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LEGAL AND TAX COUNSELING WORLDWIDE

Research

Prevention of Sexual Harassment at the Workplace (POSH)

Legal & HR Considerations

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Contents

1. INTRODUCTION	01
2. EVOLUTION OF THE LAW ON WORKPLACE SEXUAL HARASSMENT	02
I. The Vishaka Judgement	02
II. Post Vishaka – Some Other Judgments	03
3. KEY PROVISIONS OF THE POSH ACT	04
I. Applicability and scope	04
II. What amounts to Sexual Harassment?	05
III. Employee	06
IV. Workplace	06
V. Complaints Committee	07
VI. Complaint mechanism	09
VII. Conciliation	10
VIII. Redressal process/Inquiry	10
IX. Interim Reliefs	11
X. Punishment and compensation	11
XI. Frivolous complaints	11
XII. Confidentiality	12
XIII. Consequences of non-compliance	12
4. EMPLOYER’S DUTIES AND OBLIGATIONS	13
“Prevention is better than Cure”	13
5. EXAMPLES OF CONDUCT AMOUNTING TO SEXUAL HARASSMENT	15
6. OTHER LAWS PERTAINING TO WORKPLACE SEXUAL HARASSMENT	16
I. Industrial Employment (Standing Orders) Act, 1946	16
II. Indian Penal Code, 1860	16
7. FREQUENTLY ASKED QUESTIONS FOR HR	18
ANNEXURE I	19
Hotline: Court decides not to interfere with decision of Internal Complaints Committee set up by employer	19
ANNEXURE II	22
Sexual Harassment Committee - Time for a Change!	22
ANNEXURE III	24
Bombay Chartered Accountants’ Society - India’s Law on Prevention of Sexual Harassment at the Workplace	24
ANNEXURE IV	25
Sexual Harassment at Workplace: Indian Government Introduces Platform for Female Employees to File Complaints	26

ANNEXURE V	28
India's Law On Workplace Sexual Harassment: Recent Judicial Interpretations	28
ANNEXURE VI	31
India's Law On Prevention of Sexual Harassment at Workplace: Analysis of Recent Case Laws - Part 2	31

1. Introduction

Long bygone are the days when men used to be the sole bread-winners of a family. Globalization has brought a radical change in the status of women worldwide. However, with the larger influx of women in the mainstream workforce of India, sexual harassment at workplace has assumed greater dimensions.

Workplace sexual harassment is a form of gender discrimination which violates a woman's fundamental *right to equality and right to life*, guaranteed under Articles 14, 15 and 21 of the Constitution of India ("**Constitution**"). Workplace sexual harassment not only creates an insecure and hostile working environment for women but also impedes their ability to deliver in today's competing world. Apart from interfering with their performance at work, it also adversely affects their social and economic growth¹ and puts them through physical and emotional suffering.

India's first legislation specifically addressing the issue of workplace sexual harassment; the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("**POSH Act**") was enacted by the Ministry of Women and Child Development, India in 2013. The Government also subsequently notified the rules under the POSH Act titled the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 ("**POSH Rules**"). The year 2013 also witnessed the promulgation of the Criminal Law (Amendment) Act, 2013 ("**Criminal Law Amendment Act**") which has criminalized offences such as sexual harassment, stalking and voyeurism.

The POSH Act has been enacted with the objective of preventing and protecting women against workplace sexual harassment and to ensure effective redressal

of complaints of sexual harassment. While the statute aims at providing every woman (irrespective of her age or employment status) a safe, secure and dignified working environment, free from all forms of harassment, proper implementation of the provisions of the statute remains a challenge.

Although the law preventing sexual harassment at workplace has been in force since 2013, there remains lack of clarity on various aspects pertaining to the statute, including what constitutes sexual harassment, obligations of an employer, remedies/safeguards available to the victim, procedure of investigation, etc. Many are also not fully aware of the criminal consequences of sexual harassment. Lewd jokes, inappropriate comments etc. are dismissed as normal, with women being hesitant to initiate actions due to apprehension of being disbelieved or ridiculed; which underpins the need for greater awareness and greater enforcement.

Any tool would be useless if the person operating it is unaware of the way it is to be used. Therefore, the objective of this booklet is to serve as a ready reckoner to all the stakeholders and re-educate them on the law relating to workplace sexual harassment.

This booklet focusses mainly on the POSH Act and other relevant laws in India pertaining to workplace sexual harassment. Further, the objective of this booklet is to create more awareness on the issue and simultaneously equip employers in providing women a safe and secure working environment. The booklet also discusses the importance of 'prevention' as the best tool for elimination of this menace in a multi-cultural society as ours.

1. Statement of Objects and Reasons, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

2. Evolution of The Law on Workplace Sexual Harassment

The elimination of gender-based discrimination has been one of the fundamentals of the Constitutional edifice of India. The principle of gender equality is enshrined in the Constitution, in its Preamble, fundamental rights, fundamental duties and Directive Principles. However, workplace sexual harassment in India, was for the very first time recognized by the Supreme Court of India (“**Supreme Court**”) in its landmark judgment of *Vishaka v. State of Rajasthan*² (“**Vishaka Judgment**”), wherein the Supreme Court framed certain guidelines and issued directions to the Union of India to enact an appropriate law for combating workplace sexual harassment. Nothing less of an irony, the POSH Act and the POSH Rules was enacted 16 years after the Vishaka Judgement.

In the absence of a specific law in India, the Supreme Court, in the Vishaka Judgment, laid down certain guidelines making it mandatory for every employer to provide a mechanism to redress grievances pertaining to workplace sexual harassment (“**Vishaka Guidelines**”) which were being followed by employers until the enactment of the POSH Act.

I. The Vishaka Judgement

In 1992, Bhanwari Devi, a *dalit* woman employed with the rural development programme of the Government of Rajasthan, was brutally gang raped on account of her efforts to curb the then prevalent practice of child marriage.³ This incident revealed the hazards that working women were exposed to on a day to day basis and highlighted the urgency for safeguards to be implemented in this regard. Championing the cause of working women in the country, women’s rights activists and lawyers filed a public interest litigation in the Supreme Court under the banner of Vishaka.

The Supreme Court for the first time, acknowledged the glaring legislative inadequacy and acknowledged workplace sexual harassment as a human rights violation. In framing the Vishaka Guidelines, the Supreme Court placed reliance on the Convention on Elimination of All Forms of Discrimination against Women, adopted by the General Assembly of the United Nations, in 1979, which India has both signed and ratified. As per the Vishaka Judgment, the Vishaka Guidelines issued under Article 32 of the Constitution, until such time a legislative framework on the subject has been drawn-up and enacted, would have the effect of law and would have to be mandatorily followed by organizations, both in the private and government sector.

As per the Vishaka judgment, ‘*Sexual Harassment*’ includes such unwelcome sexually determined behavior (whether directly or by implication) as:

- a. *Physical contact and advances*
- b. *A demand or request for sexual favours;*
- c. *Sexually coloured remarks;*
- d. *Showing pornography;*
- e. *Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.*

Where any of these acts are committed in circumstances under which the victim of such conduct has a reasonable apprehension that in relation to the victim’s employment or work (whether she is drawing salary or honorarium or voluntary service, whether in government, public or private enterprise), such conduct can be humiliating and may constitute a health and safety problem, it amounts to sexual harassment in the workplace. It is discriminatory, for instance, when the woman has reasonable grounds

2. 1997 6 SCC 241; AIR 1997 SC 3011

3. Indira Jaising, Law Relating to Sexual Harassment at the Workplace (2014)

to believe that her objection would disadvantage her in connection with her employment or work (including recruiting and promotion), or when it creates a hostile working environment. Adverse consequences might result if the victim does not consent to the conduct in question or raises any objection thereto.’

particularly when submission to or rejection of such conduct by the female employee was capable of being used for affecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile work environment for her.”

II. Post Vishaka – Some Other Judgments

A.Apparel Export Promotion Council v. A.K Chopra

The Vishaka judgment initiated a nationwide discourse on workplace sexual harassment and threw out wide open an issue that was swept under the carpet for the longest time. The first case before the Supreme Court after Vishaka in this respect was the case of *Apparel Export Promotion Council v. A.K Chopra*.⁴ In this case, the Supreme Court reiterated the law laid down in the Vishaka Judgment and upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexually harassing a subordinate female employee at the workplace. In this judgment, the Supreme Court enlarged the definition of sexual harassment by ruling that physical contact was not essential for it to amount to an act of sexual harassment. The Supreme Court explained that “sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication,

B.Medha Kotwal Lele & Ors. V. Union of India & Ors.

A letter written by Dr. Medha Kotwal of Aalochana (an NGO) highlighted a number of individual cases of sexual harassment stating that the Vishaka Guidelines were not being effectively implemented. Converting the letter into a writ petition, the Supreme Court took cognizance and undertook monitoring of implementation of the Vishaka Guidelines across the country by directing state governments to file affidavits emphasizing on the steps taken by them to implement the Vishaka Guidelines. In its judgment, the Supreme Court observed that “the implementation of the Vishaka Guidelines has to be not only in form but also in substance and spirit so as to make available safe and secure environment for women at workplace in every aspect and thereby enabling working women to work with dignity, decency and due respect.’ Not being satisfied with the implementation of the Vishaka Guidelines, it directed states to put in place sufficient mechanisms to ensure effective implementation of the Vishaka Guidelines. Finally, the Supreme Court asserted that in case of a non-compliance or non-adherence of the Vishaka Guidelines, it would be open to the aggrieved persons to approach the respective High Courts.

