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APPLICABILITY OF THE POSH ACT TO THE VIRTUAL WORKPLACE: ASSESSING THE NEW NORMAL

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Abstract

With India still recouping from the severe blow of the second wave of the COVID-19 pandemic and preparing to enter the third wave, all organizations have been compelled to shift to the virtual mode and re-evaluate their plans and policies once again. One significant aspect that has come under scrutiny is the adequacy of the policies to counter sexual harassment of women employees at the workplace. Since remote working is here to stay for a while, it has become extremely critical for organizations to update these policies in line with the changes of the 'new normal'. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("POSH Act" or "the Act") mandates every employer employing ten or more employees to constitute an 'internal complaints committee' to deal with complaints regarding sexual harassment against women at the workplace. While the POSH Act broadly defines the term 'workplace', it does not explicitly encompass the concept of a workplace without physical existence, i.e., a 'virtual workplace'. However, with work-from-home being declared as the new normal, uncertainty looms over the protection of women from sexual harassment in the virtual workplace. Thus, this paper seeks to understand whether the POSH Act can be applicable to sexual harassment in the virtual workplace as well. Further, the paper also delineates common instances of sexual harassment in the virtual workplace and suggests possible solutions to combat the same.

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Introduction

Sexual harassment of women at the workplace is a long-standing menace in India, which made workplaces hostile towards them. The issue is even more sensitive in case of an imbalance of power between the parties vis-à-vis the employer and the employee. As per the World Bank's Women, Business and Law Index of 2021, India currently ranks at 123 out of 190 countries, on the parameter of women's employment rights from an economic perspective.[1] The study measures, among other things, the regulatory response of the participating nations against sexual harassment of women at the workplace.

On the legislative front, pursuant to the Hon'ble Supreme Court of India's directions in its landmark judgment of *Vishakha v. State of Rajasthan*[2] ("Vishakha Guidelines"), India enacted the POSH Act to combat the menace. The Act was enacted as a compendious statute to provide every woman with a safe and secure environment at the workplace, free from sexual harassment.[3] This objective is achieved, not just by preventing but also providing quick redressal mechanisms to women aggrieved from sexual harassment at the workplace.

While the implementation of the Act has become stronger, the number of reported cases has been on a rise. In a study conducted by ComplyKaro Services, a government-empaneled advisory firm specializing in POSH training, 14 percent increase in reporting of sexual harassment complaints was seen in the BSE 100 companies[4] in FY2019 as compared to FY2018.[5] A similar trend was noticed in the Nifty-50 companies as well,[6] attributing the rise in complaints to increased compliance and awareness.

In 2020, with the onslaught of the COVID-19 pandemic, work-from-home ("WFH") has become the 'new normal'. Post the first wave of COVID-19 in March 2020, several

1 The World Bank Group Women, Business and Law Index, 2020, World Bank (Oct. 2021) https://openknowledge.worldbank.org/bitstream/handle/10986/35094/9781464816529.pdf?sequence=7&isAllowed.

2 AIR 1997 SC 3011.

3 The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament [hereinafter POSH Act], Preamble.

4 Comply Karo, *Top 100 companies by market capitalization, listed on the Bombay Stock Exchange* Money Control (Aug. 24, 2021), https://www.moneycontrol.com/stocks/marketinfo/marketcap/bse/index.html.

5 Comply Karo, *Indian Companies Report 14% Increase in Sexual Harassment Cases in FY19*, Comply Karo (Sept. 26, 2020), https://complykaro.com/press-coverage/.

