

ROUNDTABLE – THE SEXUAL HARASSMENT AT THE WORKPLACE ACT 2013

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In April, India's president gave assent to the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act: the country's first piece of legislation dedicated to sexual harassment at work, which was passed by the Rajya Sabha, the upper house of India's parliament, in February. Following such a lengthy legislative process – enacted 16 years after the Supreme Court first recognised workplace sexual harassment as a human rights violation – the final transition from bill to act was relatively speedy, spurred on, according to some, by the widespread social unrest caused by the now infamous New Delhi gang rape case of December 2012.

Before enactment the bill was subject to criticism. A comprehensive study by Chief Justice JS Verma published in January took exception to several of its sections: the report declared the stipulation that conciliation between complainant and respondent must be attempted before an inquiry takes place to be “yet another way in which the dignity of women is undermined”; while the imposition of penalties for filing false complaints were called “completely abusive” and “intended to nullify the objective of the law”.

While debate rages and protests continue, *Indian Lawyer* gathered four leading Indian employment lawyers for a discussion of the effect of the new Act on their practices.

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1. *HOW EFFECTIVE DO YOU CONSIDER THE NEW LAW TO BE IN ADDRESSING WORKPLACE SEXUAL HARASSMENT IN INDIA? WHERE DOES IT SUCCEED AND*

WHERE DOES IT FAIL?

Shalini Agarwal

While the enactment of legislation in this area is a positive step forward, much more is needed than the simple act of passing legislation. This Act was pushed through fairly swiftly in the wake of the heinous crime committed in New Delhi in December. The question that is being debated is whether the legislation has really been thought through in its entirety or whether it has been much more of a knee-jerk reaction.

As with many other issues relating to the workplace, employers have to take this legislation seriously and meet their obligations. With sanctions for non-compliance being relatively low monetary penalties, the question remains of how seriously most employers will take their obligations.

Ajay Raghavan

Court-promulgated guidelines for prevention of sexual harassment have been around since 1997 (under the *Vishaka* case), however a surprisingly large number of organisations in India disregarded these entirely or implemented highly watered-down policies. It will now become difficult for employers to ignore the new Act, and this is probably the most significant impact it will have. Monetary sanctions aren't high, but the Act also contemplates revocation of operating licences for repeat offences – which if implemented correctly could prove to be a significant catalyst to compliance. A couple of positive features include the need for the committee to attempt conciliation of the complaint in the first instance, time-bound completion of inquiries, obligation of the employer to conduct trainings to sensitise employees and orientation programmes for committee members, etc.

However, considering the amount of time the Act has been in the making, it could have been better drafted and several ambiguities avoided. For example the Act seems to create a highly onerous obligation for the employer to establish a complaints committee for every one of its branches (which employs 10 or more people), even if the branches are in the same city. The definitions in several instances are vague or overlapping and the use of legal terms in the law isn't consistent, leaving a lot of scope for interpretation. The law could have also been gender-neutral. We hope that some of these issues are ironed out over time (potentially in the rules that are yet to be issued), so that when the law is finally notified into effect it is easier to comply with.

Vikram Shroff

A codified law on prohibition of sexual harassment at the workplace was the need of the hour and will most likely lead to increased awareness on this subject in the short run, hopefully leading to reduction in such cases if strictly implemented. Employers for their part are likely to be more prepared in handling such cases at the workplace, especially since non-compliance could potentially lead to cancellation of business licences.

The law could have also taken into consideration certain issues such as making it gender-neutral, adding protection from victimisation, increasing monetary penalties in case of non-compliance, etc.

While it is always possible to find faults with any new enactment (and lawyers are generally good at that), I consider this as a positive and progressive step by the Indian government, especially in light of some of the unfortunate incidents that the country has witnessed in recent times.

Manishi Pathak

It is a positive change and has come after a long wait. It hopefully will bring a positive change if enforced appropriately!

Since the law casts an obligation on an employer to ensure compliance and also provides punishment for non-compliance, it is expected that it will be taken more seriously and followed in its true spirit as non-compliance may also lead to loss of goodwill or market reputation apart from business licence.

It is too early to predict its success or failure as the rules are yet to be made or notified. There seem to be some aspects which may need to be corrected such as a committee for each workplace, etc. However, since the government will now face the practical difficulties that it earlier did not address, some amendments to the Act should be expected in the near future.

2. HOW OFTEN, TRADITIONALLY, DO SEXUAL HARASSMENT ISSUES ARISE IN YOUR EMPLOYMENT LAW PRACTICE? DO YOU EXPECT THE PROVISIONS OF THE ACT TO HAVE ANY IMPACT ON THE VOLUME OF SEXUAL HARASSMENT MATTERS YOU HANDLE?

