

# **Sexual Harassment in the Workplace**

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# Sexual Harassment in the Workplace<sup>\*</sup>

Carole J. Petersen<sup>#</sup>

## Introduction

Until 1995, there was no law prohibiting sexual harassment in Hong Kong, except where it rose to the level of a criminal offence or a traditional tort. However, the Sex Discrimination Ordinance (which was enacted in 1995 and came into force in 1996) now expressly defines and prohibits sexual harassment in a wide range of fields, including employment, education, and the provision of goods and services.

\*Part 1 of this paper outlines the areas that are covered by the new law, which are intended to be quite broad, particularly in work-related fields.

\*Parts 2 and 3 analyse the definition of sexual harassment under Hong Kong law. These sections draw upon some cases from jurisdictions with similar laws (since we have so few decided cases here in Hong Kong). However, these cases should not be considered as “definitive” statements of how a court would rule in Hong Kong, not only because they are not binding here but also because the foreign courts are applying statutes that may be quite different from our own. Yet many of the same elements do appear in the various statutory or case-law definitions of sexual harassment. Moreover, the main focus of this session is how to design a policy to *prevent* sexual harassment litigation (either by preventing the offensive conduct or by dealing with it promptly through internal procedures). In that context, cases that have been litigated elsewhere are useful examples of the types of problems that may arise.

\*Part 4 addresses the concept of vicarious liability and “victimisation” of those who make complaints.

\*Part 5 discusses the steps to be taken in designing and implementing an effective internal sexual harassment policy. It also suggests some possible language that might be

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included in a policy (although this section is put forth primarily for discussion at this session – it should not be considered an authoritative model). In my view, every organization should ideally spend some time and resources to investigate what its particular needs are and what is the most appropriate policy for its employees. I have also included, in your materials, some samples of alternative approaches to internal sexual harassment policies.

## **Part 1: The Scope of Hong Kong's Law of Sexual Harassment**

Like most statutes, the Sex Discrimination Ordinance does not prohibit sexual harassment in all contexts. Rather the Ordinance applies only to certain protected spheres, primarily in the fields of employment, education, housing, and the provision of goods and services. This section briefly reviews those areas and also discusses the application of the law to sexual harassment against men and to “same sex” sexual harassment.

### ***A. The Protected Spheres***

Sections 23, 24, 39, and 40 define the areas in which sexual harassment is prohibited.

#### **Section 23 -- sexual harassment at work:**

Section 23 protects the following persons from harassment in the workplace:

*Employees* are protected from harassment by employers and by their co-workers (section 23(2)-(3)). *Applicants for jobs* (section 23(1) and (3)) and *employers* themselves (section 23(11)) are also protected.

*Contract workers and commission agents* are protected from harassment, both by their principals and by fellow contract workers or agents (section 23(4), (5), (9) and (10)).

*Partners and potential partners.* It is unlawful for a partner in a firm to harass another partner or someone seeking to become a partner (section 23(6)). The Ordinance expressly applies to persons who are proposing to form a partnership, as

well as to existing firms (section 23(7)). It should be noted that the sexual harassment provisions apply to all partnerships regardless of their size. (In contrast, the sex discrimination provisions apply only to partnerships of six or more.<sup>1</sup>)

*Domestic helpers.* Foreign domestic helpers are particularly vulnerable to sexual harassment, as they generally live with their employers and risk deportation if they are fired. The standard provisions prohibiting sexual harassment by an employer or co-worker would not provide adequate protection, as the “employer” of a domestic helper is the person who signs her contract, whereas she may be sexually harassed by others who reside in the household (such as the husband or the son of the employer). Section 23(12) was added to the Sex Discrimination Ordinance to address this problem. It provides that it is unlawful for “any person who resides on the premises” to harass a domestic helper who works there. Of course, in practice, it is difficult for a foreign domestic helper to file a complaint of sexual harassment, as she would almost certainly have to leave her employer’s residence and would find it difficult to remain in Hong Kong to pursue her claim.

#### **Section 24 -- sexual harassment in other areas related to work:**

Section 24 extends the prohibition on sexual harassment to four additional areas that are related to work. It applies to:

*Trade unions.* It is unlawful for a member to sexually harass another member or someone seeking to become a member.

*Qualifying bodies.* It is unlawful for a member of a qualifying body (such as the Law Society) to sexually harass a person who is seeking an authorisation or qualification.

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<sup>1</sup>Sex Discrimination Ordinance, section 15(1).

*Providers of training.* It is unlawful for a person who provides or arranges employment-related training to sexually harass a person receiving the training.

*Employment agencies.* It is unlawful for a person who operates or works for an employment agency to sexually harass a person in the course of providing or offering to provide the agency's services.

### **Section 39 -- sexual harassment in education:**

Apart from employment, education is probably the sphere in which women are most likely to experience sexual harassment. Section 39 applies as follows:

*Students and potential students* are protected from harassment, not only by staff but also by other students. (The first sexual harassment case to be tried in Hong Kong, discussed in Part 5 below, concerns student-to-student sexual harassment, a problem which has received significant public attention in the past year.)

*Staff* are protected from harassment by students and potential students. (If a member of staff is harassed by a co-worker, that would fall within Section 23, harassment in employment.)

### **Section 40 -- sexual harassment in other fields:**

Section 40 defines the remainder of the “protected spheres” (those that do not fall within the areas of work or education). It applies to:

*Provision of goods, facilities and services.* This is a quite general category and could be interpreted to include a wide range of activities, including the provision of medical care, legal services, sports facilities, retail goods, and transportation.

*Provision of premises.* It is unlawful for a person who manages premises to sexually harass a person who occupies those premises. It is also unlawful to sexually harass a person in the course of providing or offering to provide premises to her.

*Barristers and pupils.* A special provision was considered necessary because a barrister works as a solo practitioner and is not in an employment or partnership relationship with other members of chambers. Section 40(6)-(7) makes it unlawful for a barrister or barrister's clerk to sexually harass a barrister or pupil in chambers or to sexually harass a person in the course of offering to provide pupillage or tenancy in chambers. It is unlawful for any person to sexually harass a barrister in the course of giving or withholding instructions.

**B. *Harassment of Men and “Same-Sex” Harassment***

Unfortunately, the Sex Discrimination Ordinance was not drafted in gender-neutral language. Thus, it uses the phrase “it is unlawful for a person . . . to sexually harass a *woman*”. Similarly, the definition of sexual harassment (discussed below) refers to sexual harassment against a *woman*. However, section 2(8) (a sub-section of the interpretation clause), states that: “[a] provision of Part III or IV framed with reference to sexual harassment of women shall be treated as applying equally to the treatment of men” and that the relevant provisions must be interpreted by the court “with such modifications as are necessary”. Thus men are equally protected from sexual harassment (and one of the few cases to be tried thus far was filed by a man, although he did not succeed). However, in this paper I will normally use “she” to refer to complainants and “he” to refer to respondents since this is, in fact, the situation in the vast majority of complaints filed.

