

Annual Review on the State of Sexual Harassment in India

2021 EDITION ●

STOP
SEXUAL
HARASS
MENT

Review on the 2020 Application of The
Sexual Harassment of Women at Workplace
(Prevention, Prohibition and Redressal) Act
2013 in the Formal Sector.



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Delhi Ethics Council

Council of Ethics (Delhi Ethics Council) has been established under the aegis of WICCI in order to create a community that can ensure ethical and safe spaces for every individual, and mainstream conversations around ethics and bring them to the forefront of every discussion.



ANNUAL REVIEW ON THE STATE OF SEXUAL HARASSMENT IN INDIA

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“

There is a need to redefine ethics. The conversation should be about doing what is right, wherein this ‘right’ is defined as working towards establishing fairness and ensuring justice, by taking decisions that are mindful of everyone and not just a few.

For true equity, ethics need to be at the vanguard of decisions made by corporations, institutions, governments as well as individuals.

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The diversity of human beings highlights that ethics cannot be applied homogeneously. While dealing with ethics, it is important to remind ourselves of the complexities of each group and each individual within that group, and work towards being mindful of these differences.

To create such an inclusive world, it is important to start redefining, revising, and rethinking the concept of ethics using a gender lens.

RISHIKA SHARMA

President

Delhi Ethics Council

*Women's Indian Chamber of
Commerce and Industry (WICCI)*

1

Foreword


RISHIKA SHARMA

*National President,
Council of Ethics,
Women's Indian Chamber of
Commerce and Industry (WICCI),
Core Team Member,
Eight Goals One foundation*

- 1 Delhi Ethics Council (DEC) of the Women's Indian Chamber of Commerce and Industry (WICCI) was set up with the aim to create a community that can ensure ethical and safe spaces for every individual, especially women. Our aim, therefore, is to mainstream conversations around the importance of ethics in every sphere. Before I dive into introducing the Council, I believe it is important to unpack what 'ethics' really means.
- 2 The mainstream definition of ethics usually associates it with the moralistic understanding of the world. Given the subjective nature of these morals, groups and individuals are often othered in the process of defining them. At the Delhi Ethics Council, our aim is to redefine ethics by moving away from this understanding and defining ethics as what is 'right'. This 'right' must be understood as working towards establishing fairness and ensuring justice, by taking decisions that are mindful of everyone and not just a few.
- 3 We have been extremely privileged to have wonderful Council Members who are thought leaders and key advisors to the DEC. They provide the secretariat with the guidance required to ensure that our work benefits each and every individual without leaving anyone behind. With the help of such distinguished individuals, the Council has been able to assist Eight Goals One Foundation to take up this initiative of drafting an Annual Review with a focus on Corporate Ethics.
- 4 In this year's Annual Review, the focus has been on a very important part of corporate ethics, that is, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (The Act). The Review is a culmination of the history of the Act, expert opinions from individuals who have been working in this area, as well as key findings of a survey conducted by DEC. We received over 3000+ unique responses, indicating the significance of the need to talk about safe workplaces for everyone.
- 5 With an aim to bring ethics to the forefront of every discussion, the Delhi Ethics Council will keep working towards creating a system of continuous and engaging conversations while simultaneously working towards impacting change.
- 6 We will always be available for you and look forward to collaborative opportunities to make the world an ethical and safer place to live in!

Introduction

- 7 India is one of the largest economies in the world, with it increasing almost six-folds in less than 20 years. While the economy has grown since independence, one area where the country still lags is the participation of the population in the workforce. This is especially true for the participation of women, which has fallen from 36.7% in 2005 to 26% in 2018. Additionally, women make up only 14% of the 58.5 million entrepreneurs in the country.



Industrialisation and globalisation paved the way for influx of women in the workforce, resultant, prevention of sexual harassment at workplace assumed greater importance. Fact is that the sexual harassment at workplace do exist and the majority of times it does not get reported. The legislation and the government has done their part, the responsibility now lies with the organisations and the employers to provide a conducive and a harassment free environment to their women workforce.

Smita Paliwal

Partner-Dispute Resolution, King, Stubb & Kasiva, Advocates & Attorneys

- 8 This is reflective of and further exacerbates the pre-existing inequalities between genders in India, which amongst other reasons, is also governed by the independence and autonomy that paid work provides an individual. Furthermore, cultural expectations of women as the primary caretakers of households plays a significant role in fewer women entering the workforce in the first place. For those women who do join the workforce, challenges such as an unsafe work environment and gender-based discrimination, are common.



Its precursors – the ‘International Bill of Rights for Women’ or ‘Convention on the Elimination of Discrimination Against Women’ (CEDAW) (which was signed by India in 1980) and the subsequent Vishaka Guidelines (1997), made a small but crucial dent in the collective Indian Consciousness about the fact that sexual harassment violates the principle of equality of rights. However, in 2013, the passing of the Prevention of Sexual Harassment (PoSH) Act drove the nail home as it came not with a “guideline” or “advisory” tag, but with a clear compliance and statutory mandate.

Anjali Varma

Independent Human Resources Consultant

- 9 One of the key factors which makes the work environment unsafe and hostile is sexual harassment¹. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ('the Act') has been an attempt to make the working environment safer

for women by addressing and establishing consequences for sexual misconduct at the workplace. The statute was passed in 2013 with a set of guidelines on what constitutes sexual harassment, and ways of addressing and penalising it.



Progressive organisations realised that the onus was on them and were quick to adopt the legislation and put into place the necessary mechanisms for the implementation of the Act. However, in many establishments, whether they were Small and Medium Enterprises (SMEs) or large organisations, it was not looked at as either “urgent” or “important”. It remained on the fringes as an eventual “check box” item until 2017 when the ‘#MeToo’ social movement spread across the world and brought this into public consciousness. A powerful google interactive map - ‘MeToo rising: a visualization of the movement from google trends’ (<https://metoorising.Withgoogle.Com/>) shows how the movement spread across the world like “wildfire”.

Social media was the enabler as instances of sexual harassment across industries (ranging from Bollywood to the government) came tumbling out, and many organisations were caught napping. They reacted by rushing in to ensure that they had all the necessary protocols in place for redressal. A huge step, all the same, to make for a safer workplace - given that the Internal Committee, which is readily accessible to any employee, has the same powers as a civil court or court of law. But to borrow a mindset from medicine or even parenting – the focus now should be on preventive Measures rather than curative. For rapid yet lasting change, efforts should be aimed at the preventive and protective aspect of the Act - and this is where we need a meshing of compliance with culture.

Anjali Varma

Independent Human Resources Consultant

- 10 In that regard, the Act has made it mandatory for organisations with more than 10 employees and local districts to have complaint

committees in place for women² to be able to file complaints against sexual harassment. Additionally, organisations are now mandatorily required to conduct gender sensitisation workshops, educate employees on what constitutes harassment, circulate information about the Act, and maintain a record of registered complaints which can be asked by the District and State governments³.



The PoSH Act 2013 has been a landmark law in attempting to ensure safe working spaces for women in india. However, despite the intention of the law, it is the on-ground lack of implementation that continues to see women face the brunt of sexual violence at the workplace.

Arti Jaiman

Station Director, Gurgaon ki Awaaz Samudayik Radio

- 11 While the number of sexual harassment cases being reported have increased since the enforcement of the Act, many organisations have still not implemented the stipulated guidelines. Therefore, a gap between what has been articulated and what has been implemented still exists.

1 Bajoria, J. 2020 | Human Rights Watch

2 Ministry of Law and Justice, 2014 | Bare Act

3 Ministry of Law and Justice, 2014 | Bare Act

- 12 In consideration of this, the Delhi Ethics Council of the Women's Indian Chamber of Commerce and Industry (WICCI), has focused the first edition of its Annual Review, on examining this gap, analysing the implementation of the Act through primary and secondary methods of research, and shedding light on the importance of safe workplaces for every individual, especially women.



With Kamala Harris being sworn in as the Vice President of the US, there is no iota of doubt that if provided the right opportunities, women can achieve and hold one of the most powerful offices in the world. A harassment free office environment does pave the way towards success for a woman, and encourage her to stand and compete with other male colleagues at an equal footing. With introduction of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter referred to as the "Act/PoSH Act") India took a major step towards bringing parity between the two sexes in a working environment and gave momentum to the right to safe and harassment free workplaces.

Smita Paliwal

Partner-Dispute Resolution, King, Stubb & Kasiva, Advocates & Attorneys

2.1

History of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

2.1.1

Domestic

- 13 To be able to discuss and analyse the status of women within workplaces, it becomes necessary to understand that sexual harassment is a systemic issue. In other words, the societal norms and social systems get replicated at workplaces, making it essential to recognise that the perception of women and their role sometimes gets dictated by traditional gender norms and stereotypes within workplaces as well.
- 14 Recognising this as one of the many reasons for work environments being unsafe, paves the way for understanding why a legislation addressing and deterring sexual harassment at the workplace, was a necessary step to ensure safe and secure workplaces, especially for women.
- 15 The first time sexual harassment at the workplace was legally addressed, was in the context of the horrifying gang rape of Shri Bhanwari Devi, a social worker for the Woman's Development Programme in Rajasthan, where she worked towards stopping infanticide, preventing child marriages, getting rid of the dowry system, as well as generating awareness about female hygiene and the importance of educating girls.
- 16 As part of her work, she protested against the marriage of a 9-month-old girl. To curb this attempt, Bhanwari Devi was gang-raped by 5 men in front of her husband, who was beaten up. While she filed a complaint against the accused, she did not get justice as all five of the accused were acquitted. In this process, the police, the medical staff and village authorities also abandoned her claim.
- 17 This led to mass outrage and led to four women's NGOs (Vishaka, the Women's Rehabilitation Group, Kali for Women, and Jagori), to file a Public Interest Litigation (PIL) in the Supreme Court. The outcome of this was the formation of the Vishaka Guidelines.



The main intention of these [Vishaka] Guidelines was to provide a platform for redressal and grievance mechanisms against workplace sexual harassment. It was these guidelines that motivated the formation of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (PoSH). The Act is very important as it discusses the various instances of sexual harassment and how a woman can complain against this kind of behaviour.

Malavika Rajkumar

Content Lead At Nyaaya (Lawyer | Policy Research And Advisory)

- 18 The Vishaka Guidelines, promulgated in 1997, marked the beginning of the development of the protection of women in the workplace and preceded the Act. According to the guidelines, it was the duty of the employer, or other responsible persons in workplaces, or other statutory institutions, to prevent and deter acts of sexual harassment, and to provide procedures for the resolution, settlement, or prosecution of acts of sexual harassment. The focus was essentially on ensuring the regard for human rights as defined under Section 2 (d) of the Protection of Human Rights Act, 1993.
- 19 Post the establishment of the Vishaka Guidelines, initial efforts towards formulating the Act started in 2007, with the Protection of Women against Sexual Harassment at Workplace Bill, 2007. The Bill was introduced in the Lok Sabha on 7th of December 2007 and was referred to a Parliamentary Standing Committee on Human Resource Development on 30th of December 2010. However, this Bill was never implemented.
- 20 This Committee formulated a report in 2011 and reviewed the debates around the formation of an Internal Committee (IC) (a complaints committee that is mandated to be formed by law)⁴ for reporting sexual harassment. The primary contention, as per the report, was whether there should be a permanent body addressing such complaints, or an ad hoc body which is formed for an inquiry and subsequently dissolved once the inquiry is completed.
- 21 The report concluded that a pre-existing panel would make targets of sexual harassment (hereinafter referred to as, targets) feel more comfortable with seeking help and redressal,⁵ therefore making it important to have such committees in place.
- 22 The report also focused on making changes to the original Bill introduced in 2007, with specific focus on adding ways to prevent and prohibit sexual harassment at the workplace, apart from just having redressal mechanisms post harassment. Prior to the Act in 2013, the sections in the Indian Penal Code (IPC) which addressed redressal were Section 354⁶ and Section 509⁷.
- 23 Therefore, the only redressal mechanism available was to file a complaint with the police.
- 24 With the consistent pending nature of the Bills being introduced to address sexual harassment, Medha Kotwal Lele, Coordinator of Aalochana, a centre for documentation and research on women, filed a petition in the Supreme Court, which included statistics on sexual harassment cases across the country. This led to the Supreme Court reiterating the importance of implementing

⁴ PoSH At Work, MoCWD 2016

⁵ PoSH At Work, MoCWD 2016

⁶ Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

⁷ Word, gesture or act intended to insult the modesty of a woman.—Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

guidelines more stringently, given the neglected status of sexual harassment complaints at workplaces.

- 25 The Supreme Court also ordered states to make the required changes to the Central Civil Services (Conduct) Rules, 1964 and all bar associations in the country, along with those admitted to it, to comply with the Vishaka Guidelines.
- 26 Additionally, the Council of Architecture, the Institute of Chartered Accountants, the Medical Council of India, the Institute of Company Secretaries and other statutory institutes were asked to mandatorily follow the Vishaka Guidelines and ensure that organisations associated with these bodies comply with them as well.
- 27 The Act was finally introduced in 2013 in this backdrop. Till date, the Act remains to be the only law governing sexual harassment of women at the workplace and therefore, it becomes pertinent to analyse its effectiveness and implementation.

2.1.2

International

- 28 Sexual harassment is an important concern globally, which has been visible through the efforts of international organisations such as UN Women, which comprises of the Division for the Advancement of Women (DAW), the International Research and Training Institute for the Advancement of Women (INSTRAW), Office of the Special Adviser to the Secretary-General on Gender Issues and Advancement of Women (OSAGI), and the United Nations Development Fund for Women (UNIFEM).
- 29 In fact, one of the first bodies to be created in the United Nations (UN) ecosystem was the United Nations Commission on the Status of Women (UNCSW), established in 1946. UNCSW spearheaded efforts to change policies which were discriminatory in nature such as those related to maternity leaves. During the drafting of the Universal Declaration of Human Rights, they successfully argued against using 'men' as a synonym for humanity.⁸ Additionally, they noted that while the Universal Declaration of Human Rights had enshrined certain fundamental rights for individuals across the world, certain groups, especially women, faced numerous constraints in the attainment of equality in different spheres of life, ranging from professional to personal.
- 30 To combat the rampant discrimination against women in different aspects of life, the UNCSW spearheaded the creation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), after 30 years of work⁹. The Convention not only focused on civil rights and the legal status of women around the world, but also on human reproduction and the impact of cultural factors on gender relations.
- 31 By its 10th anniversary, almost 100 nations had ratified its provisions. The Convention also set up the Committee on the Elimination of Discrimination against Women to monitor the implementation of CEDAW, with the ratified parties expected to submit a national report to the Committee every four years.
- 32 India ratified CEDAW in 1993. This provided legal recourse against sexual harassment in India. CEDAW is still used as a reference for drafting policies. For instance, the Supreme Court of India relied on CEDAW when forming the Vishaka Guidelines. It was later also used to create the Sexual

⁸ OHCHR, 2020 | Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979

⁹ UN Women, 2020 | A brief history of the Commission on the Status of Women

Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013¹⁰. CEDAW was specifically mentioned in the preamble of the Act¹¹, which acknowledges that by ratifying CEDAW, India is bound to protect women from sexual harassment at the workplace, as well as protect their right to work with dignity.

- 33 Many other international conventions and protocols such as the International Labour Organisation's Convention 111, and the Discrimination (Employment and Occupation) Convention, 1958, also played a major role in formulating not only India's, but the world's policies against sexual harassment¹².

2.2

Features of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

- 34 The Act, being the first and only Act on sexual harassment at the workplace, was enacted to safeguard the rights of women in the workplace through several different mechanisms. It also provided broad definitions for terms such as 'workplace' and 'sexual harassment'. A few key features of the Act are mentioned in the following points:

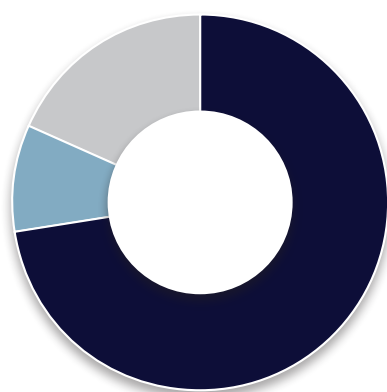


As of December 2020, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 of India (PoSH Act) completed 7 years. Thanks to the government's efforts in actively promoting the law, along with the global #MeToo movement, it has had a considerable impact in creating awareness and played a crucial role in the prevention, prohibition and redressal of sexual harassment of women at the workplace.

Vikram Shroff

Head, HR Laws (Employment & Labor) at Nishith Desai Associates

- 35 **Cases reported:** Post the enforcement of the Act, more cases have been reported as awareness of rights at the workplace has increased. Up to 500-600 cases were filed each year from 2015 to 2017¹³.
- 36 After the introduction of the Act, there has been an increase in the cases of sexual harassment at workplace. The complaints saw an increase of 45% from 2014-2017.



- More than once a week
- More than once a month (9.1%)
- More than once every 6 months (18.2%)
- More than once a year (72.7%)

Fig.1 Members of IC/LC were asked how often they received a complaint about an employee sexually harassing another employee. Over 72.7% stated that they received such complaints 'More than once a year', with 18.2% stating 'More than once every 6 months' and 9.1% selecting 'More than once a month'. This could signify that the current repercussions are not adequate deterrents for perpetrators.

10 Nathan, A. 2018 | Dalit woman's rape in '92 led to India's first sexual harassment law – but justice still eludes her

11 Ministry of Law and Justice, 2014 | Bare Act

12 CEACR, 2019 | Observation (CEACR) - adopted 2019, published 109th ILC session (2021)

13 M, Kaunain Sheriff, 2018 | Explained: When a woman is harassed at work

37 **Addressing sexual harassment at the workplace:** The Act defines ‘Sexual Harassment’ and its different forms and lays down ways of penalising such acts.¹⁴

38 It covers workplaces in both the, informal and formal sectors, by making a distinction based on the number of employees.

39 For example, the Act stipulates that organisations with more than 10 employees are required to have an Internal Committee (IC), which not only receives complaints, but also inquires and provides recommendations on the future course of action. On the other hand, for organisations with less than 10 employees, a Local Committee (LC) is instituted under the district administration.

40 The Act also defines the rights and the course of action for different parties including, domestic workers under Section 2 (e).¹⁵



The Act has been the culmination of years of work by different organisations in this field and has been successful, to an extent, in providing women with a proper channel to report sexual harassment at the workplace. Since many countries are yet to have specific legislation for workplace sexual harassment, we feel happy and proud to see our international partners appreciate and learn from the provisions of the Indian PoSH Act.

Sreemoyee Malakar

COO, Lawcubator Technologies Private Limited



While the PoSH Act and the rules thereunder are very clear on the penalties imposed on the accused, however there have been instances wherein such complaints are not acted on and are not dealt as per the provisions under the Act.

Smita Paliwal

Partner-Dispute Resolution, King, Stubb & Kasiva, Advocates & Attorneys

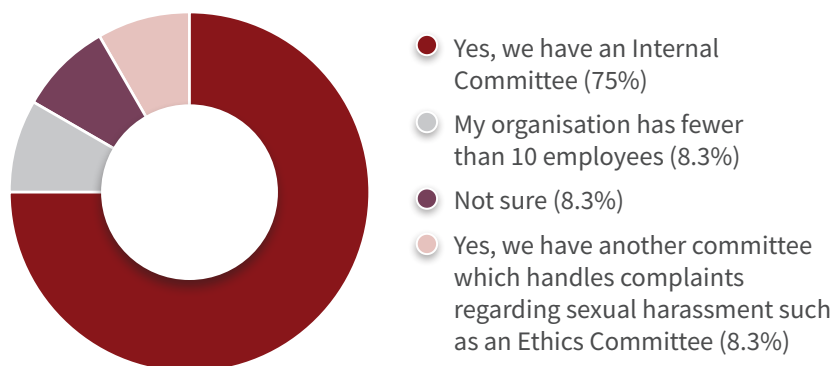


Fig. 2 depicts the responses from HR/CXOs when asked whether they have an Internal Committee (IC) as mandated by the Act. 75% of HR/CXO survey respondents stated that their organisation has such a committee and 8.3% have another committee which handles complaints regarding sexual harassment.

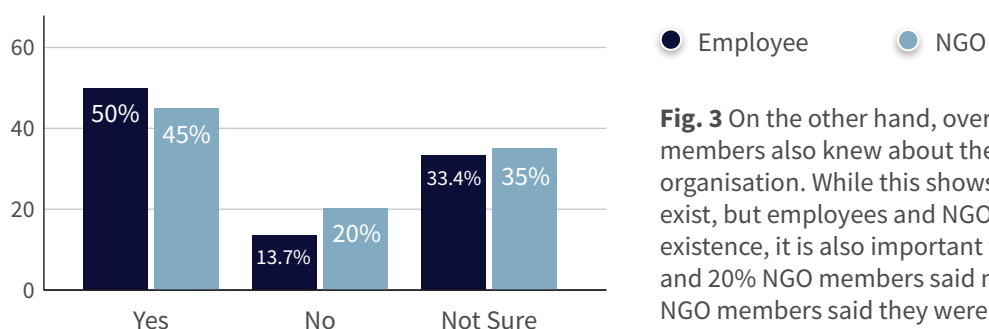


Fig. 3 On the other hand, over 50% employees and 45% NGO members also knew about the Internal Committee (IC) in their organisation. While this shows that not only does a committee exist, but employees and NGO members are aware of its existence, it is also important to point out that 13.7% employees and 20% NGO members said no. Also, 33.4% employees and 35% NGO members said they were not sure.

¹⁴ Roy, A. and Kanjamala, D., 2019 | Constitution Of ICC Under The POSH Act

¹⁵ As per the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 a domestic worker means “a woman who is employed to do the household work in any household for remuneration whether in cash or kind, either directly or through any agency on a temporary, permanent, part time or full time basis, but does not include any member of the family of the employer”.

