

## Any miss in ASH policy can be costly

### 性騷擾政策的疏漏可價值不菲

Mohan Datwani 高朗



**R**ecent news in Hollywood has drawn global attention on sexual harassment. According to a latest survey, 12% of female workers in the service industry had faced sexual harassment at the workplace. These set off the alarm bells among companies to review the adequacy of their anti-sexual harassment (ASH) policy, or adopt one in due course if they have not yet done so. In addition to an important risk management measure on reputational and legal/vicarious liability, an ASH policy is an essential part of how a firm honours equal opportunities as an employer and broader ESG policy.

While there is 'no one-size fits all' solution, below are some key elements companies should consider including in its ASH Policy:-

- **Definition of sexual harassment.**  
There should be a definition of sexual harassment, and clear statements that sexual harassment can take place regardless of gender; intention is irrelevant.<sup>1</sup>
- **Principle: zero tolerance.**  
The policy needs to state that everyone has the right to be respected and be treated equally, and that sexual harassment is discriminatory and unlawful. Sexual harassment may lead to disciplinary measures of company and may also entail civil liability and even criminal consequences.
- **Disciplinary measures.**  
The policy should state the specific disciplinary measures to which sexual harassment acts could lead and what the maximum penalty is, for instance, making apologies, attending counselling sessions, paying compensation, being dismissed, etc. Actions that could be taken by the company should also be stated. For instance, if the case involves criminal offences, the company will report it to the police.
- **Objectives and responsibility of the management.**  
The policy should set out the objectives so that all parties in company have a clear understanding of them. These include creating a safe and sexual-hostile free environment, requiring training; establishing channels to lodge complaints and to handle them in fair, impartial and confidential manner, and providing protection to complainants.
- **Obligation and responsibility of employer and all employees.**  
The policy should make it clear that the management and employees all have the obligations and responsibility to eliminate sexual harassment, including to respect the will and feelings of others, refuse to tolerate any sexual harassment behaviour and support co-workers to take reasonable steps to stop sexual harassment. When any sexual harassment is witnessed, it should be reported.
- **Rights of victim and various actions to be taken.**  
The policy should explain that every person has the right to lodge a complaint relating to sexual harassment and to take the following actions:-
  - Speak up at the time to tell the harasser that his/her act is unwelcome and should be stopped immediately
  - Keep a written record of the incidents, including the dates, time, location, witnesses and nature (what the harasser has said or done) and his/her own response
  - Tell someone he/she trusts and ask for emotional support and advice
  - Lodge a formal or informal complaint to the employer / company management
  - Lodge a complaint with the EOC and request investigation or conciliation. In case conciliation fails, the complainant may request the EOC to provide legal assistance. Telephone number of the EOC: 2511-8211. For enquiries or complaints, EOC website: <http://www.eoc.org.hk/eoc/graphicfolder/complaint.aspx>

- Consult a lawyer; report to the police or to file a civil law suit against the harasser.

- **Mechanism for handling sexual harassment complaints.**

The policy should establish both informal and formal complaint handling mechanisms for sexual harassment complaints. If the primary concern of the complainant is to stop the acts of sexual harassment as soon as possible by way of taking informal action (e.g., sending a clear message to the alleged harasser) instead of investigating his/her case, the complaint will be handled informally. The informal complaint handling mechanism is suitable for handling minor and single incidents rather than serious and repeated acts of sexual harassment.


- **Time bar for lodging a complaint.**

The policy should explain that if the person who is sexually harassed intends to lodge a complaint with the

Equal Opportunities Commission, he/she should act within 12 months after the incident occurred. Any decision to take legal proceedings to the District Court should be made within 2 years after the incident occurred.

#### Case in Point

In *Yuen Sha Sha v Tse Chi Pun [1991] 1 HKC 731*, videotaping a person undressing without consent was found to be unwelcome sexual conduct, as with *Insitu Cleaning Co. Ltd v Heads [1995] IRIL 4*, where a manager greeted an employee with ‘Hiya Big Tits. In *Aldridge v Booth (1988) 80 ALR* an employee tolerated sexual intercourse for fear of being dismissed. This is a case heard by the Federal Court of Australia. The employee was awarded AU\$7,000 by way of damages. In *L v David Roy Burton DCEO 15/2009*, the victim was subjected to numerous sexual advances and awarded approximately HKD\$200,000, including HKD\$100,000 for injury to feeling. Aside from vicarious liability claims, the reputational risk can also be

grave, especially considering how quick information travels in the Internet age. Every business should have an ASH Policy to inculcate appropriate behaviours of management and staff, or otherwise occurring in the business premises. 