Legislative Timeline of POSH Act & POSH Rules

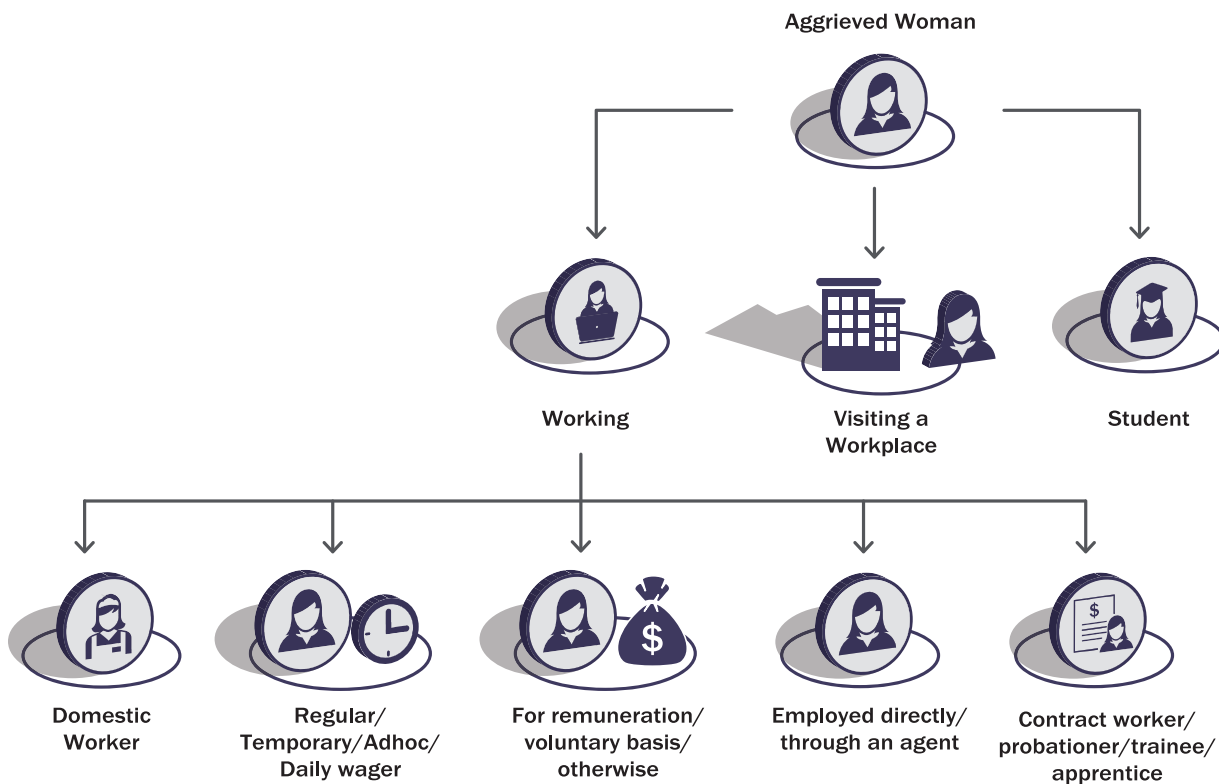
2007	Draft Protection of Women against Sexual Harassment at Workplace Bill, 2007 (“ Bill ”) approved by the Union Cabinet.
2010	The Bill was introduced in the Lok Sabha.
2012	The Bill was amended and re-introduced in the Lok Sabha.
September 03, 2012	The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Re-dressal) Bill, 2012 was passed by the Lok Sabha
February 26, 2013	The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Re-dressal) Bill, 2012 was passed by the Rajya Sabha.
April 23, 2013	The POSH Act received the President’s assent and was published in the Gazette of India as Act No. 14 of 2013.
December 09, 2013	The Indian Ministry of Women and Child Development notified December 09, 2013 as the effective date of the POSH Act and the POSH Rules.

4. (1999) 1 SCC 759

3. Key Provisions of the POSH Act

I. Applicability and scope

- **Applicable Jurisdiction:** The POSH Act extends to the ‘whole of India’.⁵
- **Aggrieved Woman:** As per the POSH Act, an ‘aggrieved woman’ in relation to a workplace, is a woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment.⁶ Given that the definition does not necessitate the woman to be an employee, even a customer/client who may be sexually harassed at a workplace can claim protection under the POSH Act.
- The POSH Act further stipulates that a woman shall not be subjected to sexual harassment at her workplace.⁷ Accordingly, it may be noted that in order for a woman to claim protection under the POSH Act, the incident of sexual harassment should have taken place at the ‘workplace’.
- The POSH Act is not a gender-neutral legislation and protects only women. Therefore, the safeguards under the POSH Act are not applicable to ‘men’ victims although employers may choose to extend the protection through their policy.



5. Section 1 of the POSH Act

6. Section 2(a) of the Prevention of Workplace Sexual Harassment Act

7. Section 3 of the Prevention of Workplace Sexual Harassment Act

- **Covered bodies:** The POSH Act applies to both the organized and unorganized sectors⁸ in India. It *inter alia*, applies to government bodies, private and public sector organizations, non-governmental organizations, organizations carrying out commercial, vocational, educational, entertainment, industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals and also applies to a dwelling place or a house.⁹

II. What amounts to Sexual Harassment?

The POSH Act defines ‘sexual harassment’ in line with the Supreme Court’s definition of ‘sexual harassment’ in the Vishaka Judgment. As per the POSH Act, ‘sexual harassment’ includes unwelcome sexually tinted behaviour, whether directly or by implication, such as (i) physical contact and advances, (ii) demand or request for sexual favours, (iii) making sexually coloured remarks, (iv) showing pornography, or (v) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.¹⁰

The following circumstances, among other circumstances, if they occur or are present in relation to or connected with any act or behaviour of sexual harassment may amount to sexual harassment:

- implied or explicit promise of preferential treatment in employment;
- implied or explicit threat of detrimental treatment in employment;
- implied or explicit threat about present or future employment status;
- interference with work or creating an intimidating or offensive or hostile work environment; or
- humiliating treatment likely to affect the lady employee’s health or safety.¹¹

As you would note from above, the definition of ‘sexual harassment’ under the POSH Act is wide enough to cover both direct or implied sexual conduct which may involve physical, verbal or even written conduct. The key distinguishing feature is that the conduct is unwanted and unwelcome by the recipient. It includes *quid pro quo* sexual harassment, a form of sexual blackmail (which if translated in English, would mean ‘this for that’). In a typical situation of *quid pro quo* harassment, the respondent being a person in power, pressurizes the woman employee (usually a subordinate) for sexual favours in exchange for advancement in the workplace or threat of adverse employment action. The definition also includes reference to creating an ‘intimidate, offensive or hostile working environment’. An example would be a work environment where an individual is subject to unwelcome comments about her body type resulting in the woman employee feeling embarrassed and unable to work properly.

While some forms of sexual harassment such as sexual assault are inherently offensive and egregious, and may need to occur only once for it to be treated as ‘sexual harassment’, some other forms may not be easily distinguishable. Since there is no fine line test in determining what would amount to a ‘hostile working environment’, the burden will lie on the internal committee to decide whether the harassment suffered by a victim is sufficiently severe to have created a hostile working environment or not. Further, determining what constitutes ‘sexual harassment’ depends upon the specific facts and the context in which the conduct has occurred.

In 2010, the High Court of Delhi¹² endorsed the view that sexual harassment is a subjective experience and for that reason held “A complete understanding of the complainant’s view requires... an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women... Men tend to view some forms of sexual harassment as “harmless

8. Having less than 10 workers

9. Section 2(o) of the Prevention of Workplace Sexual Harassment Act

10. Section 2(n) of the Prevention of Workplace Sexual Harassment Act

11. Section 3(2) of the Prevention of Workplace Sexual Harassment Act

12. Dr. Punita K. Sodhi v. Union of India & Ors. W.P. (C) 367/2009 & CMS 828, 11426/2009

social interactions to which only overly-sensitive women would object. The characteristically male view depicts sexual harassment as comparatively harmless amusement.... Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.”

Please refer to Chapter 5 for examples of conduct that amounts to ‘sexual harassment’.

III. Employee

The definition of an ‘employee’ under the POSH Act is fairly wide to cover regular, temporary, ad hoc employees, individuals engaged on a daily wage basis, either directly or through an agent, contract labourers, co-workers, probationers, trainees, and apprentices, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied.¹³

IV. Workplace

While the Vishaka Guidelines were confined to the traditional office set-up, recognizing the fact that sexual harassment may not necessarily be limited to the primary place of employment, the POSH Act has introduced the concept of an ‘extended workplace’. As per the POSH Act, ‘workplace’ includes any place visited by the employee arising out of or during the course of employment, including transportation provided by the employer for the purpose of commuting to and from the place of employment.¹⁴

In the case of *Saurabh Kumar Mallick v. Comptroller & Auditor General of India*,¹⁵ the respondent who was facing departmental inquiry for allegedly indulging in sexual harassment of his senior woman officer contended that he could not be accused of sexual harassment at workplace as the alleged misconduct

took place not at the workplace but at an official mess where the woman officer was residing. It was also argued that the complainant was even senior to the respondent and therefore no ‘favour’ could be extracted by the respondent from the complainant and thus the alleged act would not constitute ‘sexual harassment’. The Delhi Court while considering this matter held this as ‘clearly misconceived’. The Delhi Court observed that *‘the aim and objective of formulating the Vishaka Guidelines was obvious in order to ensure that sexual harassment of working women is prevented and any person guilty of such an act is dealt with sternly. Keeping in view the objective behind the judgment, a narrow and pedantic approach cannot be taken in defining the term ‘workplace’ by confining the meaning to the commonly understood expression “office”. It is imperative to take into consideration the recent trend which has emerged with the advent of computer and internet technology and advancement of information technology. A person can interact or do business conference with another person while sitting in some other country by way of video-conferencing. It has also become a trend that the office is being run by CEOs from their residence. In a case like this, if such an officer indulges in an act of sexual harassment with an employee, say, his private secretary, it would not be open for him to say that he had not committed the act at ‘workplace’ but at his ‘residence’ and get away with the same. Noting the above, the High Court observed that the following factors would have bearing on determining whether the act has occurred in the ‘workplace’:*

- *Proximity from the place of work;*
- *Control of the management over such a place/ residence where the working woman is residing; and*
- *Such a residence has to be an extension or contiguous part of the working place.*

In conclusion, the Delhi High Court held that the official mess where the employee was alleged to have been sexually harassed definitely falls under ‘workplace’.