The Ordinance does not expressly state whether “same-sex harassment” (female-to-female or male-to-male) is prohibited. However, in my view, it is clearly covered by the law because Sections 23, 24, 39 and 40 provide that it is unlawful for a *person* to sexually harass a woman. The explicit use of the gender-neutral term “person” expresses a clear intention to include sexual harassment of a woman by another woman. And, in a case in which a man alleged sexual harassment by another man, the judge would be *required* by section 2(8) (discussed above) to give a similarly broad interpretation of the law when it is applied to male complainants. The definition of sexual harassment (discussed below) does not require that the alleged harasser acted out of sexual desire. Thus a claim of “same-sex” sexual harassment would not necessarily be limited to cases in which the harasser was gay or lesbian. In my view, it could also extend to situations in which co-workers repeatedly taunt a gay employee with comments about his sexual life.<sup>2</sup> Thus, although there is still no law in Hong Kong prohibiting sexuality *discrimination*,<sup>3</sup> the law of sexual harassment could arguably be used to prohibit certain types of sexuality *harassment*. (Thus employers would be wise to add this to any policy prohibiting sexual harassment.)

## **Part 2. An Overview of the Definition of Sexual Harassment in Hong Kong**

The definition of sexual harassment is contained in section 2(5) of the Sex Discrimination Ordinance. It actually provides *three* alternative definitions of sexual harassment, two of which can be applied to any case of sexual harassment and one which can be applied in the context of work-related harassment. Section 2(5) (a) (which can be applied to any case of sexual harassment covered by the Ordinance) provides two alternative definitions of harassment. It states that:

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<sup>2</sup>Applying the definition of sexual harassment provided in section 2(5)(a)(ii), such comments could be considered unwelcome sexual conduct (which is expressly defined in section 2(7) to include a written or oral “statement of a sexual nature”). The question then would be whether the statements were such that a reasonable person would anticipate that they would cause the gay employee to be “offended, humiliated, or intimidated.”

<sup>3</sup>For a discussion of the attempt to enact legislation prohibiting discrimination on the ground of sexuality, see Carole Petersen, “Values in Transition: the Development of the Gay and Lesbian Rights Movement in Hong Kong” (1997) 19 *Loyola of Los Angeles International and Comparative Law Journal* 337.

For the purposes of this Ordinance, a person (howsoever described) sexually harasses a woman if-

(a) The person-

(i) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to her;

**OR**

(ii) engages in other unwelcome conduct of a sexual nature in relation to her, In circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated or intimidated . . .

Section 2(5) (b) goes on to state a third, alternative definition, which can be applied to work-related harassment. It states that a person sexually harasses women if:

The person, alone or together with other persons, engages in conduct of a sexual nature which creates a sexually hostile or intimidating work environment for her.

At first glance, it might appear that section 2(5)(a) is meant to prohibit only what the literature commonly refers to as *quid pro quo* harassment, as section 2(5)(b) expressly refers to hostile work environment harassment. In fact, section 2(5) (a) is not confined to *quid pro quo* harassment. This can be seen from an analysis of the Australian federal legislation, on which section 2(5) (a) is based. The Australian federal Sex Discrimination Act 1984 originally provided that unlawful sexual harassment only occurred where the complainant either: (1) objected to the conduct and suffered a detriment in connection with her employment; or (2) reasonably feared a detriment if she objected to it.<sup>4</sup> However, in 1992,

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<sup>4</sup>Section 28(3) of the Australian federal Sex Discrimination Act originally provided that a person shall be taken to harass sexually another person if he “makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person or engages in other unwelcome conduct of a sexual nature in relation to the other person, and: (a) the other person has reasonable grounds for believing that a rejection of the advance,

the Australian federal Sex Discrimination Act was amended so as to remove the “detriment” requirement. Section 28 was repealed and a new section 28A was added.<sup>5</sup> As a result of this amendment, the Australian federal legislation became significantly broader. It still prohibits *quid pro quo* harassment, but it also can be applied to “hostile environment” harassment, so long as the unwelcome sexual conduct was “in relation to” the victim and was such that “a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.” Section 2(5) (a) of the Hong Kong Sex Discrimination Ordinance (which applies to all of the protected spheres), was copied from the new Section 28A of the Australian federal legislation and can similarly be applied to both *quid pro quo* harassment and “hostile environment” harassment, provided that the plaintiff alleges facts which satisfy the statutory definition.

Thus, the express reference to “hostile work environment” harassment in section 2(5) (b) may not add much to the definition. However, during the Bills Committee meetings, some women’s organizations expressed concern about the words “in relation to”, which appear in section 2(5) (a) (ii) of the definition of sexual harassment. They feared that Hong Kong courts might interpret this phrase too narrowly, so as to require that the unwelcome sexual conduct was directed specifically at the victim. This could be problematic in cases in which the unwelcome conduct was simply a part of the general working atmosphere. For example, sexual jokes may be told at staff meetings or obscene pictures may be displayed in the coffee room. In such cases, the defendant might argue that since the unwelcome conduct was not directed just at her but rather was experienced by everyone, it was not “in relation to her”. In response to these concerns, the government

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a refusal of the request or the taking of objection to the conduct would disadvantage the other person in any way in connection with the other person's employment or work or possible employment or possible work; or (b) as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way in connection with the other person's employment or work or possible employment or possible work.” This provision was repealed and replaced with section 28A (noted below) in 1992.

<sup>5</sup>Section 28A of the Australian federal Sex Discrimination Act now provides that a person sexually harasses another person if: (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances would have anticipated that the person harassed would be offended, humiliated or intimidated.

agreed to amend its definition of sexual harassment so as to incorporate a portion of the definition used in Wu's Equal Opportunities Bill (which had been borrowed from the Western Australian Equal Opportunity Act 1984). This was the source of section 2(5) (b), which provides an additional *alternative* definition of sexual harassment in employment situations. It states that a person also sexually harasses a woman if "the person, alone or together with other persons, engages in conduct of a sexual nature which creates a sexually hostile or intimidating work environment for her". This provision does not require that the sexual conduct be "in relation to" the victim but can *only* be applied in the context of work. Women in other spheres, such as education, may also bring an action for "hostile environment" harassment, but they must prove that the conduct that created the hostile environment satisfied the definition in section 2(5) (a), including the requirement that the conduct was "in relation to the victim".

