

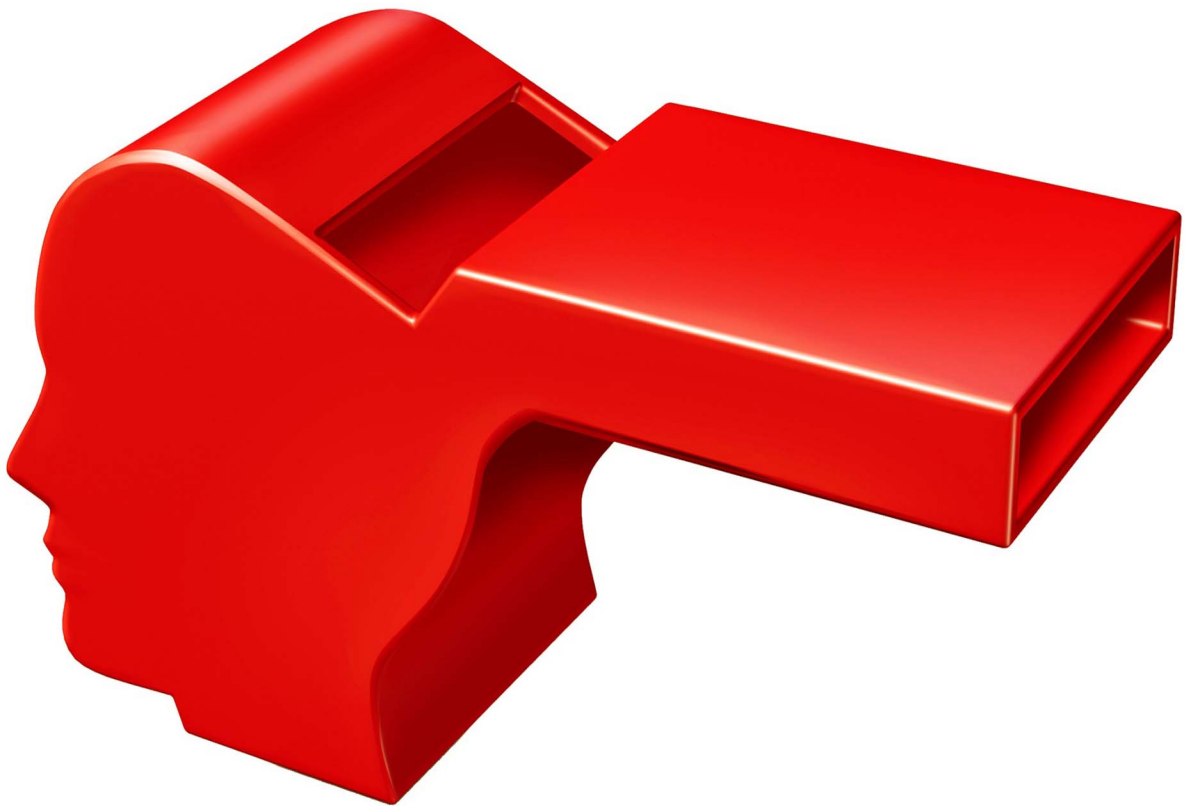
Business Manager

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Making HR People Complete

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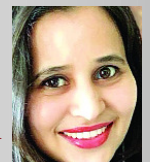
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Sexual harassment is not about sexual misconduct as much as it is about abuse of power. Two consenting adults can engage in any relationship but translate that into a work environment and it becomes impossible to deal with the repercussions and sensitivities for those involved and those not involved. Workplace sexual harassment is a form of gender discrimination which violates a woman's fundamental right to equality and right to life, guaranteed under the Constitution of India and is criminalised outside of work context through several provisions of the Indian Penal Code.

Workplace sexual harassment not only creates an insecure and hostile working environment for women but also impedes their ability to perform and be part of the labour force in equal measure in a competitive work environment of today. The POSH Act was enacted as a comprehensive legislation to provide a safe, secure and enabling environment, free from sexual harassment to every worker.

Pursuant thereto, in India, a certain level of sensitivity has crept in over the last decade or so as regards the ill effects of sexual harassment for corporate India or India Inc. Corporates cognizant of protection of women especially are taking steps to ensure people are aware there is a high bar of tolerance and this principle percolates to each and every employee.

