Addressing the Impact of Inappropriate Language in the Workplace: A Legal Perspective

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Abstract. This article examines the impact of using terms like "dear" and "sayang" in the workplace as potential forms of sexual harassment. Analyzing relevant laws and decided cases, it highlights the implications of such language for power imbalances and gender inequality. The use of endearing terms can perpetuate stereotypes, undermine professionalism, and create a hostile work environment. Employers have a responsibility to provide a safe workplace, and clear policies and education on acceptable conduct are crucial. By raising awareness, this article contributes to fostering inclusive and respectful workplaces that prioritize equality and dignity for all employees.

Keywords: workplace language, sexual harassment, power imbalances, gender inequality, relevant laws, decided cases, professionalism, workplace culture.

1 INTRODUCTION

1.1 Introduction

The concept of workplace bullying dates back to the early 1980s when a renowned Swedish psychologist, Professor Heinz Leymann, found that certain birds, relying on their majority advantage, tend to bully new or weaker peers, resulting in the phenomenon of “bullying the weak, bullying the few”. The analogy applies to various problems caused by poor interpersonal interaction in the human workplace and is collectively re-

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ferred to as “mobbing”.[1] Other European countries have gradually accepted it, and there are those referred to as “psychological harassment” or “moral harassment”. After being introduced to the United States, the term ‘bullying’ is usually used and is still used in other English-speaking countries, such as the United Kingdom, Australia, and Canada. This concept has become an emerging “prominent subject” in European and American countries’ occupational safety and health laws. It is a topic that has gradually gained attention other than workplace mismanagement, such as employment discrimination and infringement of employees’ privacy rights. It has long surpassed the traditional focus on risk factors such as chemistry, physics, and biology in occupational safety and health, and more emphasis is placed on the exploration of the so-called “psychosocial” harm caused by ergonomic factors.

Alongside this growing awareness, the issue of sexual harassment has also become a prominent subject within the workplace. It can be seen as a specific type of workplace bullying. Just as workplace bullying targets individuals through offensive, humiliating, or threatening behavior, sexual harassment specifically involves unwanted conduct of a sexual nature directed at a person in the course of their employment. Sexual harassment refers to the use of some form of coercion or inducement to impose one’s sexual thoughts and desires on the person of one’s interest, which can be put into action in an attempt to make the other party comply and meet one’s sexual demands. The common manifestations of sexual harassment include obscene language, provocative actions, touching the

[1] Sorrell DA, ‘Workplace Bullying: The Lived Experiences of Educators’ [2023] Journal of Bullying & Social Aggression <http://sites.tamuc.edu/bullyingjournal/test-2/>

other person's body, hugging, kissing, engaging in sexual relations, etc. In regard to sexual harassment in the workplace, **Section 2 of the Employment Act 1955** defines “sexual harassment” as 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.

In Malaysia, the earliest record of sexual harassment in workplace can be traced back to 1939, at that time in Malaya. The Klang Indian Association led a strike to denounce the molestation of female workers by Europeans and ‘Black Europeans’.[2] According to a survey by the Women’s Aid Organisation in 2020 – “*Voices of Malaysian Women on Discrimination and Harassment in the Workplace*”, out of 1,010 women surveyed, 62% of them have encountered various types of sexual harassment in their workplaces. The specific forms of harassment reported include offensive sexual jokes or innuendos (39%), unwelcome touching or grabbing (24%), sexual gestures, body movements, or looks (22%), stalking behaviour (18%), and verbal sexual abuse (16%).[3] Compared to the first survey on sexual harassment in workplace conducted by the Women’s Section of the Malaysian Trades Union Congress

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[2] Human Rights Commission of Malaysia. *Suhakam’s Report on the Status of Women’s Rights in Malaysia.* (SUHAKAM, 2010) <http://www.suhakam.org.my/wp-content/uploads/2013/11/SUHAKAM-Report-on-The-Status-of-Women-s-Rights-in-Malaysia-2010.pdf>

[3] Women’s Aid Organisation. 2022. *Voices of Malaysian Women on Discrimination and Harassment in the Workplace.* Malaysia. <https://www.vase.ai/resources/blogs/voices-of-malaysian-women-on-discrimination-harassment-in-the-workplace-data>

(MTUC) in 1987, the survey found that a significant percentage of female respondents, ranging from 11% to 90%, experienced sexual harassment in the workplace. In the 1990s, another survey focused on 586 public administrators in the northern states of Peninsular Malaysia. It revealed that 43.4% of men and 53% of women had encountered at least one form of sexual harassment.[4]

2 LITERATURE REVIEW

The literature review for this paper looks at the laws in Malaysia regarding sexual harassment in workplace and how does Malaysia do to combat sexual harassment and how does it reinforce power structure and perpetration of gender inequality. **Penny E Harrington & Kimberly A. Lonsway (2007)** proposes six ultimate recommendations to hep employers faced with issues of sexual harassment which are: to develop a sexual harassment policy and update frequently; Distribute the policy to everyone in the organization, and redistribute it regularly; Train all employees about the policy, evaluate and retain employees frequently; Set up fair and effective process for receiving and investigating complaints; Hold supervisors and managers responsible for monitoring the workplace to detect any violations of the policy; lastly, if complaint is made, immediately protect the complainants from retaliation, conduct a through, timely and fiar investigation, impose any discipline punishment and follow up with the complaints to make sure they are not experiencing any retaliation. Again, **Penny E. Harrington (2002)** also provides detailed guidance for each of the above way with the addition of the issue of self-

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[4] Supra, Note 6

assessment which addresses not only the issue of sexual harassment but also other gender issues that affect the recruitment, selection, training, promotion, and retention of women officers.