- 41 **Establishing ICs and LCs:** The Act specifies the formulation and functioning of ICs and LCs, including term duration, salaries, procedures, structure of the committee, and how the members are selected, amongst other specifications. This allows for uniformity across districts and organisations.
- 42 Additionally, to facilitate a full investigation system, ICs and LCs are vested with the same powers as a civil court to procure any documents and investigate any individual under oath, under Section 11(3) of the Act.
- 43 To further facilitate targets to file complaints, one can take their employer to the Local Committee of their district regardless of whether the organisation has an IC, to ensure a fair and impartial investigation.



Many times, organisations constitute the IC without considering the background of the IC members. The law clearly provides the qualification for such members, that is, a member of the IC should have some prior experience in social work or should be committed to the cause of women or have legal knowledge. This leads to mishandling of cases and sometimes the procedure is ignored and not complied. Employers should ensure that the members who have been nominated are well trained and have knowledge of the provisions and procedures provided under the PoSH Act, trainings and workshops should be organised for IC members from time to time.

Smita Paliwal

Partner-Dispute Resolution, King, Stubb & Kasiva, Advocates & Attorneys

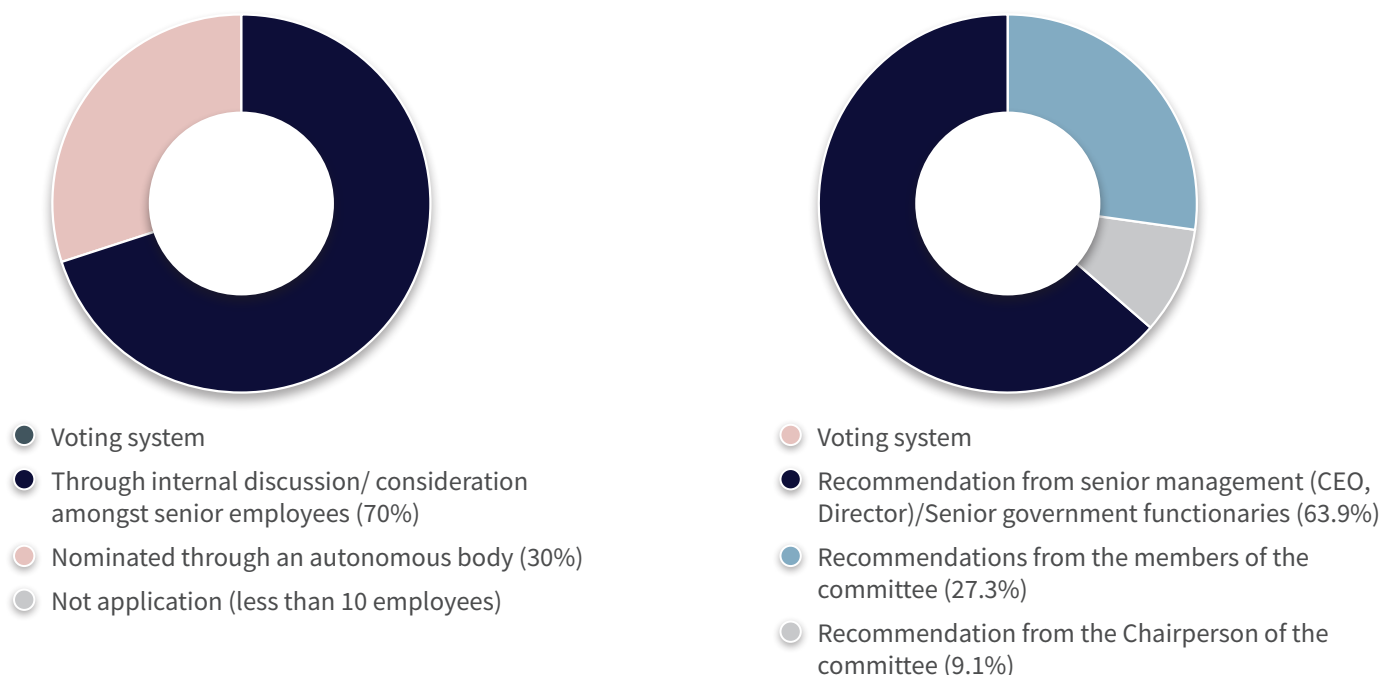


Fig. 4 and 5 analyses how the IC members are nominated and selected as well as the procedure for choosing external members for the committee. The procedure followed has an impact on the committee for organisations have to make sure that the members are above reproach when investigating matters of sexual harassment. 70% of IC members stated they were nominated either after a discussion between senior employees, while 30% said by an autonomous body (Fig.4).

At the same time, 63.9% of IC members stated that external members are chosen from those recommended by senior management (Fig.5). 27.3% IC members said that external members were chosen by recommendations of the other members of the Committee and 9.1% said by recommendations of the Chairperson.

- 44 **Filing the Complaint:** Sections under the Act are also dedicated to ensuring and encouraging the filing of complaints.
- 45 For instance, as stated under Section 9, should a woman be unable to submit a written complaint, the members of the Committee “shall render all reasonable assistance to the woman” to submit her complaint to the Committee.
- 46 Additionally, to facilitate the filing of complaints, a provision for the strict protection of the complainant’s



The short one-off orientation sessions have participants marking fleeting presence, unless an organisational senior watches over. The complaints’ committees are often conceptually and procedurally unequipped, with committee members tending to fall in line with the most authoritative voice. The staff, in many instances, are unaware of whom to complain to, or the names of committee members although the law requires this information to be notified and displayed prominently.

Madhu Mehra

Executive Director, Partners for Law in Development

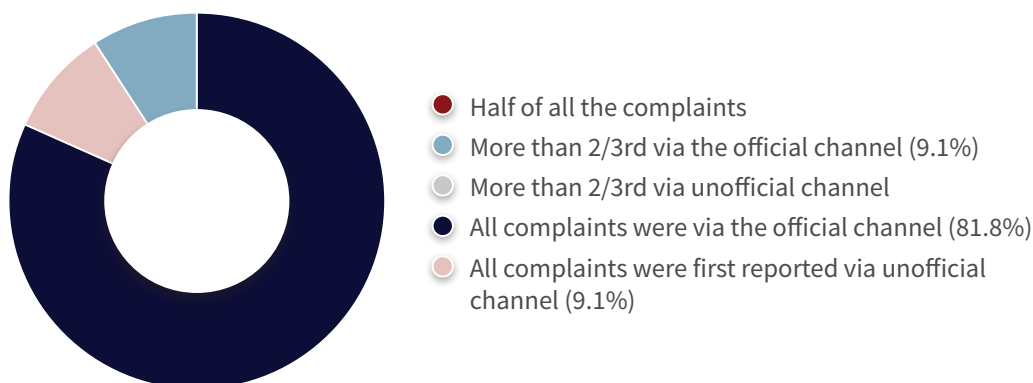


Fig.6 The Act stipulates that all complaints must be filled formally in a written manner before IC/LC. Figure 6 shows that, as per IC/LC members, over 81.8% of the complaints filed before them were through formal channels, 9.1% stated that more than 2/3rd of all complaints were via the official channel and 9.1% stated that the complaints were first reported to them via unofficial channels. This could indicate that there is a gap between policy and implementation. However, it is important to acknowledge that often complainants might not be comfortable with the idea of making a complaint through the official channels, potentially indicating the stigma attached around sexual harassment.

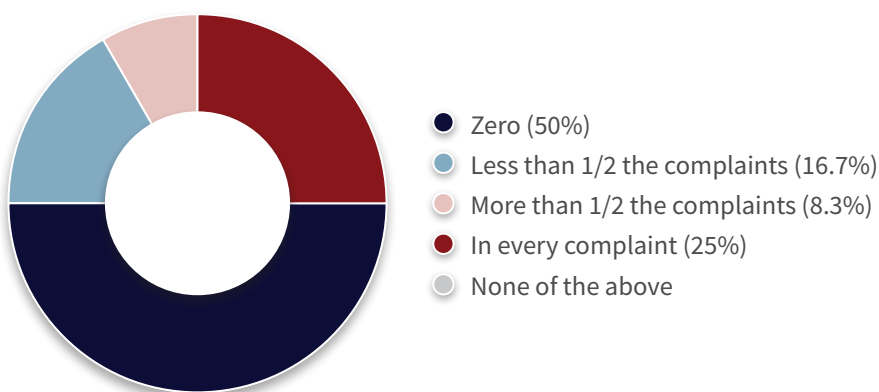


Fig.7 IC/LC members were asked how often they had to assist a woman in filling a complaint before the committee (Fig.7). 50% stated they haven’t had to help in filling a complaint. On the other hand, 16.7% stated they had to help in less than half of the complaints and 8.3% stated that they had to help in more than half the complaints. This is prescribed under the Act (Sec. 9.1) for providing help to a woman to file a complaint before the committee.

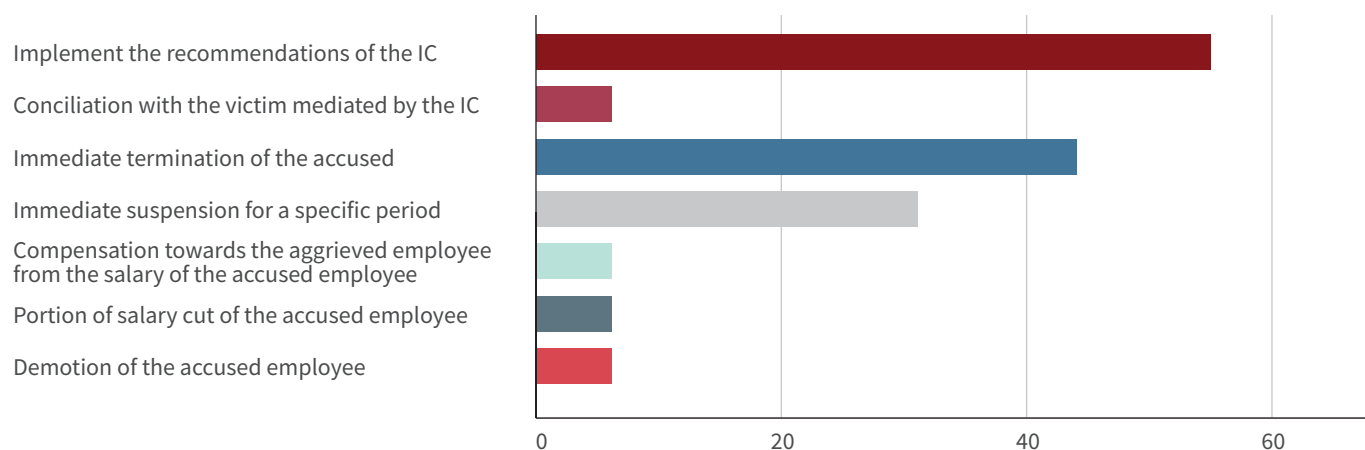
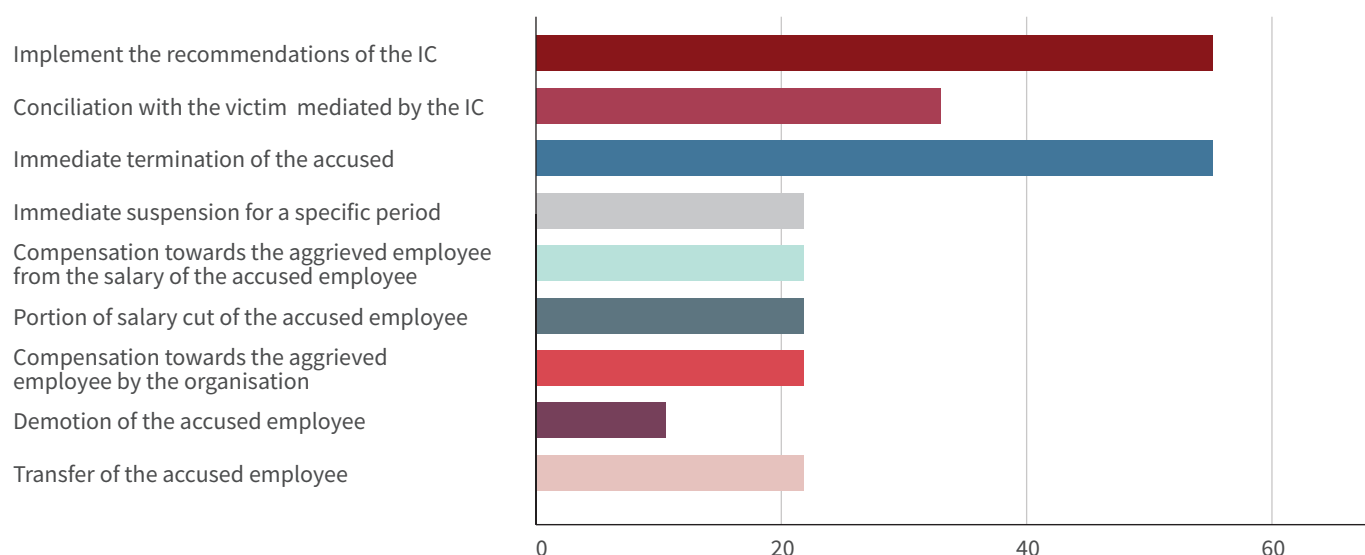


Figure 8, 9 and 10 show how HR/CXOs, IC/LC and NGO members respond when an investigation has been completed and an individual is found to have committed an act of sexual harassment. Respondents were given the option to select multiple options. A majority of both HR/CXO and NGO members stated that they would follow the recommendation of the IC among other policies such as reduction of salary, compensation towards the aggrieved etc. All three have stated, with more than 40% of the respondents stating, that they would immediately terminate the accused from the organisation.

identity is also part of the Act. Section 12 of the Act also mentions that the committee can have either of the parties under investigation - transferred or given leave of up to 3 months along with that offered by the organisation (it allows for both parties to be away from the hostile environment).

- 47 The stipulated time limit for completing an investigation is 90 days, which can be extended under exceptional circumstances.
- 48 **Redressal:** Section 13(3)¹⁶ of the Act specifies guidelines for punishment in case an individual is found guilty by the Committee. Primarily, compensation, either monetary or through land assets, are provided to the target, either by the organisation or the accused.
- 49 To determine the amount of compensation, guidelines with the various factors that should be considered are stipulated under Section 15 of the Act. These factors include mental trauma caused to the target of harassment, loss of career opportunities, medical expenses incurred for physical or psychiatric treatment, and the income and financial status of the respondent, amongst others.
- 50 The Act also provides for alternate options in case the accused is unable to pay the decided amount.
- 51 It is also to be noted that the Act has provisions against false complaints but specifies that a lack of proof/evidence cannot be considered as a false complaint under Section 14 of the Act.



...The much lauded zero-tolerance policies held up as model approaches to addressing sexual harassment, are also problematic. Far from just, such approaches overlook proportionality of wrong, gradation of punishments to adopt the cost effective termination as a standard solution. While termination is necessary in some situations, it must not be the only response. The gradation of responses and punishments obligate the employer to sensitise and work out solutions based on the degree and nature of the infraction, creating transformational possibilities.

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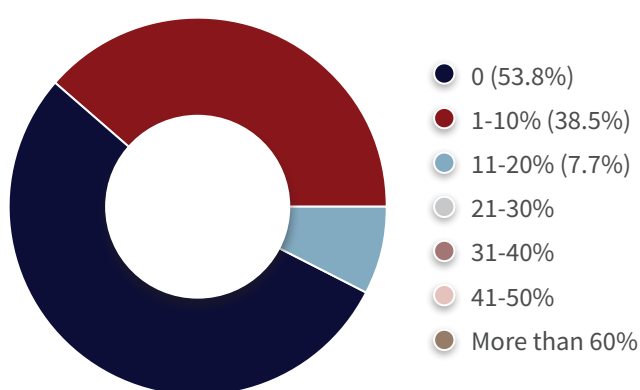


Fig.11 highlights the responses by IC/LC members when asked about the number of false/malicious complaints that they had received. Out of all the complaints received, the majority (53.8%) stated zero, 38.5% stated 1-10% of all the complaints received and 7.7% stated 11-20% of all the complaints received were false/malicious.

¹⁶ If the ICC or LCC arrive at the conclusion that the complaint is legitimate against the accused, the act states the following for punishment:

- “to take action for sexual harassment as a misconduct in accordance with the provisions of the service rules applicable to the respondent or where no such service rules have been made, in such manner as may be prescribed.”
- “to deduct, notwithstanding anything in the service rules applicable to the respondent, from the salary or wages of the respondent such sum as it may consider appropriate to be paid to the aggrieved woman or to her legal heirs, as it may determine, in accordance with the provisions of section 15.”

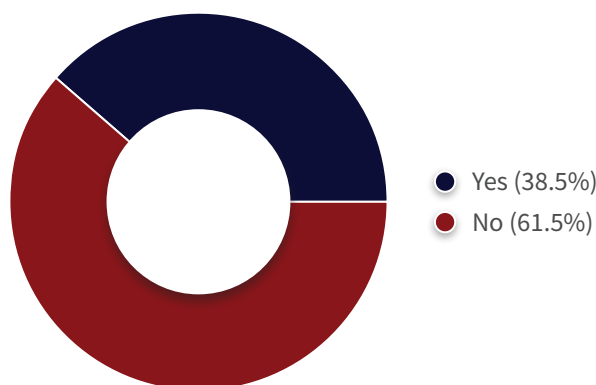


Fig.12 shows the responses of IC/LC members when they were asked whether they found it difficult to undertake an investigation for sexual harassment. 61.5% stated 'No' but more than 1/3rd of the respondents (38.5%) answered 'Yes'.

52 The features laid down in this chapter are important to understand the context in which The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was passed. The idea is to not only generate awareness about the Act, but also to understand and analyse the way forward. Given that the Act remains to be India's only law governing sexual harassment at the workplace, it becomes pertinent to critically engage with the Act to ensure that

it takes an inclusive approach that takes into consideration each and every individual.

53 The next few sections are based on the key findings from our surveys, the contributions that we received from experts in this field, as well as the existing literature available on the Act. The Review is based on information from different sources, including primary as well as secondary methods of data collection.

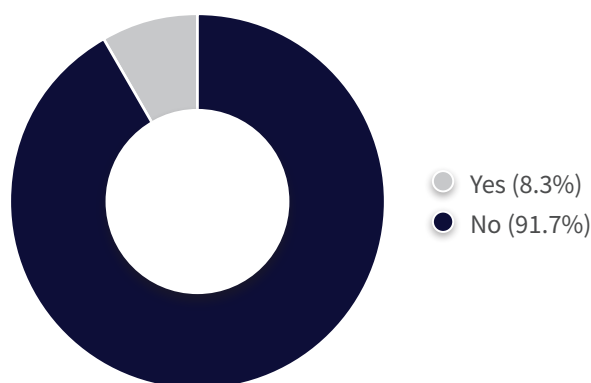


Fig.13 When IC/LC members were asked if they were ever pressurised by their superiors to diminish or dismiss a complaint that has been filed, 91.7% stated 'No' while 8.3% said 'Yes'.

As stated by one of the respondents

'In one of the cases, the respondent was not at all cooperative in the beginning but when we showed him legal powers that time he started cooperating.'

“

We must find ways to give greater autonomy to the redressal committees under the PoSH Act.

To be able to create safe working spaces for every individual, it is important that the hierarchy and power dynamics within an organisation are taken into consideration while drafting such important laws.

—

Survey Review

- 54 To assess the implementation and awareness of the Act, we circulated surveys to different stakeholders to understand how the Act has impacted employees and employers across the country.
- 55 The identified stakeholders that we reached out to for this year were: (i) Employees working in the formal sector, (ii) Human Resource Managers/Chief Executive Officers, (iii) NGO members, and (iv) Internal Committee (IC) as well as Local Committee (LC) members.



Under Section 19 of the law, the employer has multiple responsibilities and duties including creating a safe work environment, providing assistance to a woman in case she chooses to file an FIR, organising workshops etc. As per Section 19(c) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 every employer is required to conduct regular awareness workshops for all the employees to understand the provisions on the law on the subject matter. If the employer fails to comply with this provision a penalty up to INR 50,000 can be levied on the employer. The role of the employer is essential to facilitate a work environment which not only complies with the law but also provides the avenue for employees to complain. Without the employer setting up an IC (which is mandated by law), the purpose of the law would be defeated.

Malavika Rajkumar

Content Lead at Nyaaya (Lawyer | Policy Research and Advisory)

- 56 We prepared four surveys, one survey per stakeholder, whereby on an average, each survey consisted of 32 questions.
- 57 Given the sensitive nature of the survey, all responses were collected anonymously, with no question marked compulsory, unless they were dependent on another question's response, giving the respondents the choice to submit the survey at any point. All this was conveyed to the respondents through a consent form as well.
- 58 We received a total of 3,395 unique responses from various demographics as is shown in the figures below: pronouns preferred (Figure 14), age groups (Figure 15), industry (Figure 16) and states they are from (Figure 17), spread out across the four categories that we targeted in the formal sector.

