complainant such as counseling. The case itself would normally travel through the courts at a fairly slow rate and it is likely that the complainant would have to wait couples of years for a verdict.

⁴⁷ [1978] IRLR 18.

⁴⁸ [1974] IRLR 272.

⁴⁹ [1976] IRLR 20.

⁵⁰ See also *The Littlewoods Organisation Lts (appellants) v L.N. Egenti (respondent)* [1976] IRLR 334, [1976] ICR 516 and *Lewis Shops Group v Wiggins* [1973] IRLR 205.

⁵¹ See *Miller v Minister of Pensions* [1947] 2 All ER 372.

While waiting, the sexual harassment in the workplace may continue unchecked.⁵² There is no form of protection for the complainant and she will need to endure the presence of the harasser in her workplace. Criminal prosecution also does not provide any form of redress for the complainant for her injured feelings, humiliation and loss of dignity, not to mention the more tangible losses such as loss of income and negative consequences on the victim career.

The Employment Act 1995 is very limiting in its application. It covers only the strict employer employee relationships and even then, not everyone is protected under the Act. Though the new adding part under Part XVA in the Act in 2012 states “Notwithstanding paragraph 1 of the First Schedule, this Part extends to every employee employed under a contract of service irrespective of the wages of the employee”.⁵³ This Act still covers only the misconduct of the employees not the employers and its only covers the contract of service⁵⁴. This Act did not cover the “contract for service” like those who involved in income-generating activities as in the case of vendors, bus drivers, doctors, and others.⁵⁵ The existing grievance mechanism provided under the Industrial Relations Act 1967 fail to take into account the complexities of sexual harassment in the workplace cases, especially the tripartite relationship that often exists between the complainant, the alleged harasser, and the management. An alternative avenue should be given to the victim of sexual harassment in the workplace to settle their case properly and efficiently. This can easily be done by creating a complete and comprehensive law on sexual harassment in the workplace.

At present, the Malaysian Joint Action Group against Violation against Women (JAG-VAW) which consists a number of the non-governmental organizations and the Malaysian Trades Union Congress is pressing for a comprehensive proposed bill on the issue of sexual harassment since 2001. This proposed bill is known as the Proposed Sexual Harassment Bill (hereinafter referred to as “the proposed Bill”).⁵⁶ The proposed Bill adequately addresses work related sexual harassment. Section 2 of the proposed Bill defined workplace as “means any place where a person attends for the purpose of carrying out any functions in relation to his or her employment, occupation, business, trade or profession and need not be a person’s principal place of business or employment including a ship, aircraft, vehicle, and virtual or cyber spaces and any other context that results from employment responsibilities or employment relationships”. It also covers sexual harassment in sporting activities, educational institutions, and legislative bodies. If passed, the proposed Bill will bring about significant changes as it addresses two fundamental points needed to cope with the sensitivity and complexity of sexual harassment in the workplace cases: firstly, it will require all employers to prevent sexual harassment by creation of in-house mechanisms and secondly, it will provide victims of sexual harassment in the workplace with timely and meaningful access to legal redress which can be accomplished through the creations of special tribunal, procedure, remedies, counseling, and protection against retaliation and victimization for both victims and witness of sexual harassment in the workplace.

⁵² See Cecilia Ng, Zanariah Mohd Nor, and Maria Chin Abdullah, *A Pioneering Step: Sexual Harassment and The Code of Practice in Malaysia*, Petaling Jaya: Women’s Development Collective and Strategic Information Research Development, 2003 at 44.

⁵³ Section 81G of the Employment Act 1955.

⁵⁴ According to the act, contract of service means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract. See section 2 of the Employment Act 1955.

⁵⁵ See Cecilia Ng, Zanariah Mohd Nor, and Maria Chin Abdullah, n. 91 at 47.

⁵⁶ The Proposed Malaysian Sexual Harassment Bill 2001 is divided into seven parts namely Part 1 is a preliminary section that outlines definitions used in the Bill; Part 2 addresses the various forms of sexual harassment that are prohibited under the Bill; Part 3 states that victimisation of those who make complaints, and anyone who assists them, is prohibited. It also contains the vicarious liability sections, stating that employers who do not formulate their own in-house mechanisms to prevent sexual harassment or adequately address complaints will be held liable; Part 4 addresses the positions and duties of the Director and Tribunal; Part 5 outlines the complaints process, from the laying of a complaint to its resolution. Each process must be completed within a set timeframe. It also covers miscellaneous issues, including the Bill’s relation to dismissals and the Industrial Relations Act, 1967; Part 6 deals with offences under the Bill; and Part 7 includes general issues such as areas of non-application of the Bill, actions of corporations, liability issues and the making of regulations.

5. Conclusion

In most sexual harassment in the workplace cases, the victims are angry, annoyed, and embarrassed by the unwanted sexual attention. The victim may face psychological trauma, anxiety, nervousness, sadness, depression, and the feeling of low self – esteem. Some common effects of sexual harassment are decreased work performance, increased absenteeism, loss of job and income, having one’s personal life offered up for public scrutiny (the victim becomes the accused), and their dress, lifestyle, and private life will often come under attack, being objectified and humiliated by scrutiny and gossip, and others. A worker who faces sexual harassment often chooses to resign as revealing it would tarnish and humiliate their image. As a result they suffer it alone and in silence. Sexual harassment in the workplace should be regarded as a serious matter and should be tackled more effectively. For these reasons, the researcher believes enacting a comprehensive and effective legislation on the issue of sexual harassment in the workplace is important because such legislation will have a positive effect in stamping out sexual advancement in the workplace and eventually will create a more safe and healthy working environment.