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## **Sexual misconduct in academic setting: domestic law and practice in Malaysia**

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**Abstract:** Sexual harassment is one of the contemporary silent issues in academic setting in the schools and institution of higher education. The above subject has become a climax discourse and heatedly debated in various sectors in the recent past. A number of theoretical and empirical studies have demonstrated that sexual harassment has a tendency of causing long term psychological disturbances to the victims. Despite of advocacy of no discrimination between female and male in education, sexual harassment in schools and higher educational institutions in Malaysia is drastically prevalent. This paper therefore explores the domestic laws of Malaysia dealing with sexual misconduct against the students and its adequacy.

**Keywords:** sexual harassment; Malaysia; misconduct; Federal Constitution.

**Reference** to this paper should be made as follows: Mohamed, A.A.A. (2015) ‘Sexual misconduct in academic setting: domestic law and practice in Malaysia’, *Int. J. Private Law*, Vol. 8, No. 1, pp.59–72.

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This paper is a revised and expanded version of a paper entitled ‘Sexual misconduct in academic setting: domestic law and practice in Malaysia’ presented at the 8th International Conference on Legal, Security, and Privacy Issues in IT Law (LSPI), Bangkok, Thailand, 11–15 November 2013; 7th International Law and Trade Conference, Bangkok, Thailand, 11–15 November 2013; 4th International Private Law Conference, Bangkok, Thailand, 11–15 November 2013; and the 3rd International Public Law Conference, Bangkok, Thailand, 11–15 November 2013.

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## 1 Introduction

Sexual harassment is one of contemporary silent issues in academic setting. The experience of sexual harassment in schools is a serious social problem that requires solution to its psychological influences specifically on the academic performance of the victims.<sup>1</sup> The negligence of this prime social problem could worsen the woeful academic performance of the victims. A number of theoretical and empirical studies have demonstrated that sexual harassment has a tendency of causing long term psychological disturbances to the victims.<sup>2</sup> Several studies have painstakingly examined the psychological impact of sexual harassment on the victims.<sup>3</sup> Despite the fact that several studies have been carried out on sexual harassment in academic institutions, few studies however have been conducted in the contexts of Malaysian schools and institution of higher education. Several scholarly works have shown that sexual harassment in Malaysia has no much difference with the experience of the advanced countries such as the USA.<sup>4</sup> The recent studies have focused on the investigation of sexual harassment in Malaysian schools. The findings have shown that there is high rate of the students' experience sexual harassment in various schools and institutions of higher learning in Malaysia which affects the victim psychologically.<sup>5</sup>

Sexual harassment has harmful effects for lecturers, administrative staff, the university and the society. For lecturers, the impact of sexual harassment can be demoralising; both while the harassment is going on and, in some situations, if the lecturer opts to initiate action against the harasser.<sup>6</sup> Victims of harassment usually encounter and suffer a range of psychological and physical consequences while experiencing sexual harassment.<sup>7</sup> This may include symptoms like the stress and trauma caused by sexual harassment, nausea, loss of appetite, anger, fear, and even headaches.<sup>8</sup> This may affect the output and productivity capacity of the lecturer. Also, the lecturer may lose the employment or job-related experiences such as training or voluntarily resign from the university especially where the harassment is coming from a person in authority; like the Dean or Vice Chancellor. Such lecturers may even face dismissals for protesting against harassment.<sup>9</sup> Having said the above, this paper discusses the domestic laws in Malaysia dealing with sexual harassment offences involving the youth offenders.

## 2 Sexual harassment: classification according to categories

There are different categories of sexual harassment in the universities and colleges. It can emanate from lecturer to student; student to lecturer; and student to student. Sexual harassment of students by lecturers is a serious offence. The relationship between students and lecturers is unique because teachers are in a position of authority or power.<sup>10</sup> They have much influence on the success of students.<sup>11</sup> As such, lecturers are under a legal and professional obligation to keep all relationships with students completely professional. Sexual harassment of students by lecturers may take different forms such as verbal, physical and non-verbal although it is relatively uncommon in universities and colleges. A lecturer may even gain an advantage over the student especially where such a student is not academically strong. This kind of attitude may be good grounds for termination from employment.<sup>12</sup> For example, recently, Tey Tsun Hang, law professor of the National University of Singapore (NUS) was convicted and sentenced to five months

in jail in Singapore for obtaining sexual favours and gifts from a female student in exchange for better grades. His employment with NUS was also terminated.