It should be noted that the phrase "in relation to" has been considered by the Hong Kong Court of Appeal in an action for judicial review (of a decision that a police officer should be compulsorily retired for violating a Police Headquarters Order that included the same definition of sexual harassment as section 2(5)(a) of the Sex Discrimination Ordinance. While the police officer's application for judicial review was successful, both the Court of First Instance and the Court of Appeal rejected the applicant's argument that the requirement "in relation to" should be interpreted so as to exclude sexual comments that were made to a woman but were not actually about her. The Court of Appeal noted that Section 2(5)(a)(ii) "covers unwelcome conduct of a sexual nature engaged in by a person in relation to the complainant although the conduct, as in this case a conversation, was not 'in respect of' her but 'with her'".<sup>6</sup> The Court expressly stated that if a man tells sexual stories to a woman this could constitute sexual conduct "in relation to her" for the purposes of the definition of sexual harassment. This indicates that Hong Kong courts are unlikely to adopt an unduly narrow interpretation of the "in relation to" requirement. Thus, the express reference to "hostile environment" harassment in Section 2(5)(b) may not add much to the scope of the law.

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<sup>6</sup>*Ratcliffe v. Secretary for Civil Service & Anor* [1999] 4 HKC 237, 250 (Hong Kong Court of Appeal).

### Part 3: Common Questions Arising from the Definition of Sexual Harassment

***Question: What is the meaning of "conduct of a sexual nature"? Must there be a sexual motive on the part of the harasser in order for sexual harassment to occur?***

No, there need not be any sexual motive on behalf of the alleged harasser. This is an important principle because sexual harassment often does not arise out of sexual desire but rather out of a desire to hurt, humiliate, or intimidate the victim. For example, in the UK case of *Strathclyde Regional Council v Porcelli* [1986] IRLR 134 CS the defendants embarked upon a campaign of sexual harassment to compel the plaintiff to quit or apply for a transfer.

Section 2(7) also expressly states that "conduct of a sexual nature" includes "making a *statement of a sexual nature* to a woman, or in her presence, whether the statement is made orally or in writing." This makes it clear that it is the statement that needs to be sexual in nature, not the motive for making the statement. This means that sending or displaying unwelcome pornography to a woman can be considered "sexual conduct" regardless of whether the harasser sent the material for his own sexual gratification.<sup>7</sup>

Similarly, asking a woman explicit questions about her sexual life or her method of birth control could also be considered conduct that is "sexual" in nature. This will be true even though the employer may have asked the questions for the purpose of finding out whether the woman was likely to take maternity leave in the near future. For example, in *Hall & Ors v A & A Sheiban Pty Ltd & Ors* (1989) EOC 92-250, questions in pre-employment interviews (as to whether applicants were having sex with their boyfriends, using contraceptives, or had ever had an abortion) were held to constitute unlawful sexual harassment.

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<sup>7</sup>See, for example, *Robinson v Jacksonville Shipyards, Inc.*, 760 F Supp 1486 (MD Fla. 1990); *Horne & Anor v Press Clough Joint Venture & Anor* (1994) EOC 92-556 (Western Australian Equal Opportunity Tribunal).

Making insulting sexual comments about a woman's body can fall within the category of “conduct of a sexual nature”, regardless of whether the defendant sought sexual gratification. For example, in *Insitu Cleaning Co Ltd. v. Heads*<sup>8</sup> the defendant made insulting comments (such as “Hiya, big tits”) to the plaintiff at work. The defendant was much younger than the plaintiff and there was no indication that he was sexually attracted to her. The defendant thus attempted to argue that his remarks were not “sex related”, but rather were the equivalent of commenting upon a man’s balding head. The UK Employment Appeal Tribunal rejected this argument, noting that “a remark by a man about a woman's breasts cannot sensibly be equated with a remark by a woman about a bald head or a beard. One is sexual, the other is not.” (This case was also noteworthy because it held that a single act can be enough to constitute unlawful sexual harassment.)

Acts of voyeurism can also constitute sexual harassment, regardless of whether they were prompted by sexual desire. Here we can look to the Hong Kong case of *Yuen Sha Sha v Tse Chi Pan*<sup>9</sup>, in which a female university student accidentally discovered a camcorder hidden inside a paper box on top of her roommate's wardrobe. The camcorder contained a working videotape and was pointed toward the plaintiff's bed and wardrobe, where she normally changed clothes. There was no express finding in that case as to *why* the defendant decided to film the plaintiff and it appears that the court was not concerned with his motives, at least not for the purpose of determining liability.

This approach is correct. While filming a person is not, *per se*, a sexual act, common sense tells us that “conduct of a sexual nature” should include secretly filming a woman while she undresses. Society has long recognised the sexual connotations of viewing a woman’s body without her consent. For example, in criminal law, the removal of a woman's clothing without consent (or some other legal justification) constitutes an *indecent* assault and therefore is classified as a *sexual* offence. This is true, regardless of

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<sup>8</sup>[1995] IRLR 4, especially p. 5.

<sup>9</sup>[1999] 1 HKC 731. For a more detailed discussion of this case, including the remedies awarded, see my previous article, “Implementing Equality: An Analysis of Two Recent Decisions Under Hong Kong’s Anti-Discrimination Laws” (1999) 29 *Hong Kong Law Journal* 178, especially pp 179-88.

whether the defendant acted out of sexual desire, a desire to humiliate her, or simply a desire to steal her clothing.<sup>10</sup>

In an employment situation, a co-worker might attempt to spy on a woman in a bathroom or film her in a state of undress out of sexual desire. However, he might also do it for a non-sexual motive (e.g. with the intention of blackmailing her or embarrassing her by screening the film at the company Christmas party). In my view, the motive should not matter so long as the conduct can be viewed a violation of her sexual privacy.

***Question: Does this mean that any kind of bullying behaviour is now likely to be considered unlawful sexual harassment?***

No, general workplace harassment (where, for example, a supervisor takes a dislike to an employee or there is personality clash) would not be included. A boss who regularly yells at his secretary and insults her in a non-sexual manner (e.g. “you are the worst typist I have ever seen”) may be treating her very unfairly, but he will not be liable for sexual harassment because of these remarks. Even an act of unwanted touching will not necessarily constitute “conduct of a sexual nature.” For example, in the case of *Judith Malone v Robert Pike and Health Insurance Company*<sup>11</sup> the supervisor was alleged to have stood too close to female employees, carelessly left a pornographic magazine lying around, and to have poked the applicant in the chest three times in the course of an argument. The Human Rights and Equal Opportunities Commission dismissed the complaint and held that although poking the applicant in the chest was unwelcome and reasonably likely to offend, it was not conduct of a sexual nature. (However, in practice, unwanted touching is one form of conduct that is very likely to

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<sup>10</sup>See *R v Court* [1988] 2 All ER 221, in which the House of Lords stated that certain acts (such as removing a woman’s clothes without her consent) are unambiguously indecent, regardless of whether the defendant acted out of sexual desire.

