

Laying (quite) bare the legalities of sexual harassment

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I recently perused the Proposed Sexual Harassment Bill (updated 2018) submitted by the Joint Action Group for Gender Equality (JAG)¹. It is a proposed Bill for sexual harassment from an external party, not a White Paper from the government. I do not profess to be a legal expert, but while I was perusing through the document, it got me thinking: do we really need a new law? Are existing laws insufficient or ineffective? What are the pros and cons between amending our current laws and enacting a new legislation?

The Employment Act 1955

The Employment Act 1955 is the only statute that provides a specified definition to the term 'sexual harassment' and procedures for inquiries into complaints of sexual harassment (Part XVA). It details on the submission and processes of inquiries for complainants against their employers for having failed to inquire their employees' sexual harassment complaints and also stipulates offence that can be committed by the employer who fails to act according to the law, of a fine not exceeding RM10,000.

While the Employment Act 1955 allows complainants recourse to a second opportunity to report incidents of sexual harassment, it only provides coverage to victims of work-related sexual harassment. Besides, the law is only enforced in Peninsular Malaysia; in Sabah and Sarawak, labour is regulated by the Labour Ordinance of the respective states – laws which unfortunately do not contain provisions for sexual harassment. However, this does not mean that employees in the Bornean states do not have mechanisms of redress for acts of sexual harassment. The Sarawak State Labour Department, for example, lists the type of labour complaints that can be made, sexual harassment being one of them².

Under the provision of these Acts, the forms of punishment to be meted out to the offender are at the discretion of and by the employer. This may be ineffective in curbing sexual harassment, the implication of which that the harasser may not eventually be punished. The most severe form of punishment – the dismissal of the employee without notice – just ends the cycle, allowing the harasser to walk free and begin another cycle in a new working environment.

¹ <http://wccpenang.org/what-we-do/advocacy/violence-against-women/>

² <http://www.itkswk.gov.my/employer-1>

The Penal Code

While some sections of the Penal Code identify certain sexual harassment conducts as criminal offences, the offences are not worded as 'sexual harassment'. Rather, they are interpreted either as acts of [gross] indecency (Sections 377D and E), that which insult the modesty of a person (Section 509) or the deliberate use of criminal force to outrage modesty (Section 354). Although these provisions stipulate punishment for the offences committed, they fail to precisely define what the offences constitute. Thus, criminal charges have ranged from flashing to masturbation³. In one case, a man was sentenced to 12 months of imprisonment for flashing at a woman⁴, while in another, a religious teacher received 20 years of imprisonment and 4 strokes of whipping for kissing and having asked his pupils to remove their trousers⁵ – both of which were charged as acts of 'gross indecency'.

These cases demonstrate a lack of a predetermined conception to the offences indicted; this is also similar for Sections 354 and 509, in which the spectrum of acts under these provisions can be as varied as it is unclear. While the lack of clarity may be a source of confusion in that there are uncertainties as to which clause(s) to refer for sexual harassment misconduct, perhaps this confusion can be overturned and be regarded as an advantage instead. This lack of formal context could serve as providing more grounds for greater forms of sexual harassment to be charged as criminal offences – depending on the type of misconduct and its effect on the victim – under the Penal Code. Sexual harassment thus can be prosecuted under different legal clauses.

To amend or enact?

In addition to the labour laws, the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace has been established since 1999. However, it is only a guideline for organisations to voluntarily implement sexual harassment policies in their respective workplaces; not every organisation has regulatory measures to manage sexual harassment incidents, leaving these employees without mechanisms of redress when it occurs. In fact, less than 0.1% of registered and active companies had adopted the Code as of 2010⁶. One way of curbing the issue lie in revising the laws. Firstly, the Code of Practice could be inserted in all three labour laws to be made compulsory. This would at least allow for some protective coverage for employees over workplace sexual

³ <https://www.thestar.com.my/news/in-other-media/2017/07/26/teacher-allegedly-masturbates-with-boy-in-school-toilet/>

⁴ <https://www.nst.com.my/videos/jobless-man-jailed-12-months-gross-indecency>

⁵ <https://www.nst.com.my/news/crime-courts/2017/06/247268/ustaz-danny-gets-20-years-jail-four-lashes-indecency-schoolkids>

⁶ <https://www.nst.com.my/opinion/columnists/2017/07/256939/time-sexual-harassment-act>

harassment. Secondly, a clause on sexual harassment could be revised in the Penal Code, providing coverage to the general public and aligning it with our labour laws. This would lend strength to the labour laws and remove the uncertainty on sexual harassment in the Penal Code.

Another option would be to enact a law specifically on sexual harassment, as advocated by JAG for almost two decades. According to the Bill, the legislation should extensively cover the issue -includes explanations on terms used, outlines protective mechanisms for victims and persons who give information, and stipulates on the vicarious liability of employers and principals. The latter two, when properly implemented, could encourage victims to willingly report sexual harassment cases. In addition, the Bill also seeks to establish a Tribunal that follows an inquisitorial system, with the complaint to be proven of a balance of probabilities. Although the application of the latter significantly reduces the burden of proof for the complainant, there is a need to tread carefully to avoid misappropriation of awards given by the Tribunal. Lastly, it is worth pointing out that the Bill serves a greater purpose rather than merely to curb sexual harassment.

Conclusion

Presented here are but a few choices to setting the legal framework for more effective prevention and reduction of sexual harassment. Other redress includes the Industrial Relations Act 1967 and tort of sexual harassment. Legal redress for sexual harassment can be creative and varied, depending on the will of the complainant and the legal advice received.