6 Kiran Kabtta Somvanshi, *Sexual Harassment Plaints at Nifty Companies Hit a Record*, The Economic Times, (Aug. 12, 2019), https://m-economictimes-com.cdn.ampproject.org/c/s/m.economictimes.com/markets/stocks/news/sexual-harassment-plaints-at-nifty-companies-hit-a-record/amp_articleshow/70640973.cms?fbclid=IwAR2zAEw9GQOgCwZDjNMn3z0ZMBbESH65c7ABB_ZeHAHxmFYMzqObF4PNe8g.

organizations including Google, Facebook[7] and TCS, had announced WFH on a long-term basis, with high hopes of staggered re-opening.[8] However, the second wave of COVID-19, along with the apprehended possibility of a potential third wave has diminished any chances of the physical reopening of workplaces, at least till universal vaccination of masses is achieved.

In light of growing prevalence of WFH and hybrid workplaces,[9] protection of women from sexual harassment at the virtual workplace has become a major concern for employers. This is evident in light of the increased number of reported cases of workplace sexual harassment during the last year.[10] Since the beginning of the pandemic in March 2020, the National Commission for Women in India has reported an increase of over five times in cases of online sexual harassment of women at the workplace.[11] However, a 2.6 percent dip in the sexual harassment complaints has been noted in the Nifty 50 in FY 2020 from FY2019,[12] according to the data from 44 companies.[13] The decline can be attributed to lack of awareness, poor compliance and ineffective redressal mechanisms within these companies.

7 Shelly Singh, *Companies see work-from-home as a viable long-term option if regulatory issues can be addressed*, The Economic Times (Apr. 05, 2020), https://economictimes.indiatimes.com/news/company/corporate-trends/companies-see-work-from-home-as-a-viable-long-term-option-if-regulatory-issues-can-be-addressed/articleshow/74985839.cms?from=mdr.

8 Sonal Khetarpal, *Post-COVID, 75% of 4.5 lakh TCS employees to permanently work from home by '25; from 20%*, Business Today (Apr. 30, 2020), https://www.businesstoday.in/current/corporate/post-coronavirus-75-percent-of-3-5-lakh-tcs-employees-permanently-work-from-home-up-from-20-percent/story/401981.html.

9 Brain Kropp & Joe Coyle, *How to Talk to Employees About Reopening*, Harvard Business Review (May. 27, 2021), https://hbr.org/2021/05/how-to-talk-to-employees-about-reopening.

10 Namrata Singh, *Mumbai: Sexual Harassment Goes Online, Complaints Pour In*, Times Of India, (May. 31, 2020), https://timesofindia.indiatimes.com/city/mumbai/sexual-harassment-goes-online-plaints-pour-in/articleshow/76114455.cms.

11 Express News Service, *After COVID-19, cases of online sexual harassment spiked by 5 times*, The Indian Express (Jun. 15, 2021), https://indianexpress.com/article/cities/ahmedabad/after-covid-cases-of-online-harassment-spiked-by-5-times-7137386/. (The following observation was made by Rekha Sharma, Chairman of the National Commission for Women at a digital dialogue, "*Addressing Sexual and Gender-based Violence in the Post COVID World*", organised by Gujarat National Law University (GNLU) in 2020. The statistics can be accessed at http://ncwapps.nic.in/frmReportNature.aspx?Year=2020).

12 Nasrin Sultana, *Sexual Harassment cases sees a marginal decline in India's largest companies*, Live-mint, (Sep. 6, 2020), https://www.livemint.com/companies/news/sexual-harassment-cases-see-a-marginal-decline-in-india-s-largest-companies-11599384167896.html.

13 The Companies (Accounts) Amendment Rules, 2018 No. 105, Rules of Central Government. (It mandates companies to disclose compliance with provisions of the POSH Act, including information with respect to the number of POSH complaints filed, disposed-off and pending in the particular financial year. The said disclosure is to form a part of the Companies' Annual Report to be submitted by the Board of Directors under Section 134 of the Companies Act, 2013).

In order to understand applicability of the POSH Act to the virtual workplace, the author has divided the research paper into five parts. In Part I, the author provides an overview of the enactment of the POSH Act and the objective behind this legislation; Part II discusses the concept of 'workplace' and 'extended workplace', as defined in the POSH Act; Part III discusses the applicability of the POSH Act to a virtual workplace; Part IV provides suggestions to counter sexual harassment at the virtual workplace, and finally, Part V concludes the analysis envisioning the way forward.