13. Section 2(f) of the Prevention of Workplace Sexual Harassment Act

14. Section 2(o) of the Prevention of Workplace Sexual Harassment Act

15. Decided on May 9, 2008 [Citation not available]

V. Complaints Committee

An important feature of the POSH Act is that it envisages the setting up of a grievance redressal forum.

A. Internal Committee¹⁶

The POSH Act requires an employer to set up an 'internal committee' ("IC") at each office or branch, of an organization employing 10 or more employees, to hear and redress grievances pertaining to sexual harassment.¹⁷ Failure to constitute the IC has led to imposition of a fine under the POSH Act.¹⁸

B. Constitution of the IC

Presiding Officer	Woman employed at a senior level at the workplace from amongst the employees.
Members	Not less than 2 members from amongst employees. Preferably committed to the cause of women or who have had experience in social work or have legal knowledge.
External member	From an NGO or association committed to the cause of women or person familiar with issues relating to sexual harassment. ¹⁹

Not less than half of the IC Members shall be women

The term of the IC Members shall not exceed 3 years

A minimum of 3 Members of the IC including the Presiding Officer are to be present for conducting the inquiry.

C. Registration of the IC

The Department of Women and Child Development of Telangana and Maharashtra has issued a circular (on 01.07.2019 for Telangana) and an office order (on 23.03.2017 for Mumbai) mandating registration of the IC in Telangana & Mumbai.

While employers in Mumbai were required to register their ICs with the office of the District Women and Child Development Officer in the prescribed format, employers in the state of Telangana were required to register their ICs on the Sexual Harassment Electronic Box ("T-she box").

16. As per Repealing and Amending Act, 2016, the nomenclature of Internal Complaints Committee was changed to Internal Committee.

17. Section 4 of the Prevention of Workplace Sexual Harassment Act

18. Global Health Private Limited & Mr. Arvinder Bagga v. Local Complaints Committee, District Indore and Others (W.P. No.22314 and 22317 of 2017)

19. A person who has expertise on issues relating to sexual harassment and includes a social worker with at least 5 years of experience in the field of social work towards empowerment of women and in particular in addressing workplace sexual harassment; or someone who is familiar with labour, service, civil or criminal law (as per Rule 4 of the POSH Rules).

SOME PRACTICAL TIPS FOR HR / IC CONSTITUTION

- As far as possible, the IC should comprise of women members who have been trained on the POSH Act and POSH Rules and their roles and responsibilities;
- It is preferable to have an odd number of members in order for the IC to arrive at a decision based on majority in case of a divided opinion.
- The IC members should be selected based on evaluation of various factors including whether they are accessible, approachable, committed, sensitive and understanding.
- They should be sensitive to issues pertaining to gender-based violence and should have good credibility and technical competency to handle grievance procedures.
- The functioning of the IC should be made autonomous such that there is no scope of allegations of bias or favouritism.
- As far as possible, provide the IC separate space for conducting their meetings and maintaining records of cases of sexual harassment.
- Hold periodic discussions between the IC members and conduct regular trainings.

D. Local Committee²⁰

At the district level, the government is required to set up a 'local committee' ("LC") to investigate and redress complaints of sexual harassment from the unorganized sector or from establishments where

the IC has not been constituted on account of the establishment having less than 10 employees or if the complaint is against the employer.²¹ The LC has special relevance in cases of sexual harassment of domestic workers or where the complaint is against the employer himself or a third party who is not an employee.

Constitution of the LC

Chairperson	An eminent woman in the field of social work and committed to the cause of women.
Local Woman	One of the members to be nominated from amongst the women working in block, taluka, tehsil or ward or municipality in the district.
NGO members	Two members, out of which, atleast one shall be a woman to be nominated from a NGO or an association committed to the cause of women or a person familiar with issues pertaining to sexual harassment <ul style="list-style-type: none"> ■ Atleast one of the members should have a background in law. ■ Atleast one of the members should be a woman belonging to the Scheduled Castes or Scheduled Tribes.

20. As per Repealing and Amending Act, 2016, the nomenclature of Local Complaints Committee was changed to Local Committee.

21. Section 5 of the Prevention of Workplace Sexual Harassment Act

E. Powers of the IC/LC

The POSH Act stipulates that the IC and LC shall, while inquiring into a complaint of workplace sexual harassment, have the same powers as vested in a civil court under the Code of Civil Procedure, 1908 when trying a suit in respect of:

- i. summoning and enforcing the attendance of any person and examining him on oath;
- ii. requiring the discovery and production of documents; and
- iii. any other matter which may be prescribed.²²

VI. Complaint mechanism

An aggrieved woman who intends to file a complaint is required to submit six copies of the written complaint, along with supporting documents and

names and addresses of the witnesses to the IC or LC, within 3 months from the date of the incident and in case of a series of incidents, within a period of 3 months from the date of the last incident. Prompt reporting of an act of sexual harassment is probably as important as swift action to be taken by the authorities on receiving a complaint. Infact the more prompt the complaint is, the more authentic can it be treated. In instances where sufficient cause is demonstrated by the complainant for the delay in filing the complaint, the IC/LC may extend the timeline for filing the complaint, for reasons to be recorded in-writing. The law also makes provisions for friends, relatives, co-workers, psychologist & psychiatrists, etc. to file the complaint in situations where the aggrieved woman is unable to make the complaint on account of physical incapacity, mental incapacity or death.²³ Given that the POSH Act and the POSH Rules do not prescribe any format in which the complaint needs to be filed, the following tips may be kept in mind:

A WELL DRAFTED COMPLAINT

-
- The complaint should be addressed to the IC members and not the employer/HR representative.
- The complaint should be concise, i.e. it should be written in simple language which can be understood easily. Complaints that are well written and presented properly have greater credibility.
- Details of exact incident, date and time, witness etc. to be included.
- Circumstances preceding and following the incident to be recorded.
- Whether the complainant asked the respondent to desist from the unwelcome act(s).
- Append as many documents as possible in whatever format i.e. relevant e-mails, screenshots of SMS's/whatsapp messages, call details, photographs, recordings etc.
- Details of the respondent including name, designation, reporting structure between complainant and respondent if any (whether subordinate, colleague or superior).
- Do not state any fact that is false or incorrect.
- The relief that is sought from the employer.
-

22. Section 11(3) of the Prevention of Workplace Sexual Harassment Act

23. Section 6 of the Prevention of Workplace Sexual Harassment Act

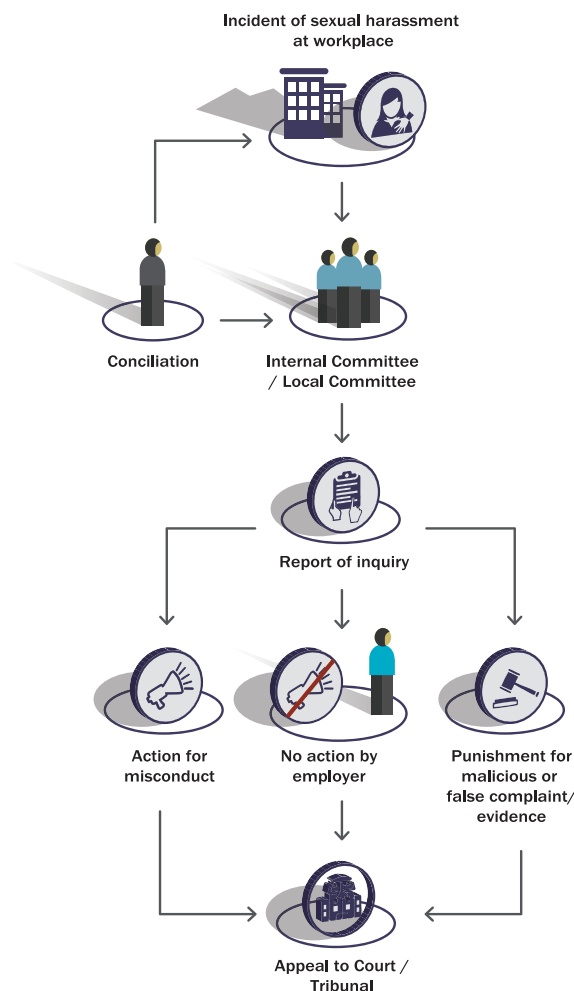
VII. Conciliation

Before initiating action on a complaint, the IC on the request of the aggrieved woman, can make efforts to settle the matter between the parties through conciliation by bringing about an amicable settlement. Conciliation is basically an informal method of resolving complaints before the complaint escalates into a fully blown formal inquiry. Thus, after a complaint of sexual harassment has been lodged, the aggrieved woman may request the IC to resolve the matter by conciliating between the parties before commencement of the inquiry proceedings, although monetary settlement should not be made as a basis of conciliation.²⁴

Once the settlement has been arrived at, the IC or the LC (as the case maybe) shall record the settlement arrived at and thereafter provide copies of the settlement to the aggrieved woman as well as the respondent. Once a settlement has been arrived at, the IC shall not proceed with an inquiry under the POSH Act.

VIII. Redressal process/ Inquiry

Please refer to the flowchart below which provides an overview of the process to be followed by the aggrieved employee to make the complaint and by the IC/LC to inquire into the complaint.



Timelines

Written complaints (6 copies) along with supporting documents and names and addresses of witnesses have to be filed within 3 months of the date of the incident. Timeline extendable by another 3 months.

Upon receipt of the complaint, 1 copy of the complaint is to be sent to the respondent within 7 days.

Upon receipt of the copy of complaint, the respondent is required to reply to the complaint along with a list of supporting documents, and names and addresses of witnesses within 10 working days.