3.1

Demographics Covered

Figure 14: Preferred pronouns

Preferred pronouns	Percentage
She/Her	80%
He/Him	10%
They/Them	4%
Prefer not to say	4%
Other	2%

Figure 15: Age

Age Bracket	Percentage
18-21 years	11%
22-25 years	30%
26-30 years	13%
31-35 years	12%
36-40 years	9%
41-50 years	11%
51-60 years	11%
60 + years	9%

Figure 16: State

State	Percentage
Delhi	44%
Karnataka	17%
Maharashtra	11%
Haryana	8%
Uttar Pradesh	5%
Madhya Pradesh	3%
Rajasthan	3%
Gujarat	2%
West Bengal	2%
Kerala	1%
Andhra Pradesh	1%
Bihar	1%
Chhattisgarh	1%
Uttarakhand	1%

Figure 17: Industry

Industry	Percentage
Education	13%
Information Technology	13%
Not-for-profit Organisation	13%
Professional Services	13%
Other	11%
Telecom, Media & Entertainment	9%
IT Enabled Services	7%
Energy, Power & Renewables	4%
Retail, Wholesale & Distribution	4%
Financial Services	4%
Healthcare & Wellness	3%
Automotive	1%
Environmental Services	1%
Technology	1%
E-Commerce	1%
Marketing	1%

3.2

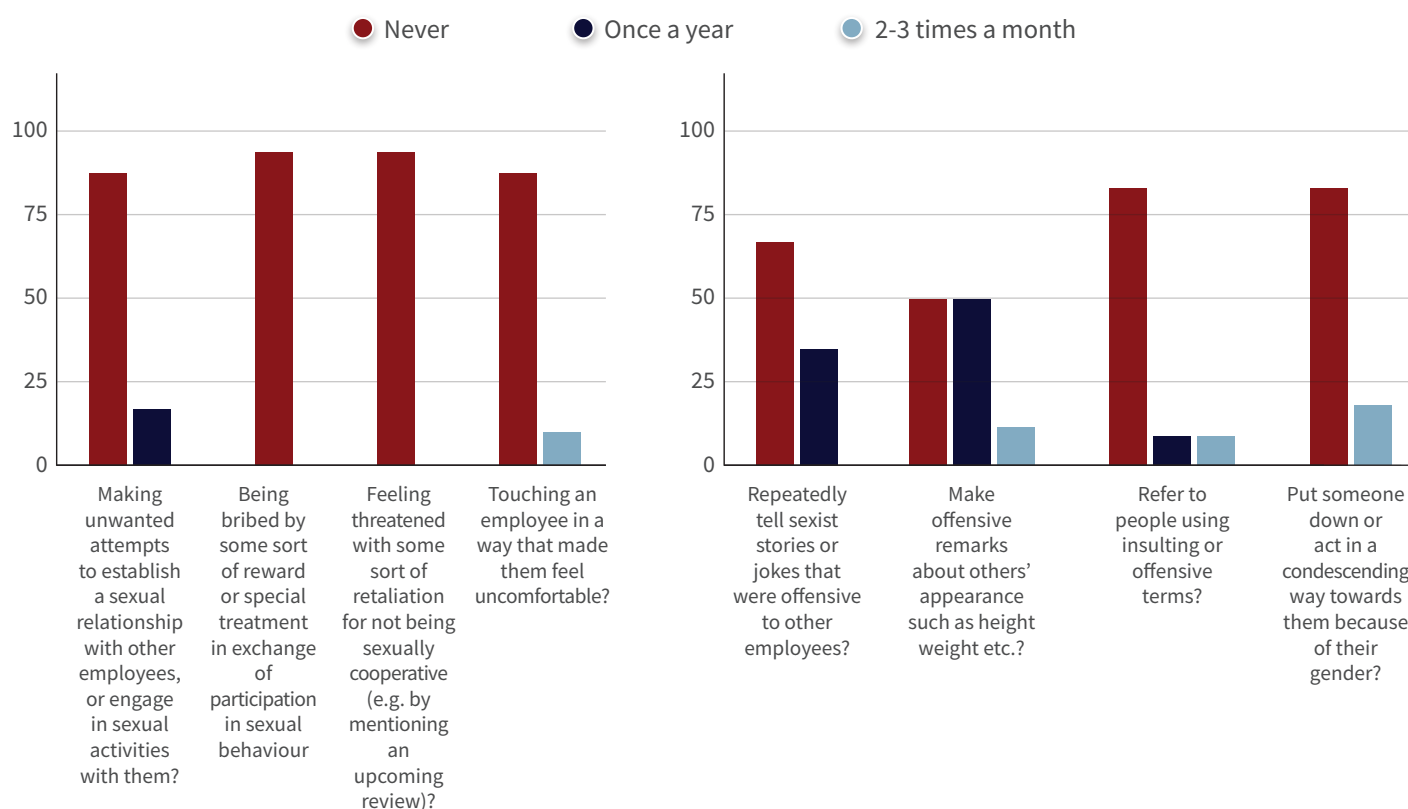
Key findings:

3.2.1

Workplace Harassment:

- When asked if an employee had ever felt uncomfortable because of the presence of a colleague, more than 70% of the respondents replied affirmatively, indicating that at least at one point, employees felt uncomfortable at their workplace due to another employee.
- When asked regarding the witnessing of sexual harassment, the majority of the respondents answered 'Never'. However, when asked if they had ever witnessed a situation where someone made offensive remarks about someone's appearance, or repeatedly heard sexist stories or jokes, many answered 'Yes'. This shows how sexual harassment is viewed and understood in society.

It is important to note here that according to the Act, and its interpretation by the Judiciary, sexual harassment not only includes unwanted physical contact and/or advances, but also unwelcome physical, verbal or non-verbal conduct of a sexual nature, sexually coloured remarks, amongst others.



HR/CXOs were asked whether they witnessed any incidents of sexual harassment at the workplace (Fig.18 and Fig.19). Majority of respondents in all sections stated 'Never', but as we further analyse figure 19, we see the number of incidents being witnessed including 'Making offensive remarks about someone's appearance', 'Repeatedly tell sexist stories or jokes', amongst others see an increase in respondents selecting 'Once a year' and '1-3 times' a year. This further points towards the need for a systemic change at the societal level to make workplaces inclusive and conducive spaces for everyone.

- Regarding witnessing inappropriate behaviour at the workplace, the majority of the HR/CXOs responded 'Never' to the 8 behavioural examples on sexual harassment, which included:
 - ◊ Making unwanted attempts to establish a sexual relationship with other employees, or engage in sexual activities with them',
 - ◊ 'Being bribed by some sort of reward or special treatment in exchange of participation in sexual behaviour',
 - ◊ 'Feeling threatened with some sort of retaliation for not being sexually cooperative',
 - ◊ 'Touching an employee in a way that made them feel uncomfortable',
 - ◊ Repeatedly tell sexist stories or jokes that were offensive to other employees',
 - ◊ 'Make offensive remarks about others' appearance',
 - ◊ 'Refer to people using insulting or offensive terms', and
 - ◊ 'Put someone down or act in a condescending way towards them because of their gender'.
- 75% of HR/CXOs stated that when they did witness incidents of harassment, they immediately tried to stop it, while the remaining 25% responded 'No' to the same question.

3.3

Knowledge Dissemination and Training:

- To the question regarding employees' understanding of the Act, approximately 50% of respondents answered 'Yes'. The remaining responses were split equally between 'No' and 'Not sure'. This shows that even though there

is awareness amongst employees, organisations need to invest more time in ensuring a full understanding with regards to the Act, for all employees.

- More than half the respondents were not aware of a policy addressing sexual harassment in the cyberspace within their organisations, despite the fact that a vast majority of individuals in the formal sector have been working from home due to the pandemic.
- 71.4% IC/LC members responded 'Yes' when asked if they undertook training regarding intervention when witnessing an act of sexual harassment, either by helping the individual facing harassment leave the area, or standing in between the harasser and the harassed, amongst others.
- There was a significant gap in answers regarding the training material provided in organisations. 75% of HR/CXOs and 76.9% of IC/LC members stated that they do provide training material, 53.1% employees responded 'No' when asked the same question.
- In terms of reviewing training material, findings showed that 58.3% of HR/CXOs did it once a year while 8.3% did it once every 3 years.

3.4

Complaint Filing Process:

- Statistics showed that 75% of HR/CXOs, 50% of employees and 45% of NGO members, who responded, worked in organisations which had a Complaints Committee, as constituted under the Act, for the prevention and redressal of sexual harassment at the workplace.
- All IC/LC members stated that they have received complaints about sexual harassment more than once a year, with 18.6% receiving

complaints more than once every 6 months and 9.1% at least once every month.

- For those who faced sexual harassment at their workplace, 68.7% decided not to file a written or an oral complaint. Reasons for this included lack of trust in the procedure, concern for their careers, the lack of consequences for the accused, and concern for their physical safety.
- More than 81.8% of IC/LC members stated that 2/3rds, or all complaints, were filed through official channels. 9.1% of IC/LC members stated that complaints were reported via unofficial channels.
- Regarding the categorisation of complaints as false/malicious, 46.2% of IC/LC members stated that such categorisation stops women from coming forward with their complaints, while 38.5% answered 'Not sure'.
- 51.1% of employees stated that an individual should be given a year or more for filing a complaint of sexual harassment, which is more than the 3 months stipulated by the law. This seems to indicate that most employees recognise that in order for a target to file an official complaint, there are many institutional, mental and social barriers to be overcome, for which 3 months is too short a time period.
- Since the Act only allows for written and formal complaints to be filed, 90% of HR/CXO members stated that both informal and formal complaints, depending on the severity of the act, should be filed.

'Lack of supportive evidences, malicious or false complaints hostile respondents and credibility of witness statements'

'Most of the times I have noticed that the IC members do not have sufficient knowledge to handle the complaints and many a times principles of natural justice are ignored.'

(IC), or knew that their organisations had an IC than they were about the Local Committee (LC). This not only shows a lack of awareness and information on LCs, but perhaps also that not enough attention is attributed to it.

- Over 53.8% of IC/LC members stated that they received zero false/malicious complaints. 38.5% of LC/IC members stated 1-10% of all complaints were false. 7.7% of committee members stated that 11-20% of complaints received are false and malicious.
- When asked if a complaint should be labelled as false/malicious due to lack of proof, 23.1% of IC/LC members answered 'Yes'. This number holds relevance because it should be noted that under Section 14, the Act specifies that a mere lack of proof cannot be reason enough to label a complaint as false or malicious.
- While it is necessary to complete an investigation into cases of sexual harassment in a prompt manner, 84.6% of IC/LC members stated that the average time it takes for them to complete an investigation is between 1-6 months, which is more than what the law prescribes.
- 38.5% IC/LC members stated they found it difficult to investigate a complaint of sexual harassment and 8.3% members indicated that they were pressured by superiors to diminish or dismiss a complaint.
- On a scale of 1-5 with 1 being the least challenging and 5 being the most challenging, most IC/LC members rated undertaking an investigation as 3 or higher. This means that members found varying ranges of difficulty when undertaking a complaint.

3.5

Functioning of ICs/LCs:

- More people were aware about the concept of an Internal Committee

3.6

Consequences of Complaint:

- More than 50% of HR/CXOs and NGO members stated that they would follow the recommendations of the IC after an investigation has been completed and an individual has been found guilty.
- More than 40% of IC/LC members, NGO members and HR/CXO stated they would immediately terminate the individual who has been found guilty, along with other punishments.
- While majority of the employees responded 'Yes' to the question regarding the effectiveness of the organisation when dealing with sexual harassment, it is important to note that there were a significant number of respondents who replied 'Not sure' to the same question.
- When asked about legal provisions for protection from sexual harassment, 40.4% respondents indicated that they were 'Not sure'.

'The victimisation of the victim, post the closure of the case has been a challenge. The sensitization of the immediate eco-system (peers and juniors), manager sensitivity program and educating the complainant and respondent that the responsibility of confidentiality also lies with them, in fact more than the IC members. The witness briefing on confidentiality and the sensitivity of the issue is an on going education.'

“

We must recognise that sexual harassment is a systemic issue which needs to be dealt through a multi-pronged approach.

While termination is an immediate step that can be undertaken, it needs to be supplemented with further steps to ensure that the perpetrator does not repeat their actions in subsequent workplaces.

—

JURISPRUDENTIAL REVIEW

- 59 The Constitution is an ever-evolving part of Indian governance, one that is amended frequently to meet contemporary needs.
- 60 The different acts therein are interpreted by the Judiciary, making it important to understand their process in order to analyse the Act effectively and holistically. This section, therefore, focuses on 11 different cases under the Act which were adjudicated upon by the Courts in 2020.
- 61 These cases are representative of how the process of interpretation and evolution continues as there are still questions regarding the different aspects of the Act such as, the definition of the term 'workplace', the powers vested to the Internal Committee, and what constitutes as sexual harassment, amongst others.



It is important to understand that sexual harassment is less about sex but more about power, while the important and foremost aspect is that a woman should be treated equally with dignity and respect.

Smita Paliwal

Partner-Dispute Resolution, King, Stubb & Kasiva, Advocates & Attorneys



What Constitutes Sexual Harassment?

1. *In a case before the High Court of Bombay, the court disagreed with the decision of the Internal Complaints Committee ("IC") and observed that the IC had failed to take into consideration the additional circumstances provided under section 3(2) of the PoSH Act, which also amounts to 'sexual harassment', including the creation of an intimidating or hostile environment for women, as well as the humiliating treatment which is likely to affect the health and safety of a woman. The complainant had claimed that her subordinate used abusive and unprofessional language against her, which the IC had concluded as act amounting to misconduct and misbehaviour.*
2. *In another case before the Delhi High Court, the court held that there must be physical contact with an undertone of a sexual nature to constitute 'sexual harassment' under the PoSH Act. It opined that an altercation in the context of an unwelcoming environment prevailing at the workplace is not a case of sexual harassment.*
3. *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."*

Vikram Shroff

Head, HR Laws (Employment & Labor) at Nishith Desai Associates

Some Noteworthy Judicial Pronouncements of 2020

K. Karnamaharajan v. The Registrar, Madurai Kamaraj University and Ors.	47
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5.1

K. Karnamaharajan v. The Registrar, Madurai Kamaraj University and Ors.

Court: Madras High Court

Last judgement passed: January 2020

Year of incident: 2018

- 62 The Madurai Kamaraj University (MKU) Syndicate had dismissed a Professor for allegedly sexually harassing a Research Scholar after the IC of the college recommended the action, which was also ratified by Governor Banwarilal Purohit. The decision was announced during a special syndicate meeting held on the 22nd of August 2019, Thursday. The complaint was filed against Professor K Karnamaharajan, who was also the Head of the Centre for Film and Electronic Media Studies Department.
- 63 On the 7th of December 2018, a Research Scholar submitted a complaint to the then Registrar, V Chinniah, and the TN Higher Education Department Principal Secretary, stating that her research guide had emotionally abused her in the past year and wilfully cancelled her PhD registration via a memo on the 27th of December.
- 64 The complaint stated that while the complainant was on leave, her research guide recommended cancelling her PhD registration to college authorities. It was further added that the guide had an “unfair intention of making her spend time with him all the time”, and ordered her not to speak with other teachers and students of MKU. “He had expressed comments seeking sexual favours from me. He also received INR 2 lakh from me to issue a predated PhD registration order,” she stated.
- 65 On receiving the complaint, MKU’s Internal Committee conducted an inquiry into the allegations, and subsequently, dismissed the accused.
- 66 While this dismissal was ratified by the Governor¹⁷, a Madras High Court order quashing MKU Syndicate’s compulsory retirement was passed after it reached the conclusion that the respondents had failed to prove allegations of sexual harassment in the manner known to law. The order also directed the college to reinstate the Professor within a period of four weeks from the date of receipt of a copy of the order¹⁸.

¹⁷ TNN, 2019 | Sexual harassment: MKU professor given compulsory retirement

¹⁸ K. Karnamaharajan vs. The Registrar, Madurai Kamaraj University and Ors. (24.01.2020 - MADHC) : MANU/TN/4049/2020

5.2

P. Govindaraju v. The Manonmaniam Sundaranar University Ors.**Court:** Madras High Court**Last judgement passed:** January 2020**Year of incident:** 2018

67 The Syndicate Committee of Manonmaniam Sundaranar University (MSU) had resolved to relieve a Professor who was facing sexual harassment charges, under “compulsory retirement”.¹⁹

68 The accused, who was the former Head of the Department of Communication, allegedly called a Research Scholar at odd hours and sexually harassed her. The complaint was reported along with a CD of conversations to the Vice-Chancellor, the Registrar, the Women’s Cell of MSU, the Syndicate Committee and the Internal Complaints Cell of the college.

69 “The Syndicate Committee that met on Thursday resolved to relieve P. Govindaraju from the MSU under compulsory retirement,” said one of its members. The committee also decided to “terminate from

service”, three faculty members of the Department of English, for “dereliction of duty”.

70 The accused approached the Madurai Bench of the Madras High Court, appealing to be reinstated back to service, with benefits. The court concluded that since the last incident was stated to be on the 25th of January 2018, the enquiry initiated by the respondents was not within the time limit prescribed in Section 9(1) of Act, 2013. Therefore, the inquiry initiated against the petitioner was without jurisdiction causing the order of Compulsory Retirement to be quashed. The University was subsequently directed to reinstate the petitioner into his service as Professor in the Department of Communication with all attendant benefits, including arrears of salary.²⁰

19 The Hindu, 2018 | MSU professor Govindaraju ‘retired’ for sexual harassment

20 P. Govindaraju vs. The Manonmaniam Sundaranar University Ors. (24.01.2020 - MADHC) : MANU/TN/2612/2020

5.3

Vijayakumaran C.P.V. v. Central University of Kerala and Ors.**Court:** Supreme Court of India**Last judgement passed:** January 2020**Year of incident:** 2017

- 71 Vijayakumaran C.P.V. was appointed as an Associate Professor in 2017 and within a month of his appointment, approximately 23 female students complained against the Professor on grounds of sexual harassment. An Internal Committee (IC) was constituted to investigate the matter as per the statutory regulations of the UGC (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015.
- 72 The IC unanimously found the accused guilty of acts of sexual harassment and recommended that appropriate action be taken by the Executive Council of the University. It is pertinent to note that as per the rules of the University, any teacher/academic staff could be dismissed from service on grounds of misconduct, as long as reasonable opportunity has been given to the accused to provide their stance.²¹
- 73 The Executive Council of the University decided to terminate the accused, after receiving the IC's report, along with other documents.
- 74 The accused challenged the order before the High Court of Kerala, as being ex facie (on the face of it) stigmatic. However, the Court concluded that it was a simpliciter termination order with no stigma attached. The Division Bench of the High Court was of the same opinion and therefore, the appeal was rejected.
- 75 The accused subsequently appealed the order before the Supreme Court of India. The Court held that the termination order was illegal and ex facie (on the face of it) stigmatic because of it being issued without the appellant undergoing an inquiry as per the service rules. The Supreme Court mandated the University to set aside the termination order and directed it to start a proper departmental or regular inquiry as per the service rules.

21 Ungender, 2020 | POSH Updates: Enquiry necessary as per service rules if misconduct is proved by ICC

5.4

Keshab Ch. Panda v. Sambalpur University and Ors.**Court:** Odisha High Court**Last judgement passed:** April 2020**Year of incident:** 2002

- 76 This case establishes clearly that the framing of charges in a sexual harassment case by any disciplinary authority is not permissible after the preparation of an inquiry report by a Complaints Committee.
- 77 The ruling came in the 17-year-old case of Dr Keshab Chandra Panda, a Reader of Sambalpur University, against whom a Junior Research Fellow had brought allegations of sexual harassment. The Court quashed the charges framed against Panda in 2003 as well as the show cause notice of dismissal from service issued to him in 2004.
- 78 The Reader was suspended by the University due to allegations of sexual harassment. The recommendation for suspension was made after an inquiry by a retired District Judge, who was appointed as the Inquiring Officer (IO). Post the inquiry and the subsequent recommendation, the Registrar issued the show cause notice of dismissal.
- 79 The Odisha High Court held that the definite charges are framed by the disciplinary authority on the basis of the allegations on which the inquiry is to be conducted and said, “Once the inquiry is completed by the Committee and inquiry report is prepared, the question of framing charges does not arise.”
- 80 The Court concluded that, “Once the report of the Committee is prepared at the conclusion of inquiry, it is to be treated as a finding/report in an inquiry into the misconduct of the delinquent and framing of definite charges thereafter by the disciplinary authority amounts to commencement of second inquiry which is not permissible in law,” a division bench of Justice Sanju Panda and Justice SK Sahoo ruled.²²
- 81 Panda had filed a writ appeal after a Single Judge Bench rejected his writ petition in August 2018. He had initially filed the writ petition in 2004 for quashing of the charges framed against him and also to quash the show cause notice issued to him on dismissal from service.
- 82 The two judge bench, however, held that no further inquiry was permissible in the case as the Syndicate had acted on the report of the Committee and imposed penalty of suspension. The view taken by the Single Judge was not considered to be sustainable in the eyes of the law. Accordingly, the charges framed against the appellant as well as the show cause notice of dismissal issued to the appellant in 2004 by the Registrar of the University were quashed.²³

²² The New Indian Express, 2020 | Framing of charges after inquiry report not permissible, says Orissa HC

²³ Keshaba Ch. Panda vs. Sambalpur University and Ors. (29.04.2020 - ORIHC) : MANU/OR/0068/2020

5.5

Nisha Priya Bhatia Vs. Union of India and ANR**Court:** Supreme Court of India**Last judgement passed:** April 2020**Year of incident:** 2007

- 83 Nisha Priya Bhatia was an employee of the Research & Analysis Wing who filed a complaint of sexual harassment against Shri Ashok Chaturvedi, the Secretary (R), and Shri Sunil Uke, the Joint Secretary, of the organisation at the time. She alleged that the officers subjected her to harassment by asking her to join a “sex racket” in the organisation to secure faster promotions.
- 84 A Committee was constituted to investigate the allegations, approximately 3 months after the complaint was filed. However, the Committee was reconstituted after it failed to comply with the Vishaka guidelines by not having an NGO representative or a representative from a body authorised to deal with sexual harassment.
- 85 In its ex parte decision²⁴, the Departmental Complaint Committee acquitted the accused of all allegations. As a consequence, Nisha Bhatia attempted suicide, which after being widely covered by the media, brought her mental well-being into question.
- 86 She was also declared “unemployable” as she had “exposed” herself, which was against Rule 135 of the 1975 Rules of the R&AW (RCS) Rules.
- 87 The matter was presented before the Supreme Court which directed the Union of India to pay a compensation of INR 1,00,000 to the petitioner for violation of the Fundamental Rights to life and dignity, as a result of the improper handling of her complaint. The Supreme Court further stated that “a non-hostile working environment is the basic limb of dignified employment.”²⁵

²⁴ A decision where a Judge takes a decision without requiring all of the parties to the dispute to be present.