Understanding the Legislative Framework of the POSH Act

The Act is the first statute introduced for combatting sexual harassment against women at the workplace. Prior to 2013, due to the absence of such a standalone statue, other legislations were relied upon for seeking remedy against sexual harassment within the confines of the workplace. However, the legislations were inadequate in their applicability and extent of protection. They are, namely, The Industrial Employment (Standing Orders) Act, 1946 ("Standing Orders Act")[14]; The Indian Penal Code, 1860[15] ("Code"); and Schedule V of the Industrial Disputes Act, 1947 (Unfair Labour Practices)[16].

The Standing Orders Act is limited in its scope as it is applicable only to industrial establishments that employ at least hundred workmen.[17] It is pertinent to note, that the scope of both 'workmen'[18] and 'industrial establishments'[19] as used in the Standing Orders Act, is much narrower than the scope of 'aggrieved women'[20] and 'workplace',[21] as used in the POSH Act. However, the Standing Orders Act protects both male and female workmen from sexual harassment.

The Code on the other hand, contains numerous provisions protecting women from a wide array of offences. However, there is no provision that specifically addresses offences committed at the workplace. Redressal mechanism under the Code, requires criminal

14 The Industrial Employment (Standing Orders) Act, 1946, No. 20, Acts of Parliament.

15 The Indian Penal Code, 1860, No. 45, Acts of Parliament.

16 Industrial Disputes Act, 1947, No. 14, Acts of Parliament.

17 (State amendments made by Maharashtra and Karnataka by reducing the limit to establishments employing 50 or more workmen).

18 Industrial Disputes Act,1947, *supra* note 16, § 2(s).

19 Standing Orders Act, 1946, *supra* note 14 § 2(e).

20 POSH Act, *supra* note 3, § 2(a). (The definition of 'aggrieved woman' under Section 2(a) of the POSH Act covers all women, including a student, customer or intern, irrespective of the status of employment).

21 POSH Act, *supra* note 3, § 2(o). (The definition of 'workplace' under Section 2(o) of the POSH Act covers industrial establishments as well).

prosecution to be initiated in an appropriate court of law, which includes section 354A which deals with sexual harassment by a man and punishment for the same; section 354B which deals with assault or use of criminal force to woman with intent to disrobe; section 354C that deals with voyeurism; section 354D that deals with stalking and section 509 that deals with insulting the modesty of a woman.

Other legislations such as the Central Civil Service Rules 1965, Protection of Human Rights Act 1993, SEBI (Employees Service) Regulations 2001, Gender Sensitization & Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013 are extremely specific and limited in their application. Thus, the existing laws had failed to provide sufficient legal safeguards to protect women from instances of sexual harassment at the workplace. The POSH Act filled this lacuna in the existing statutes by not only protecting women from sexual harassment at the workplace, but also ensuring a convenient and approachable grievance and redressal mechanism, available within the premises of the workplace itself. The Act is in line with India's international law obligations as an authorized signatory of the Convention on Elimination of All Forms of Discrimination Against Women ("CEDAW")[22] along with principles recognized at the International Labour Organization's ("ILO") Seminar, 1993[23] and the Beijing Declaration and Platform for Action, 1995.[24]

Understanding the Ambit of Workplace under the POSH Act

Definition of 'Workplace' under the POSH Act

Section 3 of the Act states that "*no woman shall be subjected to sexual harassment at any workplace*". At this stage, it is imperative to understand what comprises a workplace. The Vishakha Guidelines neither prescribed any definition of 'workplace' nor did it lay down any factors to determine whether a place visited by the aggrieved woman would be covered under 'workplace' or not. This shortcoming made it difficult to determine the scope of the workplace under the Vishakha Guidelines. In the absence of any prescribed definition, it would not have been wrong to restrict the meaning of 'workplace' to the typical office set-

22 CEDAW Convention mandates every ratifying nation to take all appropriate measures to eliminate discrimination against women in the field of employment Sep. 3, 1981 art. 11.1 U.S.T. 743.

