

Veena Gopalakrishnan & Vikram Shroff, Nishith Desai Associates

India's New Law on Prohibition of sexual harassment at the work place

Employer's Duties And Responsibilities

The year 2013 may go down in India's history as a landmark year for protection of women's rights. The country witnessed the introduction of two prominent legislations pertaining to sexual harassment. The first was the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("**Sexual Harassment Act**") and the other was the Criminal Law (Amendment) Act, 2013 ("**Criminal Law Amendment Act**"). Both the legislations were introduced as an immediate reaction to unfortunate and very serious incidents of sexual harassment that jolted the country in late 2012 and early 2013.

The Supreme Court of India ("**Supreme Court**") was not to be left behind as it quickly introduced the Gender Sensitisation and Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013.

Background and Legislative Timeline

The Vishaka Judgment: The Sexual Harassment Act has been legislated almost 16 years after

the Supreme Court, in its landmark judgment in *Vishaka and Others vs. State of Rajasthan* ("**Vishaka Judgment**")¹, laid down guidelines making it mandatory for every employer to provide a mechanism to redress grievances pertaining to workplace sexual harassment and enforce the right to gender equality of working women ("**Guidelines**").

The Vishaka Judgment for the first time in India's history, acknowledged sexual harassment at the workplace as a human rights violation. The Supreme Court relied on the Convention on the Elimination of All Forms Discrimination Against Women, adopted by the General Assembly of the United Nations, in 1979, which India has both signed and ratified. In its judgment, the Supreme Court outlined the Guidelines making it mandatory for employers to provide for sympathetic and non-retributive mechanisms to enforce the right to gender equality of working women. As per the Vishaka Judgment, the Guidelines, until such time a legislative frame work on the subject is drawn-up and enacted, shall have the effect of law and the Guidelines are to be mandatorily followed by organisations, both in the private and government sector.

1 AIR 1997 SC 3011

LEGISLATIVE TIMELINE	
2007	Draft Protection of Women against Sexual Harassment at Workplace Bill, 2007 approved by the Union Cabinet
2010	The bill was introduced in the Lok Sabha
2012	Bill was amended and re-introduced in the Lok Sabha
September 3, 2012	The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 was passed by the Lok Sabha
February 26, 2013	The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 was passed by the Upper House of the Parliament – Rajya Sabha
April 23, 2013	The Sexual Harassment Act received the President's assent and published in the Gazette of India as Act No. 14 of 2013
December 9, 2013	The Indian Ministry of Women and Child Development ("Ministry") notified: <ul style="list-style-type: none"> – December 9, 2013 as the effective date of the Sexual Harassment Act; and – The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013

The Sexual Harassment Act

Object: The Sexual Harassment Act has been enacted with the objective of providing women protection against sexual harassment at the workplace and for the prevention and redressal of complaints of sexual harassment. Sexual harassment is considered as a violation of the fundamental right of a woman to equality as guaranteed under Articles 14 and 15 of the Constitution of India ("Constitution") and her right to life and to live with dignity as per Article 21 of the Constitution. It has also been considered as a violation of a right to practice or to carry out any occupation, trade or business under Article 19(1)(g) of the Constitution, which includes a right to a safe environment free from harassment.

Sexual Harassment: The Sexual Harassment Act defines sexual harassment in line with the Supreme Court's definition in the Vishaka Judgment and includes, any unwelcome sexually determined acts or behaviour (whether directly or by implication) such as physical contact and advances, demand or request for sexual

favours, sexually coloured remarks, showing pornography, or any other unwelcome physical verbal or non-verbal conduct of sexual nature.

The Sexual Harassment Act stipulates that no woman shall be subjected to sexual harassment at any workplace². It is further provided that the presence or occurrence of circumstances of implied or explicit promise of preferential treatment in employment; threat of detrimental treatment in employment; threat about present or future employment; interference with work or creating an intimidating or offensive or hostile work environment; or humiliating treatment likely to affect the lady employee's health or safety may amount to sexual harassment.

Scope: The Sexual Harassment Act, unlike the laws in other countries, is not gender neutral and provides protection only to women employees. As per the Sexual Harassment Act, an 'aggrieved woman' in relation to a workplace; is a woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment³.

² Section 3 of the Sexual Harassment Act

³ Section 2(a) of the Sexual Harassment Act

The ambit of the Sexual Harassment Act is very wide and is applicable to the organised sector as well as the unorganised sector. The statute, *inter alia*, applies to government bodies, private and public sector organisations, non-governmental organisations, organisations carrying on commercial, vocational, educational, entertainment, industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals and a dwelling place or a house. It is interesting to note that the Sexual Harassment Act introduces the concept of an 'extended workplace' and provides that a workplace also covers within its scope places visited by employees during the course of employment or for reasons arising out of employment - including transportation provided by the employer for the purpose of commuting to and from the place of employment⁴.

