

LHAG Insights

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Anti-Sexual Harassment Bill: An Employment Perspective

After more than a decade since it was first mooted in 2011, the *Anti-Sexual Harassment Bill* (“**the Bill**”) was finally passed in the Dewan Rakyat on 20 July 2022, but not without any controversy. Unfortunately, even during the passing of the Bill, the Dewan Rakyat saw an outburst of profanity by a Member of Parliament (“**MP**”) against other female MPs. Thus, the passing of the Bill is not only timely but it marks an important recognition that Malaysia is progressing to end the normalisation of sexual harassment. It is also believed that just like the increase in police reports by 200% after the *Domestic Violence Act 1994* came into force on 1 June 1996, more victims will be forthcoming now that there is a specific legislation in place to protect both women and men from sexual harassment¹.

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.”

It must be noted that this definition is similar to the definition of sexual harassment in the Employment Act 1995, save for the addition of the phrase “*reasonably*” and removal of the phrase “*arising out of and in the course of his employment*”. On the other hand, sexual harassment under the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (“**Code of Practice**”) means:

¹<https://www.thestar.com.my/news/nation/2022/07/26/womens-groups-tribunal-must-be-diverse>
accessed on 26 July 2022

“Any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment:

- that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/his employment;*

Or

- that might on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to her/his well-being but has no direct link to her/his employment.”*

Interestingly, whilst the Code of Practice emphasises that what amounts to sexual harassment is based on the perception of the victim, the Bill appears to leave what amounts to “*reasonably offensive or humiliating or is a threat to his well-being*” to be determined by a tribunal.

Overview of the Bill

It is important to note that the Bill seeks to provide a right of redress for any person who has been sexually harassed, regardless of their gender, the establishment of the Tribunal for Anti-Sexual Harassment (“**Tribunal**”) and the promotion of awareness of sexual harassment.

Establishment of Tribunal

The Tribunal established by the Bill shall consist of not less than 12 members who will be appointed by the Minister of Women, Family and Community Development and comprise of² :

- (a) a President and a Deputy President to be appointed from amongst the members of the Judicial and Legal Service;
- (b) not less than 5 other members who are either members of or who have held office in the Judicial and Legal Service or advocates and solicitors of not less than 7 years’ standing; and
- (c) not less than 5 other members who have knowledge or practice experience in matters relating to sexual harassment.

It is suggested by the Ministry’s Deputy Secretary General, Chua Choon Hwa, that the tribunal system is meant to be victim-centric as it provides an easier and safer avenue for victims to hear cases

²Anti-Sexual Harassment Bill 2021, s 4(1)

of sexual harassment compared to the more complex and costly court system³ .

Jurisdiction of Tribunal and Exclusion of Jurisdiction of Court

The Tribunal shall have jurisdiction to hear and determine any complaint of sexual harassment made by any person⁴ . However, where a complaint of sexual harassment is lodged by any person to the Tribunal, the issues in such a complaint shall not be the subject of proceedings between the same parties in any court except where⁵ :

- (a) the proceedings in Court commenced before the complaint of sexual harassment was lodged with the Tribunal;
- (b) the complaint of sexual harassment involves any conduct which constitutes a crime; or
- (c) the complaint of sexual harassment before the Tribunal is withdrawn or struck out.

Does this mean that an employee who has lodged a sexual harassment complaint to the Tribunal may not claim for constructive dismissal in the Industrial Court on the grounds, for example, that his / her employer had failed to provide a safe working environment by failing to inquire into the same sexual harassment complaint?

Arguably, the employee may still proceed with his / her case in the Industrial Court despite the same sexual harassment complaint being lodged to the Tribunal. This is because the Industrial Court case would be between the employee and employer, whereas, proceedings before the Tribunal will be between the employee and the perpetrator.

Conduct of Proceedings

A complaint lodged to the Tribunal is subject to a prescribed fee⁶ . Upon a complaint being lodged, the Secretary to the Tribunal shall give a written notice to the complainant and alleged perpetrator of the details of the day, time and place of the hearing⁷ . The hearing shall be before a panel of 3 members⁸ and will be closed to the public⁹ . The Bill further provides that no party shall have any legal representation at the hearing¹⁰ . Although this saves costs and

³<https://www.thestar.com.my/news/nation/2022/07/26/tribunal-is-meant-to-be-more-victim-centric> accessed on 26 July 2022

⁴ Anti-Sexual Harassment Bill 2021, s 7

⁵ Anti-Sexual Harassment Bill 2021, s 8 (1)

⁶ Anti-Sexual Harassment Bill 2021, s 10

⁷ Anti-Sexual Harassment Bill 2021, s 11

⁸ Anti-Sexual Harassment Bill 2021, s 12

⁹ Anti-Sexual Harassment Bill 2021, s 14

¹⁰ Anti-Sexual Harassment Bill 2021, s 13 (2)

may simplify the proceedings, it may be a cause for concern, especially noting that upon conviction, the perpetrator may be liable to a fine or imprisonment.