²⁵ Supreme Court of India | Judgement Text

5.6

Bhuwan Chandra Pandey v. Union of India and Ors.²⁶**Court:** Supreme Court of India**Last judgement passed:** April 2020**Year of incident:** 2007

- 88 Bhuwan Pandey was a guest instructor on a 3-day paramedic course which included outdoor exercises on military topics such as map reading, navigation, etc. After the completion of night training, he was traveling back to Gwalden Station with several individuals, including two women trainees, one of whom he sexually harassed. He was dismissed from service after an investigation conducted by the Sashastra Seema Bal Academy found him guilty of sexual harassment.
- 89 Bhuwan approached the Uttarakhand High Court to appeal against this decision, arguing that the sole testimony of one person could not be considered sufficient for such action, given that there were no other witnesses to corroborate the complainant's testimony and therefore, his dismissal was grossly disproportionate.
- 90 The Court observed that it is a well-established principle by the Supreme Court that the standard of proof is lower than criminal cases for Sexual harassment suits within departmental enquiries. The Court also observed that:
- 91 ‘...the testimony of the complainant gives graphic and shocking details of acts of sexual molestation perpetrated by the petitioner on her so there isn’t any reason as to why the enquiry committee should be faulted for largely relying on the testimony of the complainant...’
- 92 Based on this argument, the Court dismissed the petition and reiterated that the burden of proof to be used is the ‘balance of probabilities standard’. Unlike a criminal case, an IC and/or an Enquiry Committee works under the notion that it is likelier that the incident of sexual harassment has occurred.
- 93 Therefore, the sole testimony of the target of sexual harassment will be taken into account and considered as proof during investigation.



While some might argue that the provisions of the Act are only applicable to the normal office setup and the physical office working space. However, under the Act, “workplace” has also been defined as places visited by the employees out of or during the course of employment including accommodation, transportation provided by the employer for undertaking such journey, etc. The definition provided by the statute itself is broad and does not restrict the place of work of the perpetrator to the physical environment of the workplace, it takes into account all possible access places/points/scenarios wherein the aggrieved woman can come into his contact.

Smita Paliwal*Partner-Dispute Resolution, King, Stubb & Kasiva, Advocates & Attorneys*

²⁶ Bhuwan Chandra Pandey vs Union Of India And Others (Writ Petition (S/B) No.153 of 2013)

5.7

Aditi Bramta v. State of Himachal Pradesh and Ors.²⁷**Court:** Himachal Pradesh High Court**Last judgement passed:** July 2020**Year of incident:** 2019

- 94 On being sexually harassed at her workplace, the petitioner filed a complaint with her organisation, which formed an Internal Committee(IC) post the complaint. The Committee's investigation found proof to support the petitioner's claims. Subsequently, the Committee was informed by a witness that they were also being threatened by the harasser.
- 95 However, the action suggested by the IC was to transfer the harasser to another department and close the matter. The petitioner approached the Himachal Pradesh High Court to appeal against the order of the IC,
- arguing that it is against the law as the Act had specified other penalties such as the deduction of salary, and termination of employment, amongst others, under Section 13 (3),²⁸ as well as Section 15²⁹ of the Act.
- 96 The High Court quashed the decision of the IC stating that the IC had not followed the law when penalising the accused. The Court further stated that merely transferring the accused is not enough and ordered the organisation to create a new IC and, ensure that they work in accordance with the Act and give an appropriate penalty to the accused.

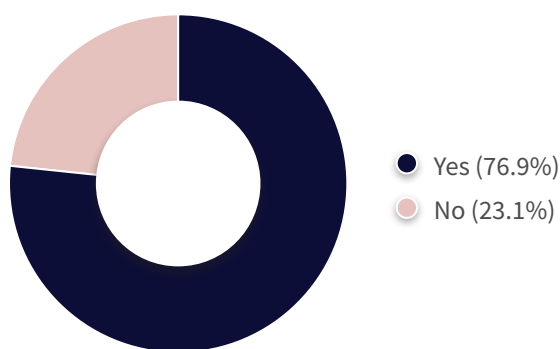


Fig.20 Regarding false/malicious complaints, IC/LC members were also asked in the survey on whether a complaint is considered false/malicious due to lack of proof (Fig.20). 76.9% said no, a complaint is not categorised as false/malicious because it is difficult to prove a case of sexual harassment due to little or no evidence, while 23.1% said yes.

While it is encouraging to see that the majority of the respondents do not consider a complaint false/malicious due to lack of evidence, almost 1/3rd stated 'Yes' which can be concerning, as lack of proof does not make the complaint false/malicious as stated under Section 14 of the Act as well as by the judiciary in numerous cases (chapter 4).

²⁷ Aditi Bramta vs State Of H.P. And Ors, CWP No. 1628/2020

²⁸ Under Section 13 (3) of the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal Act, 2013, the following has to be taken into account when deciding the punishment for the accused:

- (i) to take action for sexual harassment as a misconduct in accordance with the provisions of the service rules applicable to the respondent or where no such service rules have been made, in such manner as may be prescribed;
- (ii) to deduct, notwithstanding anything in the service rules applicable to the respondent, from the salary or wages of the respondent such sum as it may consider appropriate to be paid to the aggrieved woman or to her legal heirs, as it may determine, in accordance with the provisions of section 15: Provide that in case the employer is unable to make such deduction from the salary of the respondent due to his being absent from duty or cessation of employment it may direct to the respondent to pay such sum to the aggrieved woman: Provided further that in case the respondent fails to pay the sum referred to in clause (ii), the Internal Committee or as, the case may be, the Local Committee may forward the order for recovery of the sum as an arrear of land revenue to the concerned District Officer."

²⁹ Under Section 15 of the Act to determine the sums to be paid to the aggrieved woman under Sec 13 (3.ii), the Internal Committee or the Local Committee shall have regard:

- (a) the mental trauma, pain, suffering and emotional distress caused to the aggrieved woman;
- (b) the loss in the career opportunity due to the incident of sexual harassment;
- (c) medical expenses incurred by the victim for physical or psychiatric treatment;
- (d) the income and financial status of the respondent;
- (e) feasibility of such payment in lump sum or in instalments."

5.8

Saikuttan O.N. v. Kerala State Electricity Board Ltd and Ors.³⁰**Court:** Kerala High Court**Last judgement passed:** August 2020**Year of incident:** 2020

97 This case was filed by Saikuttan O.N., a driver at the Cherthala Electrical Division, against his transfer to the Kalamassery System Operation Circle, alleging that it was an act of vengeance as he had submitted reports regarding irregularities. He further stated that a transfer during a pandemic poses a huge health risk to him. The Kerala State Electricity Board Ltd. argued that they had received a complaint from his Controlling Officer. The Officer had alleged that Saikuttan was harassing ‘many women including his Controlling Officer who have stated that he had an ‘irresponsible attitude’ and that his behaviour ‘caused immense stress and mental agony to her and the three other lady staff.’ After receiving this complaint, the board

constituted an IC and under Section 12 of the Act³¹, ordered a transfer of Saikuttan as an interim measure until the IC completed its investigation.

98 The Court agreed with the Board stating that Saikuttan being there would create a hostile environment and he could try to influence witnesses and interfere with the proceedings. The Court also found no violation of any law in his transfer. The petition was dismissed, and the transfer was considered legal for the court. In this case, the Court clarified the powers of the IC for transferring an individual while an investigation is ongoing against them, as is specified Section 12 (1) of the Act³².

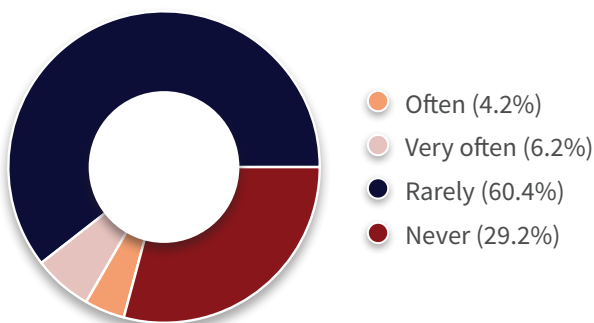


Fig.21 When asked how often employees felt uncomfortable by another employee's behaviour, 29.2% responded 'Never'. However, 60.4% selected 'Rarely', 4.2% selected 'Often' and 6.2% selected 'Very Often' indicating that most employees have felt uncomfortable at some point of time, albeit to varying degrees.

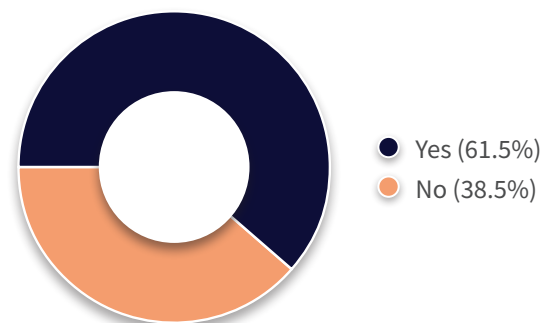


Fig.22 shows the responses of IC/LC members when they were asked whether they found it difficult to undertake an investigation for sexual harassment. 61.5% stated 'No' but more than 1/3rd of the respondents (38.5%) answered 'Yes'.

As stated by one of the respondents

'In one of the case the respondent was not at all cooperative in the beginning but when we show him legal powers that time he started cooperating.'

30 Saikuttan O.N. V. Kerala State Electricity Board Ltd and Others, WP(C).No.12087 OF 2020(I)

31 Section 12 of the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act focuses procedural rules for the IC during the Pendency of an Inquiry pertaining to the accuser and accused.

32 Section 12 'Action during pendency of inquiry:

(i) During the pendency of an inquiry on a written request made by the aggrieved woman, the Internal Committee or the local Committee, as the case may be, may recommend to the employer to—
 (a) transfer the aggrieved woman or the respondent to any other workplace; or
 (b) grant leave to the aggrieved woman up to a period of three months; or
 (c) grant such other relief to the aggrieved woman as may be prescribed.'

5.9

Sunita Devi Vs. State of Himachal Pradesh and Ors.³³**Court:** Himachal Pradesh High Court**Last judgement passed:** March 2020**Year of incident:** 2019

99 The petition was filed by Sunita Devi who was serving as a Health Officer in the Health and Family Welfare Department at the Community Health Center (CHC) in Syri, Solan, District Himachal Pradesh ('the Respondent'). She filed a complaint on the 19th of September 2019 against the Block Medical Officer (BMO) on grounds of sexual harassment. On the 4th of December 2019, she was transferred from the CHC in Syri to the one in Sillai district because of the complaint filed by her.

100 The Respondent argued that several complaints were filed against her where the allegations included character assassination and mental torture (by BMO), absenteeism, non-cooperation, and misbehaviour with the general public.

101 On the 17th of October 2019, the IC filed a preliminary inquiry report. Pending the inquiry, Sunita requested the transfer of the BMO from CHC Syri to another location, to ensure that the inquiry was conducted in a free and fair manner.

102 The BMO was transferred on the 21st of November 2019. She also requested a transfer for herself. After

examining her request, the transfer was approved to CHC Sillai. Based on these circumstances, the Respondent argued that it cannot be said that the transfer order was issued to harass Sunita Devi.

103 The Court dismissed the Petition by Sunita Devi reiterating the observation made by several Judges across the country, as well as the Himachal Pradesh High Court:

104 "Transfer of an employee is the exigency of service and prerogative of the employer. Employee has no vested right to get a posting at a particular place for a particular time. It is within the exclusive domain of the employer to determine as to at what place and for how long the services of a particular employee are required. The Court does not have the power to annul the transfer order only on the ground that it will cause personal inconvenience to the employee as these matters fall within the exclusive domain of employer." This is also based on a recent order passed by the Himachal Pradesh High Court in July 2020 where it laid down certain guidelines regarding transfer of individuals.³⁴

As stated by one of the respondents

'In one of the case the respondent was not at all cooperative in the beginning but when we show him legal powers that time he started cooperating.'

³³ CWP No. 1978 of 2019

³⁴ Himachal Pradesh High Court on Transfer of Complainant pending inquiry and Retaliation | PoSH At Work, MoWCD

5.10

Silajit Guha Vs. Sikkim University and Ors.³⁵**Court:** Sikkim High Court**Last judgement passed:** December 2020**Year of incident:** 2019

- 105 Silajit Guha, a Sikkim University Professor was accused of sexually harassing one of his students. When the student approached the University, the Internal Committee (IC) took up the matter and upon completion of the investigation, found the accusation to be true. The University decided to terminate the Professor's employment with the University.
- 106 After this decision, the Professor approached the Sikkim High Court to appeal against this decision. He argued that the allegation of harassment against him cannot be investigated by the IC due to lack of jurisdiction. He further added that since the alleged harassment took place outside the University, at a hotel room during a wedding reception outside of University business, the IC had no jurisdiction and therefore, his termination from the University should be quashed. He also argued that he was not given the 30-day time period to appeal against the decision as stated under the UGC Guidelines.
- 107 The Court concluded that no further action should be taken to complete the termination from University. However, the Court rejected the Professor's plea to resume his duties at the University and continue as the Head of Department, as it would create a hostile environment for the target, as well as other students who have also been harassed by him.
- 108 In December, the Court gave its final judgement stating that it would refrain from passing an order over the jurisdiction of the IC as it was pending before the Executive Authority of the University³⁶. Additionally, it would also not quash the current decision of the IC as it met all other legal requirements regarding the procedure.
- 109 Furthermore, the Court stated that there is a violation of Professor Guha's right to appeal the decision and stated that the Executive Council of the University is to conduct the investigation into the appeal, while clearly mentioning that:
- 110 "The observations made on the facts of the case is only for the purpose of addressing the arguments made by the parties and it shall not influence the Executive Council before whom the appeal is pending. All issues and questions which are open to challenge under the law and taken in the appeal shall be decided by the Executive Council in its jurisdiction as the Appellate Authority".

35 Silajit Guha V. Sikkim University and Others, WP(C) No. 30 of 2019

36 Senior member of the organisation, in this case individuals such as Vice Chancellor, University Registrar etc.

5.11

Sreeleja Nair Vs. Sri Lanka Airlines Ltd.³⁷**Court:** Patiala House Court, New Delhi**Last judgement passed:** December 2020**Year of incident:** 2009-2010**Case status:** Pending Sentencing

- 111 The petition was filed by Sreeleja Nair, an employee of Sri Lanka Airlines in India who had been working with the airlines since 1999. On the 8th of October 2009, while working as the Sales Executive at their Delhi office, she was called by her then local manager Lalith De Silva to his office, where he misbehaved and sexually harassed her. It was alleged that the Airline deliberately delayed the inquiry into the matter while the complainant continued to face sexual harassment.
- 112 With the Airline delaying the inquiry, the Police decided to conduct an inquiry into the matter on the behest of the National Commission for Women and filed an FIR against the accused manager. He was found guilty by the Court in September 2020 for outraging the modesty of the complainant.
- 113 In her petition, Sreeleja also alleged that in 2014, the Department of Women and Child, had informed the Delhi High Court that the Airlines did not have an IC, which further violates Section 26 of the Act³⁸. Sri Lanka Airlines, in response, argued that they did have an Internal Committee consisting of persons from Sri Lanka and one person from an NGO in India. It was considered a serious non implementation of the Indian Laws³⁹.
- 114 The Court concluded that the Airline had violated Section 4 of the Act and was therefore guilty under Section 26 of the Act for not having an IC when the incident took place. A fine of INR 50,000 was levied against them.

³⁷ Sreeleja Nair Vs Sri Lanka Airlines Ltd. | CC NO.38533/2016

³⁸ Section 26:

“Penalty for non-compliance with provisions of Act.—

(i) Where the employer fails to—

(a) constitute an Internal Committee under sub-section (1) of section 4;

(b) take action under sections 13, 14 and 22; and (c) contravenes or attempts to contravene or abets contravention of other provisions of this Act or any rules made thereunder, he shall be punishable with fine which may extend to fifty thousand rupees.

(ii) If any employer, after having been previously convicted of an offence punishable under this Act subsequently commits and is convicted of the same offence, he shall be liable to—

(a) twice the punishment, which might have been imposed on a first conviction, subject to the punishment being maximum provided for the same offence: Provided that in case a higher punishment is prescribed under any other law for the time being in force, for the offence for which the accused is being prosecuted, the court shall take due cognizance of the same while awarding the punishment;

(b) cancellation, of his licence or withdrawal, or non-renewal, or approval, or cancellation of the registration, as the case may be, by the Government or local authority required for carrying on his business or activity.”

³⁹ Talwar, S (2020) | Non-Constitution Of Internal Committee Under PoSH Act In Violation Of Mandate Under Indian Laws; Delhi Court Punishes Srilankan Airlines



CONSTITUTION OF THE IC

- 1 *The Madhya Pradesh High Court imposed a fine of Rs. 50,000 on the petitioner, a renowned hospital in Indore, for not having constituted an IC as per the PoSH Act. An employer having at least 10 employees is required to constitute an IC at each of its workplaces to investigate complaints pertaining to workplace sexual harassment of women. The court also directed the hospital to pay a compensation of Rs. 25,00,000 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.*
- 2 *In a case before the Punjab and Haryana High Court, the court ordered the employer to re-constitute the IC since there was no external member. 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.*
- 3 *In a matter before the Rajasthan High Court, it was held that the external member need not necessarily have a legal background or knowledge in the aspects of sexual harassment against women. Having experience in social work is sufficient for being a valid member of the IC.*
- 4 *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 the employer's responsibility to constitute a proper IC.*

Vikram Shroff

Head, HR Laws (Employment & Labor) at Nishith Desai Associates

“

Due to the composition of redressal committees, which do not necessarily include members from the legal profession, it becomes imperative for courts to intervene.

As with any law, PoSH also requires judicial intervention, in order to develop the jurisprudence surrounding the Act and consequently, make it more robust.

—

THE WAY FORWARD



For the most part, implementing the law even in letter, let alone in spirit, remains a challenge. The obligation to prevent sexual harassment, which to my mind is the most significant contribution of the law, has been reduced to tokenistic trainings.

Madhu Mehra

Executive Director, Partners For Law In Development

- 115 The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is a crucial legislation for women in workplaces across sectors, be it formal or informal. The inclusion of a special provision covering domestic workers and what shall be defined as the workplace for them allows the Act to be broad and cover more work areas.
- 116 However, shortcomings of the Act include lack of information on the ground, no support to the individuals in the informal sector⁴⁰, and the fear of complaints being labelled false/malicious.
- 117 The following section aims at highlighting some of these shortcomings and suggest policy improvements to make the Act more holistic. These recommendations have been drafted on the basis of the 3,395 unique responses received through the survey, expert opinions, as well as a literature review. This chapter amalgamates all of these into recommendations to suggest policy improvements.



Though it's been almost seven years since the PoSH Act was introduced, however, it still seems like a long road which needs to be travelled in order to attain the objective behind introducing the legislation, protection against sexual harassment and the right to work with dignity. The ground reality is very different from the overall picture which is painted and shown to the management.

Smita Paliwal

Partner-Dispute Resolution, King, Stubb & Kasiva, Advocates & Attorneys

6.1

The Act

6.1.1

DEFINITION

118 While the current definitions under the Act are inclusive in many ways, there is still scope for expansion to make them more holistic:

Workplace:

- 119 While the Act currently provides an extensive definition of the workplace⁴⁰, to understand it only in this reference narrows the scope of the Act since it does not take into consideration the cyberspace. This is even more significant given that many workplaces shifted online due to the COVID-19 pandemic.
- 120 Therefore, the definition of the 'workplace' should further be expanded, taking into consideration the changing landscape of how individuals understand a workplace, i.e. in the cyberspace. This could also be in light of The Information Technology Act, 2000, which prescribes punitive measures pursuant to Sections 67 and 67A of the Act which can attract penal provisions 354A, 354D or 509 of the Indian Penal Code.
- 121 In that regard, expanding the definition to include the cyberspace, sexual harassment on social media, and an organisation's online chat systems, will further widen the scope to include individuals working from home.



After 2020, many workplaces have been following work-from-home policies. Even today, many employees are unaware of how the PoSH law would apply even while working from home. Section 2(o) of the PoSH law defines "workplace" in an inclusive and non-exhaustive manner which under its subclause (vi) includes 'a dwelling place or a house'

In 2008, the Delhi High Court in Saurabh Kumar Mallick vs CAG (2008) held that the expression "workplace cannot be narrowly described to confine its meaning to the commonly understood expression of an "office" – that is a place where any person of the public could have access". It also made a reference to Vishaka v. State of Rajasthan (1997) case which placed emphasis on the object of ensuring that sexual harassment of working women is prevented and any person guilty of such an act is dealt with sternly.

In this context, in the landmark case of Saurashtra Salt Manufacturing Co. v. Bai Valu Raja and Ors., The Supreme Court opined on the applicability of the theory of 'notional extension' of the employer's premises. The Supreme Court also clearly set out that the scope of such an extension of the workplace would have to be determined in the facts and circumstances of each case. The court reasonably concluded that an employer's premises were not restricted to the strict perimeters of the office space and could be extended beyond such physical territory.

The law uses the phrase "any workplace" in Section 3 and "out of or during the course of employment" in Section 2(o) of the Act. This along with the series of cases makes it clear that anyone who is working from home is covered."

Malavika Rajkumar

Content Lead At Nyaaya (Lawyer | Policy Research And Advisory)

⁴⁰ "workplace" includes—

- (i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;
- (ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service;
- (iii) hospitals or nursing homes;
- (iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;
- (v) any place visited by the employee arising out of or during the course of employment including transportation by the employer for undertaking such journey;
- (vi) a dwelling place or a house;

- 122 Additionally, the definition should also be expanded to include those office engagements that take place out of the office, but flow from the office environment, for example team dinners, office parties, conferences, amongst others.

Applicability:

- 123 The Act, which is currently only applicable for women who face sexual harassment at the workplace, should be expanded to include and provide legal recourse to all genders facing sexual harassment at the workplace. It should be further clarified that acts of sexual harassment by those of same genders is also categorically covered by the Act.
- 124 Therefore, definitions such as those of ‘Aggrieved Woman’ as well as ‘Domestic Worker’ should be expanded to include all genders, given that it is not just women who face sexual harassment.



Despite the major progress on the gender rights front in the 21st century, PoSH Act recognizes that sexual harassment constitutes a violation of fundamental rights of women - their right to life and to live with dignity and carry on any profession, trade, or business in an environment free of sexual assault; but people across the gender spectrum are harassed. There is no dedicated legislative mechanism in place for men, transgenders, and anyone across the spectrum who isn't gendered female who face sexual harassment. Our suggestion is to make the PoSH Act gender-neutral, in an effort to be inclusive which may also lead to wider acceptance."