23 Tripartite Regional Seminar on Combating Sexual Harassment at Work, Manila, 22- 26 Nov. 1993. (It recognised that sexual harassment of women at the workplace was a form of gender discrimination).

24 The Beijing Declaration and Platform for Action, 1995, (It adopted pursuant to the United Nations Fourth World Conference on Women, 1995 recognized 'sexual harassment at the workplace' and 'gender discrimination' under the ambit of 'Violence against Women' and the need to prevent the same).

up.

However, the POSH Act recognized that acts of sexual harassment might not be limited to the primary physical location of the office set-up. The Act also went a step ahead to broaden the conventional understanding of 'workplace' to include places other than the primary physical space accessed most commonly by the employee. This was achieved through introduction of Section 2(o) in the Act.

Section 2(o) of the POSH Act, which provides a non-exhaustive and inclusive definition of 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, entertainmental, 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; [and]*

vi. *a dwelling place or a house."*

A closer look at Clause v of the above definition reveals that the legislature did not intend to limit the scope of 'workplace' to just the traditional office setup. The intention of the legislature, in fact, was to cover any other place frequented by the aggrieved woman "*during or arising out of the course of employment*" under the ambit of 'workplace'. For example, transportation taken to commute to and from the place of employment. Thus, by the two-fold virtue of the Act being a beneficial legislation intended to protect women and

due to the broad wording of Section 2(o), it should be interpreted liberally. Additionally, Section 2(o) of the Act introduces the concept of notional extension of the workplace, often known as 'extended workplace'. Due to the broad and open-ended wording of the clause, what would comprise a "workplace" would be determined on a case-to-case basis subjectively.

Judicial Precedents and Subsequent Interpretations

The principle of 'notional extension' is often applied to instances under the Workmen Compensation Act, 1923 to extend beneficial labour laws to circumstances in which the duration of employment cannot be limited to 'time' or 'place' of the particular work, in which the worker is engaged. [25] The principle of notional extension came first for consideration before the apex court in *Saurashtra Salt Manufacturing v. Bai Valu Raja and Ors*.[26]. The court held that the "*theory of notional extension of the employer's premises will include an area which the workman passes and re-passes in going to and in leaving the actual place of work*." Thus, both 'time' and 'place' may be reasonably extended to determine the contours of the 'workplace' subjectively.

With respect sexual harassment at workplace, the concept of "extended workplace" was first discussed in *Saurabh Kumar Mallick v. Comptroller & Auditor General of India*.[27] The case was decided by the Delhi High Court in 2009, i.e., before the enactment of the POSH Act in 2013. The accused in this case had challenged the applicability of the Vishakha Guidelines as sexual harassment of the senior woman officer had taken place not in the office, but at the Glen Officer's Mess, where the complainant was residing. The court noted that the rationale behind the formulation of the Vishakha Guidelines was to prevent sexual harassment of women at the workplace and provide for strict action against the guilty party. Keeping this in mind, the court observed that taking a narrow and pedantic interpretation of the term 'workplace' by restricting the meaning to the colloquially understood 'traditional office' would simply defeat the objective of the Vishakha Guidelines. The court further observed that with the advent of information technology, the internet and computers, the setup of an 'office' has experienced revolutionary shift from physical to the virtual mode. Therefore, a narrow definition of 'workplace' cannot be adopted anymore. Keeping in mind the recent trends, a person cannot be allowed to get away with sexual harassment on the reasoning that the place was not covered under 'workplace'. The court also noted that "*In a case like this if such an officer indulges into an act of sexual harassment with an*

25 General Manager, B. E. S. T. Undertaking, Bombay v. Mrs. Agnes, (1964) 3 SCR 930.

26 AIR 1958 SC 881.

27 (2008) 151 DLT 261.

