



# INTERNATIONAL LAWYERS NETWORK



## SEXUAL HARASSMENT IN THE WORKPLACE



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## SEXUAL HARASSMENT IN THE WORKPLACE: WHAT INDIAN COMPANIES NEED TO KNOW

We include the 2018 chapter in its entirety for reference following the 2019 update.

### IMPACT OF #METOO IN INDIA – WHAT HAS CHANGED

In July of last year, we covered critical aspects of sexual harassment laws in India under a collaborative paper covering multiple international jurisdictions titled “*Sexual Harassment in the Workplace: What Your Company Needs to Know.*”

Since then, internationally, new laws have developed and concepts and critical aspects of the laws that exist have been examined, reviewed and elaborated. This growth is often attributed to the #MeToo movement arising as a giant wave in the US in October 2017 and leading to similar waves in other countries.

In India the media coverage gained momentum with an Indian actor’s allegations against a co-star. It has led to rising awareness and revolution against any and all forms of sexual harassment at workplaces across occupations.

While art and media have been at the centre of attention, the government too had its share of unwanted attention with a minister (from the media) resigning to take legal recourse against allegations.

We take a fresh look at the impact of #MeToo in India.

#### The Good

*Stage 1-Recognition of Law:* While #MeToo has not led to the development of new laws in India, it has, perhaps, more importantly brought into focus that India has robust laws against sexual harassment. This in turn has stoked conversation across industries where previously there was silence concerning sexual harassment.

The law against sexual harassment at workplace has been a work in progress – the first avatar being the compulsory guidelines of the Supreme Court of India and the current avatar as an enacted law.

*Stage 2 – Implementation of Law:* In the wake of knowledge that laws exist, #MeToo has led to widespread recognition that certain practices which are deemed as the ‘culture’ of a workplace and hence tacitly allowed by a shrug of shoulders will no longer be tolerated. This recognition is not only in narrative but indicated in statistics. As per reports, cases of sexual harassment at Indian workplaces increased 54% from 371 in 2014 to 570 in 2017. A little past mid-2018, 533 cases of sexual harassment were reported across the country.

The evolution is not only in action being taken by the sexually harassed, but in employers taking increasing cognizance of their responsibilities. The law provides for training. More and more corporates are conducting training not simply annually but at regular intervals for the training to be meaningful and relevant. These widespread training sessions that are being conducted are on the one hand for everyone





at workplace and on the other for the Internal Complaints Committees. The training is oriented both for sensitization as well as empowerment – progressively centering around breaking of societal and gender stereotypes and not as a nod to bring about awareness of the law.

*Stage 3 – Going Beyond the Minimum Expected:* It also has brought about conversation if companies can, and want to, go beyond the limitation of law. A complaint concerning sexual harassment at the workplace needs to relate to an episode which happened, at the most, 6 months prior for the ICC to investigate (though criminal law allows for a longer period). A small number of corporates are also examining what they can do in cases raised beyond 6 months. In the wake of #MeToo, corporates are wishing to be active in providing the right environment for women and not merely defending when queries are raised. What more can we do to be better, as opposed to what can we do to not look bad, is also trending.

### The Other Side

The appetite for instituting formal proceedings is still low – be it before the ICC or before courts. If the accused used to silence the victim out of intimidation linked to job security before, the lengthy court proceedings in India which are the norm could end up silencing the employee who may have worked up her courage.

The #MeToo accusations not being within the formal domain often lead to counter of defamation if the accused is publicly named and shamed and additional court proceedings.

Also, the impact of training on the ICC is a work in progress. There is mistrust concerning the neutrality of the ICCs. The Indian National Bar Association, a non-profit organisation, queried 6,047 survey participants across India in 2016 and around 67% of the respondents responded with a “no” when asked if Internal Complaints Committees dealt fairly with complaints. More recently, an employee accused of sexual harassment and under committed suicide with the end note being that he could not have survived the shame of suspension and future negativity. Here the actions of the ICC were considered by the wife of the deceased (who was also an employee at the same organisation) as being excessive.

### The Next Movement

Where the #MeToo campaign would continue to be relevant, and perhaps more so, would be instances of sexual harassment of men at workplaces as the general workplace law in India presently does not cover such instances.

### End Word

If employees can access the available law and justice and not turn to social media in anonymity or otherwise; if the ICCs formed to take cognizance of complaints are trained and sensitized to efficiently deal with complaints; and if actions against abusers of their positions, result in a decline in instances, and hence statistics, we would have travelled a long way.

This would mean that both society and legal system finally allow for unapologetic, quick and deserving action against those who are accused and, often, with power.



For ultimately the #MeToo campaign would have truly served its purpose when it is no longer the catchphrase and trend that it is.