As stated by one of the IC/LC members in the survey regarding improvements to the Act: 'I would like to make provision for making the law gender-neutral as we have had cases of men being harassed. With the changing landscape in the diverse ecosystems, this accommodation is important.'

"In 2021, the Calcutta High Court has said that same-gender complaints are permitted under the law on sexual harassment at the workplace. The court held that people of the same gender can complain of sexual harassment against each other. A person of any gender can commit acts of sexual harassment at the workplace. However, the PoSH law clearly states that the complainant can only be an aggrieved woman unless the workplace has a gender-neutral policy, by which both the aggrieved person and the Respondent could be of any gender. Over time, courts will play a role in expanding the scope of the PoSH law to other genders even though it is explicitly not provided in the law.

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At GBL, anyone who is a victim of sexual assault at the workplace of any nature is entitled to invoke PoSH, irrespective of their gender. More organizations should opt to make this policy gender-neutral in order to ensure an equal representation at the workplace.

Lavanya garg and simra julka

Good business lab

6.1.2

Regular Examination

- 125 A system for conducting periodic checks and collating information on the implementation of the Act should be conducted at regular intervals. The onus of this should be handed out to the appropriate bodies, with state governments regularly examining the District Officers and checking if organisations with more than 10 members have an IC, as is mentioned under Section 21.
- 126 Though the Act stipulates a redressal mechanism for this, it fails to create a strong deterrent in a company's failure to do so. The standard fine under the Act is currently INR 50,000, however, this is a weak deterrent for any organisation with 10+ employees.
- 127 Therefore, while this amount should increase, other forms of redressals for such organisations should also be put in place.
- 128 Additionally, public transparency forms an important aspect of the Act, further increasing the safety of women by increasing awareness. In that, a list of those companies

that are found in violation of the Act in any way should be uploaded and regularly updated in the public domain.

6.1.3

Time Period

- 129 The stipulated time period for reporting an incident of sexual harassment is 3 months, which can be extended upto a maximum of 6 months. However, given that sexual harassment is a traumatic experience, it could take longer for the target of the harassment to file a complaint. Therefore, restricting the time period to a maximum of 6 months could prevent the adequate addressal of many incidents of sexual harassment.
- 130 Therefore, the time period for reporting an incident of sexual harassment should be increased from the stipulated period of 3 months, taking into consideration factors such as mental health, physical stress, societal pressures, amongst others.

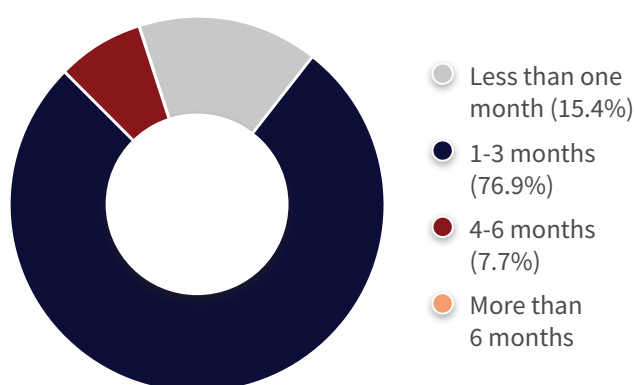


Fig.23 shows the amount of time on average, as per IC/LC members, it takes for a complaint to be investigated. 7.7% stated 4-6 months and 15.4% said less than one month. This could indicate that while there is a need for complaints of such nature to be dealt with promptly, investigations require time and committee members need that to undertake a comprehensive investigation.

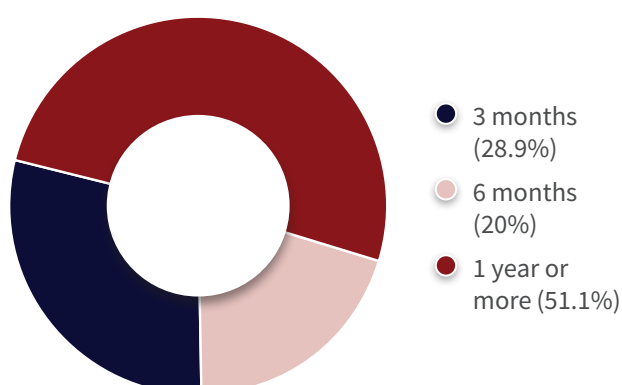


Fig.24 shows the replies by employees when asked how much time should be given to an individual to report an incident of sexual harassment at the workplace. 51.1% said 1 year or more, 20% said 6 months and 28.9% said 3 months. Collectively, over 71.1% respondents felt that the current period of 3 months, as laid down in the Act, is not enough time for an individual to report a case of sexual harassment.

6.1.4

Filing a Complaint

- 131 There is no provision in the Act to deal with anonymous complaints, which could prevent many women from filing official complaints due to social stigmas, concerns for personal safety, fear of it affecting one's career, amongst many such factors.
- 132 The Act should provide the complainant the option to keep their identity hidden as a way to encourage more women to report harassment, with the least possible hindrances.



The PoSH law and rules emphasize on the nature of the complaint to be in a written request format as well as the fact that certain persons can file a complaint on a woman's behalf - including her relative, coworker etc. Even though there is no formal recognition of anonymous complaints given in the law, many PoSH policies at workplaces allow for the same. Without a formal structure given in the law, the complaining mechanism and adjudicating process for anonymous complaints lie within the ambit of the IC of the workplace and thereby can result in situations where the process of natural justice is not followed thereby disadvantaging the complainant."

As per a report published by the Ministry of Women and Child Development, the number of cases of sexual harassment in the workplace registered in India has increased by 54%, i.e. from 371 cases in 2014 to 570 in 2017. Further, even today, misogyny and inherent patriarchy sadly also find a role to play in PoSH adjudications in workplaces. The fear of reporting and the supposed yet real consequences of the same still discourage women despite the provisions protecting them in the law.

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Breach of Confidentiality Provisions

Organisation should ensure that the identities of the parties, that is, complainant and the accused should remain confidential both during and after completion of the proceedings under PoSH. This is one of the biggest impediments which deter the complainant from filing any complaints and approaching the IC in order to avoid the stigma and the witch hunt associated with it. Provision and processes must be set by the IC in consultation with the employer to ensure that confidentiality of the proceedings are maintained, and parties who are in breach should be penalised."

Smita Paliwal

Partner-Dispute Resolution, King, Stubb & Kasiva, Advocates & Attorneys

6.2

The Internal Committee

- 133 As per Section 4 of the Act, every employer of a workplace shall, by an order in writing, constitute a Committee to be known as the Internal Complaints Committee.
- 134 Provided that where the offices or administrative units of the workplace are located at different places or divisional or sub-divisional level, the Internal Committee shall be constituted at all administrative units or offices.
- 135 For those organisations who do have ICs in place, it is important to examine the scope of their functioning and ensure that they are facilitated in their work.



Many employees are still unaware of the PoSH laws, their rights and the duties of the stakeholders around them including the IC, employer etc.

Malavika Rajkumar

Content Lead at Nyaaya (Lawyer | Policy Research and Advisory)



The IC and the employer should ensure that the principles of natural justice are followed while conducting the proceedings under the PoSH Act, which means the complainant and the accused, shall be provided with equal opportunities to present their case, and no party should be condemned unheard.

Smita Paliwal

Partner-Dispute Resolution, King, Stubb & Kasiva, Advocates & Attorneys

6.2.1

Training IC Members:

- 136 Training members of the IC on the full scope of powers and processes under the Act is extremely crucial, irrespective of any existing knowledge they might possess. Additionally, IC Members should have standard written procedures constantly available to them, to ensure that all inquiries are conducted as per the letter of the law.

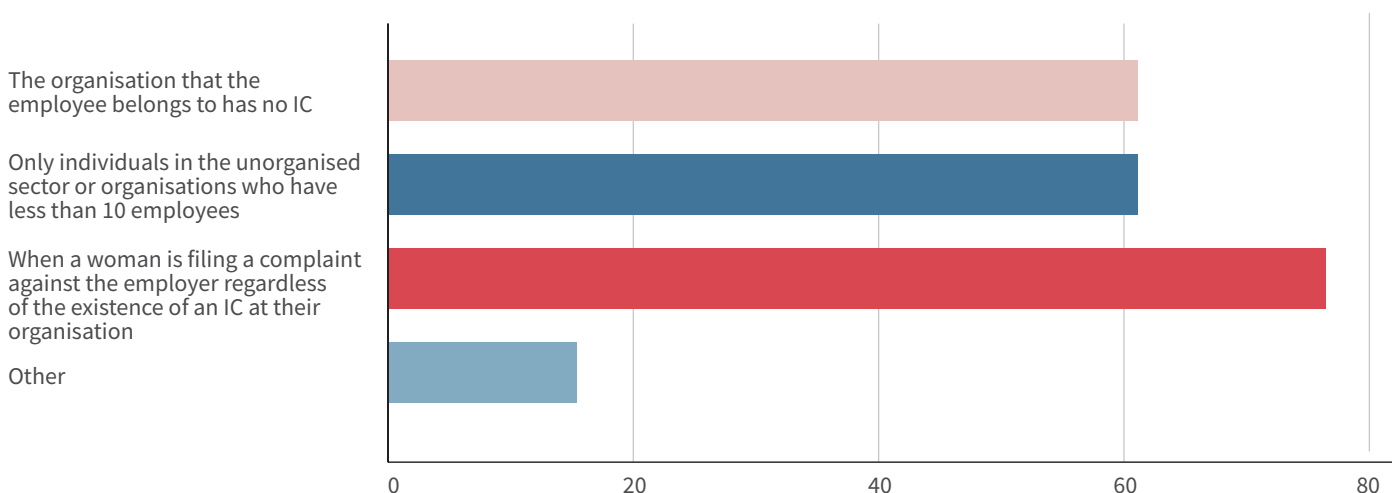


Fig.25 Members of the IC were asked questions regarding their knowledge of the Act, specifically to understand when an employee should approach the LC (Fig.25). This question had three options and the respondents could tick as many options as they thought were relevant.

While respondents were aware about the laws, they weren't aware of all points as the three options given by us were all legitimate reasons for an employee to approach the LC. Respondents who selected 'Other' as their answer, mentioned the unorganised sector which is correct but this survey focused on the organised/formal sector and therefore that option was not included.

6.2.2

Employee Awareness:

137 Information about the presence of an IC, its members, ways to contact them, and the redressal process should be made available to all members of an organisation. This information should include, but is not limited to:

- Systems and processes for addressing workplace harassment
- Powers of the IC to take action; and
- Procedure for filing a complaint

138 Additionally, conducting anonymous, periodic surveys for all individuals at the workplace, could further help

increase awareness of one's rights, as well as provide information to ICs on how they could proceed forward for undertaking activities such as knowledge dissemination and training.

139 Questions could be related to:

- An individual's perception of their own safety at the workplace.
- Rights of an employee, as stipulated under the Act.
- The type of acts that can be considered as sexual harassment, as stipulated under the Act.

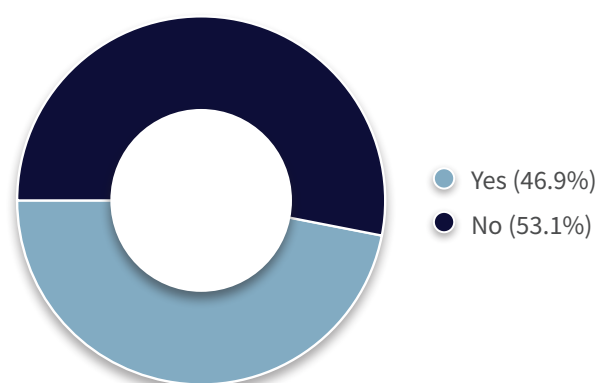
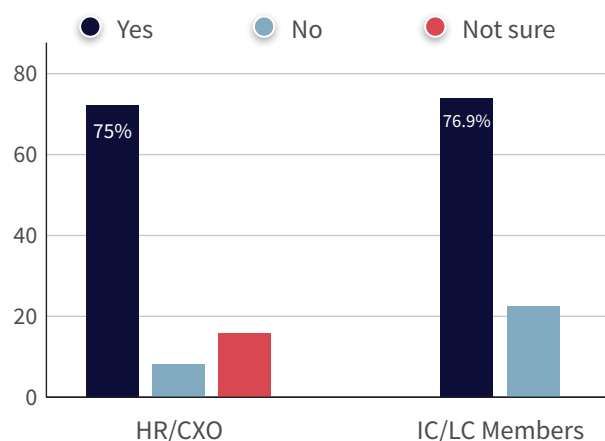


Fig.26 and 27 For training purposes, many organisations provide different types of materials such as brochures, pamphlets etc. explaining the different aspects of the Act and their own sexual harassment policy. We asked HR/CXO and IC/LC members whether they provide such materials as part of their training programmes. As per the results, 75% and 76.9% in both cases said 'Yes' respectively. (Fig.26) What is interesting to note, however, is that when employees were asked whether they have received such materials which explain their company's sexual harassment policy, 53.1% selected 'No' (Fig 27).

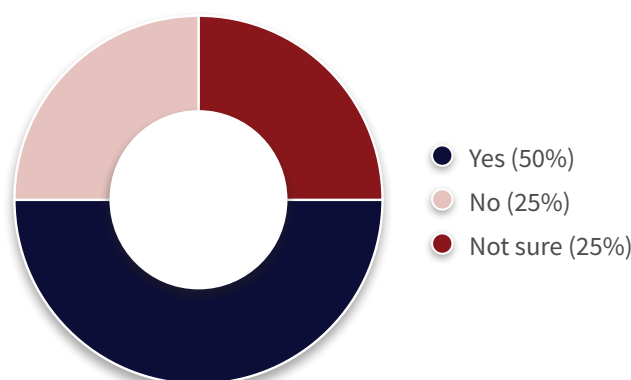


Fig.28 Employees were asked whether they feel there is a clear understanding among fellow colleagues regarding the Act (Fig.28). 50% responded 'Yes', they feel there is a clear understanding in the organisation while 25% responded no and not sure each. This is a good indicator that there is awareness amongst employees but this should be higher as 50% selecting 'No' and 'Not Sure', also indicates that more organisations need to spend time in generating awareness regarding the Act.

6.2.3

Employee Training:

- 140 Employee training through workshops and seminars, knowledge materials, posters, sessions on the Act, etc. are still lagging in organisations. In order to ensure that the Act achieves its desired aim, ICs need to take the onus of ensuring that such sessions happen periodically, methodically, and through formal organisational policies.
- 141 Additionally, trainings should be divided and targeted for employees at different levels/designations. This is not to indicate that the training should be entirely different, but that certain customisations for new hires, mid-level management, team/department heads, amongst others, are taken into account. It is especially important to ensure this since one's position in the company impacts the steps one can take in case they are made aware of harassment. To further ensure that trainings are being conducted efficiently, collaborative initiatives between ICs and LCs could be undertaken, especially for increasing awareness.



“As a part of Lawcubator, i have been working in the PoSH domain for the last five years and it has been wonderful to see how this piece of legislation has evolved.

In the initial days, we had a hard time convincing our clients to conduct awareness sessions for their employees and to set up their Internal Committees. Most organisations were unaware of the Act and its mandatory obligations and for others, it was just another compliance that could be handled by mere paperwork.

This outlook started changing after the #MeToo movement where we witnessed women opening up about their spine-chilling incidents. This movement acted as a catalyst for true change and there was a sudden rush in setting up Internal Committees, conducting awareness sessions, and introducing policies.”

Sreemoyee Malakar

COO, Lawcubator Technologies Private Limited

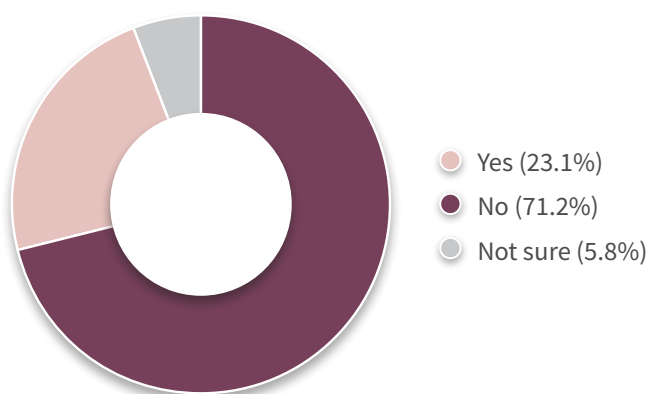


Fig.29 Employees were asked whether they have witnessed incidents of sexual harassment at their workplace (Fig.29). A majority of the respondents stated ‘No’ (71.2%), however, 23.1% of respondents said ‘Yes’ and 5.8% selected ‘Not sure’. Collectively, more than 1/3rd of respondents stated either ‘Yes’ or they were ‘Not sure’ whether they had witnessed incidents of sexual harassment at the workplace. This further indicates the need to generate awareness amongst employees on what constitutes sexual harassment.



We have received requests for conducting awareness sessions tailored to different groups, varying from sessions in regional languages to sessions for employees who are visually challenged!”

Sreemoyee Malakar

COO, Lawcubator Technologies Private Limited

6.2.4

Filing a Complaint:

142 An important aspect of the functioning of the ICs is the process of filing complaints. Currently, only formal complaints can be filed under the Act which limits the number of complaints being filed in the first place. While informal mechanisms aren't stipulated under the Act, until such time that they are, IC members should take active steps to address this and do as much as they can to make the process smoother and easier for employees.

143 Furthermore, active steps to ensure

that assistance is provided for the filing of such complaints is also important, and under the purview of IC members. This should especially be undertaken in recognition of the hesitancy that many targets of sexual harassment face prior to filing a formal complaint. Factors such as the impact on work environment, relations with other employees, personal and professional pressures, concern for one's career at the company, etc. should be addressed by IC members, in their attempt to facilitate the filing of complaints.

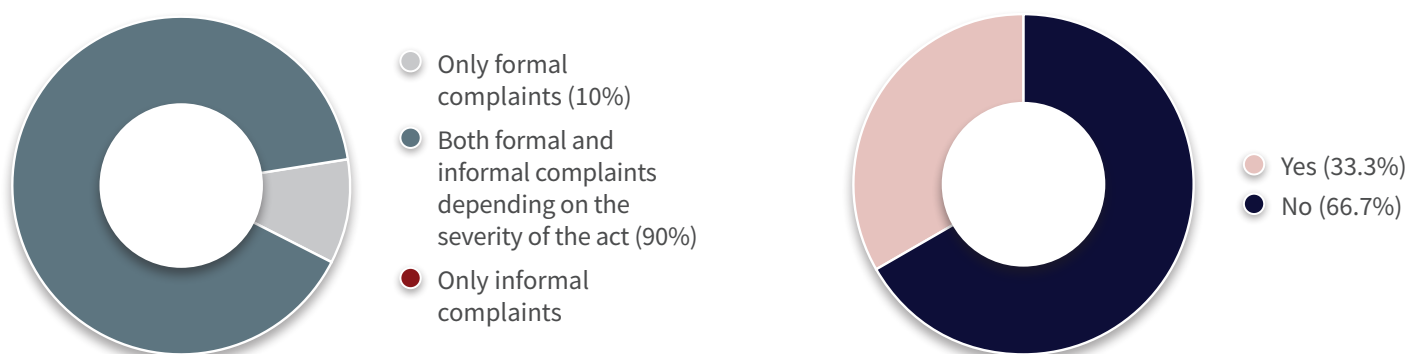


Fig.30 highlights the responses when HR/CXOs were asked their opinion on how the process of filling a complaint of sexual harassment can be made more efficient and effective. 90% said that complaints should be allowed to be both formal and informal depending on the severity of the act while 10% said only formal complaints should be allowed. While the Act only allows for formal complaints, informal complaints is something that can be analysed to make the complainant more comfortable in filing a complaint.

Fig.31 shows that out of those who have experienced inappropriate behaviour or misconduct at their workplace, 66.7% decided not to make a written/oral complaint and only 33.3% decided to file a complaint.

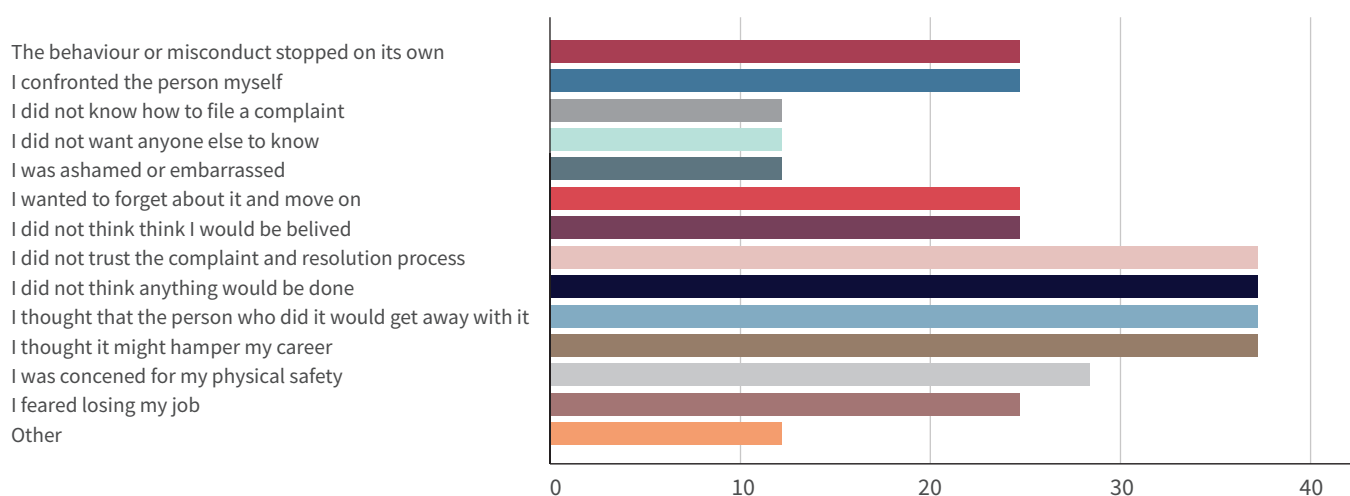


Fig.32 highlights the reasons provided by individuals who decided not to file a complaint. It can be seen that a majority of the respondents had a lack of trust in the procedures or believed that the perpetrator would get away without facing any repercussions, or that it would hamper their career or be a threat to their own physical safety, amongst other reasons (Figure 32).