<sup>11</sup>[1996] HREOC 20 (16 December 1996).

upset employees even if it is not clearly sexual in nature. It therefore should be expressly mentioned in any sexual harassment policy.)

It should also be noted that there is an increasing trend toward adopting general “anti-harassment” policies and legislation. Thus, an employer may wish to prohibit (by means of its internal harassment policy) general harassment, rather than just sexual harassment. Indeed, a recent survey of 112 organizations in the United Kingdom revealed that the majority have policies that seek to cover all forms of harassment rather than having a separate policy for sexual harassment.<sup>12</sup> There are many advantages to this approach. One is that the employer does not have to get bogged down in the question of “what is sexual” for the purpose of applying the internal policy. The other is that certain employees may be more supportive of a general policy of “no harassment”.

***Question: What is the meaning of “unwelcome” in the definition?***

The best definition of this concept can be found in the leading Australian case on this issue is the case of *Aldridge v Booth*, in which the Federal Court of Australia stated that "unwelcome" means that "the advance, request or conduct was not solicited or invited by the employee and the employee regarded the conduct as undesirable or offensive . . . "<sup>13</sup>

The question of whether the employee regarded the conduct as undesirable or offensive is clearly a subjective one. This was reiterated just this year, by the Hong Kong Court of Appeal, in the case of *Chen v. Tamara Rus and Another* [2001] 3 HKLRD 541 (a case which is discussed later, under vicarious liability). In that case, a male former employee of IBM (HK) Ltd. ("IBM") unsuccessfully sued for sexual harassment. The District Court found that the relationship he had with a co-worker was consensual and not

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<sup>12</sup> See *Equal Opportunities Review* No. 102 (February 2002), p. 9.

<sup>13</sup> *Aldridge v Booth* (1988) 80 ALR 1 at p.5.

“unwelcome”. The plaintiff appealed and argued (in the notice of appeal) that the test for "unwelcome" should be an objective test. Although this argument apparently was not pursued in the oral argument, the Court of Appeal took the opportunity to confirm that the test is actually a mix of subjective and objective elements, and that the plaintiff must first establish that the conduct was subjectively unwelcome to that plaintiff.

Because the test of "unwelcome" is subjective, the employer must be careful not to assume that conduct was welcomed just because it had become common-place in the company or because most employees did not object to it. However, the *Aldridge v Booth* definition also indicates that there is an objective element as well. If the court finds that the plaintiff behaved (from an objective point of view) in a way that “solicited or invited” the conduct then it may not be considered unwelcome.

Of course, this opens the door for all sorts of arguments by the defendant as to how the plaintiff dressed or behaved (which can be very distressing for the plaintiff). In *Meritor Savings Bank v. Vinson* 477 US 57 (1986) the US Supreme Court expressly held that evidence concerning a woman’s dress or sexually provocative speech could be relevant in determining whether she found the conduct unwelcome.

Harriet Samuels has criticised this approach (and discusses other cases, both from Australia and the UK where evidence of a woman’s dress, speech, or participation in sexual jokes was admitted as relevant, either to the issue of “unwelcome” or to the issue of whether she would have been offended by the conduct in question.)<sup>14</sup> She has suggested that evidence of a woman’s clothing and sexual behaviour generally should not be admitted in a sexual harassment case. (However, I think that such a rule is unlikely to be adopted with respect to any statements actually made by the complainant at work.)

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<sup>14</sup>See Harriet Samuels, “Sexual Harassment in Employment: Asian Values and the Law in Hong Kong”, 30 *Hong Kong Law Journal* 432 (2000), 438-9.

***Question: Does this mean that the complainant has to show that she objected to the conduct or that she complained about it (e.g. to management) in order to prove that it was unwelcome?***

This is not required by the law and an action for sexual harassment may be successful even if the harasser was entirely unaware that his conduct was unwelcome.<sup>15</sup> However, as a matter of evidence it will be much easier for the plaintiff to prove that the conduct was unwelcome to her if she communicated this fact to the defendant and gave him an opportunity to stop the behaviour before she complained. (Objecting to the conduct also makes it much easier for the plaintiff to pass the "reasonable person" test, discussed below, because the reasonable person should be presumed to have all the knowledge that the defendant had, including any knowledge as to the plaintiff's objections to his conduct.)

Nonetheless, employers (and supervisory staff) need to realise that the essence of sexual harassment is that the victim feels powerless for some reason -- otherwise she probably would have put a stop to the behaviour at the very start. There are many situations in which it will be quite reasonable for the plaintiff not to have directly confronted the harasser – she might be frightened of him, she might fear retribution, she might be much less senior to him in the hierarchy and not be accustomed to correcting his behaviour in any way. For this reason, an internal sexual harassment policy should NOT require a victim to "confront" the alleged harasser and ask him to stop before making an official complaint. Rather, the internal policy should provide victims with the option of talking directly to a sexual harassment officer, who can take on the responsibility of communicating with the alleged harasser and protecting the victim from any resulting victimization. (I will discuss this "communication" function further near the end of this paper.)

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<sup>15</sup>See *Valentin Malinov v South Pacific Tyres* [1997] HREOC 30 (29 August 1997).

***Question: What if the alleged harasser and the complainant have previously had a voluntary sexual relationship or an emotional relationship?***

In such cases there is generally no dispute that a relationship existed but one party claims that she wanted to end the relationship and was penalised for doing so. Here the court is likely to hold that the complainant had an obligation to make it "crystal clear" to the defendant that she no longer wanted to be in the relationship. And since the complainant has the burden of proof, it may be difficult for her to establish this.<sup>16</sup>

However, there are cases where a woman had had a past consensual relationship with a co-worker or an employer but was still able to establish a claim of sexual harassment. For example in *Shrout v Black Clawson*<sup>17</sup> the plaintiff was denied a pay raise because she had ended a long-term consensual relationship and rejected subsequent sexual advances. Similarly, in *Babock v Frank*<sup>18</sup> the plaintiff's supervisor issued a disciplinary letter against her when she ended the relationship and rejected him. Both cases were successful.

There is, of course, always a danger that a consensual relationship between two co-workers will cause friction when it ends and may give rise to claims of sexual harassment. Some organisations may seek to avoid this situation by adopting a firm rule against romances within the organisation (especially if the romance is between two people at very different levels of the hierarchy). However, this kind of rule is very difficult to enforce and may cause its own problems. A better approach may be to give employees very clear guidance on the specific things that they *must not* do (e.g. initiate a

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<sup>16</sup>For examples of cases in which claims of sexual harassment were unsuccessful because the court found that there had been a consensual relationship see *RayChen v. Taramus Rus and IBM (HK) Ltd*, [2000] HKDC 3 (Dist. Ct, 6 April 2000); *Huebschen v Department of Health and Social Services*, 716 F 2d 1167 (7th Cir 1983); and *Kepler v Hinsdale Township High School District 86*, 715 F Supp 862 (ND Ill 1989).