On the other hand, **Anne C. levy and Michele A. Paludi (2002)** clearly and deeply provides the effect of sexual harassment from the legal, psychological, investigation and liability of workplace sexual harassment and most importantly it provides an overview of the laws in the United States of America with special emphasis on the Civil Rights act of 1964 and Supreme Court cases which touches on sexual harassment and how is it implemented in the United States similar to what **Anna-Maria Marshall (2015)** has written with updated cases. **Martha E. Reeves (2010)** at Chapter 8 as well described the legal frame work on hostile work environments and sexual harassment as well as providing some factors which contributes to sexual harassment such as socio-cultural, partriarchy, male bonding, sex roles and fairness in the organization which all are contributing factor to sexual harassment in workplace. Another factor can be referred to **Cecilia Osterman & Magnus Bostrom (2022)** which shows compact workplace such as ships at sea corroborated with the feelings of boredom and loneliness would lead to men shipmen looking for way to fulfil their sexual desire through sexual harassment. **Akshaya Vijayalakshima et al (2022)** also pointed out the issue of domestic workers facing issues with access to formal organisation to lodge complaints as their work is informal and non-traditional in nature. **Ponmalar N Alagappar & Sabitha Marican (2014)** explains the need for a legislation on sexual harassment and **Laura Carballo & Momoka Kitada (2020)** explains how law and policies help keep women safe and its relation to

occupational safety and health, especially from the psychological perspective. Lastly, as pointed out by **Syeda Hoor-Ul-Ain (2020),** the economical background of cities also contribute to the frequency of sexual harassment in workplaces. The Federal Court case of ***Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor [2016] 4 MLJ 282*** has also provided us a better and whole understanding of the legislations regulating sexual harassment in Malaysia.

3 FINDING AND ANALYSIS

3.1 Concept of Sexual Harassment

Sexual harassment, an undeniable predicament permeating workplaces in Malaysia, echoes the global landscape of this insidious issue, highlighting its pervasive nature and the urgency to address it. Unfortunately, there is a distressing range of sexual abuse that occurs in the workplace, where exploitation and coercion are wielded by those in positions of power. Managers and supervisors manipulate employees into engaging in sexual acts for career perks like promotions or pay raises, exploiting their fears and ambitions. *Quid pro quo* harassment forces victims into compliance with authority figures' demands for sexual favours in exchange for job security or other work-related benefits, fostering an oppressive and coercive atmosphere. Unwanted advances from coworkers or superiors, like inappropriate touching, lewd remarks, or explicit gestures, create a hostile work environment, leaving victims feeling uneasy and afraid.

Sexual harassment can manifest through both verbal and physical means, with verbal sexual harassment involving the unwelcome dissemination of sexually explicit comments, jests, innuendos, or remarks. Conversely, non-verbal sexual harassment encompasses the unwarranted exhibition of physical behaviours or gestures imbued with overtly sexual undertones. The advent of technology has further expanded the horizons within which sexual harassment thrives, giving rise to the alarming manifestation of cyber harassment. This insidious trend entails sending unsolicited sexual messages, engaging in online stalking or bullying, sharing explicit content without consent, and perpetrating various other forms of digital sexual harassment. This form of harassment can be considered a subtype of "visual sexual harassment," as it encompasses the grievous act of displaying or disseminating sexually explicit imagery without obtaining due consent from the affected parties.[5]

Referring to the the **Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace ("the Code"),** issued by the Ministry of Human Resources in 1999, it clearly defines sexual harassment as any unwanted conduct of a sexual nature. Ashgar Ali, with reference to this code of practice, further explains different types of sexual harassment, including verbal harassment, non-verbal as well as gestural harassment, written harassment, visual harassment, psychological harassment, and physical harassment. Verbal harassment involves sexually suggestive comments, jokes, sounds, and questioning.

[5] Zaiton Hamin et al, "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. <http://dx.doi.org/10.6007/IJARBSS/v12-i11/15225>

Non-verbal or gestural harassment includes sexually suggestive gestures, leering, licking lips, and persistent flirting. Written harassment encompasses printed materials like pornographic content or sex-based letters sent through various means such as fax, SMS, MMS, or email. Visual harassment refers to creating a hostile or humiliating environment through the display of obscene pictures. Psychological harassment involves repeated unwanted social invitations and relentless proposals for dates or physical intimacy. Physical harassment includes unwanted physical contact, such as inappropriate touching, patting, pinching, and fondling, with clear examples being pulling a female worker's hand or touching inappropriate body parts. Regardless of the specific type, sexual harassment is unacceptable.

Whilst the specific actions and behaviours may vary, there are some general constituent elements that can help identify and understand instances of sexual harassment.

Firstly, sexual harassment in the workplace involves behaviour that carries a sexual connotation, encompassing actions like making sexual requests or advances, engaging in sexually explicit remarks or actions. In ***Vasuthevan Athaly v Freescale Semiconductor (M) Sdn. Bhd***[6], the Industrial Court Chairlady, Yamuna Menon, provided an observation on what constitutes sexual harassment. According to her, sexual harassment involves unsolicited or unreciprocated sexual conduct, such as repeated unwelcome sexual comments, looks, or physical contact. The key element in cases of sexual harassment is that the acts are unwelcome. The **Australian Human Rights and Equality Commission** has outlined

[6] [2013] 1 ILR 73

specific manifestations of sexual harassment, including unwelcome physical contact, lascivious staring, sexual jokes or comments, displaying sexually explicit materials, pressuring for dates, making sexual requests, asking unwelcome personal questions, unwanted intimacy, and using sexual insults. These behaviours, listed by the Commission, exemplify the various forms that sexual harassment can take, emphasising the need for awareness, prevention, and appropriate response to create a safe and respectful work environment.