The Inquiry has to be completed within a total of 90 days from the receipt of the complaint.

The Inquiry report has to be issued within 10 days from the date of completion of inquiry.

The employer is required to act on the recommendations of the IC/LC within 60 days of receipt of the Inquiry report.

Appeal against the decision of the committee is allowed within 90 days from the date of recommendations.

24. Section 10 of the Prevention of Workplace Sexual Harassment Act

IX. Interim Reliefs

At the request of the complainant, the IC or the LC (as the case maybe) may recommend to the employer to provide interim measures such as:

- i. transfer of the aggrieved woman or the respondent to any other workplace;
- ii. granting leave to the aggrieved woman up to a period of 3 months in addition to her regular statutory/ contractual leave entitlement;
- iii. restrain the respondent from reporting on the work performance of the aggrieved woman or writing her confidential report, which duties may be transferred to other employees.

- i. the mental trauma, pain, suffering and emotional distress caused to the aggrieved employee;
- ii. the loss in career opportunity due to the incident of sexual harassment;
- iii. medical expenses incurred by the victim for physical/ psychiatric treatment;
- iv. the income and status of the alleged perpetrator; and
- v. feasibility of such payment in lump sum or in installments.²⁶

In the event that the respondent fails to pay the aforesaid sum, IC may forward the order for recovery of the sum as an arrear of land revenue to the concerned District Officer.

X. Punishment and compensation

The POSH Act prescribes the following punishments that may be imposed by an employer on an employee for indulging in an act of sexual harassment:

- i. punishment prescribed under the service rules of the organization;
- ii. if the organization does not have service rules, disciplinary action including written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counselling session, or carrying out community service; and
- iii. deduction of compensation payable to the aggrieved woman from the wages of the respondent.²⁵

The POSH Act also envisages payment of compensation to the aggrieved woman. The compensation payable shall be determined based on:

XI. Frivolous complaints

In order to ensure that the protections envisaged under the POSH Act are not misused, provisions for action against “false or malicious” complainants have been included in the statute. As per the POSH Act, if the IC/LC concludes that the allegation made by the complainant is false or malicious or the complaint has been made knowing it to be untrue or forged or misleading information has been provided during the inquiry, disciplinary action in accordance with the service rules of the organisation can be taken against such complainant.

Where the organisation does not have service rules, the statute provides that disciplinary action such as written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counselling session, or carrying

25. Section 13 of the Prevention of Workplace Sexual Harassment Act

26. Section 15 of the Prevention of Workplace Sexual Harassment Act

out community service may be taken. The POSH Act further clarifies that the mere inability to substantiate a complaint or provide adequate proof need not mean that the complaint is false or malicious.²⁷

XII. Confidentiality

Recognising the sensitivity attached to matters pertaining to sexual harassment, the POSH Act attaches significant importance to ensuring that the complaint and connected information are kept confidential. The POSH Act specifically stipulates that information pertaining to workplace sexual harassment shall not be subject to the provisions of the Right to Information Act, 2005.

The POSH Act further prohibits dissemination of the contents of the complaint, the identity and addresses of the complainant, respondent, witnesses, any information relating to conciliation and inquiry proceedings, recommendations of the IC/LC and the action taken to the public, press and media in any manner. That said, the POSH Act allows dissemination of information pertaining to the justice that has been secured to any victim of sexual harassment, without disclosing the name, address, identity or any other particulars which could result in the identification of the complainant or the witnesses.²⁸ Disclosure of the justice secured could

not only deter other individuals from engaging in acts of sexual harassment, but also instil in the minds of employees and public that the employer is serious about providing a safe work environment and harbours zero tolerance for any form of sexual harassment at the workplace.²⁹

Breach of the obligation to maintain confidentiality by a person entrusted with the duty to handle or deal with the complaint or conduct the inquiry, or make recommendations or take actions under the statute, is punishable in accordance with the provisions of the service rules applicable to the said person or where no such service rules exist, a fine of INR 5,000 (approx. US\$70).³⁰

XIII. Consequences of non-compliance

If an employer fails to constitute an IC or does not comply with the requirements prescribed under the POSH Act, a monetary penalty of up to INR 50,000 (approx. US\$ 700) may be imposed. A repetition of the same offence could result in the punishment being doubled and/or de-registration of the entity or revocation of any statutory business licenses. *It is however unclear as to which business licenses are being referred to in this case.*³¹ It is also pertinent to note that all offences under POSH Act are non-cognizable.³²

27. Section 14 of the Prevention of Workplace Sexual Harassment Act

28. Section 16 of the Prevention of Workplace Sexual Harassment Act

29. Shivangi Prasad and Attreyi Mukherjee, Handbook on the law of Sexual Harassment at Workplace 179 (2015)

30. Section 17 of the Prevention of Workplace Sexual Harassment Act and Rule 12 of the Prevention of Sexual Harassment Rules

31. Section 26 of the Prevention of Workplace Sexual Harassment Act

32. Section 27 of the Prevention of Workplace Sexual Harassment Act

4. Employer's Duties and Obligations

“Prevention is better than Cure”

In addition to requiring an employer to set up an IC and ensure redressal of grievances of workplace harassment in a time bound manner, the POSH Act casts certain other obligations upon an employer which includes:

- a. Promoting a gender sensitive workplace and removing the underlying factors that contribute towards creating a hostile working environment against women;
- b. provide a safe working environment;
- c. formulate and widely disseminate an internal policy or charter or resolution or declaration for prohibition, prevention and redressal of sexual harassment at the workplace;
- d. display conspicuously at the workplace, the penal consequences of indulging in acts that may constitute sexual harassment and the composition of the IC;
- e. declare the names and contact details of all members of the IC;
- f. organize workshops and awareness programmes at regular intervals for sensitizing employees on the issues and implications of workplace sexual harassment and organizing orientation programmes for members of the IC;
- g. provide necessary facilities to the IC for dealing with the complaint and conducting an inquiry;
- h. cause to initiate action, under the Indian Penal Code, 1860 (“IPC”) or any other law in force, against the perpetrator, or if the aggrieved woman so desires, where the perpetrator is not an employee, in the workplace at which the incident of sexual harassment took place;
- i. provide assistance to the aggrieved woman if she so chooses to file a complaint in relation to the offence under the IPC or any other law for the time being in force;
- j. treat sexual harassment as a misconduct under the service rules and initiate action for misconduct;
- k. prepare an annual report with details on the number of cases filed and their disposal and submit the same to the District Officer;
- l. monitor the timely submission of reports by the IC.

■

The Anti-Sexual Harassment Policy – Some tips to follow

- Clearly define 'sexual harassment' and outline the scope and applicability (gender neutral or not);
 - Mention how the employer practices zero-tolerance towards sexual harassment at workplace;
 - Extended concept of workplace;
 - Complaint mechanism;
 - Regularly distribute and promote the policy at all levels of the organization;
 - Ensure that the policy is easily accessible;
 - Provide a copy of the policy to new joiners as part of their induction;
 - Review the policy periodically & update information regarding IC members etc. on a timely basis.
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5. Examples of Conduct Amounting to Sexual Harassment

Whether an act or conduct would amount to 'sexual harassment' is dependent on the specifics of the act and the circumstances. The following is an indicative list of conduct that could be considered as sexual harassment:

1. Unwanted sexual advances or propositions;
2. Pestering for dates or receiving unwelcome sexual suggestions or invitations;
3. Offering employment benefits in exchange for sexual favours;
4. Leering;
5. Making sexual gestures;
6. Displaying sexually suggestive objects or pictures, cartoons, calendars or posters;
7. Making or using derogatory comments, comments about a person's body or dress, slurs, epithets or sexually suggestive jokes;
8. Written communications of a sexual nature distributed in hard copy or via a computer network, suggestive or obscene letters, notes or invitations;
9. Physical conduct such as unwanted touching, assault, impeding or blocking movements;
10. Being forcibly kissed or hugged;
11. Having someone expose their private parts to you or repeatedly staring at a woman's body parts that makes her uncomfortable;
12. Making or threatening retaliation after a negative response to sexual advances or for reporting or threatening to report sexual harassment;
13. Eve-teasing;
14. Sexually tinted remarks, whistling, staring, sexually slanted and obscene jokes, jokes causing or likely to cause awkwardness or embarrassment;
15. Subtle innuendoes or open taunting regarding perfection, imperfection or characteristics of physical appearance of a person's body or shape;
16. Gender based insults and/or sexist remarks;
17. Displaying pornographic or other sexually offensive or derogatory material;
18. Forcible invitations for dates;
19. Forcible physical touch or physical assault or molestation;
20. Suggesting or implying that failure to accept a request for a date or sexual favours would adversely affect the individual in respect to performance evaluation or promotion;
21. Explicitly or implicitly suggesting sexual favours in return for hiring, compensation, promotion, retention decision, relocation, or allocation of job/responsibility/work;
22. Any act or conduct by a person in authority and belonging to one sex which denies or would deny equal opportunity in pursuit of career development or otherwise making the environment at the work place hostile or intimidating to a person belonging to the other sex, only on the ground of such individual providing or refusing sexual favours;
23. Physical confinement against one's will and any other act likely to violate one's privacy.

6. Other Laws Pertaining to Workplace Sexual Harassment

I. Industrial Employment (Standing Orders) Act, 1946

The Industrial Employment (Standing Orders) Act, 1946³³ (“**Standing Orders Act**”) is a central enactment which, *inter alia*, requires an employer to define and publish uniform conditions of employment in the form of standing orders. As per the statute, the standing orders should contain terms of employment including, hours of work, wage rates, shift working, attendance and late coming, provision for leaves and holidays and termination or suspension/dismissal of employees.

At the first instance, the Standing Orders Act is applicable to ‘industrial establishments employing a minimum of 100 workmen. The Standing Orders Act prescribes Model Standing Orders, serving as guidelines for employers and in the event that an employer has not framed and certified its own standing orders, the provisions of the Model Standing Orders shall be applicable.

