CSj

December 2018

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The journal of The Hong Kong Institute of Chartered Secretaries
香港特許秘書公會會刊

Opportunity lost?

Whistleblower protection in Hong Kong

Discrimination law review
Directors' duties
New HKICS guidance

CHARTERED SECRETARIES
特許秘書

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Double Anniversary *Gala Dinner*

CELEBRATING 70 & 25 YEARS ANNIVERSARY

Guest of Honour:

Edith Shih FCIS FCS(PE)

International President, ICSA
& Past President, HKICS

Thursday, 17 January 2019 | 6.30pm Cocktail reception | 7.30pm Dinner
Convention Hall, Hong Kong Convention and Exhibition Centre

Fees: HK$800 per HKICS student
HK$1,200 per HKICS member/graduate
HK$1,380 per non-member
HK$14,400 per table of 12 seats

Attire: Lounge suit

For enquiries, please contact
Vicky Lui at: 2830 6088 or
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CHARTERED SECRETARIES
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Best Dressed Competition

at the HKICS' Double Anniversary Gala Dinner

The Colour Purple

Celebrate our Double Anniversary Gala Dinner to be held on Thursday, 17 January 2019 by taking part in our 'Best Dressed' competition. All we ask is for you to add a touch of purple to your outfit when attending the Gala Dinner. It can be just a pinch or a splash of purple, we'll leave it up to you. All participants at the Gala Dinner are welcome to join in the fun with your peers and other fellow members at this wonderful event.

Enter & Win Fabulous Prizes

Two awards will be offered – Best Dressed Individual and Best Dressed Team. Please register now. The deadline for registration is Friday, 4 January 2019.

Registration

To enter the competition, please register online either at the Institute's website: www.hkics.org.hk or scan the QR code for details. The top three contestants for each award will be announced and invited to take part in a fashion parade at the Gala Dinner. The winners will be chosen by a judging panel and presented with fabulous prizes at the end of the Gala Dinner.

If you have any questions, please contact Eva Cheung at: 2830 6019 or email at: event@hkics.org.hk

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CHARTERED SECRETARIES 特許秘書

Good governance comes with membership

About The Hong Kong Institute of Chartered Secretaries

The Hong Kong Institute of Chartered Secretaries (HKICS) is an independent professional body dedicated to the promotion of its members' role in the formulation and effective implementation of good governance policies, as well as the development of the profession of the Chartered Secretary and Chartered Governance Professional in Hong Kong and throughout Mainland China. HKICS was first established in 1949 as an association of Hong Kong members of The Institute of Chartered Secretaries and Administrators (ICSA) of London. It was a branch of ICSA in 1990 before gaining local status in 1994 and has also been ICSA's China/Hong Kong Division since 2005. HKICS is a founder member of Corporate Secretaries International Association (CSIA), which was established in March 2010 in Geneva, Switzerland. In 2017, CSIA was relocated to Hong Kong where it operates as a company limited by guarantee. CSIA aims to give a global voice to corporate secretaries and governance professionals. HKICS has over 5,800 members and 3,200 students.

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Contents

Wishing you a happy and healthy holiday season filled with love, laughter and friendship!

Encouraging a speak-up culture

In Hong Kong we pride ourselves on the robust system of checks and balances against malpractice in our market. We have many layers of safeguards, including our legislative framework, corporate governance code, regulators, the Independent Commission Against Corruption and the police force, together with a small army of professional practitioners – including, of course, company secretaries and governance professionals.

All of these safeguards play a crucial role in the detection and prevention of corporate malpractice, but the undisputed champion in corporate fraud detection is not included in the list above. This watchdog often does not have a senior role in the corporate hierarchy and has rarely benefited from any formal training in reporting corporate fraud. Who is this mysterious white knight of corporate governance? It is, of course, the humble whistleblower.

Hong Kong has been overlooking the vital role of whistleblowers in fraud risk management for too long. Our cover story this month argues that companies need to have some form of whistleblower protection in place if they want to make use of this cheap and effective early warning system to ensure that fraud is detected and prevented before it does irreparable damage. In addition, these corporate whistleblower protection measures need to be backed up by a comprehensive statutory regime to give potential whistleblowers the confidence to come forward.