Secondly, harassment in the context of sexual harassment is characterised by being unwelcome, meaning it is behaviour that is not desired or invited by the person experiencing the harassment. The determination of whether a behaviour is considered unwelcome is usually made by the court and relies on the judge's discretion and judgement. In cases involving allegations of harassment, the court will assess the specific circumstances, evidence, and testimonies to determine whether the behaviour in question was indeed unwelcome. The court will consider various factors, including the subjective experiences and perceptions of the victim, as well as the objective impact of the behaviour on the work environment. It is through this judicial process that a final determination is made regarding the unwelcomeness of the behaviour in question.

Lastly, sexual harassment can occur in various workplace settings. The interpretation of workplaces extends beyond traditional labour environments and includes locations where work-related activities take place, such as customer visits, business negotiations, and work-related banquets. The **International Labor Organization's Convention on the Elimination of Violence and Harassment in the World of Work**,

adopted in June 2019, defines sexual harassment as work-related when it happens in the following situations: **(a)** within the physical workplace, including public areas; **(b)** areas where workers are paid, take breaks or meals, or use facilities for sanitation, washing, and changing; **(c)** during work-related travel, training, events, or social gatherings; **(d)** through work-related communication, including technology-powered platforms; **(e)** in employer-provided accommodations; and **(f)** during commuting to and from work. These scenarios highlight the breadth of locations where sexual harassment can occur within the context of employment.

Apart from that, in the realm of workplace sexual harassment, a conspicuous dichotomy emerges between two distinct categories of harassers. The first faction comprises unaware harassers, who unwittingly engage in offensive behaviour, oblivious to the harm they inflict. Their actions, including inappropriate jokes or gestures they deem innocuous, can inadvertently breach personal boundaries, causing discomfort. On the other hand, closed door harassers purposefully perpetrate acts of sexual harassment, fully cognisant of the wrongfulness involved. Employing calculated strategies, they seek to conceal their misdeeds, selecting secluded environments and resorting to explicit communication or stalking tactics. Motivated by a thirst for power and control, their actions are premeditated and deliberate.

Moreover, sexual harassers can display various behaviours and motivations. These categories are not mutually exclusive, as sexual harassers can exhibit diverse backgrounds, motivations, and patterns of behaviour. Power-Based Harassers exploit their authority to engage in sexual harassment, utilising their position of power to coerce or intimidate

victims, often occupying managerial or supervisory roles. Opportunistic harassers seize vulnerable moments or believe they can act without consequences, engaging in unwelcome sexual behaviour, including advances, comments, or physical contact. Serial harassers persistently commit sexual harassment over an extended period, targeting multiple victims and demonstrating a pattern of inappropriate conduct, often lacking remorse. Hostile environment harassers create a hostile work environment through intimidating, offensive, or discomforting behaviours such as making lewd comments, displaying sexually explicit material, or fostering an unwelcome atmosphere.

Sexual harassment transcends gender in Malaysia, with women statistically facing a higher prevalence. Nevertheless, it is crucial to recognise that men and individuals with non-binary or gender non-conforming identities can also be victims. Deep-seated gender inequalities, power imbalances, and cultural norms perpetuate the victimisation of women across various settings, including the workplace. Whilst less common, men can also fall prey to harassment from both male and female perpetrators, often deterred from reporting incidents due to societal expectations and the associated stigma surrounding masculinity. The LGBTQ+ community encounters harassment tailored to their sexual orientation, gender identity, or expression, with intersectional identities compounding experiences of discrimination. Typically, victims find themselves in a position of diminished power or influence relative to the harasser, stemming from job hierarchies or authority dynamics. Although sexual harassment can manifest across different age groups, younger individuals,

particularly minors, may face heightened vulnerability to workplace abuse by adults holding positions of authority.

The impact of sexual harassment is far-reaching and enduring, deeply affecting the lives of victims both personally and professionally. Its psychological toll encompasses anxiety, depression, post-traumatic stress disorder (PTSD), and a diminished sense of self-worth, accompanied by a host of negative emotions such as fear, shame, guilt, and emotional distress. The stress and trauma can manifest in physical ailments like disrupted sleep patterns, headaches, and digestive issues. Professionally, victims often grapple with diminished concentration, reduced productivity, and decreased job satisfaction, potentially leading to severe consequences like job loss, demotion, or setbacks in their careers. Interpersonal relationships suffer as trust and social interactions become challenging, while financial hardships arise from loss of income, therapy expenses, and legal support. The burden of self-blame, shame, and societal stigma further compounds the emotional toll. These profound effects can persist for years, impacting overall well-being, relationships, and future career prospects.

Victims of workplace sexual harassment often hesitate to report incidents for various reasons. The fear of facing retaliation or negative employment repercussions, such as demotion or dismissal, acts as a deterrent. Power imbalances within the workplace, particularly when the harasser holds authority, can make victims feel powerless and intimidated. A lack of trust in the organisation's response, coupled with concerns about not being believed or facing dismissal, contributes to the re-

luctance to report. Additionally, societal stigma, victim-blaming attitudes, and feelings of shame and guilt create further barriers to reporting. Limited knowledge about rights, available resources, and company policies, along with a perception that reporting won't yield significant results, hinder victims from seeking assistance. Past mishandling or dismissal of harassment complaints diminishes confidence in the reporting process. Moreover, the emotional and psychological toll of harassment, including confusion, self-doubt, and trauma, adds complexity to victims' navigation of reporting channels.

Despite reporting, victims face additional challenges when the response they receive is insufficient or unsatisfactory, resulting in feelings of discouragement. Limited evidence, particularly in private incidents without witnesses, can impede decisive action or result in the dismissal of the complaint. Disbelief and victim-blaming attitudes from the employer, colleagues, or the harasser can undermine the victim's credibility and hinder resolution. Fear of retaliation and a hostile work environment may deter victims from pursuing further action. A workplace culture that tolerates or disregards harassment undermines the reporting process, leaving victims isolated. Navigating the legal process or internal procedures can be complex, presenting challenges in evidence gathering, understanding rights, and following appropriate channels, ultimately impacting the success of the complaint.