<sup>17</sup>689 F Supp 774 (SD Ohio 1988).

<sup>18</sup>729 F Supp 279 (SDNY 1990).

relationship with someone who is reporting directly to you, retaliate in any way if a relationship goes sour).

***Question: What if the defendant argues that their friendship made it reasonable for him to assume that sexual advances would not be “unwelcome”?***

Another very difficult situation is where the two parties had a close friendship or often socialised together, albeit platonically. If one party then makes a sexual advance and is accused of sexual harassment, he will almost certainly claim that he interpreted their closeness as a sign that a sexual relationship would be welcome -- or at least that he had no reason to think that sexual advances would cause offence. Similarly, a supervisor may start by giving his secretary little gifts and if they are accepted he may argue later that he viewed this as a “welcoming” sign. (In fact, the secretary may have accepted the gifts only because she did not want to offend her boss or because she thought they were completely platonic.)

The best way (in my view) to avoid this problem is to give employees very good training and make it clear to them that a senior person must not take anything for granted – e.g. he must not assume that just because a junior employee listened to his problems, agreed to have dinner with him, or accepted a gift from him that this means that a sexual advance would be welcome. In many cases, the junior employee may go along with certain gestures to a point, just because she does not want to offend the senior employee.

***Question: How is the “reasonable person” test applied?***

Once the Court decides that conduct was unwelcome, it must then ask whether a “a reasonable person, having regard to all the circumstances, would have anticipated that [the plaintiff] would be offended, humiliated or intimidated”. The Hong Kong Court of Appeal recently expressed this as an objective question:

“Once it is established that an event had taken place which was unwelcome to the person concerned, it is then a matter of objective assessment as to whether it should have been anticipated that the person concerned would have been offended or humiliated or intimidated.” [2001] 3 HKLRD 541, at 544.

Of course, in practice there is no universal “reasonable” person when it comes to views on sexual harassment. Men and women often have different views of what is likely to cause offence. In *Ellison v. Brady*<sup>19</sup>, the trial court held that love letters and persistent requests for dates were “trivial”. However, the appellate court disagreed and adopted a “reasonable woman” standard for assessing whether conduct constituted unlawful sexual harassment. Of course, even people of the same gender will not necessarily agree on this. Their views will also be affected by their religion, culture, age and other factors.

It should also be noted that the statute includes the language “having regard to all the circumstances”. In my view, this also opens the door for a somewhat “subjective” element in the so-called reasonable person test. The “reasonable person” is assumed to know all the circumstances that the defendant knew or should have known, including the sensitivities and feelings of the plaintiff if she made him aware of them. This means that even if the average person in the company did not object to certain behaviour (such as a holiday “kiss” from the boss at the annual Christmas party), if the defendant knew or should have known that the plaintiff did not feel comfortable with it then that knowledge becomes part of the knowledge of the reasonable person – it is part of the circumstances.

That being said, the law “does not create a cause of action for the hyper-sensitive or eccentric character”.<sup>20</sup> The best example of this rule is in the Hong Kong case of *Cheng Yin Fong v CP Property Management Ltd & Ors*<sup>21</sup>, where the court rejected (on several grounds) a complaint by a woman who alleged that she was sexually harassed by men

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<sup>19</sup> 934 F 2d 872 (9<sup>th</sup> Cir. 1991).

<sup>20</sup> See Samuels, note 14 above, at p. 441

exposing their chests in the sports grounds and near stalls involving manual work. The court held that such acts were “done in the course of playing sports or manual labour” and did not constitute acts that were sexual in nature. In my view, this kind of allegation would be best analysed under the reasonable person standard – no reasonable person (in everyday Hong Kong society) would expect a person to be offended, humiliated, or intimidated by the sight of a man without a shirt if he were playing sports or doing manual labour. This is because it is widely accepted that a male manual worker will remove his shirt on a hot Hong Kong day. It would also be quite normal for a professional soccer coach to work without his shirt and we would not expect his assistant to be offended when he does so.

On the other hand, it is not normal for a Hong Kong business man to work without his shirt in his office. So if a secretary were asked to work late at night on a document for her boss and her boss suddenly removed his shirt, a reasonable person might well anticipate that she would find this intimidating, particularly if they were alone at the time. Thus the concept of what a reasonable person would anticipate regarding the plaintiff's reaction will be affected by the surrounding circumstances.

***Question: Does the alternative definition in Section 2(5)(b) “hostile work environment” also require a showing that the environment was unwelcome? Does the “reasonable person” test apply to this category of sexual harassment?***

The alternative definition in s 2(5)(b) states that a person sexually harasses a woman if “the person, alone or together with other persons, engages in conduct of a sexual nature which creates a sexually hostile or intimidating work environment for her.” The section does not expressly state that the conduct must be unwelcome or that a reasonable person must find that there is a sexually hostile or intimidating work environment. However, one can hardly argue that an environment was “hostile” if the conduct complained of was “welcomed” by the plaintiff. So in practice, cases on the

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<sup>21</sup> [1999] 2 HKC 747 (English summary).

meaning of unwelcome may be relevant to a case alleging hostile environment harassment. We can also expect that the courts will apply a test of “reasonableness” when deciding whether the environment was truly “hostile”.

Hostile environment cases do generally depend upon a showing of a continued and pervasive atmosphere. There has been substantial debate in the American case law on what is “bad enough” to constitute a hostile work environment. In one of the leading cases, *Harris v. Forklift Systems, Inc.*<sup>22</sup> the magistrate found that the plaintiff had often been insulted because of her gender and was often the target of unwanted sexual innuendos. The plaintiff had complained and the defendant had initially promised to stop (saying that he was only joking and that he did not realise that she was offended). However, he continued to make the sexual insults, including one as she was arranging a deal with a customer (“What did you promise the guy \*\*\* some [sex] Saturday night?”). She quit and sued. The District Court found for the defendant, on the ground that the conduct, while offensive, was “not so severe as to be expected to seriously affect [the plaintiff’s] psychological well-being”. However, the Supreme Court rejected this test, holding that “so long as the environment would be reasonably perceived, and is perceived, as hostile or abusive . . . there is no need for it also to be psychologically injurious”. Whether an environment is “hostile” can be determined only by looking at the circumstances as a whole, which could include the frequency of the conduct, its severity, whether it is physically threatening or humiliating, and the effect upon the plaintiff’s working conditions.