Our Institute has been promoting the adoption of statutory whistleblower protection in Hong Kong for some time. Our research report *Business Ethics – A Path to Success*, issued in September 2007, urged the government to enact a whistleblower protection law. Over a decade later, Hong Kong still lacks such legislation and, while whistleblowing reporting channels are now more common in Hong Kong, corporate whistleblower protection measures remain rare.

Meanwhile, over the last decade, whistleblowing protection measures have become a standard part of corporate governance practice around the globe. Governance institutes, such as our own, have been at the forefront of the promotion of this trend. In 2010, we published our *Whistleblowing Toolkit* (available in the publications section of our website: www.hkics.org.hk). The Institute of Chartered Secretaries and Administrators (ICSA) has also produced guides on this topic.

Our *Whistleblowing Toolkit*, following our usual remit to provide governance professionals with practical help in the adoption of best practices, is a good one-stop-shop for anyone looking to get started. It provides a whistleblowing policy checklist, a standard whistleblowing report form and an investigation procedures flowchart. These are useful tools, but the Toolkit makes it very clear that creating an effective whistleblowing system involves more than installing the necessary infrastructure. Having a whistleblowing reporting channel is one thing, but encouraging its use requires some form of assurance that any disclosures will be acted upon, and, crucially, that whistleblowers will be protected from retaliation.

The Toolkit recommends therefore that an effective whistleblowing policy should include assurances that persons making appropriate complaints under the policy are assured of protection against unfair dismissal, victimisation or unwarranted disciplinary action, even if the concerns turn out to be unsubstantiated. There should also be the assurance that persons who victimise or retaliate against those who have raised concerns under the policy will be subject to disciplinary actions.

As with many things, the effectiveness of a whistleblower system comes down to what kind of culture exists within the organisation. Only organisations with a speak-up culture with visible buy-in from the top down can hope to really benefit from the early warning system that whistleblowers provide. Moreover, where employees have a safe internal reporting channel they will be far less likely to report their suspicions externally – a persuasive argument, I think, for boards in Hong Kong.

Before I go, I would like to recommend some essential reading – our Annual Report 2018 is now available on our website – and to urge all of you to attend and vote at our upcoming 2018 Annual General Meeting (AGM), which will be held on Thursday 13 December 2018 at 6.30pm at Theatre A, 22/F, United Centre, 95 Queensway, Hong Kong. Our Annual Report, the AGM notice and proxy form, as well as the ballot form and biographies of the candidates for election to Council are available in the Events section of our website. Do cast your vote, whether in person or by proxy, to play your part in the evolution of our profession in Hong Kong.

On behalf of our Council, Chief Executive and Secretariat, I would like to wish a Merry Christmas and Happy New Year to our members, graduates, students and friends.

David Fu FCIS FCS(PE)

鼓励敢言文化

香港设有完善的制衡机制，防止市场不当行为。我们设有多重防卫网，包括法律框架、企业管治守则、监管机构、廉政公署、警队，还有一小队专业从业员，当中当然包括公司秘书和企业管治师。

在侦测和防止企业不当行为方面，这些防卫网都发挥着重要的作用，但上文所列的，并未包括公认为侦测企业欺诈行为的能手。这监察者在机构中往往地位不高，而且甚少受过关于举报企业欺诈行为的正式训练。这神秘的企业管治白武士是谁？当然就是地位卑微的检举者。

长期以来，香港一直忽略了检举者在管理欺诈风险方面的重要角色。今期的封面故事提出，公司有需要制订保障检举者的措施，以便利用这个成本低廉而又有效的预警制度，确保及早侦测及防止欺诈行为，避免让欺诈行为造成无可补救的伤害。这些保障检举者的措施，还需要有完善的法律框架作为后盾，让检举者有信心站出来。

多年来，公会一直提倡香港为检举者提供法定保障。2007年9月，公会发表《商业道德：致胜之道》研究报告，敦促政府通过保障检举者的法例。十多年过去，香港仍未有这方面的法例。纵使检举的途径日趋普遍，保障公司内部检举者的措施仍然很少。