Therefore, various organisations and institutions in Malaysia have taken steps to combat sexual harassment. The Malaysian Ministry of Women, Family, and Community Development has launched cam-

paigns to raise awareness and promote gender equality. **Non-governmental organisations (NGOs)** such as **Women's Aid Organisation (WAO) and All Women's Action Society (AWAM)** provide support and resources for victims and advocate for stronger legal protections. Employers are also becoming more proactive in addressing sexual harassment. Many companies have implemented policies and procedures to prevent and handle complaints, including training programmes for employees to promote awareness and understanding of sexual harassment issues.

Moving on, there are availability of legal remedies for victims to encounter sexual harassment in workplace. Victims have the option to initiate a civil lawsuit, seeking compensation for emotional distress, lost wages, medical expenses, and associated costs. In certain cases, sexual harassment may be considered a criminal offence, allowing victims to report incidents to law enforcement for potential investigation and charges. Victims can also pursue injunctive relief, such as restraining or court orders, to halt the harassment and promote a secure working environment. These measures prioritise the protection of victims and the advancement of workplace safety.

To conclude, it is worth noting that progress is being made in addressing sexual harassment in Malaysia. The government's dedication to enacting legislation, along with an increasing emphasis on raising awareness and advocating for change, is slowly prompting a transformation in societal attitudes. Nevertheless, it is crucial to address the prevailing gaps in the regulations and provide clarity on any ambiguous

laws to guarantee comprehensive protection. The ongoing process of fostering a workplace culture where each person feels safe, respected, and free from harassment requires continued endeavours, with persistent collaboration and unwavering commitment being vital to cultivating a supportive environment for everyone involved.

3.2 Challenges in Combating Sexual Harassment in Malaysia Workplace

It was discussed above that there are existing legislation that protects employees and employers from sexual harassment in workplace. Take for intstance, the definition under **Section 2 of the Employment Act 1995** which defines 'Sexual harassment' as "*any unwanted conduct of sexual nature, whether verbal, or non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his wellbeing, airing our of and in the course of his employment.*" However, the definition is sometimes not broad enough to cover every situation to the extend in the case of ***Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor*** the court actually said that "*... putting aside the statutory definition provided in the Employment (Amendment) Act 2012, ... harassment is, a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated and does cause that person alarm, fear or distress.*" As a matter of fact, sexual harassment does not have to be sexual in nature as long as some action is bothering a women simply because they are a man or woman, then that action alone can form sexual harassment. The definition also puts emphasise on the psychological feeling of discomfort but not all sexual

harassment may lead to psychological damage as some would take it personally but at the end of the day, it is something that bothers him or her and that along should constitute sexual harassment.

What if the top management who are overwhelmingly male, and support the harasser following the "*boys will be boys*" mentality, how would the law address the patriarchy work system? Therefore, job discrimination should also be considered as a form of sexual harassment which is not mentioned in the Act. As per the **Ontario Human Rights Code** which is administered by the Ontario Human Rights Commission, discrimination means unfair treatment due to race, sex, colour, ancestry, place of origin, ethnic origin, marital status, same sex partner status, sexual orientation, age, disability citizenship, family status or religion. Under this Code, everyone has the right to be free from discrimination and harassment in any place where the Code is applicable as harassment in this case is a form of discrimination. If a person says something to another person that the person knows or ought to know is unwelcome or makes one feel uncomfortable because it is discriminatory, this should be harassment. Sometimes, the harasser may completely be unaware of his offensive behaviour or constitutes sexual harassment, but his actions could be unlawful. As such, would the law answer to such situation and whether sexual harassment is a form of sexual and psychological abuse? What would be the stance of this new enactment?

On the other hand, this policy comes with its limitation as mentioned in the case of ***Joubert Erick v Sakura Ferroalloys Sdn Bhd***[7] where the court mentioned that **Section 81A to 81F of the EA 1955** is

[7] [2021] 1 ILR 49

not applicable in Sarawak as there is the absence of any provision dealing with sexual harassment under the Labour Ordinance Sarawak. Therefore in Sarawak, it is common practice for the employer to not treat a complaint of sexual harassment as a special category of misconduct but the same as any misconduct with minimum standards recognised by the company to investigate, observe and deal with sexual harassment complaints or grievance and to treat all employees, complainants and the person being complaint with respect and fairness according to the company guidelines. However, the normal practices still applies as the Industrial Court decided that committing sexual harassment is a breach of implied and express terms of one's contract of employment. Therefore, since his actions of sexually harassing her, he has lost the trust and confidence of the company in him, therefore justified his dismissal.

On the other hand, the Penal Code definition is restricted by the word modesty which was defined in the case of ***Major Lachhaman Singh v State***[8] which mentioned that the word 'modesty' is not to be interpreted with reference to the particular victim of the act, but as an attribute associated with female human beings as a class. With that, it only limits protection to women but not men which men is also prone victim to sexual harassment. Even though it is statistically proven that women are more prone to sexual harassment and it mostly happens to them but it can also happen to men and between members of the same sex.[9]

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[8] AIR 1963 Pun 443 at 445

[9] Latif Sheer Mohamed, "*Sexual Harassment in the Workplace* (Cher-Sher Consultancy, 2006)

When it comes to industrial disputes, in general sexual harassment cases, normally the two parties involve are the victim and the harassers. However, when it comes to the cases of sexual harassment in workplace, the dynamics change due to the presence of a tripartite relationship between the harasser, the victim, and the management. The existing grievance mechanism provided under the **IRA 1967** failed to address the complexities of such a situation. There is a lack in providing clear guidelines and definitions of sexual harassment in workplace in order to ensuring that victims have a solid legal basis to pursue their complaints.