144 Lastly, IC members should also build trust in the inquiry and redressal procedures among employees, to give them assurance of a just procedure.

6.3

The Local Committee

145 “Every District Officer shall constitute in the district concerned, a committee to be known as the Local Committee to receive complaints of sexual harassment from establishments where the [Internal Committee] has not been constituted due to having less than ten workers or if the complaint is against the employer himself. (...) The jurisdiction of the [Local Committee] shall extend to the areas of the district where it is constituted.”

146 The Local Committees (LCs) form an important aspect of the Act and are in place for those establishments who aren't mandated to have ICs in place

within their own organisations due to having less than 10 employees, or for when the complaint is against the employer. Therefore, LCs and members of LCs need to be facilitated in several ways to help them so they can fulfil their requirements.

6.3.1

Training Members of LCs:

147 To facilitate the members of the LCs, it is important to ensure that all members are aware of their own powers and the scope of their work. This can be done through:

- Conducting periodic trainings for LC members on the powers they possess under the Act.
- Ensuring that the personal bias of any member does not impact their work or the outcome of complaints.
- Ensuring that all members have a written procedure to rely on to make sure all inquiries are conducted as per the letter of the law.

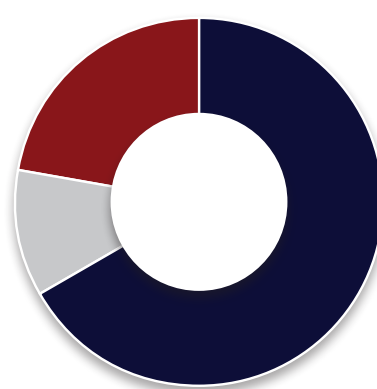
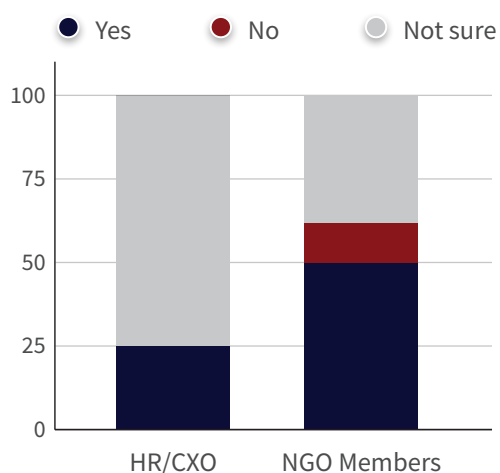


Fig.33 and 34 Local Committees work as a channel for complaints in organisations with less than 10 employees and if the complaint is against the employer. Figure 33 and 34 depict that there is a lack of knowledge about the Local Committee which is formed at the District level. A majority of the HR/CXO respondents (75%) are not sure whether their district has a Local Committee (Fig.33) and 66.7% do not know how to get in touch with them (Fig.34). It was found that in this area, NGO members are more aware with 50% stating 'Yes' in response to the question about their Local Committee (Fig.33).

6.3.2

Awareness on LCs:

As stated by one of the IC/
LC members in the survey:

*‘Having proactive
ex-officio member for
help of LC, display of LC
information on website of
district, training sessions
for LC members also
and for unorganised
sectors, delegate on LC
to check for compliances
to be done by private
organisations as there is
no check on it’*

- 148 It is important, even more so in the case of LCs, to ensure that information of their existence is circulated to establishments across the district.
- 149 Additionally, this information should not just be circulated to those organisations who do not have an LC, but also to those who do have ICs, to provide an alternative to complainants when filing their complaints.
- 150 Information that should be regularly circulated includes, but is not limited to:
 - Members of the committee.
 - The roles and responsibilities of committees.
 - The assistance that the committee can provide to individuals who have faced or witnessed harassment at the workplace.
 - Procedure for filing complaints.
- 151 As much as they can, LCs should also conduct surveys to increase their knowledge about the perception of sexual harassment, and the awareness of the Act, to better facilitate them when extending support, and for trainings and knowledge materials.



Some of the more horrendous experiences are being articulated by women working in the garment export sector in Gurgaon. Here, despite all the provisions of the law being tickmarked - an IC, prominent signs informing workers of committee members etc - female workers talk about routine harassment from male supervisory staff, the threat of firing if they speak up, and the complete blacklisting of their names from all other garment factories should they pursue the legal course and push for redressal. Almost all women working in the garment export sector are migrant workers, hence they are even more vulnerable to the diktats of the management.

Arti Jaiman

Station Director, Gurgaon ki Awaaz Samudayik Radio



Employees in workplaces which do not have such [Internal] Committees in the organisation should take collective action - through formal or informal means- to encourage the mandatory implementation of the law and for more effective training at workplaces.

Malavika Rajkumar

Content Lead at Nyaaya (Lawyer | Policy Research and Advisory)

6.3.3

Training:

- 152 As part of their work, LCs must conduct regular training programs, disseminate knowledge materials, as well as conduct workshops to increase awareness of the rights individuals possess when faced with sexual harassment.
- 153 Further, to be more effective in their initiative, LCs can collaborate with ICs, as well as local bodies such as the local market associations, Resident Welfare Associations, amongst others, to ensure the protection of women working in the informal sector, non-MCD sweepers, domestic workers, etc.
- 154 Additionally, periodic reviews to check the status of domestic workers in the district should receive special attention by making information available, including:
 - Rights under the Act
 - The manner in which they can approach the LC
 - Filing a complaint before the LC

6.4

The Organisation

- 155 While the role of ICs and LCs is crucial to the implementation of the Act, it is not solely their duty to address sexual harassment at the workplace. The blanket role remains to be that of the organisation's, which includes ensuring a safe work environment, effective human resource management, facilitating procedures, as well as setting the overall tone when it comes to addressing sexual harassment at the workplace.
- 156 There are several steps that an organisation can take to address sexual harassment at the workplace and facilitate the implementation of the Act.

6.4.1

Facilitating ICs:

- 157 Organisations must ensure that they have set up an IC in the manner stipulated by the Act, and thereafter, do all they can to facilitate the functioning of these ICs.
- 158 For those organisations who already have an IC, they must ensure its effective and efficient functioning, by ensuring that they are complying with the law, and allocating a dedicated budget for such committees.
- 159 Incorporating suggestions such as (given by employees on how organisations can improve their response to cases of sexual harassment were).

As suggested by an IC/LC member in the survey:

'Parties often get confused with respect to the functioning of the complaint mechanism and since they are not allowed to appoint a lawyer, they end up taking the advice of those who may not fully understand the process either. To avoid this situation there could be a way to give unbiased, facilitative' opinion.



I think we need to do more training and awareness programmes in all the institutions including government, educational institutions and private organisations.

Dr Alana Golmei

Founder, Pann Nu Foundation

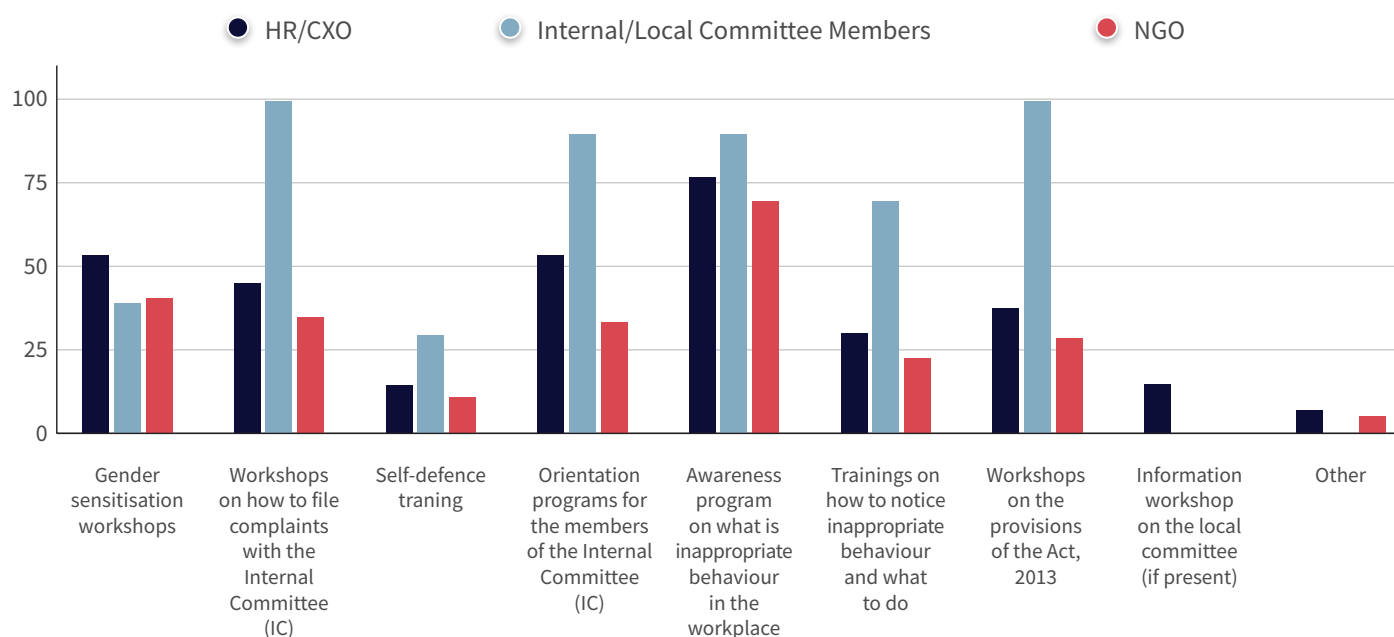


Fig.35 There are other types of training as well as indicated in figure 35, but there is a clear provision in the Act on what type of training should be provided. Fig. 35 shows the different types of training that the HR/CXO, NGO members and IC/LC members conduct in their organisations. Organisations require funding for undertaking such training.



Employers shall take on the responsibility of conducting timely workshops and training sessions regarding the applicability and the extent of applicability of provisions under the PoSH Act. Training sessions should be conducted in vernacular language in order to ensure that the employees/personnel can apprehend it accurately and are aware of the applicable laws and provision.

Smita Paliwal

Partner-Dispute Resolution, King, Stubb & Kasiva, Advocates & Attorneys

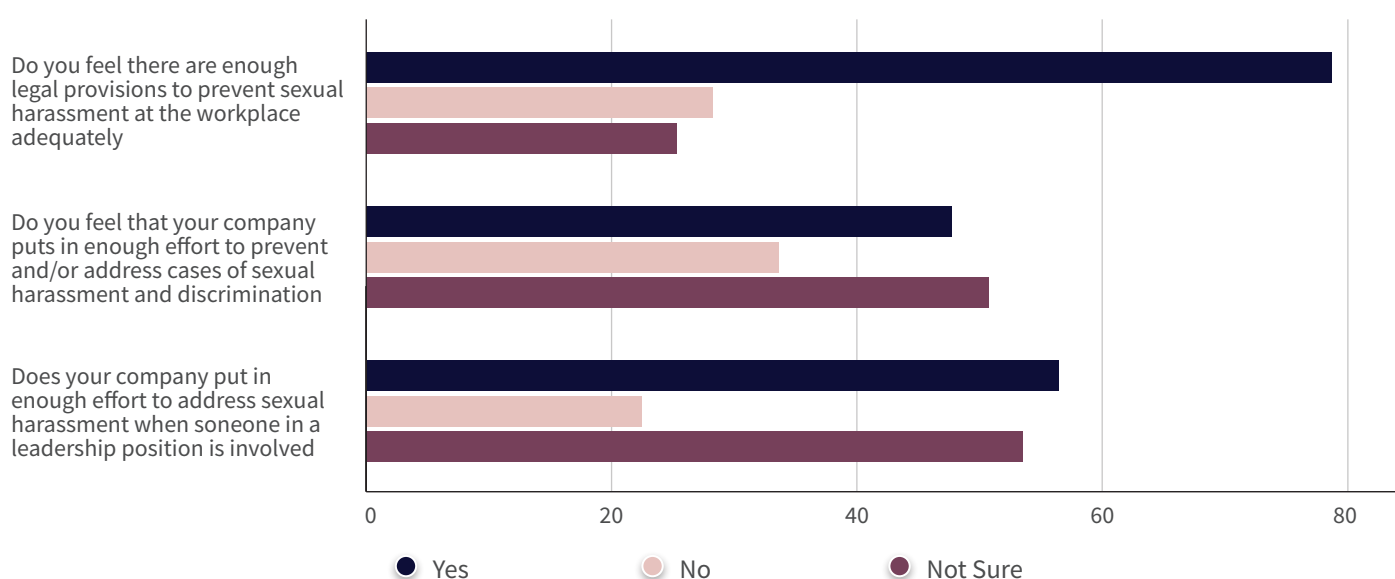


Fig.36 Figure 36 shows the responses employees gave when asked how they felt regarding their organisation's procedures to handle cases of sexual harassment. While 59.6% stated that they felt that their company puts in enough effort to prevent and/or address sexual harassment and discrimination, 21.3% said 'No' and 19.1% said 'Not sure'.

When asked about the legal provisions to prevent harassment, 36.2% selected 'Yes', 25.5% said 'No' and 38.8% said 'Not sure'. Furthermore, when asked whether their organisation puts enough effort when addressing sexual harassment by someone in a leadership position, 42.6% said 'Yes', 17% said 'No' and 40.4% said 'Not sure'.

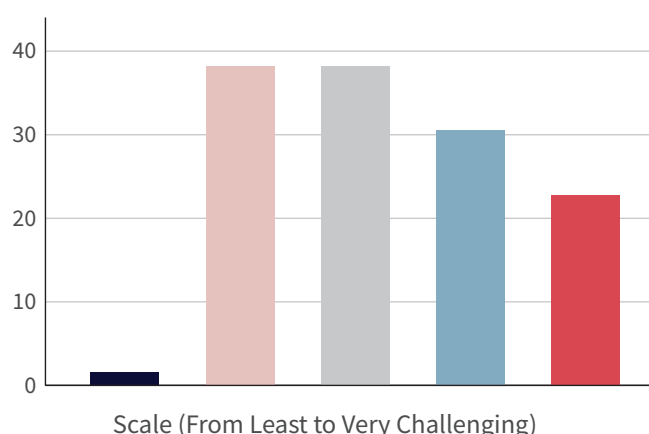


Fig.37 Shows the response of IC/LC members when asked to rate how challenging they found undertaking an investigation regarding a complaint about sexual harassment with 1 being 'Least challenging' and 5 being 'Very challenging'. A majority of respondents selected 3 and above.

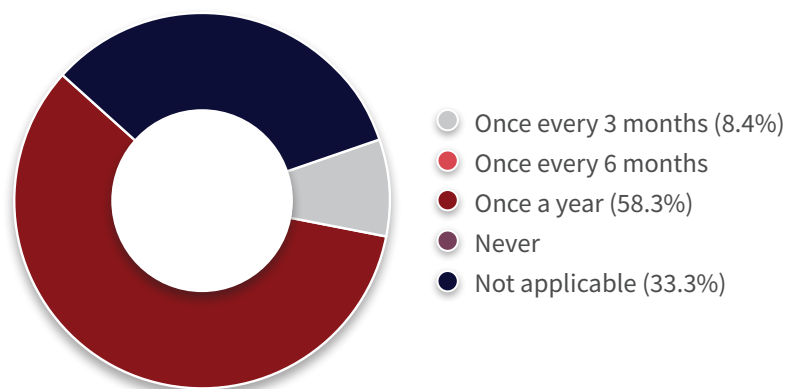


Fig.38 HR/CXO respondents were asked how often they review the material that they use as part of the training (Fig.38). Majority of the respondents (58.3%) selected once a year, while 33.3% stated it was not applicable meaning that their organisation either did not provide such material or they were not sure if it did, and when it was updated.

'It would be to deal with it with empathy and not give into seniority OR make it appear as if they are doing me a favor.'

'There needs to be better understanding of what construes sexual harassment. A touch could be friendly or be inappropriate for different individuals based on time and reasons. The training needs to be more clear on what can and cannot be acceptable behaviour at work place or at a office gathering even outside of the workplace.'

'The ICC and all the employees should be sensitized enough again and again so that no other innocent will face such injustice by the ICC and organization.'

'I would like a honest and transparent organisation which is free of any form of harassment and women are aware of their rights.'

4.4.2

Employee Training:

160 Organisations could also ensure compulsory training for new hires, about sexual harassment at the workplace on topics including, but not limited to:

- Actions which constitute as harassment under the Act including cyberspace sexual harassment.
- Individuals/Committees to approach when harassed.
- Your rights as an individual who has been harassed.
- How to approach someone who is harassing people.
- Methods of helping a person who has been harassed such as intervention training, providing support, assistance in writing formal complaints etc.



Fig.39 Information about the Local Committee is also part of the training provided to employees. Training is a key component of this Act to generate awareness about what is unacceptable under the Act. Figure 39 shows a comparison between the responses by the HR/CXO who conduct such training and the employees who are expected to attend them. While all HR/CXO stated that they conduct these training, only about half the employees who responded had attended such training, indicating a gap in terms of how the training is being conducted as mandated under the Act as well as on the sexual harassment policy of the organisation.

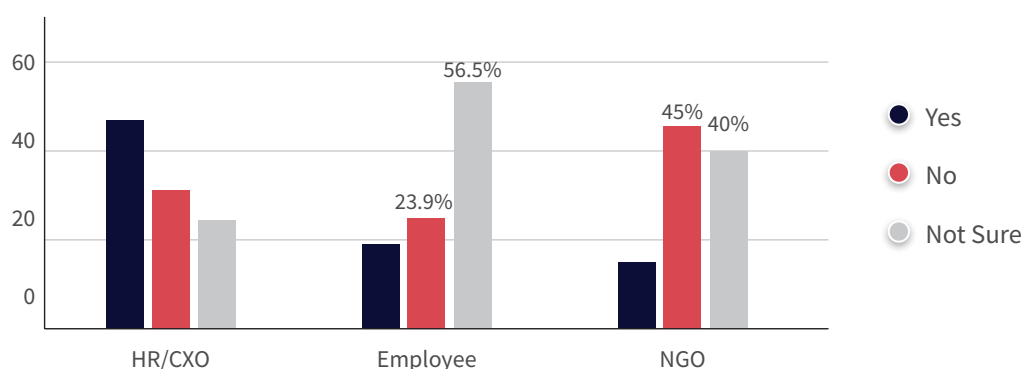


Fig.40 deals with the responses collected to understand the policy for sexual harassment in the cyberspace within organisations, given that a vast majority of individuals in the formal sector have been working from home due to the pandemic. The results were mixed with a majority of HR/CXO respondents stating they do have such a policy. However, 56.5% and 40% of the employees and NGO members respectively stated they were not sure. Also, 23.9% and 45% said no to the question respectively.

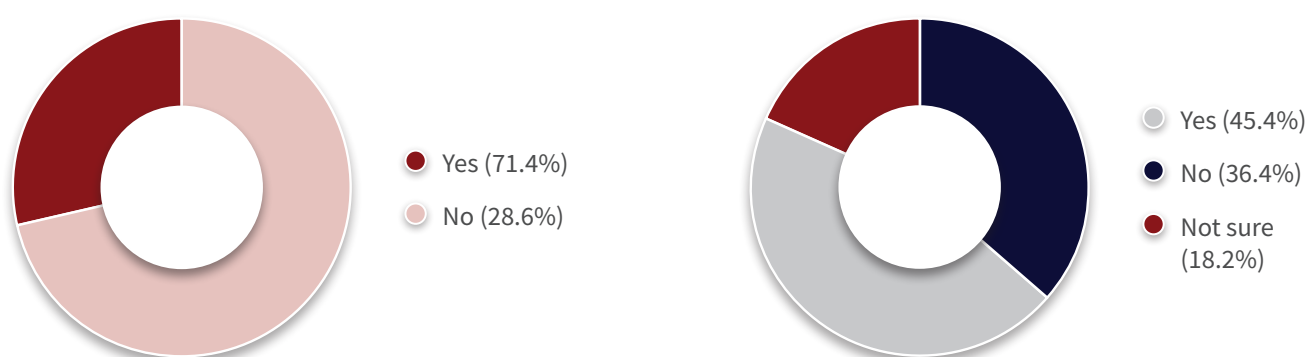


Fig.41 and 42 Bystander training includes activities which train individuals on how to help someone facing harassment as a bystander. This can include anything from walking between the individual facing harassment and the harasser to helping the target get out of such a situation. This question was asked to both the NGO and IC/LC members as we wanted to analyse whether this form of training is being provided to the workforce in India as well. Out of the IC/LC members who responded, 71.4% said yes and 28.6% said no (Fig.41). On the other hand, 45.4% of NGO members said yes, 36.4% said no and 18.2% said not sure, with not sure and no forming the majority (Fig.42).

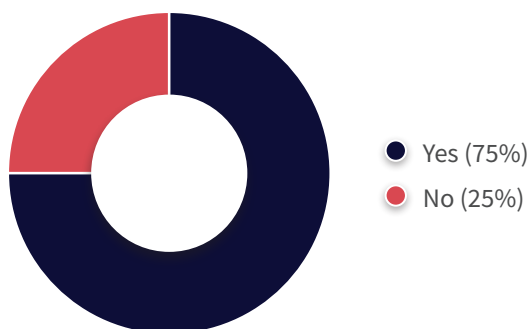


Fig.43 When asked how HR/CXO responded when they witnessed an employee or co-worker partake in activities which can be considered sexually harassing, 75% responded that they tried to stop it. At the same time, 25% said that they did not try to stop it. Even though the percentage of respondents not intervening was less, individuals should intervene when witnessing such incidents, especially HR/CXOs as they are expected to be the most aware of such policies within organisations. (Fig.43)



It is mandatory for employers to update the employees on the PoSH policy to include work from home situations and highlight several examples to indicate forms of harassment which may commonly take place. In the digital space where lines are blurred as compared to a physical space, it is essential that organizations work on a robust work from home policy to indicate instances or forms of sexual harassment that may occur.