In some instances, lecturers are the victims of sexually harassing behaviour and students are the harassers. In this situation, the victims are usually female lecturers. Male university students may be physically bigger than their female lecturers. They may even be older in age than the lecturer and may sexually harass the lecturer.<sup>13</sup> This could be done by way of bodily intimidation which can be a momentous feature in student-to-lecturer sexual harassment. Also, harassment may also take verbal and non-verbal forms. For example, cracking a joke on the dress and appearances of a passing lecturer in the hallways is a form of harassment.

The student-to-student sexual harassment is common and prevalent in tertiary institutions. This may take different forms such as verbal, physical and non-verbal. Whether or not the conduct amounts to sexual harassment may depend on the response of the harassed party.<sup>14</sup> Verbal harassment entails any upsetting or insulting words directed at someone because of her/his sex. For example, certain nicknames like ‘stud,’ ‘babe,’ ‘chick’, or ‘sexy’ may have some connotations. Physical harassment is any unwanted physical contact. This may include (but is not limited to) touching, grabbing or pinching in a sexual way.<sup>15</sup> This may upon availability of evidence be regarded as sexual assault which is a criminal offence. Non-verbal (without words) harassment may include leering (staring), or sexual gesturing (movements).

### *2.1 Students experience of sexual harassment*

As noted above, the issue of sexual harassment is not limited to male and female adult. The school children and university students also have experienced sexual harassment which tends to cause them psychological and emotional imbalances.<sup>16</sup> It is a fact that most female students experience sexual harassment and they have the tendency of keeping it to themselves. The previous studies indicated that majority of the female students tend to experience sexual harassment during their college days<sup>17</sup>. Further, recent studies showed that female generally do not consider non-physical harassment such as visual, verbal or non-verbal as sexual harassment.<sup>18</sup> The studies have also shown that, females have wider perceptions of sexual harassment compared to males because some behaviour considered as sexual harassment by female might not necessarily be considered as sexual harassment by male.<sup>19</sup> In other words, it has been acknowledged that, majority of males do not consider sexual advancement to females as harassment.<sup>20</sup> In Malaysia, studies have shown that, most of sexual harassment experiences by females are caused by male harassers which hitherto affect the harassed persons.<sup>21</sup>

## **3 Sexual harassment: domestic laws in Malaysia**

### *3.1 Sexual harassment: violation of basic human right*

The preamble of the Universal Declaration of Human Rights 1948 (UDHR), provides *inter alia*, “recognition of the inherent dignity”.<sup>22</sup> The words ‘inherent dignity’ consists of spiritual and material dignity and that former includes the right not to be sexually harassed by others.<sup>23</sup> Further, Article 3 of the UDHR provides that “everyone has the

right to life.<sup>24</sup> The ‘right to life’ does not refer only to the right to survive and live, but rather it is all-embracing of all other aspects of life which would make it comfortable. Therefore, the ‘right to life’ is inclusive of right to live a dignified life captured by the term ‘inherent dignity’. Although the UDHR is only a ‘Declaration’ and it does not have the force of law under public international law, it nevertheless, has become part and parcel of the international customary law and as such is binding on the member states.<sup>25</sup>

### *3.2 Sexual harassment: a violation of article 5(1) of Federal Constitution*

The Malaysia Federal Constitution, Article 5(1), provides: “No person shall be deprived of his life or personal liberty save in accordance with law”.<sup>26</sup> Prohibition of sexual harassment is envisaged in the phrase ‘right to life’ of the article. The ‘right to life’ is the most fundamental right which is a pre-requisite for the implementation of all other right. Besides its literal meaning that a human being possesses the right not to be deprived one’s life by another, except in accordance with law, the ‘right to life’ also implies, as what Gopal Sri Ram JCA (as he then was) in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan and Anor*<sup>27</sup> refer it to as the right to ‘quality of life’. According to the trial judge, the expression ‘life’ in art 5(1) incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Further, the trial judge adopted a broad and liberal interpretation of the word ‘life’ to include protection of human reputation and dignity. In *Lembaga Tatatertib Perkhidmatant Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal*,<sup>28</sup> it was stated *inter alia* that ‘the right to reputation is part and parcel of human dignity, a fundamental right. It is the right of every person within the shores of Malaysia to live with common human dignity.’ Undeniably, sexual violence-related crimes and sexual harassment are the most common examples of the depravation of victim’s reputation and dignity, and thus, are thus, violation of the fundamental right to life guaranteed by the Federal Constitution.