The objective of this article is to glance back at the inception of these laws and analyses the reality while keeping an eye on the future.

◆ 8 years of POSH Law - Objective, meeting expectation and outcomes

Since the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act in 2013 ("POSH" or "POSH Law" or "POSH Act"), many corporates have moved forward and appointed committees, sensitized their employees and ensured processes as mandated are put in place.

However, despite the noise and availability of public support to enforce the POSH laws including the adoption of POSH policies by the corporate, there are no reliable statistics for analyzing the extent to which employers comply with POSH and the number of complaints raised and redressed. One of the biggest deterrents in the POSH law is with respect to cancellation of license. There are but a few cases that are in public domain where such action was in fact taken.

The lack of information in this space makes one wonder whether POSH Act is a toothless tiger.

As practicing professionals in this space, we have been advising clients with even 1 employee to adopt and imbibe the principles of prohibition of sexual harassment.

Assuming (in the absence of data) that India Inc is diligent and large and small corporates have successfully adopted the policies and implemented the same, the government machinery to support corporate action is not in place. There is no support or easily available information even to perform routine compliances like filing of annual reports. Is anyone reviewing these annual reports? Is there a consolidated document published upon such review - nothing is clear.

Over the last 8 years not enough jurisprudence has been created to which could offer to clarify various aspects of the law, including what constitutes sexual harassment, obligations of an employer/IC, remedies/safeguards available to the victim, process of dealing with

There is a thin line between moral obligation of respecting a female co-worker and the legal obligation to do so. The IC cannot superimpose its moralities on the workforce but must be guided by legal principles and determine outcome of the misconduct empirically.

PoSH in India : A real protection or a GLASS FENCE?





protection to women outside of the workplace as well - like a vendor, customer or any visitor to the premise. However, how such a woman will have access to the IC of the concerned company and whether an IC can possess jurisdiction, call as witness such outsider is unclear. There are no case studies that indicate what can be done in cases like this.

Protection from outsiders



a complaint, what is permitted under investigation etc. Most women continue to be hesitant in bringing actions due to apprehension of being disbelieved or ridiculed; or having a record of being a victim. The stigma still attaches to the victim.

Corporates are complying earnestly but the law is lacking in bringing compliance in the true spirit of compliance. It's hard to say whether women are in fact safer in their workplace after 8 years of enactment of this law.

◆ Gaps and ambiguities - Measures for effectiveness

POSH law was brought in 16 years after the Vishakha guidelines were issued therefore from the very onset the spirit of this law was not as diligent as it ideally should have been. The same reflects in the character of the law too. There are certain ambiguities in the law that if corrected should move a step closer towards ensuring a robust implementation of the same and will hopefully make workplaces safer for women and others.

Protection to outsiders

The POSH Act generously extends

The POSH Act also brings within its ambit any harassment that occurs in the workplace. This could mean an employee or a female employee alleges harassment against a client or any person who is from outside of the organisation. For e.g.: harassment from a client of the company during a meeting. Again, the powers of the IC and what it can recommend are not clear.

Subjective definition of harassment

While some forms of sexual harassment such as sexual assault are offensive and horrific, some other forms may not be easily discernable. The burden of casting an action in the appropriate bucket of sexually offensive or not will lie on the Internal Committee. The IC has to decide basis what the victim perceives to be sufficiently adverse for it to have created a hostile working environment. In each case, determining what constitutes 'sexual harassment' depends upon the specific facts and the context in which such conduct has occurred.

It can be said that 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. *(Excerpted from a judgment of the Hon'ble Delhi High Court in W.P. (C) 367/2009 & CMS 828, 11426/2009)*

Protection to Transgender women

Definition of "aggrieved woman" does not today include transgender women, who are most likely to be subject to harassment and ridicule given their marginalised social status.

Cost and Resource Crunch in Setting up IC

For smaller organisations the cost of maintaining an IC, paying a professional to be the external member and bearing the cost of training of other members is not easy to bear. Also the professionals who can be appointed on the IC are few and far between. Many organisations would not even have access to such persons making the IC lopsided in most cases.