Besides, the **IRA Act 1967** lacked the provision that requires the inclusion of provisions related to sexual harassment in collective agreements. This omission might lead to the issue of that sexual harassment may not receive adequate protection in the agreements negotiated between the employers and trade unions, leaving workers vulnerable to such misconduct. At the same time, the percentage of union members workers is low in Malaysia, that is, around 9%,[10] with many of them being in the public sector where collective bargaining is not permitted. This results in the reach and effectiveness of collective agreements in addressing sexual harassment are limited, even though some companies have their own disciplinary procedures to handle sexual harassment cases.

Moreover, in examining the legal value of the Code, it is unfortunate that it is <u>not legally binding to employers</u>, as it merely works as a

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[10] Jaya Ganesan, '*A review on factors contributing to declining trade union membership in Malaysia*' (2016) 3(11) International Journal of Advanced and Applied Sciences

guideline for the proper conduct of individuals in the workplace. In addition, the implementation of the Code is optional and on a voluntary basis since it is merely a guideline with no legal force.[11] This is illustrated in the case of ***Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor***[12], where the appellant submitted that the Code was merely used as a guideline to the Malaysian employers without any legal force, and only the Employment Act 1955 imposes legal duties on employers to deal with sexual harassment cases. This was agreed by the Federal Court in which the Code is a collective guideline on what is sexual harassment and only provides in-house mechanisms to prevent eradicating sexual harassment in the workplace. No avenue is provided other than the workplace for the victim.

This principle is also applicable in English cases whereby in the case of ***Barworth Flockton Ltd v Kirk***[13] the Employment Appeal Tribunal stated that the **Industrial Relations Code of Practice** is not binding as a matter of law, but only a guidance given to the employers. Although it provides useful guidance in deriving legal decisions, it does not have much legal value when applied in court cases.

On the other hand, the Code failed to establish an independent body to look into implementing the rules and regulations in the Code itself. The Code itself does not stand as a firm legal authority, in which reference must be made to the **IRA 1967 ("IRA 1967")**. In **Section**

[11] A. Ong , "*Sexual Harassment*' (Azman Davidson & Co, June 2023) <azmandavidson.com.my/sexual-harassment/>
[12] [2016] 4 MLJ 282
[13] [1978] IRLR 18

30(5A) of the IRA 1967, it states that *"... the Court may take into consideration any agreement or code relating to employment practices between organisations representative of employers and workmen respectively..."*. Since the provision uses the words "may", it makes it discretionary for the courts to make its award based on the Code. Thus, the Code will become the law only when the court decides to make an award with reference to the Code's guidelines. It should be noted that merely some signatories of the Code are bound by it, and others act as a mere moral guideline relied on by the courts to reach their decision.

As in the case of ***Aluminium Company of Malaysia Berhad v Jaspal Singh***[14] there is no doubt that the Code of Conduct for Industrial Harmony by the company was breached. Nevertheless the Code was drawn merely to guide the employer and merely serves as a reference for healthy and good industrial relation practices in the workplace. It is totally up to the employer's discretion to form a regulating mechanism in conjunction with the Code, and there is no legislation to regulate and monitor the implementation. With reference to the case of ***Said Dharmalingam v Malayan Breweries Ltd***,[15] the Supreme Court decided that the Code was not absolute, in which **Section 30 (5A) of the IRA 1967** requires the Industrial Court to consider the employer's conduct. Therefore, if an employer opts to not adhere to the Code, and the case ends up in the Industrial Court, the employer would, in high possibility, lose the said case.

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[14] [1987] 2 ILR 558 (Award No.363 of 1987)

[15] [1997] 1 MLJ 352

As such, the Code itself had clearly failed to be an independent and strong authority to ensure that sexual harassment cases can be affectively prevented despite the fact that it consists several practical rulings put these pathetic issues to a halt. The fact that the Code is implemented by means of voluntariness and cannot be enforced as a legal duty abiding to the law, numerous victims continued to face devastating consequences such as losing their jobs and employment opportunities, as sexual harassment issues in the workplace could be worser than a nightmare.[16] For these factors, it is believed that effective legislation is required to elevate the Code to a more advanced stage where a person's fundamental rights can be effectively protected and assured by upholding the Code with more legal authority.

4 POSSIBLE REFORMATIONS ON LAW AND REGULATION ON SEXUAL HARASSMENT IN WORKPLACE

In this topic, is it relevant to discuss the recommendations Malaysia can achieve to provide adequate law for regulating sexual harassment in the workplace? Malaysia has advanced to a certain extent after the enactment of the **Anti-Sexual Harassment Act 2022,** which widens the protection to the public at broad as it was only recently that sexual harassment had been recognised as a phenomenon that had been trusted to the centre stage in recent years.[17] Nevertheless, there are still some

[16]Sexual Harassment in the Workplace : The Current Law and Practice in Malaysia [2010] 1 MLJ cxx
[17] Anne C. Levy, Michele A. Paludi, "*Workplace Sexual Harassment: Second Edition"* (Prentice Hall, 2002)

flaws in Malaysian law that require improvement, which can be done by looking at how others have done it.

As the law develops in time, culture, and our understanding of society, law and regulation must keep up with time. As per Suriyadi FCJ in the case of ***Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor***[18] from paragraph [39] onwards, the court made the findings below. First of all, there is "the Code", where Article 4 describes the types of sexual harassment, but it does not provide any other avenue other than the workplace for the victim, and it also does not provide a course of action for compensation against the victim. Then in 2012, the Employment (Amendment) Act 2012 was introduced. The law came about in the form of the Employment Act 1955 to provide statutory legislation in dealing with sexual harassment in the workplace. It was only recently the Anti-Sexual Harassment Act 2022 was passed, for proper legislation for regulating sexual harassment in Malaysia, but is the act sufficient?