Further, sexual harassment is also a form of discrimination which has been expressly prohibited by Article 8(2) of the Federal Constitution.<sup>29</sup> This article expressly prohibits any form of discrimination based on religion, race, and descent, place of birth or gender. Hence, sexual harassment can be regarded as form of discrimination.<sup>30</sup> In fact, it is a settled law in many countries that sexual harassment is form of discrimination.<sup>31</sup>

### *3.3 Sexual harassment: a criminal offence*

Criminal act is an offence or wrong against the public or State and therefore, the harasser could be criminally prosecuted by the state. However, for the harasser to be convicted under one of the sexual offences listed in the Malaysian Penal Code,<sup>32</sup> his criminal liability must be established.<sup>33</sup> In other words, the elements of an offence with which a harasser is charged have be proven in order to convict him for committing an offence. For a person to be liable for certain crime, two main elements of crime has to be proven, namely ‘actus reus’ (the conduct or action of the accused person which produce or constitutes prohibited harm) and ‘mens rea’ (the blameworthy state of mind).<sup>34</sup>

It is noteworthy that there is no specific criminal conduct known as ‘sexual harassment’ in the Malaysian Penal Code. The closest provision under which the harasser could be charged for sexual harassment offence is Section 509 of the Penal Code. This section provides: “Whoever, intending to insult the modesty of any person, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or

sound shall be heard, or that such gesture or object shall be seen by such person, or intrudes upon the privacy of such person, shall be punished with imprisonment for a term which may extend to five years or with fine or with both".<sup>35</sup>

It may be added that there are several other provisions in the Code dealing with various types of sexual offences from which behaviour that constitutes sexual harassment could be sanctioned. This includes singing obscene songs (Section 294), assault or use of criminal force to a person with intent to outrage modesty (Section 354), assault or criminal force with intent to dishonour a person, otherwise than on grave provocation (Section 355), rape (Section 375), carnal intercourse against the order of nature (Section 377A), outrages on decency (Section 377D) and inciting a child to an act of gross indecency (Section 377E). It may be added that an attempt to commit any of the above-mentioned offences is punishable under Section 511 of the Penal Code. For an act to constitute an attempt within the meaning of Section 511, the accused person must have gone beyond the preparation stage towards the actual commission of the crime which at the end is not committed.<sup>36</sup>

#### 4 Sexual offences by ‘child’ offender

A ‘child’ or ‘juvenile’ will be treated differently than an adult when charged for committing sexual offences. The Standard Minimum Rules for the Administration of Juvenile Justice 1985 (‘The Beijing Rules’) promoted a different set of procedure and punishment involving child offenders. In particular, rule 2.2(a) of the Beijing Rules states: “A juvenile is a child or young person who, under the respective legal system, may be dealt with for an offence in a manner which is different from an adult”.<sup>37</sup> The age of majority may differ from one jurisdiction to another although many countries have set 18 as the age of majority. This is also consistent with article 1 of the UN Convention on the Rights of the Child 1989 which provides: “For the purpose of the present Convention, a child means every human being below the age of eighteen years unless, under the age applicable to the child, majority is attained earlier.”<sup>38</sup>

In Malaysia, section 2 of the Child Act 2001 defines a child as: “(a) a person under the age of eighteen years; and (b) in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in section 82 of the penal Code [Act 574]”.<sup>39</sup> A ‘child’ for the purpose of Child Act 2001, must be a person who has attained the age of criminal responsibility which is generally above 12 years of age. Section 82 of the Penal Code provides: “Nothing is an offence which is done by a child under ten years of age”.<sup>40</sup> In other words, a child below ten shall be immune from any criminal prosecution. This principle is deduced from English doctrine of *doli incapax* which is based on the rationale that the child below ten is incapable of understanding the nature and consequences of his acts and thus incapable of committing a crime.

Section 83 of the Penal Code further provides: “Nothing is an offence which is done by a child above ten years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion”.<sup>41</sup> In other words, a child above ten and below 12 is *doli capax*. Thus, unlike section 82, *doli incapax* presumption in Section 83 can be rebutted if it can be proven that the child understand the nature and consequences of his act.

The burden is on child to prove that he/she did not attain sufficient maturity of understanding to be able to know the nature and consequences of his/her acts.<sup>42</sup> However, in England, the burden of proof is on prosecution.<sup>43</sup> The court is also placed with a difficult job of making the decision as to whether the child above ten years of age and below 12 attained the sufficient maturity of understanding to judge the nature and consequence of his acts. In coming to its decision the court will take into consideration child's action, character or expression prior to and immediately after the commission of an offence.<sup>44</sup>

Apart from the above, section 113 of the Malaysian Evidence Act 1950, provides that it shall be an "irrebuttable presumption of law that a boy below the age of thirteen is incapable of committing rape".<sup>45</sup> This effectively means that a boy below 13 is incapable of committing rape because he is incapable of performing sexual intercourse. This presumption of law cannot be refuted. In terms of age, the common law had departed slightly from the Malaysian Evidence Act, Section 113. At common law, a boy under the age of 14 is incapable of sexual intercourse and evidence to prove otherwise is inadmissible.<sup>46</sup> That means even if there is evidence that a boy reached the age of puberty and had in fact committed the act, such evidence is simply inadmissible. However, that does not imply that a boy cannot be charged and convicted for other related sexual offences such as aiding and abetting others to commit rape, indecent assault, or attempted rape.<sup>47</sup>