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<sup>1</sup> Under the Sex Discrimination Ordinance (SDO), there are two limbs as to what amounts to sexual harassment. The first limb is where a person (male or female) is subject to (i) unwelcome sexual advance; (ii) request for sexual favours; (iii) or engagement in conduct of a sexual nature where a reasonable person having regard to the circumstances would be offended, humiliated or intimidated. The second limb extends to conduct of a sexual nature which creates a hostile or intimidating environment, including where there is no targeted person. If a group of colleagues tell dirty jokes in the office and everyone enjoys that, this is not unwelcome, and there would be no sexual harassment. However, if another staff member in the office overheard the dirty jokes, which is not directed at the staff, that staff member can lodge a complaint of sexual harassment.



Representatives from different sectors hold slogans of **#TIMESUP** and **#BreakingSilence** at a March 2018 seminar co-organised by the Equal Opportunities Commission and the Gender Research Centre of The Chinese University of Hong Kong to express their determination to eliminate sexual harassment.

在2018年3月平機會與香港中文大學性別研究中心合辦的一個研討會上，來自社會各界的參加者一齊高舉**#TIMESUP**和**#打破沉默**的紙牌，展示攜手消除性騷擾的決心。

Detail 詳情：<http://www.eoc.org.hk/eoc/GraphicsFolder/ShowContent.aspx?ItemID=15505>

# 荷

里活近期發生的連串性騷擾事件引發全球關注。一項最近的調查發現，服務業女性從業員中12%表示曾在工作間遇到性騷擾。這正正警醒商界檢討其反性騷擾政策，若其仍未訂立有關政策者，應及早行動。除了為聲譽及法律責任作風險管理，性騷擾政策亦是企業作為平等機會僱主及秉持ESG（環境、社會及管治的企業）政策的重要一環。

雖然反性騷擾政策沒有一個特定的方案，但企業可根據個別需要，考慮包含以下要素：

## 性騷擾的定義

政策應列出性騷擾的定義，並清晰表明性騷擾有可能在任何人身上發生，不分性別、有否意圖並不相干。<sup>1</sup>

## 原則：零容忍

政策應表明人人有權受到尊重及得到平等對待，並明確指出性騷擾是歧視及違法行為，不但機構內會有紀律處分，並會帶來民事法律責任，更可能有刑事後果。

## 處分

政策應說明性騷擾他人可導致的具體處分及最高懲罰，如道歉、接受輔導課程、支付賠償和可被解僱等，以及機構可能採取的行動，如當事件可能涉及刑事罪行，機構會向警方舉報等。

## 僱主和管理層的目標和責任

政策應列明政策的目標，讓公司內各方對此有清晰的了解，包括營造一個安全和在性方面沒有敵意的環境、要求員工接受培訓、提供投訴渠道，並以公正、不偏不倚的態度保密地處理投訴，以及保護投訴人。

## 僱主和全體僱員的義務和責任

政策應表明管理層和員工皆有義務和責任消除性騷擾，包括尊重他人的意願和感受、不姑息任何性騷擾行為，及支持同事採取合理行動制止性騷擾。如有人目睹任何性騷擾行為，應向公司舉報。

## 受害人的權利和可以採取的行動

政策應表明人人都有權投訴性騷擾行為及採取以下行動：

- 即時表明立場，告訴騷擾者其行為

不受歡迎及必須立刻停止。

- 書面記錄性騷擾的日期、時間、地點、證人和性質（騷擾者的說話和做過的行為），以及受害人當時的反應。

- 告訴信任的人，讓他們給予情緒的支援和處理事件的建議。

- 向僱主 / 公司的管理層作正式或非正式投訴。

- 向平機會投訴，要求展開調查或調停。若調停不成功，投訴人可向平機會尋求法律協助。平機會的聯絡電話為2511-8211。如欲向平機會查詢或投訴，請參考平機會網頁：