The victim has no civil cause to claim civil remedies again. Even under the law of tort, there are major challenges in its development as where Waterhouse J in the case of ***Patel v Patel***[19] stated that there was no tort of harassment in England then and also in the case of ***Hunter and others v Canary Wharf Ltd***[20] where though the court did acknowledge that there was no reason why an intentional tort could not compensate for mere distress, inconvenience or discomfort, rather than insisting on proof of physical or psychiatric injury. Cases of harassment under the law of tort would fall under the context of tort of harassment, but more

[18] [2016] 4 MLJ 282
[19] [1988] 2 KB 141
[20] [1997] 2 All ER 426

of a nuisance, as in most cases, it does not cause any physical or psychiatric illness, more towards discomfort against the victim as laid down in the Singaporean case of ***Tee Yok Kiat v Pang Min Seng***[21] where the plaintiff relied on the tort of intimidation and harassment when she was sexually harassed. The Court of Appeal relied on ***Malcomson Nicholas Hugh Bertram & Anor v Naresh Kumar Mehta***[22] where the tort of harassment was good law in Malaysia as both torts of intimidation and harassment were allowed in relation to the Blackmail claim, hence recognised the existence of the tort of harassment in Singapore. However, this decision was soon overthrown in the case of ***AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan***,[23] where the court ruled that there is no existence of the tort of harassment in Singapore. The inconsistency in the claim for the tort of harassment causes uncertainty to the law in which the victim's right is under the law of tort. Neither does it fall under the rule of ***Wilkinson v Downton***[24] for a claim of trespass to a person or psychiatric illness. In Malaysia, when there is a case of sexual harassment in workplace, the most the victim would get is too have the harasser dismissed based on just cause, similar to the other Commonwealth countries. In the case of ***Edaran Communication Sdn. Bhd. v. Tahar Mohamed***,[25] where the employee was dismissed for sexual harassment towards his subordinates, and the Court in upholding the dismissal stated the following: "*Oleh yang demikian Mahkamah memuji tindakan yang*

[21] [2013] SGCA 9
[22] [2001] 3 SLR 454
[23] [2013] 3 SLR 545
[24] [1897] 2 QB 5
[25] (1998) 3 ILR 487

diambil oleh Syarikat memberhentikan yang menuntut setelah berpuashati yang dia telah melakukan salahlaku mengganggu pekerja-pekerja wanita dengan gangguan seksual."

Yet far away in the United States, the courts would award equitable damages to the victim where we can refer to the case of ***Weeks v Baker & Mackenzie***[26] where the court ordered the firm to pay $6.9 million, almost 10% of the firm's net worth in punitive damages to send a wake-up-call to other companies out there to abstain from being arrogant in handling situation on sexual harassment. More effort can also be done by referring to the model in Japan where in 1997 they revised the **"Ordinance for the Enforcement of the Act on Ensuring Equal Opportunities for and Treatment of Men and Women in Employment"** where the liability is directed at the company if they should have known about the harassment or did nothing to prevent it. Therefore, it is not merely the personality of the employee that is in question, but the employer, similar to the role as the law enforcement shall also take active steps to prevent sexual harassment in its workplace.

In Malaysia, it can be seen clearly that trouble arises as to its right to claim under the tort of harassment. It is suggested that there shall be legislation in which the state may take action; under the new legislation in Malaysia, it merely establishes the "*Tribunal for Anti-Sexual Harassment*" and its function, but it does not provide punishment for the offender who sexually harasses the victim. Cross-referencing into the United States of American legislation's, **Title VII of the Civil Rights Act of 1964** which states that it is "*an unlawful employment practice for*

[26] 63 Cal. App. 4th 1137, Superior Court for the City and County of San Francisco

an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" covers people working for a business with 15 employees or more, which states two forms of sexual harassment: *quid pro quo* harassment and hostile work environment harassment. These two types of sexual harassment is not any sexual harassment but it very much relates to reinforcement of power by male employers against a female employee and how does gender contributes to hostile working environment in the workplace. All of these concerns not just the touching of a victim in any cases but it concerns the whole atmosphere of sexual harassment in the workplace.

Briefly speaking, by mainly referring to the case of ***Burlington Industries v Ellerth***[27] *quid pro quo* harassment occurs when an employee's submission or refusal to sexual favours would determine whether he or she gets permission or otherwise. For example, in this situation harassment occurs if a woman's supervisor threatened to deny her a promotion unless she succumbed to his sexual desires, or the employee's position is changed because of her refusal to date the supervisor. The employment decisions could include any number of things, such as hiring and firing decisions, salary increases, work assignments, or work schedules; A hostile work environment, on the other hand, as per the case of ***Meritor Savings Bank v. Vinson***,[28] can be defined as behaviour that focuses on the sexuality of another person or persons in the environment. The unwelcome sexual conduct creates an environment that makes an

[27] 524 U.S. 742 (1998), US Supreme Court
[28] 477 U.S. 57 (1986), US Supreme Court

individual feel intimidated or uncomfortable of an environment that interferes with work productivity which is determined by sex and gender.

Malaysia or Asia in general, practical "partriarchy" or also known as *adat pepatih* which means "rule of the fathers" and in a workplace which has such culture, it becomes the central cause of sexual harassment, and any discrimination based on gender. Even if women gained access to the occupations, patriarchy will keep them from exercising any real power and male aggression becomes a weapon they use to protect their space to keep women from sharing in organisational rewards, which one of it is by intimidating female workers with their gender characteristics.[29] With that comes the **United States Equal Employment Opportunity Commission** to enforce employment discrimination legislation where many efforts have been expended in order to eliminate and prevent gender discrimination.