employee, say, his private secretary, it would not be open for him to say that he had not committed the act at workplace, but at his residence and get away with the same."[28] The court further mentioned a few general guidelines (but not determinative factors), which may be considered for ascertaining whether a particular place falls under the ambit of workplace or not. These include proximity from the place of work; control of management over such place/residence where the working woman is residing; and such a 'residence' has to be an extension or contiguous part of working place. The court, thus by giving a broader meaning to the term 'workplace', quashed the writ petition and ordered the department inquiry to continue its investigation.

In another case prior to the enactment of the POSH Act, the Supreme Court gave an expansive interpretation of the term 'workplace'. In *D.S Grewal v. Vimmi Joshi*,[29] an army officer posted in Sonmarg had sent an offensive letter to the complainant, who was working as a teacher in an army school situated in Pithoragarh. The apex court broadly interpreted the term 'workplace', and held that the accused's place of posting, i.e., Sonmarg would be included within the workplace of the complainant. The court further found the management of the school guilty of violating the Vishakha Guidelines.

In *Ayesha Khatun v. State of West Bengal*,[30] the court while recognizing the absence of the definition of the term 'workplace"' in the Vishakha Guidelines opined that logical meaning should be given to the expression 'workplace' so that the purpose for which the Vishakha Guidelines were framed, is not made unworkable. The court held as follows:

> *"Workplace, in my view, cannot be given a restricted meaning so as to restrict the application of the said Guidelines within the short and narrow campus of the school compound. Workplace should be given a broader and wider meaning, so that the said Guidelines can be applied where its application is needed even beyond the compound of the workplace…for providing a suitable and congenial atmosphere to her in her place of work where she can continue her service with honour and dignity."*[31]

Post the enactment of the POSH Act in 2013, courts have taken the same stand of liberally interpreting 'workplace' in the interest of protection of women from sexual harassment.

28 *Id*.
29 (2009) 2 SCC 210.
30 (2012) SCC OnLine Cal. 1860.
31 *Id* at ¶ 12.

In the case of *Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University*,[32] the Bombay High Court stated 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 the matter of *Gaurav Jain v. Hindustan Latex Family Planning Promotion Trust and Ors.*,[33] the accused had sexually harassed the colleague-complainant during one of the outstation trips to Hyderabad. The internal committee formed had terminated the accused. The Delhi High Court held that the outstation trip would be covered under the ambit of 'workplace' since it was undertaken for official purposes as opposed to private capacity.

Judicial Pronouncements- Sexual Harassment at the Virtual Workplace

Most recently, in the case of *Sanjeev Mishra v. Bank of Baroda*,[34] the point of contention was regarding the interpretation of what comprised 'workplace' since the alleged act occurred through text messages where both the complainant and the petitioner resided in different states. The Rajasthan High Court held that due to the digital world, different bank branches situated in different states will be considered as one workplace on a digital platform. Thus, the case recognized online sexual harassment (during the course of employment) under the ambit of 'workplace'.

Therefore, the settled position of law is that all possible places which might be accessed by the aggrieved woman in connection with, during, or arising out of the course of her employment will be covered under the ambit of 'workplace' under the POSH Act. This will also be in line with the ILO's stance on the matter, which reiterated that the understanding of the workplace should not be "*restricted to the physical environment of the workplace; it must take into account the 'access' that a perpetrator has to the harassed by virtue of a job situation or work relation*".[35] Additionally, ILO, through the Violence and Harassment Convention, 2019,[36] recognized harassment through work related communications, including those enabled by information technology.[37]

32 (2014) SCC OnLine Bom. 814.

33 (2015) SCC OnLine Del. 11026.

34 (2021) S.B. W.P. (Civil) No. 150/2021, (It is important to note that the relevant legislation in the case was the Bank of Baroda Officer Employees' (Discipline and Appeal) Regulations, 1976).