Stigma and lack of confidence in Non-Disclosure

Given the state of protection of confidentiality in India and overall lack of respect of non-disclosure coupled with inadequate enforcement through the judicial process, victims are never able to weigh the impact of stigmatisation and seeking of justice. Lack of faith in the system and overall lack of clarity on what would happen eventually or how the harassment will be redressed pushes women into silence.

◆ Remote working and Sexual Harassment

In a world tormented with Covid-19, a new form of sexual harassment has emerged. CSH or *cyber sexual harassment* as it is now known appears to have (as per publicly available information) increased substantially.

Long working hours, work weeks that continue into weekends, and many channels of engagement such as authorized discussion forums, emails, late night video conferences, and WhatsApp have expanded the workplace to our homes and into the majority of the day. Personal and professional life have increasingly become indistinguishable. Because of the remote working model, harassment now takes the form of



showcasing objectionable material on the screen during video calls, invading another employee's personal space by insisting on turning on video while calling, asking personal questions on official platforms, taking screenshots of colleagues during video calls and using such images inappropriately, and so on. Any misconduct or words with sexual innuendos that affect adversely an employee's ability to work or creates an uncomfortable atmosphere while working online can be considered CSH.

The idea of a workplace is fluid in the context of a work from home, and the boundary between our professional versus personal space has blurred. Under the pretext of official communication, perpetrators of harassment today have multiple social-media platforms to connect, and these provide grounds for harassment as well.

Barriers to reporting

Some key barriers to reporting emerge on an analysis of news reports :

- i) What constitutes CSH and/or the guidelines. There are no clear guidelines from companies on how work from home should function in an organisation.
- ii) Women employees not being able to identify that sexual harassment can happen even while working from home.
- iii) At the level of the victim, the fear of repercussions, the onus of proving harassment emerged as big barriers to take the step forward.
- iv) The added insecurities of keeping their jobs operated to seal the lips of many women.

Modifications for WFH situations

For reporting complaints of sexual harassment in the workplace, a special email ID may be generated. To address the issue of virtual harassment, it is advisable to review the company's sexual harassment policy to include CSH. If the original policy requires the Complainant to physically hand up the complaint to the IC or that the IC meetings be held in person, those portions can be modified to reflect the WFH constraints. Forensic support will be required for any investigation by IC and companies should create robust mechanism of tracking such behaviour through social media sweeps and random checks on meeting reports etc.

◆ Is compliance with POSH

Act sufficient to make India Inc safer for women?

POSH is seen as yet another compliance. Filing of annual reports, getting an external member, conducting 2 workshops a year and providing the POSH policy is often seen as the zenith of compliance. Does the above really translate into a safe workspace?

In order to truly make a workplace safe, the pressure has to be built from the top. The leadership must take responsibility for ensuring this and follow this up as an organisational goal. Sensitizing employees often happens more effectively when there is leadership pressure from the top. Some aspects of protection to women that we have seen occur in the past :

- ◆ Official transportation to women who stay late in the workplace.
- ◆ IC being available over email to ensure that aggrieved workers do not experience practical or emotional barriers in reaching them.
- ◆ Conducting surveys, frequent check-ins, may all help to provide a secure area for workers to express their issues. These initiatives foster trust and raise awareness about the IC's constitution, and the deployment of measures to protect complainants, victims, eyewitnesses, and whistle-blowers from victimization.

- ◆ Increasing employee participation in the formulation, implementation, and monitoring of workplace policies on violence and harassment.
- ◆ Shifting to virtual inquiries and investigations to provide interim protection, and swiftly complete cases.

It is important to understand the psyche of workforces in India Inc. While in the Western context, the consequence of sexual harassment is equated with cost to company by way of lawsuit settlements and loss of public image for the organisation, in the Indian context sexual harassment cases tend to be bent towards the intention to quit and decreased morale to work.

◆ Effect of Moral Policing on Organisations

In a recent Delhi High Court judgment, it has been observed that "Moral Policing" is not the job of the





management or of the IC. Any consensual relationship among adults would not be the concern of the management or of the IC, so long as the said relationship does not affect the working and the discipline of the organisation and is not contrary to the Rules or code of conduct binding on the said employees.