<http://www.eoc.org.hk/eoc/graphicsfolder/c/complaint.aspx>

- 諮詢律師意見、向警方報案，或循民事途徑向騷擾者提出訴訟。

## 處理性騷擾投訴的機制


政策應設有處理性騷擾投訴的非正式和正式機制。若投訴人首要關注的是以採取非正式行動的方式（如向騷擾者發出明確的訊息），盡快遏止性騷擾行為，而非調查事件，則該投訴可透過非正式機制處理。非正式投訴處理機制適用於處理輕微和單一事件，但不適用於處理嚴重和多次發生的性騷擾行為。

## 投訴的時限

政策應說明被性騷擾者若有意向平機會投訴，需於事件發生後的12個月內提出。若受害人打算在區域法院提出法律訴訟，需於事發後2年內提出。

## 引以為鑒

在 *阮莎莎訴謝智斌* [1991] 1 HKC 73 一案中，法庭裁定未得同意而拍攝他人脫衣服屬不受歡迎的性行徑；在 *Insitu Cleaning Co. Ltd v Heads* [1995] IRIL 4 一案中，一名經理打招呼時向僱員時說「Hiya Big Tits（喂，大胸脯）」，法庭亦裁定為不受歡迎的性行徑。在 *Aldridge v Booth* (1988) 80 ALR 一案中，一名僱員因怕被解僱而與僱主性交。這是澳洲聯邦法院的案件，法庭裁定受害員工獲償\$7000澳元；而在 *L v David Roy Burton DCEO 15/2009* 一案中，受害人多次遭被告提出性要求，法庭裁定其勝訴獲償約20萬港元，當中

10萬港元為情感傷害賠償。性騷擾除了可能招致法律責任外，對公司造成的聲譽損害亦不容忽視，尤其在資訊發達互聯網年代。因此公司需要制定性騷擾政策，為管理層、員工，及在辦公室以內的行為提供適當的有關基準。 

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<sup>1</sup> 根據《性別歧視條例》，構成性騷擾的情況分為兩種。第一種情況是任何人對另一人（無論男女）(i)提出不受歡迎的性要求；(ii)提出獲取性方面的好處的要求；(iii)或作出其他不受歡迎並涉及性的行徑，而一名合理的人在顧及有關情況後，應會預期該人士會感到受冒犯、侮辱或威嚇。第二種情況是任何人作出涉及性的行徑，而該行徑造成對另一人屬有敵意或具威脅性的環境，即使該行徑沒有針對任何特定人士。假如一群同事在辦公室大談黃色笑話而每人都樂在其中，這行為並非「不受歡迎」，便不算是性騷擾；但假如有同事無意中聽到這些黃色笑話，即使笑話不是對該同事說的，他/她也可以作出性騷擾投訴。

## In Memory 懷念

To the following who left us, the Institute would like to extend our deepest condolences to their families:  
致下列辭世人士，本會向他們的家人致以深切慰問：



**Mr Liu Lit Mo MBE JP FHKIoD (1938 – 2017)**, our long-time and supportive member who joined HKIoD in 1997.

廖烈武先生 MBE JP FHKIoD 於1997年成為本會會員，長期支持本會。



**Mr Mark Whitehead FHKIoD (1957 – 2018)**, awardee of Directors Of The Year Awards 2017.

韋浩德先生 FHKIoD，「2017年度傑出董事學會獎」得獎者。

We will sadly miss them. May they rest in peace.  
我們永遠懷念他們，願他們安息長眠。



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### 香港上市公司企業管治水準報告2016 Report on the HKIoD Corporate Governance Score-card 2016



【香港董事學會上市公司企業管治水準報告2016】闡述有關恆生指數成份股上市公司的企業管治水準研究結果，本研究以這些公司的年報及公開資料為基礎，研究目的在於提升公眾意識及建立基準以切合本港金融市場與國際標準。

Report on the HKIoD Corporate Governance Score-card 2016 documents findings of a survey on corporate governance practices of listed companies that are Hang Seng Index constituents, based on these companies' annual reports and publicly available information. It serves the purposes of raising community awareness, establishing benchmarks relevant to the Hong Kong financial market and compatible with international standards and helping Hong Kong companies to enhance corporate governance.

If you are interested in this Score-card Report, please visit our website for further information:  
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