35 Nelien Haspels, Zaitun Mohamed Kasim, Constance Thomas & Deirdre Mccann, "Action Against Sexual Harassment At Work In Asia And The Pacific 22, 126 (International Labour Organization (2001).

36 Violence and Harassment Convention, 2019 (C-190), Jun. 10, 2019 International Labour Organization.

37 *Id.,* art. 3(d).

Applicability of the POSH Act to Virtual Workplaces

Are Virtual Forms of Sexual Harassment Recognized Under The POSH Act?

Due to the broad definition of the term 'sexual harassment' under the POSH Act,[38] virtual forms of harassment will also be covered under the purview of the Act. Moreover, it has been held by courts that sexual harassment occurring through virtual mediums, including SMS[39] and WhatsApp texts[40] will be covered under the Act.

In a WFH setup, unwarranted calls and texts at odd hours, use of indecent emojis, inappropriate jokes/remarks, initiating personal conversation at the pretext of work-related discussions, sexist comments, sexually provocative clothes and/or posters appearing in the background of video calls, taking screenshots of video calls without consent of the parties involved, gender-based work discrimination, etc. has nullified the need of a typical physical office setup for sexual harassment to take place.

Will the POSH Act be applicable to Virtual Workplaces as well?

The Delhi High Court in the case of *Saurabh Kumar Mallick*,[41] correctly recognized the undefinable boundaries of the workplace, especially with the emergence of information technology and high-speed internet. Work arising out of or during employment is no more restricted to the four-corners of the office in the 21st century. Every employee is nowadays required to travel to destinations outside of the primary office for business meetings. Therefore, giving a restricted meaning to the term 'workplace' will not just defeat the purpose of the Act, but also render it redundant. As it can be seen from the judgments discussed above, the position of law is clear that sexual harassment can take any form-physical verbal or otherwise.[42] Thus, it can be said that sexual harassment through online medium in the virtual workplace will be covered under the ambit of the POSH Act.

The question for consideration is whether personal homes of employees and other such private spaces will be considered as 'workplace' under the POSH Act. In the current times

38 POSH Act, *supra* note 3, § 2(n). (Section 2(n) of the POSH Act broadly defines the term 'sexual harassment' as, any unwelcome sexually determined behavior, which includes verbal or non-verbal conduct, remarks, gestures, etc. whether physical or otherwise).

39 Jahid Ali v. Union of India, (2015) W.P.(C) No. 11182 of 2015 (Del); *see also* Ajay Tiwari v. University of Delhi, (2012) W.P (C) No. 1288 of 2012 (Del).

40 Shambhoo Singh Raghuvanshi v. High Court of M.P. & Ors., (2021) L.L.R. 186.

41 Saurabh Kumar Mallick, *supra* note 27.

42 POSH Act, *supra* note 3, § 2(n) *see also*; Manisha Sharma v. Union of India & Ors. (2006) LPA No. 489 of 2004, Del.

of WFH during COVID-19, people are carrying out duties arising out of employment from their homes. While this has blurred the line between personal and professional workspace, it is to be noted that the use of home premises is nevertheless being done for activities "*arising out of or during the course of employment*". Therefore, by application of the ratio established in the case of *Saurabh Kumar Mallick* and others mentioned above, homes and other personal spaces of employees should be covered under the ambit of 'workplace', for the determination of sexual harassment (provided the personal spaces are being used for carrying out obligations arising out of employment). The same will be effectuated by a harmonious reading of Section 3 along with Section 2(o) of the POSH Act. However, determination of what will comprise a 'workplace' would be subjective, provided a direct relationship between the alleged act and employment is established.