In terms of industrial relations, there is a need to amend **Part IV of the IRA** in order to require unionized companies to incorporate their mechanism for dealing with sexual harassment in their collective agreements. **Part IV of the IRA** provides guidelines and procedures for collective agreement and collective bargaining. At present, according to the provisions under **Part IV of the IRA**, there are no compulsory clauses that must be included in collective agreements. However, by inserting appropriate clauses related to sexual harassment, companies could provide protection for workers covered by the collective agreements, which typically extends beyond union members. Even though there is only a

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[29] MacKinnon C., "*Sexual Harassment of Working Women*" (New Haven CTL Yale University Press, 1979)

small percentage of workers who are union members, this approach can leverage the existing disciplinary procedures established by employers in unionised companies. Through mandating these companies to include clauses that deal with sexual harassment in the workplace, enabling effective mechanisms to address misconduct, including sexual harassment. By utilising the collective bargaining framework, the inclusion of sexual harassment policies in collective agreements can enhance protection for a broader range of workers within unionized companies. For example, "*Employers or heads of government agencies must protect their employees from sexual harassment in the workplace. This obligation to protect also includes preventive measures.*"[30]

In regards to the employer's responsibilities, employers shall be jointly and severally liable for transactional sexual harassment committed by management personnel. While for other sexual harassment behaviours, if the employer has exercised reasonable care to prevent and take positive measures to correct the sexual harassment behaviour, they may be exempted from liability. This usually means that the employer has proven, developed and published rules and regulations to prevent sexual harassment in the workplace, and provided internal mechanisms for accusing sexual harassment. At the same time, it must be proven that the victim did not use any preventive and corrective measures or other methods to avoid harm. Suppose an employer knows or should have known about such behaviour but has not taken steps to prevent or correct it; they shall be jointly and severally liable for the employee's behaviour. Firstly,

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[30] Section 2(1) of the German Workplace Sexual Harassment Protection Act ('Gesetz zum Schutz der Beschftigten vor sexueller Belstigung am Arbeitspla')

employers are the best persons to prevent sexual harassment, as they are financially capable and capable of punishing harassers. Secondly, employers have an obligation to provide employees with a work environment free from sexual harassment, to make all employees aware of the nature and harm of sexual harassment, and to show a stance of intolerance and resolute punishment. Thirdly, suppose the law stipulates that employers are responsible for the behaviour of management personnel. In that case, employers can consciously train employees to understand the essence of sexual harassment and how to avoid such behaviour and urge employers to actively take measures to provide relief after sexual harassment occurs effectively. Fourthly, transactional sexual harassment implemented by management personnel is intended to use their decision-making power over employee employment, promotion, and other matters in order to obtain sexual rewards from the other party. This form of sexual harassment can only be carried out by individuals with a certain authority, which constitutes an abuse of power. The employer clearly gives the authority to engage in transactions, and the employer should be responsible for the employer's negligence. For other types of sexual harassment, as long as the employer exercises reasonable care obligations, they should be exempted from liability.

Other than that, since 2001, the **Malaysian Trades Union Congress and the Malaysian Joint Action Group against Violation Against Women (JAG-VAW)** have been advocating for a comprehensive bill to address sexual harassment in workplace. The Proposed Sexual Harassment Bill focuses specifically on workplace sexual harass-

ment. The proposed Bill provides a comprehensive definition of "workplace", which "*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*". The Bill also extends its scope to address sexual harassment in sporting activities, educational institutions, and legislative bodies. If enacted, the proposed Bill would introduce significant changes to handle workplace sexual harassment effectively. It emphasises the importance of prevention by requiring employers to establish in-house mechanisms to prevent sexual harassment. This proactive approach aims to create safe and respectful work environments. Additionally, the proposed Bill seeks to ensure timely and meaningful access to legal redress for victims of workplace sexual harassment. It suggests the establishment of a special tribunal, specific procedures, remedies, counselling services, and protection against retaliation and victimisation for both victims and witnesses.[31] Thus, this proposed bill presented as a solution to the inadequacies of the current existing grievance mechanism, which is a crucial step towards combating workplace sexual harassment by providing a comprehensive definition, emphasising prevention, and ensuring timely access to legal redress, thus fostering safer and more respectful work environments.

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[31] Dr. Muzaffar Syah Mallow, 'Sexual Harassment in the Workplace: An Overview over the International Law and Current Law and Practice in Malaysia' (2013) 3(13) International Journal of Humanities and Social Science <http://www.ijhssnet.com/journals/Vol_3_No_13_July_2013/10.pdf>

Besides, the **Occupational Safety and Health Act 1994 ("OSHA")** aims to protect the safety, health, and overall well-being of individuals in the workplace, protecting them from any potential risks or hazards that may arise from their work activities. **Section 15 (2) of the OSHA** specifically outlined several specific matters that fall within the duty of employers to ensure the safety and well-being of their employees. These includes providing and maintaining plant and systems of work that are safe and free from health risks to the extent practicable; making arrangements to ensure safety and the absence of health risks in relation to the use, operation, handling, storage, and transport of equipment and substances; providing necessary information, instruction, training, and supervision to ensure the safety and health of employees at work to the extent practicable; maintaining workplaces under their control in a safe and healthy condition and providing safe means of access and egress; and providing a working environment that is safe, free from health risks, and adequate in terms of welfare facilities for employees to the extent practicable. In addition, **S.16 of the OSHA** employers are required to develop a written general policy concerning the safety and health of their employees in the workplace, where this section states that "*...it be the duty of every employer and every self-employed person to prepare and as often as may be appropriate revise a written statement of his general policy with respect to the safety and health at work of his employees and the organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees.*" Therefore, new provision could be

introduced into this act, making it mandatory for employers to incorporate policies on sexual harassment, as recommended in the Code of Practice. By expanding the scope of the **OSHA**, employers would be mandate to establish comprehensive policies addressing sexual harassment in the workplace, ensuring a solid legal basis in dealing with the prevention and procedures of workplace sexual harassment cases.