Ajay Raghavan

Not as often as they potentially occur. India is largely a conservative society and majority workplaces still remain male-dominated, although the ratios are slowly improving. Women are generally hesitant about raising such complaints and most smaller acts of sexual harassment go unreported. Even when complaints are sometimes raised, complete details are not shared making it difficult to investigate them further. Unless employers have robust policies and they take active interest in sensitising employees about this issue, it is unlikely that there will be a sharp spike in sexual harassment matters. The Act also prescribes sanctions against false complaints, which while helping avoid frivolous claims, will also make women all the more guarded and cautious about what they report and what they don't. The importance of employee sensitisation and training – which the Act is trying to achieve – therefore cannot be stressed enough.

Manishi Pathak

In the last few years, there has been a growth in the cases received. However, not every complaint has turned out to be correct, for various reasons. The Act would deter any malicious acts on the part of women employees as well any accomplices who may intend to support them as a witness to an incident, since it clearly intends to encourage the enforcement of law in its true sense.

We feel that since the law is new, a lot of time is being spent in ensuring that the employers take preventive steps then corrective steps. Accordingly, as of now, we are actively involved in spreading the spirit of the law with the expectation that it will be respected. A lot of time is being committed in spreading awareness, not only to employers but also employees at all levels.

Vikram Shroff

The number of allegations of sexual harassment at the workplace has increased over the past couple of years. While traditionally, female employees in India were conservative in their approach and preferred to ignore rather than to use the formal complaint mechanism set up by the employer, it appears that they are now more aware of their legal rights, especially the employer's obligation to provide them with a harassment-free working environment.

In addition to the review of their policies and practices relating to prohibition of sexual harassment in the workplace, we are being approached by clients for advice on the new law, the processes to be followed, the employer's obligations during the investigation period, the nature of disciplinary action to be taken, assistance in conciliation, etc.

Shalini Agarwal

We have seen an increase in the number of complaints being made public and employers having to take up issues in the workplace. Often the perpetrators are the managers in charge of operations and hence victims feel unable or unwilling to expose the problem. Not only has the legislation been weak in this regard but social stigma attached to this issue often prevents women from disclosing harassment.

The new Act that places an onus on employers to have a proper committee and complaints mechanism in place will no doubt provide much needed support and courage to victims to come forth. Although this obligation has existed since 1997, employers did not take the dictate very seriously, often not realising that the guidelines in the *Vishaka* judgment had the force of law. The new Act obviously leaves no doubt in terms of what is legally required of employers. The general mood in India as well – of women's rights and redressing inequality etc – is no doubt going to have an impact on the statistics with more cases coming to light.

3. WHAT HAS THE RESPONSE BEEN AMONG YOUR CLIENTS TO THE LAW? WHAT SORT OF QUESTIONS ARE BEING ASKED?

Manishi Pathak

Quite positive. Constitution of committees, the right manner in which the law should be presented, punishment and who could be punished in the management, and whether to notify the concerned authorities for minor or only major incidents seem to have taken the centre stage. Some clients are concerned with the practical issues around reintroducing a policy that people and organisations had become familiar with – especially in the MNCs that have subsidiaries in India – as the Act would add

more work (such as amendments to employee handbooks, etc.) to the “to-do” lists of overseas and Indian legal and HR teams, as well as presenting related practical challenges.

Shalini Agarwal

The furore surrounding sexual harassment in the workplace in India has really been contained in the Indian press and within India. Western employers, especially those from jurisdictions such as the US and UK are well versed with issues relating to such harassment and often have had provisions in their company policies in India to deal with harassment. With the advent of the new Act, there is now a quest to ensure that employers are meeting all the specific requirements set out under the law. Thus the majority of queries are on ensuring that adequate measures exist within their Indian organisations to comply with the new Act.

Ajay Raghavan

While our clients are keen to understand their obligations under this Act, they are also not overly concerned because most have already implemented procedures to deal with sexual harassment based on the *Vishaka* guidelines and international best practices. However, the less than desirable drafting of the Act has thrown up several questions – many of them avoidable – which clients are hoping to get clarity on. For example, is there a positive obligation on the employer to report even minor acts of sexual harassment to the police, even if the victim does not desire it? Which employer is responsible to handle sexual harassment claims in case of vendor-supplied workers especially in light of the extended definition of the term “workplace”?

Vikram Shroff

Most of the questions that we have been receiving after the enactment of the new labour law revolve around the formation of the Internal Complaints Committee (ICC) and the requirement to include an external member as part of the committee, since clients are worried about the confidentiality aspect. Other questions include the definition of “workplace”; the need to set up an ICC at every office location and have consistency of approach; having common members within different ICCs of the same employer; the need for a written complaint; interim measures to be adopted during the investigation process; type of punishment and determination of the amounts if the allegations have been proved; details and frequency of the reports to be submitted; and the employer’s obligations in general to create awareness and provide training.

Since sexual harassment has also become a criminal offence in view of a recent amendment to the Indian Penal Code, clients are also asking questions in relation to their obligations to report the crime to the local police authorities.

Multinational companies having Indian operations or subsidiaries have also been asking questions in relation to aligning their global policies on prohibition of harassment at the workplace.

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