Sreemoyee Malakar

COO, Lawcubator Technologies Private Limited



Having conducted trainings across the country for state governments, educational institutions and the private sector through my organisation, Partners for Law in Development (PLD), there are some observations and learnings. On the positive side, many from within women's groups, and just as many outside have equipped themselves as external members, several creative training modules exist as do examples of inquiry committees navigating institutional pressures. Some workplaces have gone well beyond addressing sexual harassment to also implement flexi work hours, maternity benefits to achieve inclusivity and equal opportunities more fully.

Madhu Mehra

Executive Director, Partners for Law in Development

4.4.3

Knowledge Dissemination:

- 161 Organisations should also promote information about the different forms of sexual harassment and the punishments for employees through posters, notices, and other forms of communication to ensure all employees are informed, aware, and up to date.
- 162 Conduct periodic reviews of the performance of the IC in areas including, but not limited to:
 - Performance of the IC in dealing with complaints.
 - Interacting with complainants and how safe they feel working with the IC.
 - Compliance with the Act in terms of remuneration and case deal around.
 - Promoting information about the Local Committee in your district to your employees as part of the training material.

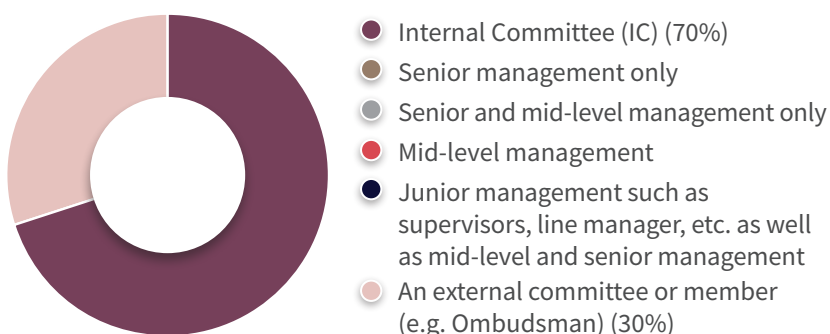


Fig.44 We wanted to see whether HR/CXO think that the powers of the IC should be given to someone else to ensure complaints regarding sexual harassment are addressed more efficiently and effectively (Fig.44). While the majority of respondents (70%) stated that it should be with the Internal Committee, 30% said an external committee or member like an Ombudsman should be given the responsibility.



Conflict of Interest Amongst the 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, 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 part of an inquiring officer, he must not conduct the inquiry.” 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. It is evident from some of these cases that the law continues to be strictly interpreted by the courts. Hopefully, over the next few years, with the government’s continued efforts and strict enforcement, the law will continue to play a crucial role in eliminating this [sexual harassment] social evil.

Vikram Shroff

Head, HR Laws (Employment & Labor) at Nishith Desai Associates

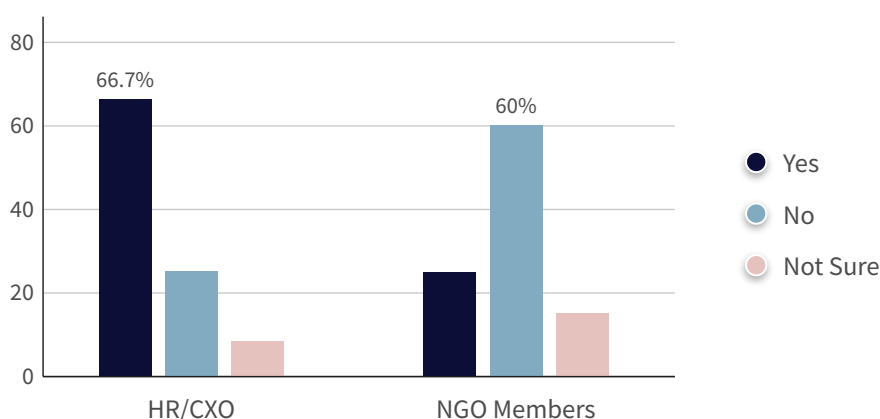


Fig.45 HR/CXOs and NGO members were asked whether they allow employees to give feedback on the training, knowledge of members, and to suggest changes etc. (Fig.45). While 66.7% of HR/CXO selected ‘Yes’, NGO members were the opposite with 60% saying ‘No’. Having a feedback mechanism in place is extremely important as it allows for improvements in the training and towards making the workplace safer for all individuals, especially women.



Seven years after the enactment of PoSH, and twenty four years after the Supreme Court judgment in the case of Vishaka vs State of Rajasthan (1997), which directed that this law be enacted – there is much to be concerned about. For the law appears to be limited to the urban organised sectors, and the myths surrounding sexual harassment persist. These challenges and tokenism call for concerted collaborations between women’s rights groups and the private sector, and much deeper commitment to fighting sexism and harassment within and beyond workplaces.

Madhu Mehra

Executive Director, Partners for Law in Development

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Taking everything into account, it becomes abundantly clear that there is a need to work across various aspects of both, the law and its implementation.

However, what is perhaps most important, is to ensure that every individual feels safe at their respective workplaces.

CONCLUSION

- 163 In this year's Annual Review, we have assessed and analysed the The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, seven years after it came into existence. The Act was introduced in 2013 in order to regulate and deal with workplace harassment of women. Given the constraints posed by the pandemic, the focus for this year was the formal sector.
- 164 On collating and analysing data from primary and secondary research, as well as conversations with experts, it is concluded that while the Act has been successful in giving voice to working women across the country, the potential for it to be more detailed and expand, is ever present. In its current form, as was detailed in the review, this Act alone is unable to provide protection from sexual harassment at the workplace for all.
- 165 Taking this into consideration, we reached out to the stakeholders in the formal sector (including employees, HR/CXOs, IC/LC members and NGO members) as well as experts who have been working in the area of sexual harassment and more specifically, with the Act.
- 166 The Annual Review identifies gaps in policy by collating the experiences of all the identified stakeholders to suggest a way forward through policy suggestions. The Act being the only law governing and protecting workplaces against sexual harassment, should develop an approach that is inclusive and holistic by taking into consideration the issues faced by individuals in the workforce.



What constitutes extended 'workplace' under the law?

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.

In a case before the High Court of Calcutta, the court 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.

The Delhi High Court upheld the decision of the employer to terminate the employment of the accused in line with the recommendations of the IC, where the accused was alleged to have sexually harassed a female colleague during an outstation visit for work, which was considered as an extended workplace.

Smita Paliwal

Partner-Dispute Resolution, King, Stubb & Kasiva, Advocates & Attorneys

167 One place where the Act still lacks is acknowledging the systemic inequalities that play a crucial role in how cases of sexual harassment are reported and dealt with.

168 While the #MeToo Movement provided a lot of individuals with a platform to talk about sexual harassment which highlighted the commonality of such cases, sexual harassment remains to be a sensitive issue which not every target of harassment is comfortable sharing. To add to this, the fear of a complaint being labelled false/malicious and the fear of being ostracised once the complaint is filed often discourages individuals to come forward and report a case of sexual harassment.

169 In order to create safer spaces for every individual, it becomes pertinent to acknowledge the need for these systemic changes. This must involve acknowledging that all genders face sexual harassment as well as the social dynamics that come into play when someone harasses another individual.



In training sessions, the most recurring queries pertain to fear of false cases, despite the entrenched nature of gender discrimination and normalised sexism around us.

These challenges speak to the general apathy towards gendered experiences of women, as it does to the scant attention paid by the management to integrating gender equality within workplaces. All too often employers are known to treat complaints as an organisational irritant, and complainants as troublemakers, leading to unresolved grievances, broken morale and mental health breakdown, if not retaliation. Women's groups have accounts of complainants pursuing losing battles, at great cost to themselves and their families – on the promise that justice will follow if a law exists. The truth, however, is that a law is as effective as those who implement it.

Madhu Mehra

Executive Director, Partners for Law in Development

170 The Review has attempted to keep jurisprudence as a central theme in order to analyse how different courts in the country have been interpreting the law. This allows for a holistic

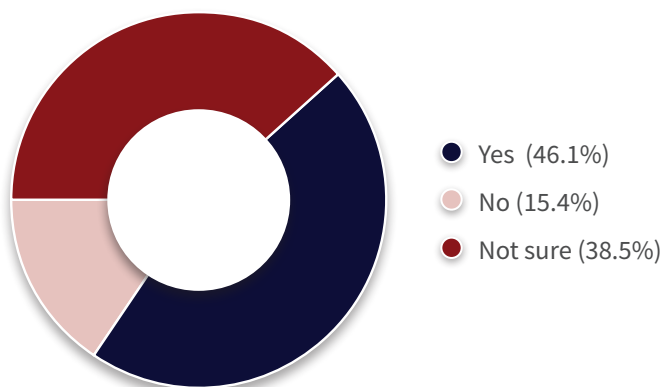


Fig.46 When asked whether categorising complaints as false/malicious deters targets of sexual harassment from coming forward to file a complaint, almost half of all the respondents (46.1%) said 'Yes', while 38.5% were 'Not sure' and 15.4% said 'No' (Fig.46).

Many women could be deterred from coming forward as they might be afraid of reprisals as well as lose confidence in the system (Fig.32) if complaints are categorised as false/malicious especially due to a lack of evidence, leading to less women coming forward.

understanding of the Act and paves the way for future actions to create safe workplaces for all individuals, regardless of their caste, class, gender and/or sector of work.

- 171 Finally, since this year's Review has focused on the formal sector, what we must also acknowledge is that 94% of Indian women work⁴¹ in the informal sector, making it a crucial sector to be looked at.
- 172 Therefore, for the year 2021, our aim is to reach out to individuals working in the informal sector and making it as exhaustive as possible by getting at least 10x respondents and taking into consideration diverse demographics to ensure that the subsequent reviews are inclusive of all perspectives and do not leave anyone behind.

- 173 Throughout this Review, one key highlight has been the fact that there is a lot left to be done even though undeniable progress is being made. We envision a world where every individual is treated with respect, dignity and courtesy, where safety and consent are given topmost priority, where an individual can walk with their head held high and where justice is promptly delivered. To reach that state of eudaimonia, we need to continuously work towards bettering our current policies, judicial system, workplaces and most importantly, our own selves. To reiterate the famous phrase, 'change begins at home'. Let us try ensuring that we are able to bring that change home.



The big questions for civil society organisations working with migrant workers to support their rights are: what will it take to ensure that women are safe in factories and offices without endangering their livelihood? Can factories be encouraged to hire more women in supervisory roles? Can there be regular gender-sensitisation of staff through the year? Can the cost of being a perpetrator of sexual violence be so high as to deter such behaviour?

Arti Jaiman

Station Director, Gurgaon ki Awaaz Samudayik Radio

41 Kumari, A. and Kantak, P., 2019 | Opportunity or Challenge? Empowering women and girls in India for the Fourth Industrial Revolution

“

PoSH is extremely necessary to ensure that women in the formal sector can work without the fear of being harassed at their workplace.

We must take the requisite steps to safeguard women's rights in the informal sector as well.

—

“

Ethics are everywhere. They go beyond right and wrong and need to be taught to every individual from an early age to create a world that is inclusive of everyone.

By stressing on ethics, we can create institutions, corporations, organisations, and other such spaces safer and conducive for every individual to grow, especially women and other minority groups.

Shivani Bagdai

Vice President

Delhi Ethics Council

Women's Indian Chamber of Commerce and Industry (WICCI)

ENDNOTE



SHIVANI BAGDAI

Vice President

Delhi Ethics Council

Women's Indian Chamber of Commerce and Industry (WICCI)

- 174 At the Delhi Ethics Council, every initiative is undertaken keeping ethics at the forefront and through that, ensuring that we take into consideration all individuals. Our aim is to be able to create safe workplaces for every individual regardless of their caste, class, gender, or sector of work.
- 175 This year, in our exploration of corporate ethics, we examined The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (The Act), to provide a holistic perspective of its understanding and implementation in the formal sector by engaging with different stakeholders, including (i) employees working in the formal sector (ii) CXO/HR (iii) NGO Members as well as (iv) Internal Committee/Local Committee Members.
- 176 However, while the Act does help increase conversations about safe workplaces in organisations operating in the formal sector, these conversations often do not take into consideration the large number of individuals working in the informal sector as domestic workers or day labourers, amongst others.
- 177 Therefore, going forward, our aim is to undertake research on the informal sector, and making it as exhaustive as possible by getting at least 10x respondents and taking into considerations diverse demographics to ensure that we are able to provide a review that is inclusive.
- 178 While we do acknowledge that outreach to stakeholders in the informal sector is a tougher task, given communication, economic and other similar barriers, this is a task that is extremely significant and relevant. If this is an initiative you think you can contribute towards, we would be more than happy to welcome collaborations in any and all capacities, including, information sharing, knowledge dissemination, reviews and most importantly, your feedback.

Special Thanks

- Alana Golmei
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- Diva Dhar
- Falak Choksi
- Isha Sharma
- Japleen Pasricha
- Jhuma Sen
- Kavita A. Sharma
- Lakshika Joshi
- Meenakshi Nayar
- Merrill Diniz
- Neera Chandhoke
- Rakhi Sehgal
- Rekha Yadav
- Rina Ramdev
- Rishika Sharma
- Rita Manchanda
- Shelly Pandey
- Shivangi Saxena
- Shivani Bagdai
- Suman Doonga
- Urvashi Prasad



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Pann Nu Foundation

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Bharat Sanchar Nigam Limited

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Dr. Baani Yadav

Indian Rally Driver, Social Rights Supporter

Dr. Baani Yadav is India's fastest woman rally racer and is the only Indian woman to win all major Rally Titles in the country in the Women's Category in a year. She dreams to open a Motorsport Driving School in Haryana to further empower the women of the state.



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Independent Filmmaker, Senior Creative Producer (Only Much Louder)

Isha is currently working with Only Much Louder (OML) as Senior Creative Producer and has been working in films as a director and producer since 2011. Her first ever video project stemmed from a music video and she has never looked back since then. From studying engineering to completely rearranging her career following her filmmaking passions, she works extensively on social issues and non-fiction case studies.



JAPLEEN PASRICHA

Feminism in India

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JHUMA SEN

Jindal Global Law School

Jhuma Sen is an Associate Professor and Assistant Director at the Centre for Human Rights Studies at Jindal Global Law School. Her research interests lie at the intersection of courts and gender, citizenship and constitutionalism and transnational feminist movements and law reforms. She is currently working on the manuscript of her forthcoming book with Pan Macmillan India tentatively titled 'Breaking the Bar: Early Women Lawyers and the Legal Profession in India'.



DR. KAVITA A. SHARMA

Eminent Scholar

An eminent scholar, Dr. Kavita A. Sharma has been an Honorary Visiting Lecturer at the Tokyo Women's Christian College and the University of Indonesia. Dr. Sharma has written and published books on various subjects including 'Internationalisation of Higher Education', 'Windmills of the Mind' and 'Interpreting Indian Diasporic Experience', among others.



LAKSHIKA JOSHI

Altran

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Good Business Lab

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MERRIL DINIZ

Sheroos

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PROFESSOR NEERA CHANDHOKE

Professor & Author

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RAKHI SEHGAL

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British Council

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REKHA YADAV

Ministry of Labour and Employment, GoI

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DR. RINA RAMDEV

Sri Venkateswara College

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RISHIKA SHARMA

EIGHT GOALS ONE FOUNDATION

Rishika is part of the Core Team at The RASICH Group (TRG) and Eight Goals One Foundation (8one), where she leads consulting initiatives across both, business and social sector engagements. She has a Masters in Gender Studies from Ambedkar University Delhi (AUD) and her interest lies in having conversations and working towards the practicality of theoretical concepts of gender, patriarchy, feminism, human rights, nationalism, body rights, politics, peace and conflict.



RITA MANCHANDA

Human Rights Activist, Writer

Rita Manchanda is a researcher, writer, lecturer and human rights advocate, specialising in conflicts and peace building in South Asia with particular attention to vulnerable and marginalised groups including women, minorities and forcibly displaced persons. She is a Board Member of the 'Women's Regional Network', the 'International Journal of Transitional Justice', and Nat Com member of 'Pakistan India Forum for Peace and Democracy', Member WISCOMP and 'Inclusive Security'.



DR. SHELLY PANDEY

Ambedkar University, Delhi

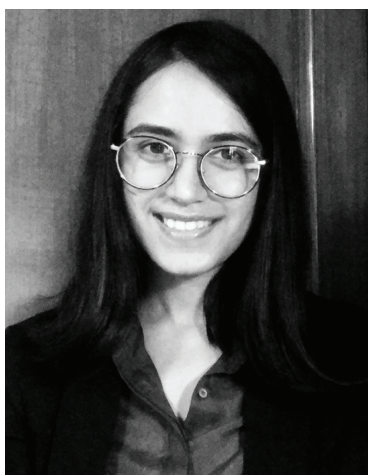
Dr. Shelly Pandey teaches Gender Studies at the School of Human Studies at Ambedkar University, Delhi. Her areas of teaching and research are Gender and Labour, City and Spaces, Middle Classes, Migration and Refugee Studies, Research Methods and Writing, Neoliberalism, Information and Communication Technologies (ICTs) and Society.



Shivangi Saxena

World Bank

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SHIVANI BAGDAI

THE RASICH GROUP

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SUMAN DOONGA

Spic Macay

Suman Doonga is a passionate and devoted Indian arts and culture evangelist with over three decades of consulting and advisory experience, specialising in Education, Public Relations and Media. She works as an educationist and social worker as a senior volunteer in SPIC MACAY and various educational and social empowerment organisations. Suman is the Media Director of SPIC MACAY, where she spearheads the media and publicity for the organisation nationally, with more than 5000 cultural programs, across cities in the country and abroad.



URVASHI PRASAD

NITI Aayog

Urvashi Prasad is currently part of the core team supporting the work of Government of India's Empowered Group 1 for managing the Covid-19 Pandemic in the country. She has extensive experience in the areas of health, nutrition, sanitation, gender and public policy. Over the last four years, Urvashi has been working as a Public Policy Specialist in the Office of the Vice Chairman at NITI Aayog (National Institution for Transforming India).

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10.1

Opinion Piece By

Anjali Varma

Anjali Varma, is an independent Human Resources consultant, based in Bangalore. She works with small and medium enterprises on all aspects related to HR, especially PoSH and D&I. She writes regularly for national newspapers such as the Hindu Businessline, the Economic Times etc. She is an alumnus of the Tata Institute of Social Sciences, Mumbai.

Why The Act Needs A Meshing of Compliance And Culture

- 179 The Prevention of Sexual Harassment (Prevention, Prohibition and Redressal) Act 2013 was a significant step in the history of Indian law and the Indian employment landscape towards making the workplace safer for women. Coming into effect 66 years after India's independence, it was an essential, overdue and much-awaited piece of legislation.
- 180 Its precursors – the “International Bill of Rights for Women” or Convention on the Elimination of Discrimination against Women (CEDAW) (which was signed by India in 1980) and the subsequent Vishaka Guidelines (1997), made a small but crucial dent in the collective Indian consciousness about the fact that sexual harassment violates the principle of equality of rights. However, in 2013, the passing of the Prevention of Sexual Harassment the Act drove the nail home as it came not with a “guideline” or “advisory” tag but with a clear compliance and statutory mandate.
- 181 Progressive organisations realised that the onus was on them and were quick to adopt the legislation and put into place the necessary mechanisms for the implementation of the Act. However, in many establishments, whether they were small and medium enterprises (SMEs) or large organisations, it was not looked at as either “urgent” or “important”. It remained on the fringes as an eventual “check box” item until 2017 when the ‘MeToo’ social movement spread across the world and brought this into public consciousness. A powerful Google interactive map - ‘Me Too Rising: A visualization of the movement from Google Trends’ shows how the movement spread across the world like “wildfire”.
- 182 Social media was the enabler as instances of sexual harassment across industries (ranging from Media to Bollywood to the government) came tumbling out, and many organisations were caught napping. They reacted by rushing in to ensure that they had all the necessary protocols in place for redressal. A huge step, all the same, to make for a safer workplace, given that the Internal Committee, which is readily accessible to any employee, has the same powers as a civil court or court of law.
- 183 But to borrow a mindset from medicine or even parenting – the focus now should be on preventive measures rather than curative. For rapid yet lasting change, efforts should be aimed at the prevention and protection aspect of the Act - and this is where we need a meshing of compliance with culture.

Culture in Society

- 184 The presence of sexual harassment at the workplace is symptomatic of a larger, deeper and broader socio-cultural issue. Gender stereotypes, patriarchy, and resulting power equations and male entitlements

have had a part to play in the way women are seen and the way they see themselves. Sexual harassment has left no sector untouched. What is and is not permissible needs proactive, deliberate and prolonged awareness campaigns in society so that it becomes part of the cultural fabric of the country and is not just relegated to “organised” workplaces. The definition of the term “aggrieved woman” is broad as per this law and extends to contract workers, probationers, trainees, apprentices, interviewees and so on, apart from the obvious full-time employees. It is wholly possible that a student or an apprentice (from any gender) may not even know the law exists, what it entails or may look at it as something that does not directly apply to them and or may apply only in the distant future. Campaigns (in all applicable languages) should focus on the following groups:

- high school students (e.g., tying in with UNDP’s Sustainable Development Goal 5 that focuses on gender equality);
- college graduates - in their capacity as future interns and employees, and
- domestic workers and staff working in shops and industrial establishments.

185 Conversations that create awareness and educate different demographics on the Act (including on the existence of Local Committees and Internal Committees) - will make for a society where zero tolerance is understood in letter and spirit.

Culture at the workplace

186 With the embracing of Diversity, Equity and Inclusion principles at the workplace, organisations made huge leaps in creating safe spaces for all employees. There were many employees who had to “unlearn” behaviours that thrived on another employee’s discomfort (e.g., jokes, anecdotes) or were otherwise classified under the Act as “unwelcome”. This is where “culture” comes in or, in other words, the environment that pervades through a

workplace and clearly calls out what is or is not acceptable within an office.