The above irrebuttable presumption of law has been subject to scholarly debates in the past. In fact, in many jurisdictions the presumption that a person is incapable of sexual intercourse due to his age has been abolished. For example, section 1 of the Sexual Offences Act 1993 abolished the presumption in England and South Wales. If not abolished completely, then at least the age limit has been lowered. For example, section 13 of the Tasmania Criminal Code Act states: "a male person under 7 years of age is conclusively presumed to be incapable of having sexual intercourse".<sup>48</sup> However, the South Africa's Law of Evidence and Criminal Procedure Act (Amendment Act) 1987 provides that the presumption that a boy under 14 is incapable of sexual intercourse to be rebutted and the evidence to prove otherwise is admissible.<sup>49</sup>

In Hong Kong, the Law Reform Commission of Hong Kong had in their report entitled: "The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse", which was submitted to the Hong Kong authority in December 2010, recommended the abolition of the common law presumption that a boy under 14 is incapable of sexual intercourse.<sup>50</sup> As from the foregoing, the irrebuttable presumption of law that a boy under the age of 14 is incapable of sexual intercourse has been done away with in many jurisdictions. It is submitted that in not allowing a charge of rape against a child below 13, despite the existence of substantial evidence to prove the contrary, could be unjust to the victim, and a potential danger for the society. After all, the rebuttable presumption of *doli incapax* under section 83 of the Penal Code for the children above 10 and below 12 would still apply and child accused of rape is given an adequate protection under this section.

Reverting back to the application of Child Act 2001, if the accused person falls into the definition of a 'child' under Section 2 of the Child Act 2001, which in general is between the ages of 10 to 18, he/she will be tried for the sexual offence under Penal Code in accordance with Child Act 2001.<sup>51</sup> It effectively means that the procedure and punishment for an offence committed by a child would be different from the criminal procedure and punishment applicable to an adult. The Child Act 2001 acknowledges:

“that a child, by reason of his physical, mental and emotional immaturity, is in need of special safeguards, care and assistance, after birth, to enable him to participate in and contribute positively towards the attainment of the ideals of a civil Malaysian society”.<sup>52</sup>

Pursuant to the Child Act 2001, the ‘Court For Children’, a special court, is constituted to decide criminal cases involving a child.<sup>53</sup> This Court is conferred jurisdiction to try all offences committed by a child except offences punishable with death.<sup>54</sup> The Court consists of a Magistrate and two advisors appointed by the Minister from a panel of persons resident in the state.<sup>55</sup> One of the two appointed advisors shall be a woman.<sup>56</sup> The primary functions of the advisors, as stated in the Act, are: “(a) to inform and advise the Court For Children with respect to any consideration affecting the order made upon a finding of guilt or other related treatment of any child brought before it; and (b) if necessary, to advise the parent of guardian of the child”.<sup>57</sup>

The child’s identity is protected throughout the pre-trial, trial or post-trial stage. In fact, the Act prohibits publication of the child’s name, address, or educational institution, or any particulars that could lead to the identification of the concerned child, by any newspaper or magazine or transmitted through any electronic medium.<sup>58</sup> Further, while being in the police station or court, the child should be treated differently from an adult accused.<sup>59</sup> The Act also prescribes that the words such as ‘conviction’ and ‘sentence’ should be avoided. Instead, words such as the ‘child found guilty’, ‘a finding of guilt’, ‘an order made upon a finding of guilt’ should be employed.

Besides the above, the punishment which the Court For Children may impose on a child found guilty are yet another differentiating point compared to an adult being charged with the same offence. Even if a child is tried and found guilty by High Court for an offence punishable with death, such penalty cannot be imposed on the child.<sup>60</sup> Instead, the child will be imprisoned during the pleasure of the Yang di-Pertuan Agong or Monarch.<sup>61</sup> For example, in *PP v Kok Wah Kuan*,<sup>62</sup> the accused, a child at the time of the commission of an offence punishable with death, was imposed with an alternative order namely, a detention during the pleasure of the Yang di-Pertuan Agong pursuant to section 97(2) of the Child Act 2001. The child’s case must be reviewed at least once a year by the Board of Visiting Justices for that prison and the Board may recommend the child’s further detention or early release.<sup>63</sup>