过去十年间，设立保障检举者的措施，在全球各地已成为企业管治的惯常做法。像公会这类管治机构，均站在前线，提倡这方面的发展。2010年，公会推出了《举报工具套》（可在公会网站 www. hkics.org.hk的Publications一栏阅览）。特许秘书及行政人员公会（ICSA）也有就这课题发出指引。

公会一向为企业管治专业人员提供实用的帮助，协助他们采纳最佳做法。《举报工具套》正是为有意开始制订保障检举者措施的企业提供一站式资讯，包括检举政策清单、标准检举表格，以及调查流程图。这些都是有用的工具，但工具套清楚指出，要建立有效的检举制度，并非单靠设立所需的架构。设立检举途径固然有其必要，但若要鼓励员工利用这途径，便要提供保证，让员工知道举报事项会得到跟进，而更重要的，是检举者会受到保护，免遭报复。

因此，工具套建议有效的检举政策应提供保证，让按政策提出恰当投诉的人放心，知道即使投诉不成立，也不会受到不公平解雇、陷害或不适当的纪律处分；也让他们知道，若陷害按政策提出关注的人，或向这些人报复，会遭受纪律处分。

正如许多其他事情一样，检举制度是否有效，视乎机构内的文化。只有高层明确鼓励敢言文化的机构，才可真正从检举者提供的预警制度中得益。此外，若内部设有安全的举报途径，员工向外报告可疑状况的机会便少得多：就设立内部检举制度，对于香港公司的董事会来说，我相信这是令人信服的理由。

最后，我建议大家翻阅已上载至公会网站的2018年年报，并促请大家参与2018年周年会员大会。大会将于2018年12月13日（星期四）下午6.30，假座香港金钟道95号统一中心22楼A演讲厅举行。公会年报、周年会员大会通告及代表委任表格，以及投票表格、理事会候选人简历，均可在公会网站Events一栏阅览。请亲自或委派代表投票，参与特许秘书专业在香港的发展。

我谨在此代表公会理事会、总裁及秘书处，恭祝各位会员、毕业学员、学员及朋友圣诞快乐，新年进步。

傅溢鸿

傅溢鸿 FCIS FCS(PE)

Whistleblower protection in Hong Kong – opportunity lost?

Whistleblowing provides an effective early warning system to ensure that fraud does not go undetected. Cynthia Chung, Partner, Deacons, argues that Hong Kong companies need to have corporate whistleblower policies and programmes in place, backed up by a comprehensive statutory regime to give potential whistleblowers the confidence to come forward.

The recent explosive uncovering of a railway construction scandal in Hong Kong by whistleblowers not only flagged concerns about its potential impact on public safety, but also alerted employers to the importance of having a whistleblowing framework in place for the protection of their employees who report malpractice.

Usually, front-line employees of an organisation will be the first to know of a wrongdoing since they have access to firsthand information in their workplaces. Whistleblowing happens when such employees report misconduct or malpractice that has occurred within their organisation. It is therefore crucial to have a whistleblowing policy in place to ensure compliance with the law and prevent corporate wrongdoing from turning into a crisis or disaster, as otherwise it could easily attract adverse publicity or ridicule.

Should whistleblowing be encouraged at your company?

The railway construction scandal and other well-publicised high-profile cases around the world in recent years all show that whistleblowing is a vital tool to help organisations detect and correct unlawful conduct or irregularities that occur in the workplace more efficiently.

The International Bar Association's *Whistleblower Protections: A Guide*, published in April 2018 (see 'Further reading' for details of the publications mentioned in this article), points out that: 'Organisations, be they government or private, rely on individuals, particularly employees, to bring to their attention information on actual or potential misconduct that may be occurring in the workplace.'

According to the *OECD Foreign Bribery Report*, published by the Organisation for Economic Co-operation and Development (OECD) in 2014, 33% of the bribery cases analysed by the OECD between 1999 and 2014 were detected through whistleblowing. Furthermore, the statistics published in the OECD's 2016 report *Committing to Effective Whistleblower Protection* reveal that, of the private sector employees who have reported to the US Securities and Exchange Commission (SEC) Office of the Whistleblower, over 80% first raised their concerns internally before reporting to the SEC. Only 18% of the private sector employees in the US chose to report externally.