The Model Standing Orders prescribed under the Industrial Employment (Standing Orders) Central Rules, 1996 (“**Standing Orders Rules**”) prescribe a list of acts constituting ‘misconduct’ and specifically includes sexual harassment. The Model Standing Orders not only defines ‘sexual harassment’ in line with the definition under the Vishaka Judgment, but also envisages the requirement to set up a complaints committee for redressal of grievances pertaining to workplace sexual harassment. It is interesting to note that ‘sexual harassment’ is not limited to women under the Standing Orders Rules.

II. Indian Penal Code, 1860

Conduct that may be construed as sexual harassment not only violates the Prevention of Workplace Sexual Harassment Act, but also could constitute an offence under the IPC. Listed out below are the key offenses under the IPC that could be triggered in a case of sexual harassment.

Section #	Offence	Punishment	Cognizable/ Non-Cognizable
354	Outraging the modesty of a woman Assault or use of criminal force to any woman, intending to outrage or knowing it to be likely that modesty would be outraged.	Simple/Rigorous Imprisonment for a term which shall not be less than one year but which may extend to five years; and fine	Cognizable

33. This law is proposed to be replaced by the Code on Industrial Relations, 2020.

354-A	<p>Sexual harassment by a man</p> <p>i. Physical contact and advances involving unwelcome and explicit sexual overtures;</p> <p>ii. Demand or request for sexual favours;</p> <p>iii. Showing pornography against the will of a woman; or</p> <p>iv. making sexually coloured remarks.</p>	<p>Offences (i), (ii) and (iii) are punishable with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.</p> <p>Offence (iv) is punishable with simple/ rigorous imprisonment for a term which may extend to one year, or with fine, or with both.</p>	Cognizable
354-B	<p>Assault or use of criminal force to woman with intent to disrobe</p> <p>Assault or use of criminal force to any woman or abetment of such act with the intention of disrobing or compelling her to be naked.</p>	<p>Simple/Rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and fine.</p>	Cognizable
354-C	<p>Voyeurism</p> <p>Watching, or capturing the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image.</p>	<p>First conviction: Simple/ Rigorous imprisonment for a term which shall not be less than one year, but which may extend to three years, and fine.</p> <p>Second or subsequent conviction: Simple/ Rigorous imprisonment for a term which shall not be less than three years, but which may extend to seven years, and fine.</p>	Cognizable
354-D	<p>Stalking</p> <p>Following a woman and contacting or attempting to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or Monitoring the use by a woman of the internet, email or any other form of electronic communication.</p>	<p>First conviction: Simple/ Rigorous imprisonment for a term which may extend to three years, and fine;</p> <p>Second or subsequent conviction: Simple/ Rigorous imprisonment for a term which may extend to five years and fine.</p>	Cognizable
509	<p>Insulting the modesty of a woman</p> <p>Uttering any word, making any sound or gesture, or exhibiting any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by a woman, with an intention to insult her modesty, or intruding upon the privacy of such woman.</p>	<p>Simple imprisonment for a term which may extend to three years, and fine.</p>	Cognizable

7. Frequently Asked Questions for HR

1. Can both men and women be victims of workplace sexual harassment?

Yes, both men and women can be victims of sexual harassment. However, the safeguards/protection under the POSH Act is available only to women.

2. Can verbal conduct amount to sexual harassment?

Verbal harassment that is sexually coloured can constitute sexual harassment. Words can be just as offensive as physical acts and contact. Sexually coloured jokes, comments and stories can be sexually harassing and can create a hostile work environment.

3. Is the employer responsible if an employee is sexually harassed at a company-sponsored event (a) during working hours and (b) outside of working hours?

The POSH Act introduces the concept of 'extended workplace' covering under its ambit any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey. Hence, any form of sexual harassment at a company-sponsored event whether within or outside of the normal working hours would also fall under the scope of the POSH Act.

4. When is an establishment required to constitute an IC?

Every establishment having 10 or more employees is required to constitute an IC.

5. Is an IC required to be constituted at every branch/office?

Yes, an IC is required to be set up at every branch/office of the company wherein at least 10 employees are employed.

6. Can the complaint be filed with and inquired by the HR manager of the company?

No, the complaint needs to be filed with and inquired into by the IC.

7. Is there a time limit for filing a complaint of sexual harassment?

A complaint of sexual harassment needs to be filed within 3 months of the date of incident and in case of a series of incidents, within a period of 3 months from the date of the last incident. However, the IC or the LC, as the case may be, may extend the time limit, however, not exceeding 3 months, for reasons to be recorded in writing if it is satisfied that the circumstances were such that the victim was unable to file a complaint within the said period.

8. Can a complaint of sexual harassment be conciliated/mediated between the parties?

Yes (at the request of the aggrieved woman), but no monetary settlement shall be allowed.

Annexure I

Hotline: Court decides not to interfere with decision of Internal Complaints Committee set up by employer

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- Court does not interfere with the order of punishment by Disciplinary Authority unless it is shockingly disproportionate to the act of misconduct.
- Court does not re-appreciate evidence once the Committee has conducted a domestic enquiry.
- Employer to have proper mechanism for prevention and redressal of sexual harassment complaints and to create greater awareness regarding gender sensitization at workplaces.

The Bombay High Court (“**Court**”) ruled that it would not interfere with an order of punishment passed by the Internal Complaints Committee (“**ICC**”) in relation to a sexual harassment complaint, unless the order is shockingly disproportionate.

The Court passed this judgment in the case of *Vidya Akhawe (“**Petitioner**”) v. Union of India and Ors*³⁴ in relation to the new Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 of India (“**Sexual Harassment Act**”).

The Court observed that the employer must sufficiently comply with the duties cast upon it under the Sexual Harassment Act. The Court also stated that (a) an employer must provide for an effective mechanism for prevention of sexual harassment of women at workplace; (b) male employees must be sensitized towards the concerns of female employees and (c) the ICC must deal with complaints of sexual harassment in an expedited manner.

34. Writ Petition 796 of 2015

I. Facts

The employee (petitioner) was employed with an Indian government owned development bank. She had filed a complaint of sexual harassment against the General Manager, who was her immediate superior officer (“**Supervisor**”). However, no action was taken by the employer. Thereafter, the employee filed another complaint seeking establishment of an ICC as was necessary to be set up, as per the law laid down by the Supreme Court in the case of *Vishakha v. State of Rajasthan*.³⁵

As for the incidents that took place before February/March 2012, the limitation period of three months prescribed under the Sexual Harassment Act had expired and thus, were not taken into account by the ICC. However, the Human Resource department could take separate action based on those instances, which would be beyond the scope of the Sexual Harassment Act. Based on the ICC’s report, the Disciplinary Authority passed an order, by which the Supervisor was (a) demoted to a lower rank by two ranks; (b) transferred to another city and (c) received a pay cut as per his lower rank (“**Order**”).

II. Contentions

The employee however challenged the validity of the Order before the Court under Article 226 of the Constitution of India (“**Constitution**”). The employee contended that a higher punishment should be imposed on the Supervisor. Also, the employee challenged the validity of the observations of the ICC as it had not adequately taken on record all evidences. Also, the Supervisor had not been declared guilty under the Sexual Harassment Act and

35. AIR 1996 SC 1

a mere condemnatory statement was made by the Disciplinary Authority against the Supervisor. As for expiration of the period of limitation, the employee argued that because the Supervisor was her immediate superior, she was under reasonable apprehension to file a complaint as it would endanger her career.

The Supervisor argued that the penalty imposed was harsh enough as a result of which the Supervisor had suffered psychologically and financially. It was contended that the Supervisor had to stay apart from his family, as he had to shift to another city. It was further contended that it was not open to the Court to re-appreciate the evidence once the Disciplinary Committee had considered it and ruled over it. Lastly, it was contended that the Court cannot look into the proportionality of the Order passed by a Disciplinary Committee.

III. Judgment

The Court referred to its decision in *Om Kumar v Union of India*³⁶ and reaffirmed the principles of judicial restraint to be exercised by courts under Article 226 of the Constitution. The Court held that unless the Order is shockingly disproportionate to the act of the delinquent employee, it will be circumspect in interfering with the Order. Reiterating the decision of *Om Kumar*, the Court held that interference is warranted only when there is non-compliance of the principles of administrative law, Wednesbury Principles and doctrine of proportionality by the Disciplinary Authority.

As for compliance with the Wednesbury Principles, interference was held to be not permissible unless any of the following conditions were satisfied: (a) the Order was contrary to law, (b) relevant factors were not considered, (c) irrelevant factors were considered and (d) no reasonable person would have taken such a decision.

Under the principle of proportionality, the Court stated that it would have to be seen whether the legislature and administrative authority maintained a proper balance between the adverse effects which the legislation or order may have on the rights, liberties or interests of persons, keeping in mind the purpose which they were intended to serve. The Court also observed that the inquiry by the Disciplinary Authority was conducted dispassionately and all evidences were appropriately considered and ruled upon in a fair and proper manner. Therefore, the Court was not entitled to give a second opinion merely because it had the discretion to do so.

However, the Court felt that there was a need to have an effective mechanism in place at workplaces for addressing issues of sexual harassment of women. The Court also observed that male employees must be made aware of concerns of female employees by undertaking an exercise of gender sensitization as more and more women were becoming part of the national workforce and contributing to the national economy. The Court also remarked as to how many companies, corporations and government undertakings have not complied with the Sexual Harassment Act and do not have an adequate mechanism to deal with issues of sexual harassment.

IV. Analysis

This judgment reaffirms the importance and powers of the ICC that is required to be formed under the Sexual Harassment Act. Given the sensitivities surrounding sexual harassment allegations, it is important that the ICC is trained to deal with such cases in a fair, proper and dispassionate manner and based on the principles of natural justice. It is also necessary for the ICC to ensure that it completes the investigation and issues its order within the time frame set under the law.