The main purpose of punishing a child is not to inflict pain but rather to rehabilitate the child. Section 91(1) of the Child Act 2001 provides that if a Court For Children is satisfied that an offence has been proved the Court shall, in addition to any other powers exercisable by virtue of this Act, have power to – “(a) admonish and discharge the child; (b) discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions as may be imposed by the Court; (c) order the child to be placed in the care of a relative or other fit and proper person – (i) for such period to be specified by the Court; and (ii) with such conditions as may be imposed by the Court; (d) order the child to pay a fine, compensation or costs; (e) make a probation order under section 98; (f) order the child to be sent to an approved school or a Henry Gurney School; (g) order the child, if a male, to be whipped with not more than ten strokes of a light cane – (i) within the Court premises; and (ii) in the presence, if he desires to be present, of the parent or guardian of the child; (h) impose on the child, if he is aged fourteen years and above and the offence is punishable with imprisonment and subject to subsection 96(2), any term of imprisonment which could be awarded by a Sessions Court”.<sup>64</sup> As from the above, imprisonment will be considered only as the last resort.

## **5 Challenges in the implementation of the law on sexual harassment**

Although there is a range of criterion to be satisfied in a claim of sexual harassment, proving these requirements presents some challenges. The major challenge is the standard of proof. The prosecution has to establish that sexual harassment happened beyond a reasonable doubt. This presents an almost insuperable obstacle as sexual harassment frequently occurs when there is no body to witness the crime. Even where such incidence has been witnessed by a person, such a person may not be reluctant to testify for a variety of reasons such as fear of losing job, fear of retaliation and the hassle of testifying in court, to name but a few.

It is trite law that in respect of sexual offences, corroboration of the victim's evidence is vital.<sup>65</sup> Evidence of the children of tender years must be corroborated. 'Corroboration' is defined as 'evidence that confirms the accuracy of other evidence in a material particular'.<sup>66</sup> The accused shall not be liable to be convicted of the sexual offence unless that evidence is corroborated by some other material evidence in support thereof implicating him. The reasons for requiring corroboration involving children of tender years is because of his or her known aptitude to confuse fact with fantasy and being easily influenced by adults.<sup>67</sup> In *Ah Mee v PP*,<sup>68</sup> the Federal Court held that in a rape case, corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence. For example, in a charge of rape, medical evidence showing any fresh tear in the hymen is sufficient to corroborate the evidence of the victim on the *factum* of rape.<sup>69</sup> Again, in *PP v Emran b. Nasir*<sup>70</sup> it was held that evidence of distress of the victim of a sexual offence soon after the offence, the demeanour and behaviour of the victim after the alleged rape can be regarded as corroboration. The trial judge must also sufficiently warn itself of the risk of convicting without the accused on the evidence of the victim alone without any independent corroboration.

Where there had been failure to comply with this requirement, the Court, in *Mohd Hanafi Ramly v. PP*,<sup>71</sup> have stated that it would justifies the setting aside of the conviction due to a misdirection which had occasioned a failure of justice. In *PP v Tanwir Masri & Anor*,<sup>72</sup> for example, the accused was acquitted and discharged from the crime of raping a 12-year school girl as there was no independent evidence of some material fact which implicates the respondents which tends to confirm that they were guilty of the offence.

Further, section 133A of the Malaysian Evidence Act 1950 laid down the condition in accepting the evidence of a child of tender years. The above section provides that where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. The Federal Court in the case of *Muharam bin Anson v PP*,<sup>73</sup> stated *inter alia*, that the trial court was required to comply with the mandatory procedure set by section 133A namely, by first conducting an inquiry to satisfy itself as to whether a child of tender years should give sworn or unsworn evidence which would be dependent on whether the child understood the nature of the oath to be sworn or otherwise. In *Tajuddin Salleh v PP*,<sup>74</sup> it was held that a failure to comply with section 133A mandatory requirement was fatal to the conviction and was not curable under section 422 of the Criminal Procedure Code.

A further challenge is that the prosecution has to establish the harasser's intention which largely depends on the circumstances of each case. Furthermore, criminal prosecution does not offer any type of remedy for the victim for her injured feelings, embarrassment and loss of self-esteem, not to mention other substantial losses such as loss of income and harmful consequences on her career.

