

# JEEVA PARTNERSHIP

*Advocates & Solicitors*

## SEXUAL HARASSMENT AT WORKPLACE : WHAT CAN YOU DO ? (NEWSLETTER #002/2022)

### Introduction

According to a 2020 survey, 62% percent of Malaysian women have experienced workplace sexual harassment and the numbers are unfortunately growing. Sexual harassment is deemed a misconduct which may be subjected to disciplinary action. This newsletter focuses on the law and practice on sexual harassment.

## I. SEXUAL HARASSMENT: EMPLOYMENT ACT 1955

**Employment Act 1955** defines sexual harassment in Section 2 as follows :-

**Sexual harassment** means any unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment.

Sexual harassment refers to :

*“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 his/her well-being, but has no direct link to her/his employment”*

***(Code Of Practice On The Prevention And Eradication Of Sexual Harassment In The Workplace (1999) – Ministry Of Human Resources)***

## **2. ELEMENTS OF SEXUAL HARASSMENT**

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There are three main elements to establish sexual harassment namely :

- i) the occurrence of conduct that is sexual in nature ;
- ii) the conduct being unwanted ; and
- iii) the conduct is perceived as threatening the victim’s ability to perform her job which is in line with the definition.

***(See the case of Mohd Ridzwan Abdul Razak v. Asmah Hj Mohd Nor [2016] 6 CLJ 346 FC)***

## **3. CATEGORIES OF SEXUAL HARASSMENT**

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<b>Sexual harassment can be broadly classified into two categories</b>	
<b>Sexual Coercion</b>	<b>Sexual Annoyance</b>
<ul style="list-style-type: none"><li>• This category directly affects a victim’s employment.</li><li>• The employee is threatened to lose his/her employment benefits like pay</li></ul>	<ul style="list-style-type: none"><li>• Sexually related conduct that is offensive, hostile or intimidating and no direct link to any job benefit.</li><li>• The conduct of sexual harassment may be repetitive in nature to the annoyance of the victim.</li></ul>

<p>rise and promotion if he/she refuse to allow the indulgence of his/her employer or immediate superior.</p> <ul style="list-style-type: none"><li>• There is usually an imbalance of power in such a situation between the employee and employer.</li></ul>	
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*(See the case of Mohd Ridzwan Abdul Razak v. Asmah Hj Mohd Nor [2016] 6 CLJ 346 FC, Putrajaya)*

## 4. FORM OF SEXUAL HARASSMENT

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Sexual Harassment can be verbal harassment, non-verbal/gestural harassment, visual harassment, psychological harassment or physical harassment. This may occur at Workplace, Public Areas or Events.

## 5. EFFECTS TOWARDS VICTIMS

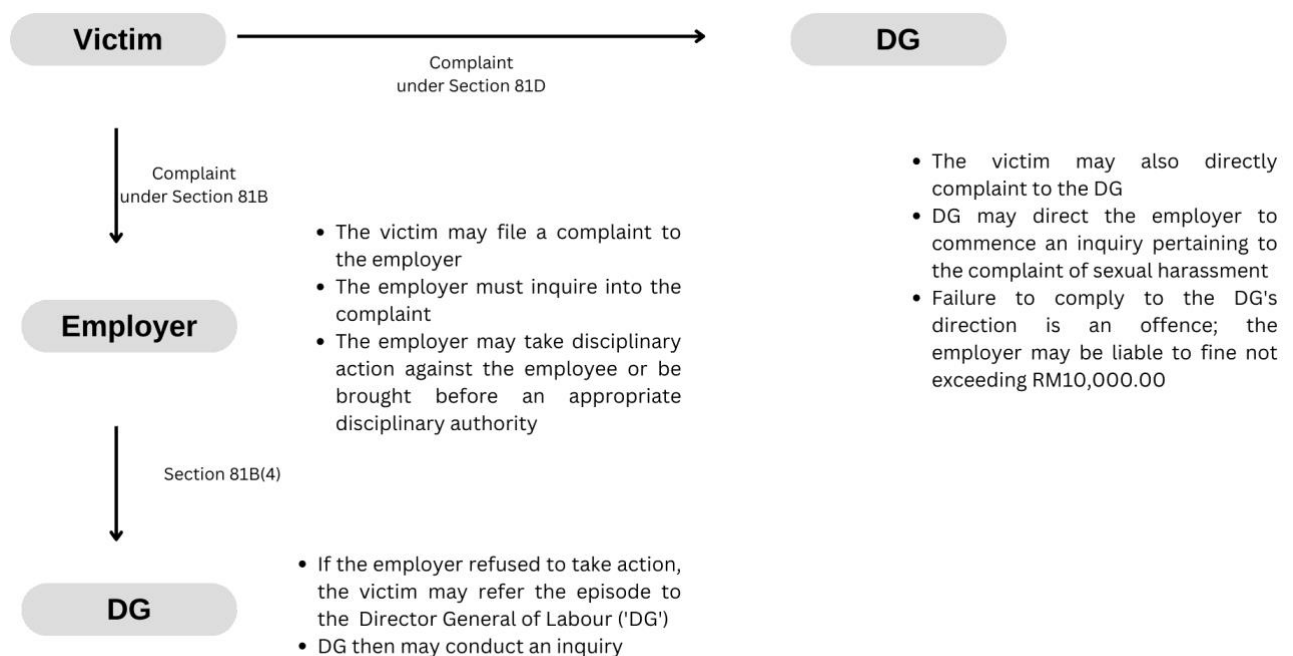
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- Depression
- Low self-esteem
- Sexual dysfunction
- Anxiety
- Sleeping disorder