36. (2001) 2 SCC 386

The judgment also clarifies the already enshrined principles of judicial restraint by the courts. The interference of the courts should be limited to ensuring that there are no procedural irregularities

or violations of principles of natural justice. Once the ICC has adequately and appropriately addressed a complaint of sexual harassment, it is not open to the courts to look into the merits of the matter.

Annexure II

Sexual Harassment Committee - Time for a Change!

This article was first published on SHRM (India) website on February 9, 2017.

India's new sexual harassment law is now more than three years old. And that should serve as a reminder to start the process to change the members of your Internal Complaints Committee (ICC).

India's Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (Sexual Harassment Act) was notified in December 2013. The law has been a catalyst in creating greater awareness of the issue of sexual harassment at the workplace. It has also given huge confidence to female employees to report any adverse incidents. Progressive employers on their part have gone to great lengths to implement the law, not just in form but also in spirit.

The Sexual Harassment Act requires the employer to constitute an ICC at every office location having a minimum of 10 employees. The law prescribes the details on how the members of the ICC need to be nominated by the employer based on their seniority, experience and familiarity with issues relating to sexual harassment.

The law allows the Presiding Officer and other members of the ICC to hold office for up to 3 years. Assuming most employers set up their ICC in or after December 2013, as per the Sexual Harassment Act, its time they initiate the process of replacing the members of their ICC.

Accordingly, in the next couple of months, employers should identify and start training the new members. The training should be in terms of the provisions of law, requirements of the employer's anti-harassment policy and charter,

investigation process and timelines, manner of collecting and documenting evidence, ways of examining the parties (including witnesses), drafting the report and its conclusion, types of penalties that may be levied, etc. Employers should also focus on helping their new members develop soft skills in terms of dealing with the complainant and the respondent. To the extent the existing ICC has undergone a training programme, a similar initiative should also be extended to the new members. Subject to complying with confidentiality obligations, the employer may also request the existing ICC to include the new members as 'observers' in some of the ongoing matters being investigated by the ICC, as part of their training.

But this change is unlikely to be an easy process. While some employers and their ICCs are still getting familiar with the requirements of the Sexual Harassment Act, its already time to change the members. In a way, the process followed by employers in December 2013 will need to be repeated.

Some of the questions that are likely to arise while implementing the change are:

1. Does the employer need to change the entire ICC at one go or gradually, especially to retain continuity?
2. Can the employer extend the term of an existing member of the ICC to another 3 years?
3. What happens if the employer is unable to identify an appropriate Presiding Officer of the ICC, given the importance of such a role?
4. Does the employer also need to change the external member on the ICC who may be appointed from a non-governmental organisation or association committed to the cause of women?

5. What happens to complaints that are being investigated by the existing ICC and likely to continue for some more time?
6. What if another complaint is received in relation to a matter that has been previously investigated and closed by the existing ICC?
7. Can there be two ICCs constituted in parallel - the current ICC to complete investigations relating to existing complaints while the other for any new complaints?
8. How will the new ICC prepare the annual report if they are not familiar with the previous complaints?

All answers may not be easily available at this stage. There may also be a need to consider some of these questions on a case-by-case basis given the sensitivities involved. At the end of the day, while taking any decision, employers must ensure that the intent and principles of the Sexual Harassment Act are adhered to and the interest of women remains secured at all times. Incidentally, the guidelines issued by the Supreme Court in 1997 in the case of *Vishaka v. State of Rajasthan* did not prescribe such a three year period and hence these questions did not arise previously.

The Bombay High Court has recently³⁷ ruled that it would not interfere with an order of punishment passed by the ICC in relation to a sexual harassment complaint, unless the order is shockingly disproportionate.³⁸ This judgment reaffirms the importance and powers of the ICC that is required to be formed under the Sexual Harassment Act. Given the sensitivities surrounding sexual harassment allegations, it is important that the ICC is trained to deal with such cases in a fair, proper and dispassionate manner and based on the principles of natural justice. It is also necessary for the ICC to ensure that it completes the investigation and issues its order within the time frame set under the law.

This judgment also clarifies the already enshrined principles of judicial restraint by the courts. The interference of the courts should be limited to ensuring that there are no procedural irregularities or violations of principles of natural justice. Once the ICC has adequately and appropriately addressed a complaint of sexual harassment, it is not open to the courts to look into the merits of the matter.

This time though, employers are not alone - the government, on its part, faces similar issues and questions as mentioned above. Members of the Local Complaints Committee set by up the District Officers in each district, are also subjected to the same timeline of 3 years.

37. *Vidya Akhave v. Union of India and Ors.* (Writ Petition 796 of 2015)

38. For more information, please refer to our legal alert: <http://www.nishithdesai.com/information/news-storage/news-details/article/workplace-sexual-harassment-complaint.html>

Annexure III

Bombay Chartered Accountants' Society - India's Law on Prevention of Sexual Harassment at the Workplace



India's Law on Prevention of Sexual Harassment at Workplace

About the book

A stitch in time saves nine. And especially if it is in relation to measures for prevention of sexual harassment at the workplace.

Studies reveal that almost 3 out of every 5 (working) women have faced some form of sexual harassment in their lives! Isn't that alarming? Although the law preventing sexual harassment at workplace has been in force for over 3 years, there still remains a lack of clarity on the objective of the statute, Acts that constitute sexual harassment, obligations of the employer, remedies available to the victims, process for investigation, etc. Many are also not fully aware of the criminal consequences of sexual harassment.

Any tool would be useless if the person operating is unaware of the manner in which it to be used. The objective of this publication is to serve as a ready reckoner to the stakeholders. We have also attempted to provide an insight into the relevant provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and other relevant laws in India dealing with this topic.

The publication provides a general background on what constitutes sexual harassment and when and where to draw the line. It should enable female employees to understand their rights and the remedies available to them if faced with an act of sexual harassment. We have also outlined the employer's obligations and the steps to be adopted by the employer in redressing grievances pertaining to sexual harassment.

We hope you find this publication relevant and informative.

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Annexure IV

Sexual Harassment at Workplace: Indian Government Introduces Platform for Female Employees to File Complaints

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- The Ministry of Women and Child Development has launched “**SHe-Box**”, an online platform for reporting complaints of sexual harassment arising at the workplace.
- The SHe-Box facility can be used by both government and private sector employees.
- Complaints received on SHe-Box shall be directed by the government to the employer’s ICC or LCC.
- Progress of the investigation can be monitored by both the complainant and the Ministry of Women and Child Development.

WCD will direct such complaint to the employer’s Internal Complaints Committee (“**ICC**”) or the Local Complaints Committee set up by the government at each district (“**LCC**”), as the case may be. The WCD also proposes to actively monitor the progress of inquiry conducted by the ICC / LCC and keep the complainant updated.⁴² SHe-Box also proposes to work as a repository providing information related to dealing with workplace sexual harassment complaints. The users are free to access the resources available on SHe-Box for creating awareness.⁴³ The WCD promises to ensure that the identity of the aggrieved women / complainant is kept confidential.⁴⁴

I. What’s She-Box?

The Indian Ministry of Women and Child Development (“**WCD**”) had launched an online complaint platform named “**SHe-Box**”, which stands for “Sexual Harassment Electronic Box”.³⁹ SHe-Box has been introduced to allow female employees or visitors a platform to raise complaints of sexual harassment at the workplace.⁴⁰ This facility has also been extended to private sector employees.⁴¹

‘SHe-box’, which can be accessed at www.shebox.nic.in, seeks to ensure effective implementation of India’s Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“**Anti-Harassment Law**”). It aims at providing speedy redressal of sexual harassment complaints. In the event that a formal complaint is lodged with SHe-Box, based on an assessment of the complaint, the

39. <http://shebox.nic.in/>

40. <http://pib.nic.in/newsite/PrintRelease.aspx?relid=168892>

41. <http://pib.nic.in/newsite/PrintRelease.aspx?relid=173299>

II. Grievance Redressal Under The Anti-Harassment Law

Please refer to our research paper titled ‘**India’s law on Prevention of Sexual Harassment at Workplace**’ for information on India’s Anti-Harassment Law. A brief snapshot is as follows:

- The Anti-Harassment Law was enacted in December 2013, almost 16 years after the guidelines issued by the Supreme Court in the case of Vishakha.⁴⁵ Please refer to our legal alert on this topic [here](#).
- As per the Anti-Harassment Law, every employer employing at least 10 employees is required to set up an ICC at each office or branch to investigate and redress sexual harassment grievances.

42. <http://www.hindustantimes.com/india-news/she-box-to-the-rescue-of-govt-s-women-employees-facing-sexual-harassment-at-work/story-nb3z7Ihc1l9yiag5MTLOoI.html>

43. <http://www.shebox.nic.in/user/termsConditions>

44. Ibid

45. Vishaka and others v. State of Rajasthan, 1997 (7) SCC 323

- The government is also required to set up a LCC in every district to deal with complaints of sexual harassment arising from the unorganized sector or from establishments where the ICC has not been constituted (on account of the establishment having less than 10 employees) or if the complaint is against the employer.
- The law imposes a penalty of upto Rs. 50,000 (approx. USD 775) on employers who do not implement the provisions of the Anti-Harassment Law including failure to constitute an ICC.

III. Analysis

The introduction of SHe-Box is a positive step of the Indian government in its continuing efforts to provide a safe and fair working environment for women. With this initiative, female employees now have another channel to raise workplace sexual harassment complaints.

In spite of the enactment of the Anti-Harassment Law in 2013, the WCD has been receiving sexual harassment complaints.⁴⁶ This indicates that either there are employers that may not have a fully functional ICC or necessary awareness has not been created at the workplace. It could even be possible that female employees do not have enough confidence in their employer's internal complaint mechanism or that the investigation has been delayed.