The punishment to be imposed on the offender must be sufficiently harsh and proportionate to the harm done so as to reflect public disapproval of the crime committed. The prevalence of offences involving teacher/student outraging and molestation cases should also be given due consideration in justifying an even harsher sentence. Referring to cases involving rape and outraging molestation, Zakaria Yatim J in *Ong Lai Kim & Ors v PP*,<sup>75</sup> stated "The offence of rape is rampant in this country. The Court will be failing in its duty if it does not impose a deterrent sentence in this case. The punishment must not only deter the appellants from committing a similar offence in the future but it must also deter others from committing such an offence. The punishment inflicted for grave offences including the crime of rape should adequately reflect the revulsion felt by the great majority of society. Again, in the case of attempting to outrage the modesty and other sexual offences against children, Poyser J in *PP v Tanga Muthu*<sup>76</sup> stated that 'the imposition of a fine only is not an adequate punishment and the appropriate sentence should be one of rigorous imprisonment'.

Having said the above, to further illustrate the courts disapproval of sexual offences committed against children, Table A1 contained the reported cases and the appropriate punishment imposed.

## 6 Conclusions

Sexual harassment in the Malaysian tertiary institutions is a reality and has, as noted in this paper, the tendency of causing long term psychological disturbances to the victims. Generally, students who were sexually harassed were psychologically affected. Inferably, students who are academically stressful could be affected physically and mentally let alone couple with the sexual harassment. Hence, it has been posited that sexual harassment experience by the students contributes immensely to their mental stress in their academic activities. It has therefore been concluded that, there are relationships between sexual harassment and psychological disturbance and metal health of the students in their academic activities. As students are psychological and emotional imbalance, therefore they will not be able to focus on their studies, henceforth, their academic performance is affected. Further, it has been discussed in this paper that the existing laws in Malaysia adequately address the issue of sexual offences which also includes sexual harassment. In so far as trial is concerned, if the offender falls into the definition of a 'child' under section 2 of the Child Act 2001, which in general is between the ages 10 to 18, he/she will be tried for sexual offences under Penal Code in accordance with Child Act 2001. It effectively means that a trial procedure and punishment for an offence committed by a child would be different from a criminal procedure and punishment applicable for adults. Last but not least, the preamble to the Child Act 2001 acknowledges that 'a child, by reason of his physical, mental and emotional immaturity, is in need of special safeguards, care and assistance, after birth, to enable him to participate in and contribute positively towards the attainment of the ideals of a civil Malaysian society.'

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- 22 See Paragraph 1 of the Preble of the Universal Declaration of Human Rights 1948.
- 23 See Mohamed, A.A.A. (2008) ‘Sexual harassment in school involving youth: extent of legal protection’, *Malayan Law Journal*, Vol. 1, No. 1, p.90.
- 24 See Article 3 of the Universal Declaration of Human Rights 1948. See also Art. 2 of the European Convention on Human Rights, Art. 4 of the American Convention on Human Rights, and Art. 4 of the African Charter on Human and People’s Rights.
- 25 See Fileborn, B. (2010) ‘Addressing sexual assault through human rights instruments’, *ACSSA Aware No. 25, Australian Centre for the Study of Sexual Assault*, pp.2–14.
- 26 See Article 5(1) of the Federal Constitution of Malaysia.
- 27 [1996] 1 MLJ 261. See also *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665, whereby the same judge concluded that the word ‘life’ in Art. 5(1) of the Federal Constitution is sufficiently broad to include the ‘right of livelihood’.
- 28 [2000] 3 CLJ 224.
- 29 See Jothy, L.N. (2010) ‘Sexual harassment as discrimination’, *Industrial Law Reports*, Vol. 3, p.1.
- 30 See Jothy, L.N. op. cit., xix.
- 31 See, for example, in the UK, the Court in *Porcelli v. Strathclyde Regional Council* [1986] ICR 564 recognised that sexual harassment was a form of discrimination under the Sexual Discrimination Act 1975. In Australia, in *O’Callaghan v. Loder* [1984] EOC 92-023 court recognised that sexual harassment could be a form of discrimination.
- 32 See Penal Code, Act 574.
- 33 See Card, R. (2008) *Criminal Law*, 18th ed., p.39, Oxford University Press, UK.
- 34 See McAlhone, C. and Huxley-Binns, R. (2007) *Criminal Law – The Fundamentals*, 1st ed., p.11, Thomson, Sweet & Maxwell, UK.
- 35 See Section 509 of the Penal Code.
- 36 See Tan Beng Chye v Public Prosecutor [1966] 1 MLJ 173; Kurchang Singh Wedhawa Singh v Public Prosecutor [1989] 2 CLJ 442.
- 37 See rule 2.2(a) of the Standard Minimum Rules for the Administration of Juvenile Justice 1985 (‘The Beijing Rules’). Adopted by General Assembly resolution 40/33 of 29 November 1985.
- 38 See Article 1 of the UN Convention on the Rights of the Child 1989. Document A/RES/4425 (12 December 1989).
- 39 SEE section 2 of the Child Act 2001, Act 611.
- 40 See Section 82 of the Penal Code.
- 41 See Section 83 of the Penal Code.
- 42 See Hussin, N. (2005) ‘Juvenile delinquencies in Malaysia: legal provisions and prospects for reforms’, Paper presented at the *4th World Congress on Family Law and Children’s Rights*, Cape Town, South Africa, 20–30 March 2005.
- 43 Ibid.
- 44 Ibid.
- 45 See Section 113 of the Evidence Act, Act 56.
- 46 See for example, *R v Philips* (1839) 8 C & P 736; *R v Jordan & Cowmeadow* (1839) 9 C & P 118; *R v Waite* (1892) 2 QB 600.