## 6. SEXUAL HARASSMENT VICTIM'S RECOURSE ?

### a) AT THE WORKPLACE

#### i) Summary of Recourse



#### ii) Employment (Amendment) Act 2022

- In accordance with the recent amendment to the Employment Act 1955, which will come into effect on the 1<sup>st</sup> January 2023, employers will have to take additional precaution to avoid sexual harassment by prominently displaying a notice to promote awareness of the issue. The fine has been enhanced to fifty thousand ringgit (RM50,000.00).

### **b) MAKE A POLICE REPORT**

- A police report will trigger police investigation which may lead to criminal charges against the perpetrator. (S354 or S509 Penal Code)
- Police report can be used to substantiate the complaint in a civil suit as well.
- Investigation Officer (Police) can be called as a witness by the Plaintiff in a civil case to support the investigation

### **c) FILE A CIVIL SUIT AGAINST THE PEPETRATOR**

- In addition to the employee taking disciplinary action against the perpetrator of the sexual harassment the victim can file a civil action. The Malaysian Courts have recognized the tort of sexual harassment as a cause of action.
- It is paramount for the victim to possess material evidence to support the allegation of sexual harassment, for instance, Whatsapp communication, recording of verbal conversations, physical contact by the perpetrator communicated to third parties (potential witnesses), medical report from psychiatrist, etc.
- Domestic inquiry or internal organization's findings on a complaint of sexual harassment are relevant for court proceedings.

## **7. INTRODUCTION TO THE ANTI-SEXUAL HARASSMENT BILL 2021**

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- The Anti-Sexual Harassment Bill has been passed on 20<sup>th</sup> July 2022 by Dewan Rakyat and 11<sup>th</sup> August 2022 by Dewan Negara. The said Bill has yet to be Gazetted at the time of this publication.
  
- The purpose of the Anti-Sexual Harassment Bill 2021 is to:
  - o Redress the sexually harassed victims
  - o Raise awareness and prevent the occurrence of sexual harassment
  - o Establish a Tribunal of Anti-Sexual Harassment (“the Tribunal”)

### **A. CREATION OF A TRIBUNAL**

- i) The Tribunal has the power to hear, determine and award damages pertaining to complaint of sexual harassment. The Tribunal must pronounce an Award within sixty (60) days from the completion of the hearing and the Awards made by the Tribunal is final and is deemed to be an order of a court. Failure to comply with the Tribunal’s order may give rise to a criminal penalty.
  
- ii) In order for a victim to commence a proceeding at the Tribunal, he or she will have to first lodge a complaint of sexual harassment. It is important to note parties cannot be represented by an advocate and solicitor at the hearing unless the hearing involves complex issues of law, and if one of the parties is allowed to be represented by an advocate and solicitor, the other party would also be entitled to such representation.

**B. THE ADMINISTRATOR OF ANTI-SEXUAL HARASSMENT**

- i) Part III of the Anti-Sexual Harassment Bill 2021 provides the appointment of the Administrator.
  
- ii) The functions of the Administrator are:
  - a. Formulating policy and guidelines in prevention or awareness of sexual harassment;
  - b. Promoting activities including requesting anyone to display any notice at any place related to preventing or awareness of sexual harassment;
  - c. Administering related matters to the prevention of awareness of sexual harassment; and
  - d. Carrying out any other functions for the betterment and proper implementation of this Act.

Our lawyers have conducted numerous cases involving sexual harassment. Should you have any enquiries, kindly contact us at [jkl@jeevaretnam.com.my](mailto:jkl@jeevaretnam.com.my) (KL) or [info@jeevaretnam.com.my](mailto:info@jeevaretnam.com.my) (PENANG)

***\*Kindly note that the above does not constitute legal advice and is distributed for educational purposes of the law.***