The Tribunal may also mediate every complaint of sexual harassment within its jurisdiction and with agreement of the parties¹¹. Where an agreed settlement is achieved between parties, the said settlement shall be recorded and take effect as if it is an award of the Tribunal¹². Before an Award is made by the Tribunal, it has a discretion to refer to a Judge of the High Court a question of law¹³:

- (a) which arose in the course of the proceedings;
- (b) which in the opinion of the Tribunal, is of sufficient importance to merit such reference; and
- (c) which in the opinion of the Tribunal, raises sufficient doubt to merit such reference.

Award and Order of Tribunal

The Bill provides that the Tribunal shall make its award without delay and where practicable, within 60 days from the first day of the hearing¹⁴. This is to encourage victims to come forward with their complaints as they are assured that they will not be forced to go through a lengthy process. In fact, a survey conducted by the Ministry of Women, Family and Community Development (“**the Ministry**”) showed that over 80% of the respondents felt confident about reporting cases¹⁵.

An award of the Tribunal is final and binding on parties and deemed to be a court order¹⁶, wherein its non-compliance results in a criminal penalty. Similar to an Industrial Court award, the award of the Tribunal shall contain the reasoning for its decision and the finding of facts¹⁷. In making the award, the Tribunal may also make any one or more of the following orders¹⁸:

- (a) an order for the perpetrator to issue a statement of apology to the complainant;
- (b) an order for the perpetrator to publish a statement of apology in any manner where the act of sexual harassment was carried out in public;

¹¹ Anti-Sexual Harassment Bill 2021, s 16

¹² Anti-Sexual Harassment Bill 2021, s 16 (3)

¹³ Anti-Sexual Harassment Bill 2021, s 17

¹⁴ Anti-Sexual Harassment Bill 2021, s 19 (1)

¹⁵ <https://www.thestar.com.my/news/nation/2022/07/26/swift-justice-on-the-cards> accessed on 26 July 2022

¹⁶ Anti-Sexual Harassment Bill 2021, s 22 (1) (b)

¹⁷ Anti-Sexual Harassment Bill 2021, s 19 (2)

¹⁸ Anti-Sexual Harassment Bill 2021, s 20

- (c) an order for the perpetrator to pay any compensation or damages not exceeding RM250,000.00 for any loss or damage suffered by the complainant; or
- (d) an order for the parties to attend any programme as the Tribunal thinks necessary.

Any person who fails to comply with an award of the Tribunal within 30 days from the date the award was made commits an offence and shall on conviction, be liable to either¹⁹ :

- (a) a fine amounting to 2 times the total amount of compensation or damages or to imprisonment for a term not exceeding 2 years, or to both, in a case where compensation or damages is ordered by the Tribunal; or
- (b) a fine not exceeding RM10,000.00 or to imprisonment for a term not exceeding 2 years, or to both, where no compensation is ordered by the Tribunal.

Challenging the Award

The Bill provides that any party to the proceedings of the Tribunal may, upon notice to the other party, apply to the High Court to challenge an award of the Tribunal on the ground of serious irregularity of the following kinds²⁰ :

- (a) failure of the Tribunal to deal with all the relevant issues that were put to it; or
- (b) uncertainty or ambiguity as to the effect of the award.

This suggests that the mode of challenging an award of the Tribunal is by way of an application for judicial review to the High Court.

Special Provision for Police Report

Importantly, a complaint of sexual harassment made under this act does not preclude the complainant or any other person from lodging a police report for any offence relating to sexual harassment under any written laws.

¹⁹ Anti-Sexual Harassment Bill 2021, s 21 (1)

²⁰ Anti-Sexual Harassment Bill 2021, s 23

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Employment (Amendment) Act 2022

Apart from an additional requirement for employers to exhibit conspicuously at the place of employment, a notice on sexual harassment at all times²¹, no other significant amendments were made to an employers' duty to prevent and address sexual harassment in the workplace in the *Employment Act 1995*.

Nonetheless, the passing of the Bill may potentially affect how sexual harassment complaints are managed by employers as victims no longer need to wait for employers to take action against their perpetrators. Instead, they may take matters into their own hands and lodge their complaints directly to the Tribunal.

Thus, it is of utmost importance that employers take heed of the Bill and reinforce its internal sexual harassment management procedures as well as raise awareness of the seriousness of such a misconduct which will have penal consequences.

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