- 187 Culture at the workplace that champions respect and fairness is now recognised as the “secret ingredient” in all aspects of the employee experience. It comes alive in the way the code of conduct lays down acceptable behaviours at the office. It reveals itself in the manner in which recruitment or exits are conducted. It has a huge role to play in the designing and executing of policies. Finally, it has a direct bearing on how safe women feel in reporting any harassment.
- 188 Culture can make or mar the assimilation of the PoSH Act and what it aims to achieve. While organisational leaders may wholeheartedly support the compliance part of the Act (formulating the Internal Committee and filing required data in their Annual Report) they play a pivotal role in preventing any form of harassment or hostile work environment through their active championing and vocal advocacy of what the Act laid down in 2013. Regular communication from leaders on the importance of “speaking up”, socialising channels that are available, reassurance to employees from any possible retaliation and a zero-tolerance stand will create a culture that genuinely supports a safe workplace. Culture after all is known to percolate to the rest of the organisation or institution. If women employees are assured of the sanctity of the preventive and protective measures at the workplace (both physical and remote), it will help them bring their whole selves to work, benefiting them, their team and the organisation alike.
- 189 The fusing of compliance and culture to create an understanding of what sexual harassment is and the negative ramifications it has on the woman can be a game-changer in the trajectory of safer workplaces in India. This can then become a turning point for social and economic empowerment of women.

10.2

Opinion Piece By

Arti Jaiman

An advocate for community radio, Aarti Jaiman is the Station Director of Gurgaon ki Awaz, a community radio based in Gurgaon, India. She believes in there being radios in India in every community and to that end, is an active participant of the Community Radio Forum of India and World Association of Community Radio Broadcasters (AMARC). She is also a Director at Pitara Kids Network Private Limited. Before this, she worked at the Economic Times as a feature writer as an arts journalist focusing on such as theatre, literature, design and architecture. She has also written for organisations such as the Hindu, the Hindustan Times, Tehlka etc.

- 190 The Act 2013 has been a landmark law in attempting to ensure safe working spaces for women in India. However, despite the intention of the law, it is the on-ground lack of implementation that continues to see women face the brunt of sexual violence at the workplace. Some of the more horrendous experiences are being articulated by women working in the garment export sector in Gurgaon. Here, despite all the provisions of the law being tickmarked - an LC, prominent signs informing workers of committee members etc - female workers talk about routine harassment from male supervisory staff, the threat of firing if they speak up, and the complete blacklisting of their names from all other garment factories should they pursue the legal course and push for redressal. Almost all women working in the garment export sector are migrant workers, hence they are even more vulnerable to the diktats of management.
- 191 The big questions for civil society organisations working with migrant workers to support their rights are: What will it take to ensure that women are safe in factories and offices without endangering their livelihood? Can factories be encouraged to hire more women in supervisory roles? Can there be regular gender- sensitisation of staff through the year? Can the cost of being a perpetrator of sexual violence be so high as to deter such behaviour?
- 192 There is still a long way to go before we can say that women are safe at their workplaces.

10.3

Opinion Piece By

Madhu Mehra

Madhu Mehra is a feminist lawyer, heading research and trainings at Partners for Law in Development, a legal resource organisation working towards realising women's equality and social justice. Her work, spanning over 25 years, covers issues relating to gender, sexuality, violence against women, access to justice and the law.

- 193 The sharply declining participation of women in the workforce in India is one of the lowest in the world. Equal opportunities are more relevant than ever for women, bringing to focus legal protections for women workers, and amongst these, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (referred to as PoSH). Essentially, this law seeks to engender workplace policies to tackle routine and severe forms of sexual harassment that women endure.
- 194 Having conducted trainings across the country for state governments, educational institutions and the private sector through my organisation, Partners for Law in Development (PLD), there are some observations and learnings. On the positive side, many from within women's groups, and just as many outside have equipped themselves as external members, several creative training modules exist as do examples of inquiry committees navigating institutional pressures. Some workplaces have gone well beyond addressing sexual harassment to also implement flexible work hours, maternity benefits to achieve inclusivity and equal opportunities more fully.
- 195 The positive examples remain miniscule in the vast and diverse landscape of workplaces in India. For the most part, implementing the law even in letter, let alone in spirit, remains a challenge. The obligation to prevent sexual harassment, which to my mind is the most significant contribution of the law, has been reduced to tokenistic trainings. The short one-off orientation sessions have participants marking fleeting presence, unless an organisational senior watches over.
- 196 The complaints' committees are often conceptually and procedurally unequipped, with committee members tending to fall in line with the most authoritative voice. The staff, in many instances, are unaware of whom to complain to, or the names of committee members although the law requires this information to be notified and displayed prominently. In training sessions, the most recurring queries pertain to fear of false cases, despite the entrenched nature of gender discrimination and normalised sexism around us.
- 197 These challenges speak to the general apathy towards gendered experiences of women, as it does to the scant attention paid by the management to integrating gender equality within workplaces. All too often employers are known to treat complaints as an organisational irritant, and complainants as

troublemakers, leading to unresolved grievances, broken morale and mental health breakdown, if not retaliation. Women's groups have accounts of complainants pursuing losing battles, at great cost to themselves and their families – on the promise that justice will follow if a law exists. The truth, however, is that a law is as effective as those who implement it.

- 199 On the flip side, the much lauded zero-tolerance policies held up as model approaches to addressing sexual harassment, are also problematic. Far from just, such approaches overlook proportionality of wrong, gradation of punishments to adopt the cost effective termination as a standard solution. While termination is necessary in some situations, it must not be the only response. The gradation of

responses and punishments obligate the employer to sensitise and work out solutions based on the degree and nature of the infraction, creating transformational possibilities.

- 199 Seven years after the enactment of PoSH, and twenty four years after the Supreme Court judgment in the case of Vishaka vs State of Rajasthan (1997), which directed that this law be enacted – there is much to be concerned about. For the law appears to be limited to the urban organised sectors, and the myths surrounding sexual harassment persist. These challenges and tokenism call for concerted collaborations between women's rights groups and the private sector, and much deeper commitment to fighting sexism and harassment within and beyond workplaces.

10.4

Opinion Piece By

Malavika Rajkumar

Malavika Rajkumar is a legal professional whose main area of focus includes main areas of research include women's rights, child rights, social welfare legislations, gender based violence and information design. She is also the Editorial lead at Nyaaya and a Research Fellow at the Vidhi Centre for Legal Policy. She has completed her B.B.A. LLB degree from the Symbiosis International University. Malavika has also written for other organisations such as Scroll.in, Outlook India, TheWire, LiveLaw etc.

- 200 Sexual harassment at the workplace is widespread. Women all around the world have faced instances of sexual harassment, calling for a strong law to curb these acts. In India, the framework for the Sexual Harassment at Workplace law was laid down in the landmark judgement of the Supreme Court in *Vishaka v. State of Rajasthan* (1997).
- 201 In 1992, Bhanwari Devi, a Dalit woman who was a social worker employed with the Rural Development Programme of the Government of Rajasthan was gang-raped. This highlighted the extents of sexual harassment incidents in India's workplaces. It struck a chord with the nation and revealed the hazards working women face in the workplace. The Supreme Court framed guidelines and issued directions to the Union of India for a law to combat workplace sexual harassment.
- 202 The main intention of these guidelines was to provide a platform for redressal and grievance mechanisms against workplace sexual harassment. It was these guidelines that motivated the formation of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (PoSH). The Act is very important as it discusses the various instances of sexual harassment and how a woman can complain against this kind of behaviour.
- 203 As per a report published by the Ministry of Women and Child Development, the number of cases of sexual harassment in the workplace registered in India has increased by 54%, i.e. from 371 cases in 2014 to 570 in 2017. Further, even today, misogyny and inherent patriarchy sadly also find a role to play in PoSH adjudications in workplaces. The fear of reporting and the supposed yet real consequences of the same still discourage women despite the provisions protecting them in the law.
- 204 Some of the common issues in PoSH law in our country today include:
- Abuse of Transfer Position**
- 205 During the pendency of inquiry by the Internal Committee (IC), the IC can recommend the transfer not only of the harasser but also the aggrieved woman (as per Section 12). This is commonly misused as transfers in the name of the protection of the law resulting in women being disadvantaged and discriminated against in many workplaces.
- Employees Unaware of PoSH Laws**
- 206 Many employees are still unaware of the PoSH laws, their rights and

the duties of the stakeholders around them including the IC, employer etc. Under Section 19 of the law, the employer has multiple responsibilities and duties including creating a safe work environment, providing assistance to a woman in case she chooses to file an FIR, organising workshops etc. As per section 19(c) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 every employer is required to conduct regular awareness workshops for all the employees to understand the provisions on the law on the subject matter. If the employer fails to comply with this provision a penalty up to INR 50,000 can be levied on the employer. The role of the employer is essential to facilitate a work environment which not only complies with the law but also provides the avenue for employees to complain. Without the employer setting up an IC (which is mandated by law), the purpose of the law would be defeated. Employees in workplaces which do not have such committees in the organisation should take collective action - through formal or informal means to encourage the mandatory implementation of the law and for more effective training at workplaces.

Anonymous Complaints

- 207 The PoSH law and rules emphasize on the nature of the complaint to be in a written request format as well as the fact that certain persons can file a complaint on a woman's behalf - including her relative, coworker etc. Even though there is no formal recognition of anonymous complaints given in the law, many PoSH policies at workplaces allow for the same. Without a formal structure given in the law, the complaining
- mechanism and adjudicating process for anonymous complaints lie within the ambit of the IC of the workplace and thereby can result in situations where the process of natural justice is not followed thereby disadvantaging the complainant.

Gender Neutral Law

- 208 In 2021, the Calcutta High Court⁴² has said that same-gender complaints are permitted under the law⁴³ on sexual harassment at the workplace. The Court held that people of the same gender can complain of sexual harassment against each other. A person of any gender can commit acts of sexual harassment at the workplace. However, the PoSH law clearly states that the complainant can only be an aggrieved woman unless the workplace has a gender-neutral policy, by which both the aggrieved person and the respondent could be of any gender. Over time, Courts will play a role in expanding the scope of the PoSH law to other genders even though it is explicitly not provided in the law.

Work From Home

- 209 After 2020, many workplaces have been following work from home policies. Even today, many employees are unaware of how the PoSH law would apply even while working from home. Section 2(o) of the PoSH law defines "workplace" in an inclusive and non-exhaustive manner which under its subclause (vi) includes 'a dwelling place or a house'.
- 210 In 2008, the Delhi High Court in *Saurabh Kumar Mallick v. CAG*⁴⁴ (2008) held that the expression 'workplace' cannot be narrowly described to confine its meaning to the commonly understood expression of an "office"

42 Dr. Malabika Bhattacharjee Vs Internal Complaints Committee, Vivekananda College & Ors. W.P.A. 9141 of 2020

43 The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013

44 Saurabh Kumar Mallick Vs The Comptroller & Auditor General of India & Aths. Civil Writ Petition No. 8649 of 2007

– that is a place where any person of the public could have access. It also made a reference to *Vishaka v. State of Rajasthan*⁴⁵ (1997) case which placed emphasis on the object of ensuring that sexual harassment of working women is prevented and any person guilty of such an act is dealt with sternly.

211 In this context, in the landmark case of *Saurashtra Salt Manufacturing Co. v. Bai Valu Raja & Ors.*⁴⁶, the Supreme Court opined on the applicability of the theory of ‘notional extension’ of the employer’s premises.

212 The Supreme Court also clearly set out that the scope of such an extension of the workplace would have to be determined in the facts and circumstances of each case. The Court reasonably concluded that an employer’s premises were not restricted to the strict perimeters

of the office space and could be extended beyond such physical territory.

213 The law uses the phrase “any workplace” in Section 3 and “out of or during the course of employment” in Section 2(o) of the Act. This along with the series of cases makes it clear that anyone who is working from home is covered.

214 It is mandatory for employers to update the employees on the Ac policy to include work from home situations and highlight several examples to indicate forms of harassment which may commonly take place. In the digital space where lines are blurred as compared to a physical space, it is essential that organizations work on a robust work from home policy to indicate instances or forms of sexual harassment that may occur.

45 *Vishaka & Ors vs State Of Rajasthan & Ors*, 13 August, 1997

46 *Saurashtra Salt Manufacturing Co. v. Bai Valu Raja & Ors*, AIR 1958 SC 881

10.5

Opinion Piece By

Smita Paliwal

Smita Paliwal is the Partner in Dispute Resolution at King Stubb & Kasiva. She has been with the firm for more than a decade practicing law across different fields. Some of her primary fields include regulatory approvals, joint ventures, acquisitions, company law, labour and employment law, exchange control, general commercial transactions and corporate litigation. She is also the lead of the firm's division on the PoSH Act, leading workshops and client training in sexual harassment prevention.

PoSH Act: The Challenges and the Way Forward

215 With Kamala Harris being sworn as the Vice President of the US, there is no iota of doubt that if provided the right opportunities, women can achieve and hold one of the most powerful offices in the world. A harassment free office environment does pave the way towards success for a woman, and encourage her to stand and compete with other male colleagues at an equal footing. With introduction of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter referred to as the "Act/PoSH Act") India took a major step towards bringing parity between the two sexes in a working environment and gave momentum to the right to safe and harassment free workplace.

216 Though it's been almost seven years since the PoSH Act was introduced, however, it still seems like a long road which needs to be travelled in order to attain the objective behind introducing the legislation, protection against sexual harassment and the right to work with dignity. The ground reality is very different from the overall picture which is painted and shown to the management.

217 The major challenges which I feel an employer should address in order

to ensure that the place of work is safe and encouraging to a woman employee are:-

A. Creating awareness among employees pertaining to applicability of the Act

Employers shall take on the responsibility of conducting timely workshops and training sessions regarding the applicability and the extent of applicability of provisions under the PoSH Act. Training sessions should be conducted in vernacular language in order to ensure that the employees/personnel can apprehend it accurately and are aware of the applicable laws and provision.

B. Well trained Internal Committee (IC)

Many times, organisations constitute the IC without considering the background of the IC members, the law clearly provides the qualification for such members, that is, a member of the IC should have some prior experience in social work or should be committed to the cause of women or have legal knowledge. This leads to mishandling of cases and sometimes the procedure is ignored and not complied. Employers should ensure that the members who have been nominated are well trained and have knowledge of the provisions and procedures provided under the

PoSH Act, trainings and workshops should be organised for IC members from time to time.

C. Specific mention of sexual harassment policy in agreements with employee/personnel/consultants

In order to ensure that employees or personnel are aware of the provisions of the PoSH Act and the applicable policies of the organisation, there should be a specific mention of the same in their agreement with the company/organisation. Many times, the policies are formulated however, the employees are not aware of its existence; this is the best way to ensure awareness among employees.

D. Zero Tolerance Approach towards such incident

While the PoSH Act and the rules thereunder are very clear on the penalties imposed on the accused, however there have been instances wherein such complaints are not acted on and are not dealt as per the provisions under the Act.

E. Breach of Confidentiality Provisions

Organisation should ensure that the identities of the parties, that is, Complainant and the accused should remain confidential both during and after completion of the proceedings under PoSH. This is one of the biggest impediments which deter the complainant from filing any complaints and approaching the IC in order to avoid the stigma and the witch hunt associated with it. Provision and processes must be set by the IC in consultation with the employer to ensure that confidentiality of the proceedings are maintained, parties who are in breach should be penalised.

F. Extending the concept of Workplace

While some might argue that the provisions of the Act are only

applicable to the normal office setup and the physical office working space. However, under the Act, “workplace” has also been defined as places visited by the employees out of or during the course of employment including accommodation, transportation provided by the employer for undertaking such journey, etc. The definition provided by the statute itself is broad and does not restrict the place of work of the perpetrator to the physical environment of the workplace, it takes into account all possible access places/points/ scenarios wherein the aggrieved woman can come into his contact.

G. Following the Principles of Natural Justice

The IC and the employer should ensure that principles of natural justice are followed while conducting the proceedings under the PoSH Act, which means the complainant and the accused, shall be provided with equal opportunities to present their case. And no party should be condemned unheard.

Conclusion

Industrialisation and globalisation paved the way for influx of women in the workforce, resultantly, prevention of sexual harassment at workplace assumed greater importance. The fact is that the sexual harassment at workplace do exist and majority of times it does not get reported. The legislation and the government has done their part, the responsibility now lies with the organisations, the employers to provide a conducive and a harassment free environment to their women workforce. It is important to understand that sexual harassment is less about sex but more about power, while the important and foremost aspect is that a woman should be treated equally with dignity and respect.

10.6

Opinion Piece By

Sreemoyee Malakar

Sreemoyee Malakar is the Chief Operations Officer of Lawcubator Technologies. She has been working in this field for the past 8 years and has been the COO of Lawcubator Technologies for more than 4 years. She is an expert in intellectual property and trademarks law. She is also an expert in PoSH law and has conducted numerous workshops and training exercises for both national and international organisations as well as academic institutions such as IIT Madras, CureFit, Biras, Urban Ladder, Udaan etc.

Thoughts on the current state of PoSH Act in India

- 218 As a part of Lawcubator, I have been working in the PoSH domain for the last five years and it has been wonderful to see how this piece of legislation has evolved.
- 219 In the initial days, we had a hard time convincing our clients to conduct awareness sessions for their employees and to set up their internal committees. Most organisations were unaware of the Act and its mandatory obligations and for others, it was just another compliance that could be handled by mere paperwork.
- 220 This outlook started changing after the #MeToo movement where we witnessed women opening up about their spine-chilling incidents. This movement acted as a catalyst for true change and there was a sudden rush in setting up internal committees, conducting awareness sessions, and introducing policies.
- 221 In the last few years, we have been very happy to see the enthusiasm not only from our corporate clients but also from higher education institutions and schools. We have received requests for conducting awareness sessions tailored to different groups, varying from sessions in regional languages to sessions for employees who are visually challenged! To us, this has been proof of the massive increase in realising the need for and importance of the PoSH Act in India.
- 222 At Lawcubator, we have the joy of working in this domain with international partners too. Since many countries are yet to have specific legislation for workplace sexual harassment, we feel happy and proud to see our international partners appreciate and learn from the provisions of the Indian PoSH Act.
- 223 There are indeed some grey areas in the Act but the experts in this field are doing a great job in handling those and upholding the spirit of the Act. We at Lawcubator believe that this legislation will evolve in the coming years to protect every person from workplace sexual harassment, irrespective of gender, and will truly stand as a remarkable and exemplary piece of Indian law.

10.7

Opinion Piece By

Vikram Shroff

Vikram Shroff is a practicing lawyer working with Nishith Desai Associates. He specialises in Employment and Labour law and has been in this field for the past 20 years. For his practice and years of experience, he was recognised in 2013 as a leader in the field of employment and labour law by the publication. He has written numerous articles and blog posts on matters pertaining to the Act such as the manner in which the law is developing, areas for improvements etc.

Legal Update on PoSH Act

224 As of December 2020, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 of India (PoSH Act) completed 7 years. Thanks to the government's efforts in actively promoting the law, along with the global #MeToo movement, it has had a considerable impact in creating awareness and played a crucial role in the prevention, prohibition and redressal of sexual harassment of women at the workplace.

225 As an employment lawyer, I have been tracking the important judgements that have been delivered by the courts especially in the law for a few years. I am providing a summary of some of those cases, which I hope helps in interpreting the law.

A. What constitutes sexual harassment?

1. In a case before the High Court of Bombay, the court disagreed with the decision of the Internal Complaints Committee ("IC") and observed that the IC had failed to take into consideration the additional circumstances provided under Section 3(2) of the PoSH Act, which also amounts

to 'sexual harassment', including creation of an intimidating or hostile environment for women as well as humiliating treatment likely to affect the health and safety of a woman.⁴⁷ The complainant had claimed in the case that her subordinate used abusive and unprofessional language against her, which the IC had concluded as act amounting to misconduct and misbehaviour.

2. In another case before the Delhi High Court, the court held that there must be physical contact having an undertone of sexual nature to constitute 'sexual harassment' under the PoSH Act.⁴⁸ It opined that an altercation in the context of unwelcoming environment prevailing at the workplace is not a case of sexual harassment.

3. 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.⁴⁹ A solitary allegation of intemperate language against a female

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

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

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

employee in a report does not constitute an offence under the PoSH Act.

B. What constitutes extended 'workplace' under the law?

1. 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.⁵⁰
 2. In a case before the High Court of Calcutta, the court 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.⁵¹ Therefore, the court directed the Counselling Officer of IIM, Calcutta to mediate and settle the matter.
 3. The Delhi High Court upheld the decision of the employer to terminate the employment of the accused in line with the recommendations of the IC, where the accused was alleged to have sexually harassed a female colleague during an outstation visit for work, which was considered as an extended workplace.⁵²
- #### **C. Constitution of the IC**
1. The Madhya Pradesh High Court imposed a fine of Rs. 50,000 on the petitioner, a renowned hospital in Indore, for not having constituted an IC as per the PoSH Act.⁵³ An employer having at least 10 employees is required to constitute

an IC at each of its workplaces to investigate complaints pertaining to workplace sexual harassment of women. The court also directed the hospital to pay a compensation of Rs. 25,00,000 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.

2. In a case before the Punjab and Haryana High Court, the court ordered the employer to re-constitute the IC since there was no external member.⁵⁴ 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.
3. In a matter before the Rajasthan High Court, it was held that the external member need not necessarily have a legal background or knowledge in the aspects of sexual harassment against women. Having experience in social work is sufficient for being a valid member of the IC.⁵⁵
4. 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.⁵⁶ In that judgement, the court also re-emphasized that it is the employer's responsibility to constitute a proper IC.

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

51 Shubham Bhuwangiri Goswami v. The Union of India and Ors. MANU/WB/1285/2019

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

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

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

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

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

D. Conflict of interest amongst the IC members

1. 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, 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.”⁵⁷ 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.

- 226 It is evident from some of these cases that the law continues to be strictly interpreted by the courts. Hopefully, over the next few years, with the government’s continued efforts and strict enforcement, the law will continue to play a crucial role in eliminating this social evil

⁵⁷ Somaya Gupta v. Jawaharlal Nehru University and Ors. 2018 (159) FLR 390



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