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## 2018 Edition: Sexual Harassment in the Workplace: What Indian Companies Need to Know

### What constitutes sexual harassment?

India recognises that what constitutes sexual harassment at the workplace are acts and behaviors of a sexual nature which are intrinsically linked to any of a range of negative experiences. These range from interference with work to creation of a hostile work environment to implied or explicit promises and threats related to a person's treatment at a workplace i.e. quid pro quo.

The Ministry of Women and Child Development, Government of India (**MOW&CD, GOI**) has succinctly identified five parameters of workplace sexual harassment, viz., sexual, subjective, unwelcome, impact and power.

### What body of law governs sexual harassment in your jurisdiction?

Workplace sexual harassment is governed primarily by the legislation titled The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal Act), 2013 (referred to generally as "**POSH**") and the corresponding Rules of the same year.

In addition, there is a separate specific regulation which governs sexual harassment in higher educational institutions viz. the UGC (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015.

Further, with time to time amendments, the law covering criminal offences viz. Indian Penal Code, 1860 also seeks to protect against sexual harassment by providing for punishment for offences constituting sexual harassment.

### What actions constitute sexual harassment?

Sexual Harassment is constituted of unwelcome acts or behavior (whether directly or by implication) related to implied or explicit promises and threats of preferential or detrimental treatment in either present or future employment and creation of an offensive and health risk environment for women.

Indian laws refer to such unwelcome acts or behavior being any of the following

- physical contact and advances;
- demand or request for sexual favors;
- making sexually colored remarks;
- showing pornography;
- any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.



The MOW&CD, GOI goes a step further to elaborate for concerned persons and organizations that the below behaviors would also *inter alia* constitute sexual harassment at the workplace:

- Serious or repeated offensive remarks, such as teasing related to a person's body or appearance.
- Inappropriate questions, suggestions or remarks about a person's sex life.
- Displaying sexist or other offensive pictures, posters, mms, SMS, WhatsApp, or e-mails.
- Invasion of personal space (getting too close for no reason, brushing against or cornering someone).
- Persistently asking someone out, despite being turned down.
- Stalking an individual.
- Controlling a person's reputation by rumour-mongering about her private life.

#### Can sexual harassment occur between two members of the same sex?

Neither POSH nor criminal laws envision the same and hence on the face of it same-sex sexual harassment is not covered.

POSH protects women as is evident from its title. Men, as aggrieved party, are not covered within the scope of POSH. The rationale for the law, as set out in the statement of objects and reasons and the preamble, is to ensure a woman enjoys the fundamental rights enshrined in the Constitution of India including the right to equality, right to life, right to live with dignity and practice profession. The background of the law *inter alia* was to promote an enabling working environment for women.

Whether, this woman-centric law covers harassment of one woman employee by another woman is not tested. The statute refers to the person who is accused as a 'respondent' and at a number of places refers to 'him' and 'his'. Additionally, the law prescribes the constitution of the 'Internal Committee' to look into complaints of sexual harassment and implicit in the prescription of the constitution, with a predominance of women members, is the understanding that the victim is a woman and the person accused is a man.

Similarly, the criminal law provisions presume that offences are against women and that the accused is a man – these include stalking, voyeurism and sexual harassment.

The exception to the above general position is the protection expressed in the UGC Regulations.

While the UGC Regulations are similarly titled (i.e. referring to protection of women employees) and not only define an 'aggrieved woman' but also provide for a similar Internal Committee as provided for in POSH, there is recognition of all genders being covered by the UGC Regulations. The definition of 'aggrieved woman' is in fact not used and the reference throughout the regulations is to either "aggrieved person" or an "aggrieved party". Additionally, there is recognition of the respondent/accused person being either a male or a female.



An identified and key responsibility of Higher Educational Institution stipulated in the UGC Regulations is to ***“act decisively against all gender-based violence perpetrated against employees and students of all sexes recognising that primarily women employees and students and some male students and students of the third gender are vulnerable to many forms of sexual harassment and humiliation and exploitation”***.

Finally, the UGC Regulations recognises vulnerable groups and seeks for supportive measures to be put in place for such vulnerable groups which includes those whose sexual orientations may make more vulnerable.

### **Are employers required to provide sexual harassment training for their employees?**

POSH prescribes that every employer must organize workshops and awareness programs at regular intervals for sensitizing employees with the provisions of POSH as well as orientation programs for members of the Internal Committee.

Indian judicial precedents have also highlighted the need for organization of workshops to continue with creation of awareness of the vulnerability of women given that men may view sexual conduct in a vacuum without full reference to social setting or underlying threats of violence that a woman may perceive.