The definition of 'employee' under the Sexual Harassment Act is fairly wide and covers regular, temporary, *ad hoc* employees, individuals engaged on daily wage basis, either directly or through an agent, contract labour, co-workers, probationers, trainees, and

apprentices, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied.

Grievance Redressal Mechanism

Internal Complaints Committee and Local Complaints Committee: The Sexual Harassment Act requires an employer to set up an 'Internal Complaints Committee' ("ICC") at each office or branch, of an organisation employing at least 10 employees, to hear and redress grievances pertaining to sexual harassment. At the district level, the government is required to set up a 'Local Complaints Committees' ("LCC") to investigate complaints regarding sexual harassment from establishments where the ICC has not been constituted on account of the establishment having less than 10 employees or if the complaint is against the employer.

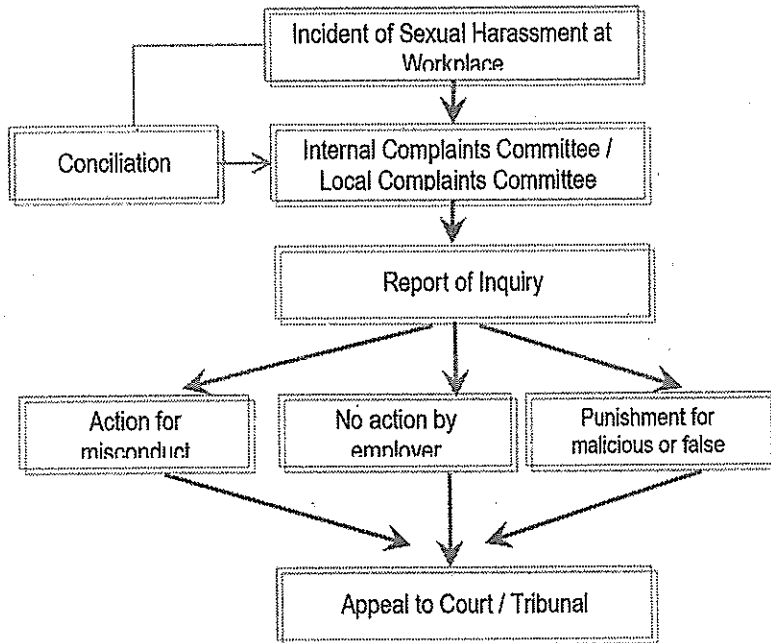
The Sexual Harassment Act prescribes the constitution of the committees, process to be followed for making a complaint and inquiring into the complaint in a time bound manner.

CONSTITUTION OF THE ICC	
Presiding Officer	Woman employed at a senior level at the workplace from amongst employees
Members	<ul style="list-style-type: none"> - Not less than 2 Members from amongst employees - Preferably committed to the cause of women or who have had experience in social work or have legal knowledge
External Member	From an NGO or association committed to the cause of women or person familiar with issues relating to sexual harassment
Not less than 50% of the total membership of the ICC shall be women	

Complaint: As per the statute, an aggrieved woman is required to submit six copies of the written complaint, along with supporting documents and names and addresses of the witnesses to the ICC or LCC, within 3 months from the date of the incident and in case of a series of incidents, within a period of 3 months from the date of the last incident. The law makes provisions for friends, relatives, co-workers, psychologist, psychiatrists, etc. to file the complaint in situations where the aggrieved employee is unable to make the complaint on account of physical incapacity, mental incapacity or death.

4 Section 2(o) of the Sexual Harassment Act

Process for Complaint and Inquiry: Please refer to the flowchart which provides, in brief, the process to be followed by the aggrieved employee to make the complaint and by the employer to inquire into the complaint. The law allows the aggrieved woman to request for conciliation in order to settle the matter although a monetary settlement should not be made as a basis of conciliation.



Timelines

A written complaint (6 copies) along with supporting documents and names and addresses of witnesses have to be filed by the aggrieved woman within 3 months of the date of the incident.

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

Upon receipt of the copy of complaint, the respondent should file his reply to the complaint along with his list of documents, and names and addresses of witnesses within 10 working days.

The Inquiry has to be completed within a total of 90 days from the receipt of the complaint. The Inquiry report has to be issued within 10 days from the date of completion of inquiry.

The employer is required to act on the recommendations of the committee within 60 days of receipt of the Inquiry report. Appeal against the decision of the committee is allowed within 90 days of the date of recommendations.