Suggestions for Countering Sexual Harassment at Virtual Workplaces

The mandate to uphold the objectives of the POSH Act statutorily falls upon the employer. This involves the legal obligation to not only comply with provisions of the Act, but also disseminate information, raise awareness and sensitize employees on matters of sexual harassment at the workplace.[43]

Duties of Employer

In addition to the duties prescribed under the regulatory framework, the following pointers can be considered by employers for the prevention of sexual harassment at the virtual workplace:

Facilitating Online Complaint Filing and Redressal Mechanism

The employers may consider launching an online complaint filing portal and redressal mechanism with provisions to upload and attach soft copies of documentary evidence, audio/ video clips, screenshots, etc. Moreover, in order to abide by the prescribed timelines of inquiry as dictated under the POSH Act,[44] quick redressal of sexual harassment complaints should be facilitated through virtual media. This can be achieved by facilitating remote working of the Internal Committee ("**IC**"), rather than waiting to hold in-person meetings.

43 POSH Act, *supra* note 3, § 19, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013, Rules of Central Government, Rule 13 [Hereinafter "POSH Rules"] *see also*; Samridhi Devi v. Union of India, 125 (2005) DLT 284.

44 POSH Act, *supra* note 3, § 11(3)(4). (The Act prescribes the inquiry to be completed within 90 days of filing of complaint).

The inquiry report should be available in soft copy for the benefit of all concerned parties.

Improving Efficiency of the Local Committee

For the unorganized sector, access to the Local Complaint Committee may be restricted due to multiple lockdowns. Online filing of complaints through mediums such as She-Box should be further developed and promoted. This is of utmost importance since 95 percent of the workforce employed in the unorganized sector comprises women.[45]

Redrafting and/or Amending the Existing POSH Policies

The employers may consider redrafting and/or amending the existing POSH policies to extend the scope of 'workplace' to provide protection against sexual harassment at the virtual workplace. Additionally, while the Act only protects women against sexual harassment, employers may consider drafting gender-neutral POSH policies. This comes in light of recent statistics[46] and emerging incidents[47] of sexual harassment against men at the workplace. Lessons can be drawn from gender-neutral POSH policies of various Indian companies including WIPRO, Tech Mahindra Foundation, Taj Group of Hotels, etc.

Addressing Confidentiality Concerns

The Act, by placing utmost concern on confidentiality of the complainant and the witnesses, prohibits dissemination or publication of any information relating to the inquiry proceedings in any way.[48] Employers may consider strengthening the same by the use of non-disclosure agreements and software blocking screenshots/screen capture during video calls.

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45 Government of India, *Report on Study on Working Condition and Privileges of Women in the Unorganized Sector in India,* Ministry of Women and Child Development (2016).

46 ET Bureau, *Even men aren't safe from sexual harassment at workplace: Survey* The Economic Times (Aug. 27, 2010), https://economictimes.indiatimes.com/special-report/even-men-arent-safe-from-sexual-harassment-at-workplace-survey/articleshow/6389438.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.
(In India, in a joint survey conducted by Economic Times and Synovate in 2010, 19 percent of the 527 male respondents admitted to having faced sexual harassment at work.) *see also;* U.S. EEOC, *Statistics of Charges of Harassment Filed,* U.S. Equal Employment Opportunity Commission (Aug. 24, 2019) https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2020 (In USA, 16.8 percent of the total complaints concerning sexual harassment at workplace, filed with the Equal Employment Opportunity Commission in 2020, were filed by men).

47 Devika Agarwal, *Vijay Nair Sexual Harassment Case: Rising Incidents Against Men Emphasize Need for Gender Neutral Laws in India,* First Post, (May. 17, 2017), https://www.firstpost.com/india/vijay-nair-sexual-harassment-case-rising-incidents-against-men-emphasise-need-for-gender-neutral-laws-in-india-3452286.html.