The IC has to be objectively reviewed the inter-position of investigated facts and the law on sexual harassment and not sit in judgment of whether or not certain behaviour is considered appropriate. While in another case, the Delhi High Court has 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, such proceedings must be based on legal backing provided by the POSH Act and Rules read with organisational policy and not based on overall morality. This can also be particularly tricky in international organisations, where moral and societal values between the 2 geographies in which such organisation exists would be poles apart.

Most POSH Policies have "no-dating" or "no-relationship" clauses especially when it comes to positions where there is considerable authority - for instance between a manager and a reportee. This is done to prevent situations where there is general inequality of positions and power and to protect the weaker employee. It also operates to exonerate the employer and helps the employer in enforcing consequences especially in the nature of termination or transfer.

There is a thin line between moral obligation of respecting a female co-worker and the legal obligation to do so. The IC cannot superimpose its moralities on the workforce but must be guided by legal principles and determine outcome

of the misconduct empirically.

◆ Abuse of law and Reputational Damage

This perhaps is one of the biggest concerns of the Act that false complaints are becoming detrimental to the accused to an extent that it has led to the abuse of a protective law.

Section 14 of the PoSH Act 2013 deals with the issue of false complaint. In case the complaint is found to be untrue and filed with malicious intent then, the Internal Committee can take appropriate action against the complainant.

Malicious complaints weaken the law on two fronts; there is a risk of loss and harassment to a good worker leading to his exit from the organisation and causes suspicion against real victims on account of actions of a few. In 2015, there was a case before the Delhi High Court where a woman was fined for bringing forth a false complaint. However not much exists on this aspect of the law in the public domain.

Sexual harassment allegations in the workplace not only run the risk of loss of employer's reputation but also weaken the belief in safe working environment with any office associated with the said brand. It is necessary to weigh the consequences of disclosure and protection of identity of the victim. It is important to bring before the world the identity of the perpetrator as would be done in any criminal proceeding so as to ensure that the public at large and others connected with the perpetrator are aware. One must however remember that until someone is said to be guilty of sexual harassment the obligation to maintain confidentiality must be upheld.

News report from earlier in January mentions an SLP being filed before the Supreme Court against an order passed by Justice Gautam Patel in the Bombay High Court, to conduct proceedings in camera. Such a measure is being titled a gag-order. One must appreciate that the difference between a criminal complaint before a magistrate and a private forum settlement such as through the IC. Gravity of the damage that may be caused to both the perpetrator and the victim, if their details were revealed, not for a minute considering the repercussions on the organisation, where they are involved, it is better to err on the side of caution in my opinion

rather than allow a media trial of the issue.

In Sum

Sexual harassment at workplace continues to remain one of the most sensitive issues that needs to be dealt with immense care and in a delicate manner. 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. (See *Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University* (2014 SCC OnLine Bom 814))

There is an impending need for effective and consistent communication of organisational policies on sexual harassment, stricter vigilance, consistent gender sensitization programs, especially for male employees, and strengthening of redressal mechanisms. Today, these well-established recommendations need to be revamped to keep pace with the demands of the cyber world of work. Awareness campaigns that inform employees about sexual harassment in the "new normal," that define the new issue of CSH, clarify organisational mechanisms and legal provisions and provide necessary training, will serve both as a deterrent to potential perpetrators and as a facilitator for the victims to take action.

The burden of justice is currently on the victim and organisations need to take a stronger role in sharing the same. Sexual harassment is often perceived as an "individualized" problem characterized by the inappropriate workplace conduct of one employee against another. The courage of the perpetrator often stems from systemic grandfathering and protections and that cannot be viewed with this individual lens alone. A preventative approach to workplace harassment is recommended given the imminent need to clarify the boundaries of "workplace" sexual harassment and examine if the protection measures in place are adequate, especially for vulnerable workers such as those who occupy marginalized social positions.

We have come a long way since Vishaka. But there is miles to go before we sleep and promises to keep... **BM**

(This article is based on the opinion of the author and does not constitute legal advice or indicate the opinion of the firm on the above matters.)

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Archana Balasubramanian is Founder and Partner at Agama Law Associate, Mumbai. Archana has versatile experience of over 13 years wherein she has gained immense tactical transactional understanding as well as significant industry expertise across diverse sectors.