### **What are the liabilities and damages for sexual harassment and where do they fall?**

An ‘aggrieved woman’ would be entitled to compensation determined by the Internal Committee based on its assessment of the trauma, pain and distress suffered by the victim, loss of career opportunities and medical expenses incurred by the victim be it for physical or psychological suffering. Since the compensation is deducted from the pay of the person held guilty of sexual harassment, the income and financial status of such person is also a determining factor for the Internal Committee in arriving at the sum payable. Such sums can also be recovered from a former employee by legal proceedings.

In addition to compensation payment, the person deemed guilty of sexual harassment could be subject to actions ranging from requiring a written apology to withholding of promotion or pay increment to undergoing counselling sessions or carrying out community service.

Employers/companies’ liabilities relate to failure to follow processes for implementation of policies against sexual harassment and could range from approximately USD 735 for the first offence to loss of business license for subsequent ones.

Courts have taken proactive action to curb inaction - in one case punitive damages of approximately USD 247,000 was imposed for failure to constitute Internal Committee and the resultant mental and emotional distress suffered by the aggrieved woman. Reinstatement and payment of back wages have also been ordered in certain cases.

### **What does an employee who believes they’ve been sexually harassed have to prove for a successful claim?**

For a successful claim, a clear complaint supported by evidence including witness account is the key.



The complaint should indicate the improper and/or offensive conduct, which was directed at the complainant, that the conduct was at the workplace as described in POSH and the complainant experienced harm. There are guidelines concerning details to be provided in the complaint such as timelines, description etc. The employee needs to timely file a complaint in writing, preferably within 3 months of the incident.

Since the trained Internal Committee is statutorily equipped with powers of a civil court, including the right to summon witnesses and requiring the production of documents and provision of opportunity to challenge findings, a lucid narrative of the incident by the complainant will be the fundamental factor to prove the account to a judicious Internal Committee and succeed in the claim.

#### **Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?**

POSH does not distinguish on the basis of hierarchy although harassment related to promises and threats of preferential or detrimental treatment in employment would likely stem from a supervisor as opposed to a co-worker. Given that POSH aims to protect women from a hostile work environment arising out of a range of conduct, a co-worker could equally be held accountable.

#### **What are the potential defenses employers have against sexual harassment claims?**

Claims under POSH are against the person accused of engaging in sexual harassment. However, employers as organizations have been held responsible for failure to implement POSH and a healthy working environment.

An employer, as an organization or as the management of the organization, can best defend by proactive compliance with POSH. It is for the employer to implement the duties prescribed for employers in letter and spirit without looking for options of narrow compliances for form sake. This proactive compliance could range for real and frequent training and induction of the Internal Committee and employees, treating sexual harassment as a misconduct and not just setting up an Internal Committee but appointing to such committee qualified and truly eligible members aware and experienced in dealing with matters of sexual harassment.

#### **Who qualifies as a supervisor?**

The term used in India is 'employer' which is defined as meaning any person responsible for the management, supervision and control of the workplace. It could include a person or board or committee in charge of formulation and administration of policies of the organization. In a hierarchical chart, it would include any person whose promises and threats related to employment would likely affect an employee.

#### **How can employers protect themselves from sexual harassment claims?**

Response same as the question about defending against claims above i.e. be proactive and real in creating a safe working environment as prescribed by law, principles of natural justice and judicial precedents.





**Does sexual harassment cover harassment because of pregnancy?**

It may. Sexual harassment at the workplace includes interference with work and creation of a hostile work environment. It includes unwelcome acts or behavior including any unwelcome verbal conduct of a sexual nature. It is a subjective experience and may be considered objectionable by the pregnant woman. Offensive remarks, such as teasing related to a person’s body or appearance are included.

**Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?**

Response same as for the question about harassment between members of the same sex.

**What is prohibited retaliation?**

This is not a concept covered under POSH.

However, as a principle of justice, should adverse action be taken by an employer for making a complaint of sexual harassment, the courts would be pro-active in protecting complainants from such action. An adverse action which was seen as founded on the making of the complaint but disguised as an appraisal of work outcome has been set aside and reinstatement and back wages ordered.

**Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?**

While it is consensual, depending on the facts and change in circumstances from consensual to non-consensual, it may constitute sexual harassment.

**Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?**

Yes, as definition of workplace is wide, and employer’s duty comprises a duty to providing a safe working environment which includes safety from persons coming into contact at the workplace.

**How is the #MeToo movement impacting the law in your jurisdiction?**

The #MeToo movement is impacting the law by drawing focus to the law for those who are unaware. A vast majority of the discussion concerning the social media campaign time and again draws attention to the existing law. Although evolving from long standing Supreme Court compulsory guidelines, the Indian legislation is in any event quite recent and comprehensive media reports on the #MeToo movement makes employers and employees cognizant of the rights, duties and liabilities attached to prevention, prohibition and redressal of sexual harassment.

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