***Question: Must the victim be aware of the harassment while it is occurring?***

At first one might say "yes" -- after all, how can a person feel harassed (or humiliated, offended, or intimidated) but something that she is not even aware of? Similarly, how can a person allege that an environment is “hostile” because of conduct that one is entirely unaware of?

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<sup>22</sup> 510 U.S. 17 (1993).

But recall the *Yuen Sha Sha* case. She was entirely unaware of the filming while it was on-going. The filming stopped a few moments after she became aware of it and it never resumed. Thus the defendant might have argued that a reasonable person would not have anticipated that the plaintiff would be offended or humiliated by the filming because the expectation was that she would never find out about it. Although the court did not expressly deal with this issue, I think the answer to this question is that the proper test is whether a reasonable person would anticipate that she would be offended, humiliated or intimidated *when and if* she found out about it. In other words "after-the-fact" awareness of the conduct is enough.

A similar approach was taken in the American case of *Liberty v Walt Disney World*,<sup>23</sup> one of the few reported decisions I have found on secret videotaping as a form of sexual harassment. In that case, a male employee had drilled holes in the walls of the female dancers' dressing area and videotaped them in various states of undress. The defendant argued (in a motion for summary judgement) that the plaintiffs could not have perceived a hostile environment, as they were unaware of the videotaping until after it stopped. The court rejected this argument and held that the plaintiffs' after-the-fact knowledge could serve as the basis for their perception that a hostile work environment existed.

Similarly, suppose that an employee has been circulating false rumours about a female employee, claiming that "She slept with the boss to get her promotion" and "I caught them in the act on his desk". She might not find out about his comments until long after he made them but it seems to me that she should be able to argue that these comments fell within the definition of "conduct that is sexual in nature" that a reasonable person would anticipate would offend her once she found out about them.

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<sup>23</sup>912 F. Supp. 1494, 1504 (MD Fla. 1995) (denying defendant's motion for summary judgement). The case settled before trial.

#### **Part 4: Vicarious Liability for Sexual Harassment and Liability for Victimization**

The Hong Kong Sex Discrimination Ordinance does not *require* employers to institute policies prohibiting sexual harassment in their establishments. Instead, the Ordinance tries to create an incentive for employers to do so by making the employer vicariously liable for acts of sexual harassment unless the employer can prove that it took all practical steps to prevent the unlawful acts. Section 46(1) states that “[a]nything done by a person in the course of his employment shall be treated for the purposes of this Ordinance as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.” (Principals are also vicariously liable for unlawful acts of agents done with authority.) However, the employer can raise the defence that it took “such steps as were reasonably practicable” to prevent his employee or agent from committing the unlawful act. The burden of proof will be on the employer to establish this defence.<sup>24</sup>

The Sex Discrimination Ordinance Code of Practice on Employment provides (at paragraph 20) recommendations on what employers should do to prevent and address harassment. For example, it provides that employers should establish a clear policy against sexual harassment, including examples of the kind of conduct that must be avoided. The employer should then actively promote the policy, through notices, staff meetings, and training courses. The employer should also designate a co-ordinator (preferably one who is sensitive and trained in the field) to receive complaints. The complaints procedures must assure potential victims that they will not suffer any retaliation if they make complaints. Although the Code of Practice does not have the same status as the Ordinance (and does not create any additional legal duties) it may be admissible in evidence and taken into account by the court if it is relevant to a question.<sup>25</sup> Thus, a court can consider the fact that an employer failed to follow the Code (which has now been well publicised by the Equal Opportunities Commission) as relevant to the question of whether the employer has taken reasonable steps to prevent unlawful acts by employees.

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<sup>24</sup>Sex Discrimination Ordinance, section 46(3).

<sup>25</sup>Ibid, section 69(14).

One of the few decided Hong Kong cases demonstrates how an employer can protect itself from vicarious liability if it adopts and enforces a policy against sexual harassment. A male former employee of IBM (HK) Ltd. (“IBM”) alleged that he had been sexually harassed by a female project manager and dismissed by the company after he complained about the harassment.<sup>26</sup> The female project manager admitted that she and the plaintiff had had a personal relationship but testified that it was consensual and that she had no influence over his career (as she was in a lower “band” than the plaintiff in the management hierarchy). The case largely turned on the facts, as the Judge found the plaintiff an unreliable witness, rejected most of his evidence, and decided that the sexual advances of his co-worker were not unwelcome. However, the Judge also found that even if the plaintiff had been successful against his co-worker, IBM would not have been vicariously liable for her acts because it had taken reasonable steps to prevent sexual harassment and thus could establish the affirmative defense in section 46(3) of the Sex Discrimination Ordinance. In particular, the Judge noted that IBM provided guidelines on sexual harassment and required employees to sign a certificate declaring that they had read and understood them.

Section 9 of the Sex Discrimination Ordinance attempts to protect women who complain by prohibiting less favourable treatment (commonly known as “victimisation”) on the ground that a person has sought to enforce the Ordinance or has alleged an act that would be unlawful under the Ordinance. Obviously, firing the complainant would constitute less favourable treatment within the meaning of section 9. Other examples would include transferring her to a less desirable position; denying her a promotion or raise to which she would otherwise have been entitled; subjecting her to undue criticism; giving her an unusually heavy workload; or putting negative comments on her personal file. A complaint for victimisation can be successful even though the underlying complaint for sexual harassment was not successful. However, the duty not to discriminate against a person who

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<sup>26</sup>See *RayChen v. Taramus Rus and IBM (HK) Ltd.*, [2000] HKDC 3 (Dist. Ct, 6 April 2000). The plaintiff’s appeal was dismissed at [2001] 3 HKLRD 541..

makes an allegation does not apply if the allegation turns out to be “false and not made in good faith”.<sup>27</sup>

The vicarious liability provision discussed above (section 46) applies equally to discrimination by way of victimisation. Thus, in theory, the employer must not only refrain from discriminating against the complainant, but must also prevent the alleged harasser (or other co-workers) from retaliating against her. In practice, this may be quite difficult. However if the employer can demonstrate that it took reasonable steps to protect her (for example, by directing the alleged harasser not to retaliate, giving the victim the opportunity to work with other people, and encouraging the victim to report any acts of retaliation), the employer may be able to successfully assert the defence to vicarious liability provided in section 46(3).

In the recent case against IBM (discussed above), the plaintiff alleged victimization, claiming that he was fired after he made a complaint of sexual harassment against his co-worker. The Judge accepted the testimony of IBM's witnesses, which was that the plaintiff was terminated for reasons unrelated to his complaint of sexual harassment, including unauthorised purchases, difficulties working with others, and a record of poor performance reviews.