Interim Reliefs: The Sexual Harassment Act empowers the ICC and the LCC to recommend to the employer, at the request of the aggrieved employee, interim measures such as

- (i) Transfer of the aggrieved woman or the respondent to any other workplace;
- (ii) Granting leave to the aggrieved woman up to a period of 3 months in addition to her regular statutory/ contractual leave entitlement; and
- (iii) Restrain the respondent from reporting on the work performance of the aggrieved woman or writing her confidential report. Such duties may be transferred to other employees.

Punishment and Compensation: The statute prescribes the following punishments that may be imposed on an employee for indulging in an act of sexual harassment:

- Punishment prescribed under the service rules of the organisation;
- If the organisation does not have service rules, disciplinary action including written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counselling session, or carrying out community service; and
- Deduction of compensation payable to the aggrieved woman from the wages of the respondent.

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

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

Action against Frivolous Complaints: So as to ensure that the protections contemplated under the Sexual Harassment Act do not get misused, provisions for action against "false or malicious" complainants have been made. The Sexual Harassment Act provides that if the ICC or the LCC concludes that the allegation made was false, malicious, the complaint was made knowing it to be untrue or forged or misleading information has been provided during the inquiry, disciplinary action in accordance with the service rules of the organisation may be taken against such complainant. Where the organisation does not have service rules, the statute provides that disciplinary action such as written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counselling session, or carrying out community service may be taken.

Employer's Duties and Obligations

In addition to ensuring compliance with the other provisions including setting up the ICC, the Sexual Harassment Act also casts certain obligations upon the employer to, inter alia,

- a. Provide a safe working environment

- b. Formulate and widely disseminate an internal policy or charter or resolution or declaration for prohibition, prevention and redressal of sexual harassment at the workplace
- c. Display conspicuously at the workplace, the penal consequences of indulging in acts that may constitute sexual harassment and the composition of the ICC
- d. Declare the names and contact details of all members of the ICC
- e. Organise workshops and awareness programmes at regular intervals for sensitising employees on the issues and implications of workplace sexual harassment and organising orientation programmes for members of the ICC.
- f. Provide necessary facilities to the ICC for dealing with the complaint and conducting an inquiry;
- g. Cause to initiate action, under the Indian Penal Code, 1860 ("IPC") or any other law in force, against the perpetrator, or if the aggrieved woman so desires, where the perpetrator is not an employee, in the workplace at which the incident of sexual harassment took place
- h. Provide assistance to the aggrieved woman if she so chooses to file a complaint in relation to the offence under the IPC or any other law for the time being in force
- i. Treat sexual harassment as a misconduct under the service rules and initiate action for misconduct;
- j. Prepare an annual report with details on the number of cases filed and their disposal and submit the same to the District Officer;
- k. Monitor the timely submission of reports by the ICC.

Non-compliance with the Sexual Harassment Act: If an employer fails to constitute an ICC or does not comply with the requirements prescribed under the Sexual Harassment Act, a monetary penalty of up to INR 50,000 (approx. US\$1,000) may be imposed. A repetition of the same offence could result in the punishment being doubled and / or de-registration of the entity or revocation of any statutory business licences. It is however unclear as to which business licenses are being referred to in this case.

any offences of sexual harassment to the appropriate authorities.

Analysis

While the law on sexual harassment is a much awaited development in ensuring women a healthy work environment, it is being viewed as a hasty firefighting measure taken by the legislature which is ambiguous, with loopholes and susceptible to abuse. The Sexual Harassment Act only addresses the issue of protection of women employees and is not gender neutral. Male employees, if subjected to sexual harassment, cannot claim protection or relief under the law. The statute nowhere provides any protection against retaliation and victimisation, which is a very common consequence faced by individuals upon making a complaint of sexual harassment.

The law also casts an obligation upon the employer to address the grievances in respect of sexual harassment at workplace in a time bound manner, which in several cases may not be practically possible as the employees or witnesses involved may not easily or readily co-operate. Another interesting inclusion in the statute is the ability of the employer to punish the complainant in case of a false or malicious complaint. This provision, although meant to protect the employer's interests, is likely to deter victims from reporting such incidents and filing complaints, which may defeat the purpose for which the law has been enacted. Whether this law is successful in protecting women employees and reducing instances of sexual harassment at the workplace is yet to be tested.

Amendments to the Indian Penal Code

The IPC was amended in April 2013 to include a new section pertaining to sexual harassment of women. The Criminal Law Amendment Act has introduced section 354A which enlists the acts which constitute the offence of sexual harassment and further prescribes penalty / punishment for such acts. Section 354A includes within the scope of sexual harassment:

- Physical contact and advances involving unwelcome and explicit sexual overtures;
- A demand or request for sexual favours;
- Showing pornography against the will of the woman; and
- Making sexually coloured remarks.

An offence of sexual harassment is punishable with imprisonment of up to 3 years and/or fine. Since the amendment criminalises all acts of sexual harassment, employers shall be required to report