- 47 See The Law Reform Commission of Hong Kong (2010) *The Common Law Presumption That a Boy under 14 is Incapable of Sexual Intercourse*, Report, December, p.3 [online] [http://www.hkreform.gov.hk/en/docs/boy\\_14\\_e.pdf](http://www.hkreform.gov.hk/en/docs/boy_14_e.pdf). (accessed 8 January 2013). See also Nasimah Hussin, op. cit.
- 48 See paragraph 18(3) of Section 13 of the Tasmanian Criminal Code Act 1924. (No. 69 of 1924).
- 49 See The Law Reform Commission of Hong Kong, op. cit. 4-5.
- 50 See The Law Reform Commission of Hong Kong, op. cit. 9.
- 51 See Ashgar Ali Ali Mohamed, op. cit.
- 52 See Child Act 2001.
- 53 See Section 11(1) of the Child Act 2001.
- 54 See Section 11(5) of the Child Act 2001.
- 55 See Section 11(2) of the Child Act 2001.
- 56 See section 11(3) of the Child Act 2001.
- 57 See Section 11(4) (a) and (b) of the Child Act 2001.
- 58 See Section 15 of the Child Act 2001.
- 59 See Section 85 of the Child Act 2001.
- 60 See Section 97(1) of the Child Act 2001.
- 61 See Section 97(2) of the Child Act 2001.
- 62 [2007] 6 CLJ 341.
- 63 See Section 97(4) of the Child Act 2001.
- 64 See Section 91(1) of the Child Act 2001.
- 65 See *Din v PP* [1964] MLJ 300).
- 66 *Oxford Dictionary of Law* (5th ed.).
- 67 See *Mohd Yusof Rahmat v. Pendakwaraya* [2009] 2 CLJ 673.
- 68 [1967] 1 MLJ 220.
- 69 See *Syed Abu Tahir a/l Mohd. Esmail v PP* [1988] 3 MLJ 485.
- 70 [1987] 1 MLJ 166.
- 71 [2011] 1 LNS 442.
- 72 [2009] 1 LNS 1012.
- 73 [1981] 1 MLJ 222.
- 74 [2008] 2 CLJ 745.
- 75 [1991] 6 CLJ (Rep) 376.
- 76 [1939] FMSLR 166.