48 POSH Act, *supra* note 3, §§ 16 & 17.

Social Media Policy

Employers may adopt a "Social Media Policy" binding on all, which restricts sharing of personal information/data/pictures, etc. of others without their consent. The policies may also specify certain do's and don'ts, for example regulation of the content allowed to be shared on social media which directly concerns the company/employer, guidelines for official meetings and calls, prohibition of indecent language/gestures/behavior, appropriate dress code during meetings, virtual meeting etiquettes, etc.[49]

Corresponding Liability of The Employer

The Act imposes a two-fold duty, primarily on the employer, to provide a safe working environment at the workplace,[50] vis-à-vis *first,* prevention and *second,* redressal.[51] This duty is not just limited to constitution of an IC, but also upholding the purpose of having such a committee in place.[52] 'Prevention' involves carrying out training and sensitization programs[53] for all, including colleagues, visitors and beneficiary of services provided.[54]

In case of non-compliance of these duties by the employer, a corollary provision penalizing the same is absent, from both the Act and the POSH Rules. Section 26 of the Act does prescribe a general penalty of Rs. 50,000 for any non-compliance of the Act.[55] However, the amount is not proportional to either deter non-compliance or encourage compliance, on part of the employer. This is visible from absence of any penal action taken against Twitter India, for non-constitution of an IC for 6 years.[56] Moreover, the Act is unclear about cancellation of '*what specific business license*' in case of a repeated/continued non-compliance of the POSH Act.[57]

49 Masooma Ranalvi, *POSH Act now to stop harassment at virtual workplace*, LIVE-MINT (Jul. 08, 2020) https://www.livemint.com/opinion/online-views/act-now-to-stop-harassment-in-the-virtual-workplace-11594217747525.html.

50 POSH Act, *supra* note 3, § 19.

51 Vidya Akhave v. Union of India & Ors., (2016) 6 AB. R 506.

52 X v. Union of India (2021) 1 SCT 264.

53 POSH Act, *supra* note 3, § 19, POSH Rules, *supra* note 43, Rule 13.

54 X, *supra* note 52 at ¶ 25.

55 POSH Act, § 26(1), No. 14, Acts of Parliament, 2013.

56 OP India Staff, *Twitter operated without committee against sexual harassment as required by the Indian law for more than six years: Report*, OPINDIA, (Jun. 25, 2021), https://www.opindia.com/2021/06/twitter-india-operated-without-sexual-harassment-committee-for-6-years/.

57 POSH Act, *supra* note 3, § 26(2)(ii).

Conclusion

With the rapid increase in the number of COVID-19 cases in India, it is unlikely that organizations will resume physical operations on the same scale as before. Remote workplaces are here to stay for a while, especially with most organizations permanently shifting to remote offices in a bid to cut costs and increase productivity. With this, sexual harassment is not expected to decrease, but take newer forms. Therefore, what is required is a strict policy of zero-tolerance to sexual harassment against women in any form.

Taking into consideration the current circumstances, both positive and negative trends have emerged. On one hand, while multiple organizations such as HUL, ICICI Bank have taken positive steps including training and sensitization during the lockdown to curb the menace.[58] On the other hand, there has also been an increase in the number of pending POSH complaints filed in the BSE 500 companies. According to a study conducted by Comply Karo Services, a 12 percent increase in the number of pending POSH complaints has been observed in FY2020 from FY2019.[59] This increase in the number of pending POSH complaints was pegged at 275 percent in FY2020 from FY2016.[60] While much progress has been noted since the enactment of the POSH Act, there is still a long way to go. Thus, given the changing face of virtual workplaces and the dynamics of sexual harassment, it is pertinent for all organizations, public and private, organized and unorganized alike to re-evaluate the policies and improvise.

58 M. Saraswathy, *Why there has been an 8% increase in sexual harassment complaints at Nifty50 firms*, MONEYCONTROL, (Oct. 6, 2020) https://www.moneycontrol.com/news/business/companies/why-there-has-been-an-8-increase-in-sexual-harassment-complaints-at-nifty50-firms-5926501.html.

59 Comply Karo Staff, *India INC. Fails to Settle Sexual Harassment Cases*, COMPLYKARO, (Oct. 24, 2020) https://complykaro.com/press-coverage/.

60 *Id*.