Furthermore, there is a need to expand the applicability of **OSHA**. Pursuant to **S.1(2) of the OSHA**, the act is applicable throughout Malaysia to the industries specified in the First Schedule, which are "*1. Manufacturing; 2. Mining and Quarrying; 3. Construction; 4. Agriculture, Forestry and Fishing; 5. Utilities:(a) Electricity; (b) Gas; (c) Water; and (d) Sanitary Services; 6. Transport, Storage and Communication; 7. Wholesale and Retail Trades; 8. Hotels and Restaurants; 9. Finance, Insurance, Real Estate and Business Services; and 10. Public Services and Statutory Authorities*". This results in employees in other fields of industries such as private medical services and private educational institutes are not protected under this act.

Last of all, it is important to emphasise how important "the Code" is in order to ensure the Code is effectively implemented in the workplace to prevent sexual harassment, it is recommended that the Code can be made a stronger legal authority rather than being a mere option to be followed by the courts. The wording in the Code could be amended to widen the scope and mandate the intended group of individuals to be subjected to it. Take the **Content Code 2022** for instance, although **Part 6.2** states that in compliance with this code is on a voluntary basis, **Part**

4.2 uses the term "*shall*" apply to all Content Application Service Providers (CASP), and even stated that it can be subjected to the member of the Content Forum and individuals who submitted their agreement to be bound to the Code. Therefore, it is clear that the 2022 Code provides a comprehensible indication that these people are subjected to the guidelines in the 2022 Code. In order to uphold the guidelines in **the Code**, it is recommended that the wordings in the guidelines could be amended such as by amending the term "encourage" **Paragraph 6** of the Code to "*shall*" in order to increase legal weight of the guideline, and to emphasise the employer's responsibility in forming a comprehensive in-house mechanism to prevent, handle and eradicate sexual harassment in the workplace. Also, by referring to **Paragraph 29** of **the Code** that states an employer "should" provide employees and supervisors with education in regards to sexual harassment, and **Paragraph 30** which states the employer "*should*" provide special training sessions to the supervisory and managerial staff in combating sexual harassment issues, it is recommended that the suggestive term "*should*" be replaced with "*shall*" to show a stronger intention that the employers are obligated to provide such trainings and education to their employees.

In addition, it is advisable for the Code to include a specific guideline in terms of the scope of protection whereby both employee and employer are subjected to the Code's guideline to ensure both parties cooperate to avoid any verbal sexual harassment. Although **Paragraphs 2 and 3** of the Code were meant to impose duties to the employers, employees, trade unions and other relevant parties on the protection of the dignity of men and women at work, there are no clear-cut guidelines

stated in any paragraphs that these people are subjected to the Code. It would be a waste if the five clearly defined types of sexual harassment are not properly vested legal weight. For that reason, amending the wordings of the Code will be the crucial step to make the Code a more powerful legal authority despite being voluntary in nature. As the Code itself consists of a specific guideline about five types of sexual harassment which includes verbal sexual harassment,[32] it is crucial for it to be upheld in order to raise awareness as well as make verbal sexual harassment a firm and serious offence that would punishable in order to protect female employees who are facing this hazardous issue due to gender discrimination in the workplace.

5 CONCLUSION

Sexual harassment in the workplace has been a major and alerting issue for several years. It is considered as a worrying misconduct that cannot be tolerated continuously since it causes numerous detrimental effects to an individual's mentality especially towards female workers. Such conduct undeniably lowers the dignity and respect of the victim, yet leaving the offender unpunished is indeed irritating and humiliating, forming an unhealthy work environment for the employees who are struggling to earn a living. Employers need to be responsible for providing a safe and conducive work environment for their employees, and also ensure that all employees are aware about the serious consequences of conducting a crime of sexual harassment. This is consistent with the

[32] Paragraph 8 of the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace

law's objective of protecting all employees from sexual harassment in the workplace.

Sadly, with reference to the above legislations, it is undeniable that the Malaysian laws in combatting the issue of sexual harassment is still in its infancy, where numerous challenges and amendments are still in the queue, awaiting for its improvements. As the existing legislations are still immature in protecting the rights and interests of employees from being sexually harassed in the workplace, there are still numerous issues that are awaited to be looked into. Since only the case of ***Mohd Ridzwan Abdul Razak*** provided developments in the law, majority of the victims who are not exposed to the legal field are still unaware of their rights to claim for any redress since the law itself is still ambiguous.[33] Solely relying on one case law will not be sufficient to ensure sexual harassments, particularly in verbal sexual harassment which is newly '*introduced*' in workplace can be effectively reduced.

It is highly advisable that the Malaysian legislation could make reference to other international laws in combating sexual harassment in the workplace. By assimilating the United State's legislations to provide equitable damages for victims, our Malaysian victims could be effectively protected since employers will be pressured with sanctions and the huge amount of damages that they will need to repay the victim. Not forgetting Japan's legislation, the Malaysian law could refer to their 1997 Ordinance to impose liability on the employers if they fail to prevent

[33] Muhammad Aliff Shafiq Maskor, *Sexual Harassment At The Workplace In Malaysia: Commentaries In Resolving "The Pandemic"* [2021] 1 LNS(A) viii

sexual harassment cases in their workplace. Gender equality in the workplace will continue to be a distant dream until workplaces acknowledge these complex layers and make systemic amendments to the laws in Malaysia, as sexual harassment laws in Malaysia continue to regress.

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