The government will however need to quickly implement the requisite infrastructure and resources to manage this initiative to achieve the desired objectives. While SHe-Box has currently been designed to cater to the interests of female employees, enabling them to raise complaints of sexual harassment on a quick time basis without fear of retaliation, the government should also use this platform by providing necessary tools to help employers comply with the Anti-Harassment Law.

By way of examples, SHe-Box could serve as a point of reference for employers or their ICC should they have any questions relating to the process to be followed upon receiving a complaint or how the report should be worded. It could also serve as a repository of experienced personnel who could serve as the external member on the employer's ICC at different locations.

According to the National Crime Records Bureau, between 2014 and 2015 (that is, after implementation of the Anti-Harassment Law by the Indian government), reporting of sexual harassment complaints has increased significantly.⁴⁷ In terms of statistics, 65.2% of women have reported that their employers do not follow the procedure laid out under the Anti-Sexual Harassment Act and 46.7% of the participant companies have admitted that their ICCs are not aware of the legal provisions pertaining to sexual harassment.⁴⁸ The recent worldwide social media campaign #MeToo which was started in response to the Harvey Weinstein scandal, depicted the magnitude of sexual harassment issues worldwide. The movement gave many Indian women the space and encouragement to come out with their own experiences of sexual harassment.⁴⁹

Some women also penned down horrifying instances from their childhood through social media, while some shed light on their daily struggles including incidents of sexual harassment at their workplaces.

In the last couple of years, sexual harassment issues have been widely covered in the Indian media. Given the litigational and reputational risks associated with non-compliance of the Sexual Harassment Law, it is high time that employers take affirmative steps in implementing zero-tolerance policies towards sexual harassment at their workplaces and ensure that the complaint is investigated swiftly, comprehensively and confidentially.

46. <http://www.hindustantimes.com/india-news/she-box-to-the-rescue-of-govt-s-women-employees-facing-sexual-harassment-at-work/story-nb3z7lhcll9yia5MTL0oL.html>

47. http://www.business-standard.com/article/current-affairs/70-working-women-do-not-report-workplace-sexual-harassment-in-india-117030400227_1.html

48. Ibid.

49. <https://theprint.in/2017/10/16/me-too-indian-victims-sexual-assault/>

Annexure V

India's Law On Workplace Sexual Harassment: Recent Judicial Interpretations⁵⁰

The law on prevention of sexual harassment of women at workplace is nearing its 5th anniversary. And during the period, courts in India have already started analyzing cases, interpreting the law and rendering their decisions.

In this legal alert, we have attempted to summarise some important judgements which we hope will provide additional guidance to inhouse counsels and HR practitioners who regularly deal with such matters.

Background

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 of India (“**POSH Act**”) was enacted in December 2013. For background on the law, please refer to our research publication on the law and the employer's obligations: [click here](#)

A direct outcome of this new law was increased awareness amongst the employee community. The media played a critical role in spreading that awareness and highlighting lack of compliances by employers. All of this led to creating a robust platform for the female workers to report harassment incidents. After enacting the law, the government on its part made it easier by launching SHE-Box initiative. Please refer to our legal alert on this subject: [click here](#)

A. What constitutes ‘sexual harassment’?

1. The Delhi High Court held that there must be physical contact having an undertone of sexual nature to constitute ‘sexual harassment’ under the POSH Act. It opined that an altercation in the context of unwelcoming environment prevailing at the workplace is not a case of sexual harassment.⁵¹
2. In another instance, the Kerala High Court held that the act or behavior must be connected with sexual harassment including allegations of promise, threat or an offensive or hostile work environment towards female employees. A solitary allegation of intemperate language against a female employee in a report does not constitute an offence under the POSH Act.⁵²

B. What is a workplace?

1. The Delhi High Court upheld the decision of the employer to terminate the employment of the accused in line with the recommendations of the Internal Committee (“**IC**”), where the accused was alleged to have sexually harassed a female colleague during an outstation visit for work.⁵³
2. The Bombay High Court pointed out that the definition of ‘workplace’ is inclusive and deliberately kept wide by the Parliament to ensure that any area where women may be subjected to sexual harassment is not left unattended or unprovoked for.⁵⁴

51. Shanta Kumar v. Council of Scientific and Industrial Research (CDIR) & Ors, Delhi High Court ((2018) 156 FLR 719)

52. K.P. Anil Rajagopal v. State of Kerala, Kerala High Court ((2018) 1 KLJ 106)

53. Gaurav Jain v. Hindustan Latex Family Planning Promotion Trust and Ors. (2015 SCC OnLine Del 11026)

54. Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University (2014 SCC OnLine Bom 814)

50. <https://www.peoplematters.in/article/diversity/prevention-of-sexual-harassment-at-workplace-lessons-from-case-laws-19210>

C. Filing of a complaint with the IC

1. The Rajasthan High Court held that the aggrieved woman can file a complaint with the IC without having to submit the complaint in person. The complaint could be sent to the IC through another person or by any other media, the main point being that it should be received by the IC.⁵⁵
2. The Delhi High Court held that merely because the petitioner has an alternate remedy to file the given case before another forum, it would not act as a constitutional bar for the Court to adjudicate upon the matter. It also held that the findings of IC should not be ignored on vague and general grounds.⁵⁶

D. How can IC be constituted?

1. The Delhi High Court has opined that the appointment of external member of the IC should be in strict compliance with the POSH Act and the rules thereunder. Accordingly, enquiry proceedings conducted by an IC that is not properly constituted as per the law, may be treated as invalid.⁵⁷
2. In another matter before the Rajasthan High Court, it was held that the external member need not necessarily have legal background or knowledge in the aspects of sexual harassment against women. Having experience in the social work is sufficient for being a valid member of the IC.⁵⁸
3. The Bombay High Court held that an IC which does not have at least two members (who are either dedicated to the cause of women or have experience in social work or have legal knowledge), would be illegal and contrary to the provisions of the POSH Act. In that judgement,

the court also re-emphasized that it is employer's responsibility to constitute proper IC.⁵⁹

E. Powers of the IC

1. The Delhi High Court held that the IC could extend the time limit for filing a complaint by another 3 months, i.e. up to six months from the date the incident has taken place, by recording reasons in writing, if it is satisfied that circumstances prevented the complainant filing of complaint earlier.⁶⁰
2. In another case, it was clarified that the petitioner has the right to approach IC for immediate protection that may be required and that the IC is empowered to grant interim relief, if it deems fit.⁶¹
3. The Delhi High Court has clarified that the IC is empowered to enforce the attendance of any person as per the provisions of the POSH Act.⁶²
4. The Bombay High Court held that where the inquiry has been conducted by the IC after giving adequate opportunity to all the parties and it has reached a conclusion, then merely because two views are possible, the court is not expected to re-appreciate the evidence and come to a different conclusion than the one which has been arrived at by the ICC.⁶³

F. Conducting the inquiry proceedings

1. It was ruled that the inquiry proceedings should be fair and impartial. If there is any allegation of bias against any member of the IC, the inquiry proceedings should be stayed or put on hold until the disciplinary authority takes a decision. If the disciplinary authority believes that the allegation

55. Shital Prasad Sharma v. State of Rajasthan and Ors. (2018 SCC OnLine Raj 1676)

56. Sarita Verma v. New Delhi Municipal Corporation & Ors, (2016 LLR 785 (2))

57. Ruchika Singh Chhabra v. Air France India and Anr. (2018 SCC Online Del 9340)

58. Shital Prasad Sharma v. State of Rajasthan and Ors. (2018 SCC OnLine Raj 1676)

59. Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University, Bombay High Court (2014 SCC OnLine Bom 814)

60. Tejinder Kaur v. UOI (2017 SCC Online DeL 12221)

61. Confidential v. Indian Institute of Corporate Affairs (2018 SCC Online Del 6801)

62. Ashok Kumar Singh v. University of Delhi and Ors (2017 LLR 1014)

63. Vidya Akhave v. Union of India, Department of Women & Children & Ors (2017 LLR 357)

of bias is true, then it would invalidate the proceedings, a new committee would be formed and proceedings would need to start afresh.⁶⁴

2. The Madras High Court set territorial jurisdiction for conducting the inquiry proceedings - it ruled that the inquiry proceedings should be conducted within 500 kms of the place of the incident. In that case, the Hon'ble Judge opined that requiring the victim to travel more than 500 kms to attend the inquiry proceedings would itself constitute harassment!⁶⁵
3. It was held that the inquiry as per the POSH Act is not a preliminary inquiry but instead a full-fledged enquiry, which needs to be done in the same manner as is done to prove misconduct in disciplinary proceedings. The court mandated the IC to follow principles of natural justice and give fair opportunity to the respondent to defend himself.⁶⁶
4. The Delhi High Court pointed out that strict rules of evidence are not required to be followed in inquiry proceedings and that the IC can adopt its own procedure in conformity with the principles of natural justice and especially in a case of sexual harassment.⁶⁷
5. In another matter before Rajasthan High Court, it was observed that the POSH Act and the rules enable a three-member team to conduct the inquiry so long as the Presiding Officer is present. Therefore, the inquiry report does not stand vitiated unless it is shown that there were less than 3 members who conducted the inquiry.⁶⁸

64. Tejinder Kaur v. UOI, Delhi High Court, (2017 SCC Online Del 12221)

65. K.Hema Latha v. State of Tamil Nadu, Madras High Court, (MANU/TN/1414/2018)

66. Sibv v. Air India Limited, ((2016) 2 KLJ 434)

67. Gaurav Jain v. Hindustan Latex Family Planning Promotion Trust and Ors. (2015 SCC OnLine Del 11026)

68. Shital Prasad Sharma v. State of Rajasthan and Ors. (2018 SCC OnLine Raj 1676)

G. Employers' rights and territorial jurisdiction of the courts

1. The Patna High Court held that the disciplinary authority can dismiss an employee from the services once the sexual harassment charges are proven.⁶⁹
2. The Gauhati High Court held that the court which shall have the territorial jurisdiction to hear the matter of sexual harassment shall be the place where the act has occurred. Accordingly, if the harassment occurred in Kolkata while the parties were travelling for office work, the court in Kolkata shall have the jurisdiction even if the workplace of the offender is in Guwahati.⁷⁰

Analysis

Since the POSH Act is still at a nascent stage, these cases help us clarify the position of law and better analyse the matters relating to sexual harassment at workplace. While several of these cases are specific to their unique backgrounds, they serve as an aid to the IC who are required to investigate complaints.