However, a section 9 complaint was successful in the recent case of *Chang Ying Kwan v. Wyeth (HK) Ltd.* [2001] 2 HKC 129. Although the underlying complaint was one of pregnancy discrimination (also prohibited by the Sex Discrimination Ordinance), the court’s discussion of the claim for victimisation would be equally applicable to a case involving sexual harassment. The complainant, a former marketing manager of the defendant, gave notice that she was pregnant and soon after received an "ultimatum" to either resign or accept a demotion to marketing assistant. The complainant refused and telephoned the EOC for advice. She continued to work but claimed that she suffered detrimental treatment, not only due to her pregnancy but also because she had

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<sup>27</sup>Sex Discrimination Ordinance, section 9 (2).

complained to the EOC. She alleged that the treatment continued even after she returned from maternity leave and she ultimately resigned (and claimed constructive dismissal). What is interesting about the case is the court did not find that the company treated pregnant employees badly in general. Rather the Judge concluded that certain employees did not like the complainant and chose to use her pregnancy as a reason to give her the ultimatum (resign or accept demotion), thinking that she would be more likely to resign. Thus, although the pregnancy was not the only motivation for the poor treatment, the court found that it was “a factor” in the decision to give her the ultimatum and was therefore a discriminatory act. This was sufficient to allow her claim for pregnancy discrimination because section 4 of the Sex Discrimination Ordinance provides that if an act is done for two or more reasons and one of the reasons is the sex, pregnancy, or marital status of the plaintiff then it shall, for the purposes of the SDO, be taken to have been done for that reason.

However, the court held that section 4 would not apply to claims of victimisation, made under section 9 of the Ordinance, because section 4 does not mention that type of discrimination. The court held that to succeed on a claim of victimisation the complainant must establish that at least one of the acts listed in section 9 was within the knowledge of the defendant (or its employees) and that there is no other adequate or satisfactory explanation for the detrimental treatment received by the complainant. In this case, the court found that the plaintiff had satisfied this burden: she had made a complaint to the EOC, the employer was aware of it, and the court was satisfied that there was no other justification for the treatment she received thereafter (e.g. she received written warnings that would not have been given to other employees in similar circumstances). The case is worth reading, as an example of how employees may attempt to build a “paper trail” to justify firing another employee but can actually succeed only in digging a deeper hole for the employer (which will be vicariously liable for their acts). The court can often see through “written warnings” and poor reviews that are suddenly heaped upon a previously satisfactory employee after she makes a complaint that falls within section 9.

Finally, it should be noted that section 9 of the Sex Discrimination Ordinance also protects anyone who gives evidence or information in connection with proceedings under the Ordinance. Thus, if an employee gives evidence in support of a co-worker's sexual harassment claim the employer must be careful that the employee is not victimised (either by the employer itself or other employees).

### **Part 5: How to Develop an Effective Internal Sexual Harassment Policy**

The definition of an effective sexual harassment policy is not one that is just sufficient to avoid vicarious liability in court – employers do not want to get to the point of seeing their sexual harassment policy tested in court.

Rather, an effective sexual harassment policy is one that:

- \*Makes employees feel safe and secure in their work-environment;
- \*Does not cause unnecessary resentment and stress;
- \*Takes into account the circumstances of the particular workplace;
- \*Can be easily understood and is supported by training;
- \*Can be enforced fairly and promptly.

How to accomplish this?

#### **Look at what other organizations do and at materials from the EOC.**

The EOC has very good materials, including the Code of Practice and numerous training packages. A quick search on the internet will also reveal a host of sample policies that one can refer to (some examples are provided in your materials). I have also included some specific possible language later in this paper.

**Do not rely entirely upon outside materials; survey your staff.**

In order for your sexual harassment policy to be truly effective, it must take into account the special circumstances of your organization. You might wish to circulate a few sample sexual harassment policies and ask employees for their views on them. It is also wise to conduct a confidential survey of employees and ask them what *they think* should be included as “examples of inappropriate behaviour”. The survey might also ask specific questions about their experiences, such as the sample questions listed below. (You may wish to shorten the list, so as to make it more specific to your organization.) Please note that “at work” should be defined in the survey (and in the eventual policy) to include not only working at the office but also on work-related excursions, such as dinner meetings and business trips. “At work” should also include harassment that an employee may suffer from customers, as the employer does have a duty to take reasonable care to protect employees from harassment by customers. Sample questions include:

*\*Do you feel physically safe at work?*

*\*Do you feel secure when working late at night?*

*\*Have you ever been sexually assaulted at work?*

*\*Have you ever felt threatened at work?*

*\*Have you ever felt offended by the language used by your boss or co-workers?*

*\*Have you ever been asked questions about your personal life that you find inappropriate?*

*\*Please describe any other behaviour at work that you feel is a problem or that you feel should be mentioned in our harassment policy.*

*\*If you suffered sexual harassment, would you feel comfortable filing a complaint about it? If not, why not?*

*\*Are you aware of any other employees (including former employees) who felt that they had been sexually harassed in our organisation?*

*\*Have you ever suffered any other form of harassment or discrimination (e.g. racial discrimination or harassment)?*

The point of the survey is to find out what is problematic in your organization. Remember, you are not bound by the limits of the law against sexual harassment. As the employer, you can adopt a policy which prohibits other kinds of harassment, as long as the restrictions placed on employees by the policy do not unreasonably restrict their rights. For example, you might decide to adopt a policy that requires all employees to “treat each other with equal respect, regardless of their sex, race, age, sexuality, or disability”.

**Draft a policy that takes into account the issues raised in the survey.**

It will always be tempting to draft a policy that is very general, perhaps a copy of the definition of sexual harassment in the Ordinance and a statement that unlawful conduct is not to be tolerated at work.

However, in practice, employees will probably want more guidance, particularly on the issues that have been raised in the survey. Thus, an effective policy is one that includes not only the general definition of prohibited harassment but also gives at least some specific rules. For example, the policy *might* state that:

- *All employees have a right to be treated with respect and dignity and not to be sexually harassed at work.*
- *Employees have a right to bodily integrity and should not be touched in ways that a reasonable person would find offensive.*
- *If you are touched at work in a way that makes you uncomfortable or experience other behaviour that you feel is sexual harassment then you have a right to ask the person not to do it again. If you feel uncomfortable saying this directly to the person, then you may ask the sexual harassment officer to convey this message on your behalf.*