Often, when employees become aware of wrongdoing in a company, whether or not they will report the matter depends on whether there exists a mechanism to protect them against the risk of retaliation. The hard truth is – the less protection there is for whistleblowing, the more likely an employee will be at risk, whether in terms of losing his or her job or other interests that hang in the balance.

Surveys conducted in the past 10 years, for example *Gaps in the System: Whistleblower Laws in the EU*, published by Blueprint for Free Speech in 2018, reveal the different forms that a fear of retaliation can take, such as apprehension about being disciplined, fired, sued or prosecuted, or even threats to personal safety. These are among the top reasons why employees would not blow the whistle.

Analyses of whistleblower protection over the years show that effective whistleblower protection requires both robust internal corporate whistleblowing

Highlights

- the legislation in place in Hong Kong to tackle the practical consequences associated with whistleblowing are piecemeal in nature
- effective whistleblower protection requires both robust internal corporate whistleblowing policies, and a comprehensive legislative/regulatory regime
- the Hong Kong government should enact a comprehensive whistleblower protection regime in line with international standards and practices without delay

> "whistleblowing is a powerful internal system of checks and balances for a company to maintain business integrity"

policies, and a comprehensive legislative/regulatory regime.

Legal protection for whistleblowers

Regrettably, Hong Kong lags behind on whistleblower protection in comparison with other member countries of the OECD. It is therefore not surprising that Hong Kong employees are less willing to come forward.

The common law does not provide much protection for whistleblowers except in certain circumstances. For instance, an employee may have a defence to a claim for breach of confidentiality if the disclosure of such information is in the public interest.

In terms of legislation, there is currently no single comprehensive whistleblowing law to protect whistleblowers in Hong Kong. There are, however, piecemeal provisions in various ordinances that provide protection to specific whistleblowers for the reporting of specific offences (see 'Current legal protections for whistleblowers in Hong Kong').

In summary, the existing legislative measures in Hong Kong are fragmented and only afford a limited scope of protection to certain whistleblowers.

The UK model

The OECD's *Whistleblower Protection: Encouraging Reporting* (July 2012) advocates the enactment of a comprehensive law as the most effective means of providing whistleblower protection. This gives the requirements visibility, thereby making implementation easier for employers. The *Gaps in the System* report mentioned above found that a piecemeal approach to protecting whistleblowers is largely ineffective. Among the nine European countries that have a standalone whistleblower protection law covering public and private sector employees, the UK attracts a top protection rating. The UK Public Interest Disclosure Act (PIDA) of 1998 is considered to be one of the most developed and comprehensive whistleblower protection laws in the world, and has been used by several countries as a model in developing their whistleblower protection regimes.

The PIDA, which came into force in 1999, is part and parcel of the Employment Rights Act 1966. It applies to every employee in the private, public and not-for-profit sectors, and operates in the manner set out below.

- Under the PIDA, it is unlawful for an employer to dismiss an employee or subject a worker to a detriment on the grounds that he or she has made a 'protected disclosure'. 'Worker' includes limited liability partnership members, National Health Service (NHS) job applicants, homeworkers, non-employees undergoing training, self-employed medical professionals, agency workers and police officers.

- To be protected, a disclosure must, in the reasonable belief of the whistleblower, be in the public interest, and such disclosure must be made via one of the prescribed disclosure channels. These include: the worker's employer, the person responsible for the relevant failure, legal advisers, government ministers, a person prescribed by an order made by the Secretary of State and a person who is not covered by the list above provided certain conditions are met. Employees may, subject to certain conditions, choose any of the prescribed disclosure channels.