It is pertinent to note that the courts are recognizing and upholding the powers to the IC as provided by law. Accordingly, employers and their ICs need to ensure that the proceedings are conducted in a fair manner and in compliance with the law and the principles of natural justice.

Sexual harassment allegations in the workplace not only run the risk of loss of employer's reputation but also lead to legal troubles. Needless to mention, sexual harassment at workplace continues to remain one of the most sensitive issues that needs to be dealt with immense care and sensitively. As opined by the Bombay High Court, employers need to genuinely be concerned with the safety of women at workplace rather than staging a farce of compliance under the POSH Act.⁷¹

69. Mohan Kumar Singh v. Chief Manager (HRD) Central Bank of India, (2017 SCC OnLine Pat 2483)

70. Biplab Kumar Das v. IDBI Bank Ltd and Others, (2017 LLR 1148)

71. Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University (2014 SCC OnLine Bom 814)

Annexure VI

India's Law On Prevention of Sexual Harassment at Workplace: Analysis of Recent Case Laws - Part 2

India continues to see a rise in sexual harassment complaints and related litigation, largely due to its Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 of India (“**POSH Act**”) followed by the #MeToo revolution. We are writing this legal alert analysing the important case laws, following our previous **legal alert**.

I. Wider Interpretation of What Constitutes Sexual Harassment

In a case before the High Court of Bombay⁷², the court disagreed with the decision of the Internal Complaints Committee (“**IC**”) who had concluded that the complaint filed by the woman amounts to misconduct and mis-behaviour, rather than sexual harassment. The complainant claimed that her subordinate used abusive and unprofessional language against her. The court observed that the IC had failed to take into consideration the additional circumstances provided under Section 3(2) of the POSH Act which also amounted to sexual harassment including creation of an intimidating or hostile environment for women and humiliating treatment likely to affect health and safety of a woman.

II. Employer's Failure to Constitute The IC

The Madhya Pradesh High Court imposed a fine of INR 50,000 (approx. US\$ 700) on the petitioner, a renowned hospital in Indore, for not having constituted an IC. As per the POSH Act, every employer having at least 10 employees is required

72. Sapana Korde Nee Ketaki A. Ghodinde v. the State of Maharashtra and Ors. 2019(1) Bom CR (Cri)415

to constitute an IC at each of its workplaces to investigate complaints pertaining to workplace sexual harassment of women.⁷³ The court also directed the hospital to pay a compensation of INR 2.5 million (approx. US\$ 35,000) to the complainant for the pain & suffering, loss of reputation, emotional distress and loss of salary, which had resulted in deprivation of the complainant's right to live with dignity.

III. Need of An External Member to Form The IC

The Punjab and Haryana High Court ordered the employer to re-constitute the IC since there was no external member.⁷⁴ As per the POSH Act, the IC should have an external member who is a person associated with a non-governmental organisation or association committed to the cause of women or a person who is familiar with issues relating to sexual harassment.

IV. Extent of Extended 'Workplace' Under Posh Act

The High Court of Calcutta held that the Privy Lounge, Bar-cum-Restaurant at a mall, where the incident of sexual harassment was alleged to have taken place between two fellow students of IIM, Calcutta, cannot be termed as a 'workplace' under the POSH Act. Therefore, the court directed the Counselling Officer of IIM, Calcutta to mediate and settle the matter.⁷⁵

73. Global Health Private Limited & Mrs. Arvinder Bagga v. Local Complaints Committee, District Indore and Others

74. Neelam Bhardwaj v. State of Punjab & Ors., 2018 LLR 1286

75. Shubham Bhuwangiri Goswami v. the Union of India and Ors. MANU/WB/1285/2019

V. Conflict of Interest Amongst IC Members

In a case before the High Court of Delhi, the court ruled that a mere apprehension of bias would not be sufficient to exclude a member from the IC. Citing certain previous decisions of the Supreme Court in this respect, the court pointed out that it would be necessary to establish a real likelihood of bias rather than a mere apprehension. The court also said that “*if right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the inquiry.*”⁷⁶ In this case, since the Presiding Officer of the IC was a witness to the incident, she recused herself from handling the complaint. With respect to the rest of the IC members, there was not even a remote suspicion that any of them had any personal interest which would conflict with their obligations to conduct a fair inquiry under the POSH Act. Therefore, the court held that there was no need to re-constitute the IC.

Please also see our recent article titled “**POSH Committee - Dealing with bias and conflict of interest**” which may be viewed [here](#).

VI. Improper Investigation Procedure Can Vitate The Inquiry

The Kerala High Court set aside the order of the IC to terminate the accused since it had not followed the procedure set out under law while conducting the inquiry.⁷⁷ In this case, the accused was not provided with a copy of the complaint nor the findings of the IC after completion of the inquiry.

In a similar case before the High Court of Calcutta, the court held that since the respondent was not given an opportunity to cross-examine the complainant, proper investigation procedure has not been followed.⁷⁸ Although the complaint arose

before the POSH Act was enacted, the court observed that neither the landmark Supreme Court decision in *Vishaka v. State of Rajasthan* (1997) nor the provisions of Section 11 of the POSH Act conceives a situation of denying the accused an opportunity of hearing what the victim has to say against the respondent or the opportunity to cross-examine the complainant. In this case, the investigating authority had not recorded any reason as to why it would not be feasible to allow the victim to record her statement in the presence of the alleged offender and also as to why the respondent has been denied the opportunity to cross-examine the complainant. The court observed that ‘*the right of cross-examination has invariably been recognised as a basic right of an accused in proceedings, whether it be criminal or departmental*’. If an inquiry is conducted without extending the opportunity of cross-examination to a delinquent and findings are adverse to the interests of such party, the delinquent can legitimately raise a claim of having been denied the ‘reasonable opportunity’ to defend himself. If the allegation is found to be correct, the proceedings would stand vitiated.

VII. Need to Comply With The Employer’s Service Rules

In a case before the High Court of Calcutta, the court set aside the order of the IC on the ground of procedural impropriety and violation of principles of natural justice.⁷⁹ In this case, the petitioner had alleged that the respondent humiliated and mentally harassed her. Basis the investigations, the IC made a decision in favour of the petitioner. However, the court observed that where there is a procedure prescribed for inquiry under the service rules (HR policies) of the employer, it should be complied with by the employer in addition to the procedure prescribed under the POSH Act.

76. *Somaya Gupta v. Jawaharlal Nehru University and Ors.* 2018 (159) FLR 390

77. *Dr. T.V. Ramakrishnan v. Kannur University* 2018 LLR 990

78. *Union of India and Ors. v. Shibaram Sarkar MANU/ WB/1016/2019*

79. *Debjani Sengupta v. Institute of Cost Accountants of India* 2019 SC OnLine Cal 734

VIII. Limitation Period for Complaint Under Posh Act

In a case before the High Court of Delhi, the order of the Local Complaints Committee (LC) dismissing the complaint was challenged. The LC had dismissed the complaint on the ground that the complaint was filed beyond the limitation period of three months prescribed under Section 9 of the POSH Act. However, the complainant submitted before the court that there were certain previous correspondences which were filed with the employer within the limitation period and that the complaint was brought to the notice of the employer within the limitation period. Since such documents/information were not furnished to the LC while deciding upon the matter being barred by limitation period, the court relegated the parties to the LC by giving the complainant an opportunity to file such communications before the LC, enabling the LC to make an informed fresh decision on the issue of limitation.⁸⁰

IX. Criminal Proceedings Besides Remedy Under The Posh Act

The High Court of Jammu & Kashmir held that the POSH Act does not bar the complainant from seeking remedy under the Ranbir Penal Code (equivalent to the Indian Penal Code (IPC)) just because the matter has already been taken cognizance of by the IC constituted under the provisions of the POSH Act.⁸¹

However, the High Court of Karnataka has clarified that initiating criminal prosecution under Section 354 of the IPC in respect of a matter which has already been investigated by the IC on the same facts and evidences and

was found to be no claim of sexual harassment by the IC, would be unjust on the part of the court. In this case, except reiterating the very same allegations which were made by the complainant before the IC, no additional material was placed on record to substantiate the said criminal charges.⁸²

Analysis

The POSH Act being a relatively new labour law in India, these judgements analysing various intricate aspects under the POSH Act helps provide better clarity not just for the employer and the IC members, but also for the public at large.

In light of the #Me Too movement, a number of cases including those which occurred before the enactment of the POSH Act are now coming into limelight. With the rising number of reported cases of workplace sexual harassment of women, it becomes imperative for employers and their respective HR & in-house legal teams to take pro-active steps to prevent and effectively redress complaints of workplace sexual harassment.

It is also important for employers to regularly train their IC members on the nuances of the POSH Act and investigation formalities. In order to keep litigation at bay, a comprehensive understanding of the interpretation being adopted by courts in India and the ability to look at things from the lens of the judiciary, is necessary.

While employers have in general been following the process of educating/training their IC members on the POSH Act, as a next step, the IC members should be kept abreast of the latest judicial interpretations, so as to avoid any potential mistakes which could end up creating litigation and reputational risks for the employer.

80. X. v. District Magistrate MANU/DE/0361/2019

81. D.B Singh v. State of Jammu & Kashmir and Ors. MANU/JK/76/2019

82. Usha Padmini and Ors. v. State of Karnataka and Ors. MANU/KA/0584/2019

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Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

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Prevention of Sexual Harassment at the Workplace (POSH) - Legal & HR Considerations

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