- *Employees are encouraged to report incidents of harassment and will never be penalized for doing so, providing such reports are made in good faith.*
- *Pornography is not permitted in the office. Sexual advances, sexual insults, sexual jokes, and comments about a person's body which a reasonable person would view as sexual in nature have no place in the office.*
- *Employees and job applicants should never be questioned about their sex lives.*
- *Job applicants should not be questioned about their marital status or their plans to have children. Similarly, existing employees should not be questioned along these lines in the context of promotion interviews.*
- *Employees should not be pressured to socialize with supervisors outside of regular work events. Nor should an employee feel pressured to develop a social relationship with a particular supervisor. Socializing with a supervisor shall not be a factor in promotion decisions.*
- *While socializing with clients may be a part of an employee's job, these duties shall be kept within reasonable limits. Moreover, employees have a right to be free from sexual harassment by clients and are encouraged to report any improper behaviour by clients. Employees will never be penalized for reporting such behaviour or for refusing to tolerate it.*
- *Supervisors shall not have romantic or sexual relationships with an employee who reports directly to that supervisor. If such a relationship develops the supervisor is required to inform management and adjustments must be made to the reporting relationship. (Some companies may find this a very difficult policy to live with. However, from the point of view of the other staff, who might feel that they are at a disadvantage because one of their co-workers is*

dating the supervisor, it might be a very welcome rule. It might also give a junior member of staff an easy “out” if she is feeling pressured by a supervisor to socialize with him – “Much as I appreciate your dinner invitation, I would not want to break any company rules.”)

**Distribute the draft policy for comments (which employees should be allowed to submit on a confidential basis).**

Employees should be given at least two weeks to submit comments on the draft policy. You may, at the end of the two week period, want to hold a staff meeting to discuss the comments that were submitted. However, this really depends upon the level of interest and the extent to which your staff feel comfortable discussing the policy in a public forum. If no such meeting is held, the drafters of the policy should find some way to summarize for staff what comments were submitted and whether they have been incorporated by the drafters.

**Publicize very clear rules on complaints procedures and conduct regular training.**

At a minimum, the employer should require each employee to read the policy, to sign a statement that s/he has read it, and to attend one training session on it. It is a good idea to have separate training sessions for people who are in supervisory positions. It is very important that these people understand the policy, support it, and accept the responsibility for “making sure” that their own conduct does not violate the policy.

Supervisors should also accept responsibility for implementing the policy within their areas of jurisdiction, so as to protect junior staff who may not feel comfortable filing complaints. For example, a partner in a law firm should understand that he cannot just ignore the situation if he overhears an associate making a clearly offensive sexual insult to his secretary. It is the responsibility of the partner to remind the associate about the policy, even if the secretary has not complained. If the partner witnesses something

really offensive he may have to actually report the associate. If he fails to do so he may be exposing the firm to vicarious liability.

Training should be available on a regular basis (at least once a year, so that new employees can benefit from it). Employees who receive warnings or have had complaints made against them can be sent for refresher courses.

The policy and training sessions should advise employees as to how to get advice and what their *rights* will be during any formal complaints procedures. They must feel assured that they will not be victimized for complaining about sexual harassment and that they will be treated fairly if a complaint is made about them.

The policy should also set a time frame for complaints. For example, it might state that complaints should normally be made within 1 year of the events that gave rise to it. From the employer's point of view, this is a form of protection should an employee suddenly come up with a complaint of sexual harassment (e.g. during an exit interview).

Ideally (assuming a company of reasonable size), there should be at least two sexual harassment "officers", one female and one male. (In practice the female officer will get most of the work so take that into account when giving credit for the work.) The procedures should be fairly simple but should include at least the following stages, to assure fairness.

1. There should be an *informal* procedure under which an employee can come to the sexual harassment officer on a confidential basis and just get advice (without necessarily filing a complaint). The officer needs to be trained that she cannot breach confidentiality about these consultations. The officer (and the written policy) should clearly explain to employees the difference between making an actual complaint and just seeking advice. When an employee simply seeks advice, the normal rule would be that the officer will not take any action and will not breach confidentiality unless the employee gives permission for her to do so. (The one exception would be if the officer reasonably feared that someone was in real danger.)

2. There should also be an *optional* “mediation” or “communication” service if an employee wants some help conveying her dissatisfaction to another employee without making a formal complaint about him. Again, this should be kept confidential (limited to the two parties and the officer if at all possible) and it should be advertised as such in the written policy. The essence of this kind of procedure is that it is unlikely to lead to any formal punishment. Rather it is a way to get help to convey one’s objections to certain behaviour.

3. The more formal complaint procedure will require a written complaint (this can take the form of an oral complaint recorded by the officer and signed by the complainant), an opportunity for the respondent to respond (also in writing), and an impartial procedure to investigate the facts. The complainant should also be made aware of the services of the EOC and should not be discouraged from filing a complaint there as well (or penalized if she does so).

4. A clear policy should exist on “punishment” where a formal complaint is made and found to be valid.

### **Be very careful about record-keeping**

This is one of the more difficult areas of implementing a sexual harassment policy and this is just a summary. Regardless of the procedures that are adopted, employees should know what they are. In other words, an employee should know when a formal record is made and whether anything is being placed on their personal file.

If a formal complaint is started then detailed records should be kept and all communications with the parties should ideally be confirmed in writing. These records could be quite important if the employer ever needs to establish the affirmative defense in Section 46 to avoid vicarious liability. Employees who are involved in a complaint should be able to see (eventually) records made in connection with the complaint and should be given an opportunity to correct errors. All efforts should be made to keep such records confidential. Thus, they should be separate from the ordinary staff files, so that the information is not spread about the office (e.g. the details of the complaint should not be

visible every time someone updates an employee's leave record). If an employee ultimately is penalized for sexual harassment, a note of this may then have to be made in his personal file but the details of the case should still be kept separate.

It is more complicated if an employee comes to the sexual harassment officer but does not wish to start a formal complaint. If an employee just comes to the sexual harassment officer for "general advice" then the sexual harassment officer probably should not do anything more than make a brief note in her diary that she met with the person and the *general* nature of the advice given (without naming any other employee). The sexual harassment officer should be careful not to create any written record that attributes guilt to anyone and should also be careful not to place notes in the personal file of *any* employee. (The person who came for advice should be told that this is the policy.) This is because there has been no investigation – in fact the other employee may not even be aware that anyone has sought advice regarding his actions.

If the employee asks the sexual harassment officer to communicate her objection to some behaviour to another employee and she does so, then the sexual harassment officer should record these communications in her diary. However, she should also briefly note the other person's response (if there was one) and should not create any record that could be interpreted as unfairly attributing "guilt" to the other employee, as there still has been no formal complaint and no investigation. Both employees should be told that nothing will be put on their personal files as a result of the communication but that the officer has made a note in her own records of the communication.

One of the reasons that the sexual harassment officer should keep some record of her work (even in the absence of a formal complaint) is that the company will want to know what type of queries are being made and how often. In a large company, this information can be gathered together and reported to management in a way that does not violate people's confidentiality.

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