## Appendix

**Table A1** Sentencing: sexual offences against young pupils/students

Section	Description of Offence	Name of case	Sentence	Remarks
Section 376 of the Penal Code	Statutory rape against girl of 13 years and 9 months	<i>PP v Sharif Abd Wahab</i> [1993] 4 CLJ 279	5 years imprisonment	Sentence was not manifestly excessive or inadequate or that in fixing the sentence, the lower Court had failed to adequately consider all the relevant factors either for or against the respondent.
Section 376 of the Penal Code	Statutory rape against girl aged 14 who was also deaf and dumb	<i>Shahinur Salleh v PP</i> [2011] 1 LNS 1423.	Eighteen years imprisonment and five strokes of the cane	She appeared to the court to be a quiet girl without guile or pretence. The court found the victim to be a credible witness after observing her demeanour throughout her time on the witness stand in the court. The High Court also pointed out the Session Court had correctly highlighted the danger of relying on uncorroborated evidence of a witness and after warning of the danger the court still satisfied on the reliance of the victim's evidence alone without corroboration.
Section 376 of the Penal Code	Statutory rape against girl aged 9	<i>Lim Teng Leng v PP</i> [1998] 5 CLJ 400	13 years imprisonment and one stroke of the rotan	The factors such as the accused is a first offender, the long prison sentence would cause hardship to the family of the accused upon whom they are dependent for their livelihood and the accused after serving such a long term would be too old to work and be a parasite to society, among others, cannot outweigh the seriousness of the offence. It was because that it is so easy for this sort of offence to be committed and because it is almost impossible for any child to defend herself against rape that a deterrent sentence was called for in order that such offence should be stopped. Any lesser sentence may not serve the purpose. The sentence herein was neither excessive nor unlawful.
Section 354 of the Penal Code	Assault or use of criminal force to a person with intent to outrage modesty of the victim, 8 years of age	<i>Mohamad Arif v Public Prosecutor</i> [2010] MLJU 1976	5 years imprisonment and 6 strokes	The appellant was a teacher in a religious education school. The girl was one of his students. The accused had abused his authority as a teacher and picked on one of his student, a child, to gratify his deviant sexual urges not once but twice. Having regard to the seriousness of the crime committed the totality of 5 years imprisonment and 6 strokes were well-deserved. The aggravating features in the case are as follows: 1. the accused abused his position as a teacher 2. the girl was only 8 years old 3. the indecent assaults were of a serious nature and involved intrusion on the private part of the victim.
Section 354 of the Penal Code	Assault or use of criminal force to a person with intent to outrage modesty of the victim, 10 years of age	<i>Tajudin Salleh v PP</i> [2008] 2 CLJ 745	20 months' imprisonment	There was a failure on the part of the learned magistrate to comply with the provisions of s. 118 of the Evidence Act as well as s. 133A of the Evidence Act thereby making the conviction in law unsafe. Such a failure could not be cured by s. 422 of the Criminal Procedure Code. There was a substantial miscarriage of justice as PW3's (victim's cousin) competency was not established in this case and it could not be patiently said that there was 'material evidence' to corroborate the evidence of the victim, as required under s. 133A of the EA.
Section 354 of the Penal Code	Outraged the modesty of a 14-year old schoolgirl	<i>Ishak Hj Shaari v PP</i> [2006] 2 325	Restoring the four years imprisonment and two strokes of the rotan imposed by the Magistrate	The original sentence of four years imprisonment and whipping imposed by the magistrate was not manifestly excessive having regard to the facts of this case. This was a case where the accused had used his position as a religious teacher to attempt to satisfy his carnal desires, a very serious offence by its very nature aggravated by the circumstances in which it was committed. Hence, the learned judge's order altering sentence was, with respect, flawed because the sentence imposed by the magistrate was not manifestly excessive having regard to the public interest. A manifest injustice had occurred at the intermediate appellate

**Table A1**    Sentencing: sexual offences against young pupils/students (continued)

<i>Section</i>	<i>Description of offence</i>	<i>Name of case</i>	<i>Sentence</i>	<i>Remarks</i>
Section 377A Penal Code	Committed carnal intercourse against the order of nature on the complainant who was 16 years old at the material time	<i>Kesavan</i> <i>Sendaran v PP</i> [1999] 1 CLJ 343	7 years imprisonment	The offence with which the appellant has been convicted has been described also as an offence against nature. Parliament has expressed its condemnation with a maximum sentence of 20 years imprisonment and caning. The learned trial judge took into consideration all of the matters raised in mitigation such as his age, length of service with the government, that he has diabetes, that this is his first offence, that he has a wife and an adopted child to support, and the conviction means that he would have lost his job. However, the learned trial judge also took into consideration the seriousness of the offence, and the fact that the appellant had abused his position of trust at the clinic to which the school students are regularly referred to. The learned trial judge has not failed to consider any matter brought up before him for his consideration in passing sentence.
Section 376 f the Penal Code	Statutory rape on a 12-year old school girl	<i>Mohamad Terang Bin Amit</i> [1999] MLJU 134	Thirteen years' imprisonment and ten strokes of whipping	The record shows the learned Sessions Court Judge had taken all relevant factors into consideration. She took into account the fact that since 1995 the number of rape cases registered with the court in Sri Aman is 18, the fact that the accused, an acting principal and warden, had betrayed the trust of the students under his charge and the fact that a girl had been ravished and those factors were balanced against the fact that the accused was a first offender, a good teacher and the distress this case had caused and will cause his family. She had, therefore, exercised her discretion in accordance with correct principles in passing the sentence she did.
SS 354, 377B and 509 Penal Code	Three charges of committing sexual offences against his pupils, a 10-year-old girl	<i>Mohd Hanafi Ramly v PP</i> [2012] 2 CLJ 326	9 years' jail and three strokes of whipping	The appellant, a school teacher, was found guilty by the Sessions Court on. On the first charge of kissing her on the mouth and sucking her breasts, the appellant was sentenced to three years' jail. On the second charge of committing carnal intercourse against the order of nature, namely, asking her to perform fellatio, the appellant was sentenced to five years' jail and three strokes of whipping. On the third charge of insulting the girl's modesty by asking her to strip naked and taking a photograph of her in the nude, the appellant was sentenced to a year's jail. The court was of the view that the prevalence of such teacher/student outraging and molestation cases justifies an even harsher sentence.