Current legal protections for whistleblowers in Hong Kong

Legislation	Protection
Employment Ordinance (EO)	• An employer cannot terminate an employment by reason of the employee giving evidence in proceedings or enquiry for the enforcement of the EO, or in any proceedings or enquiry in relation to safety at work. • Employers in breach will be liable to a fine and payment of compensation to the victimised employee.
Sex Discrimination Ordinance, Disability Discrimination Ordinance, Family Status Discrimination Ordinance, and Race Discrimination Ordinance (collectively 'Discrimination Ordinances')	• Under the Discrimination Ordinances, it is unlawful for a person (discriminator) to discriminate against another person (person victimised) on the grounds that the person victimised has brought proceedings against the discriminator or given evidence or information in connection with proceedings brought by others against the discriminator. • The court has the power to order the discriminator to employ, re-employ or promote the person victimised, or to pay him/her compensation or damages.
Drug Trafficking (Recovery of Proceeds) Ordinance (DTRPO), Organised and Serious Crimes Ordinance (OSCO), United Nations (Anti-Terrorism Measures) Ordinance (UNATMO)	• A whistleblower who makes a disclosure of suspected proceeds of drug trafficking, money laundering or other crimes to an authorised officer under the DTRPO, OSCO and UNATMO, will not be regarded as in breach of any restriction against disclosure of information imposed by contract or by any enactment, rule of conduct or other provision, or render the whistleblower liable to damages for any loss arising out of the disclosure. • Under the DTRPO and the OSCO, witnesses in any civil or criminal proceedings are not required to reveal the identity of the person making the disclosure.
Prevention of Bribery Ordinance (PBO) and Witness Protection Ordinance	• Under the PBO, the name and address of an informer have to be kept confidential and any documents that may lead to disclosure of the informer's identity have to be redacted prior to disclosure in civil or criminal proceedings. • The Independent Commission Against Corruption (ICAC) informers are entitled to witness protection under the Witness Protection Ordinance, including protection for personal safety or well-being.
Securities and Futures Ordinance	• A whistleblower will be protected against any civil liability whether arising in contract, tort, defamation, equity or otherwise, for reporting any financial irregularities or non-compliance with any financial resources rules which occurred in the company.
Competition Ordinance	• Under the Leniency Policy for undertakings engaged in cartel conduct, immunity from fines is granted to the first undertaking which enters into a leniency agreement with the Competition Commission (CC). The CC may consider a lower level of enforcement action for undertakings which do not qualify for leniency but cooperate with the CC. • The CC is under a general obligation to preserve the confidentiality of any confidential information provided to it. Under the Leniency Policy, the CC will use its best endeavours to appropriately protect its records of the leniency application process, including the leniency agreement. • An employer is prohibited from terminating or threatening to terminate the employment, discriminating in any way, intimidating or harassing, or causing any injury, loss or damage to an employee who provides material to the CC in connection with the CC's functions, or gives or agrees to give evidence in any proceedings brought by the CC.

> “the current legal protections for whistleblowers in Hong Kong fall far short of international standards in many aspects”

- As far as relief is concerned, employees who are unfairly dismissed, or workers who are subjected to any detriment, by reason that they have made a protected disclosure, can bring a claim against their employers. Further, employers may be vicariously liable for detriment caused by employees and workers unless they have taken all reasonable steps to prevent this from happening. Workers or agents with employer's authority who victimise whistleblower colleagues will be personally liable.

Hong Kong needs a comprehensive whistleblower protection law

While Hong Kong continues to boast its status as an international financial centre, the laws in place to tackle the practical consequences associated with whistleblowing are merely piecemeal in nature. Compared to the broad scope of the PIDA, it can be readily seen that the current legal protections for whistleblowers in Hong Kong fall far short of international standards in many aspects. There is uncertainty on the extent of coverage of persons, the reporting channel is unclear and there is no definition of the scope of disclosure that would be protected or what constitutes retaliatory actions. Even if employees are willing to come forward, there are as yet no clear procedures for reporting retaliation, or remedies open to those who suffer retaliation as a result of making a report.

To promote and encourage whistleblowing, a comprehensive legal regime should be introduced, the sooner the better! The OECD's *Committing to Effective Whistleblower Protection* survey mentioned earlier found that 27 countries had already adopted dedicated whistleblower protection laws back in 2014. It is therefore high time for the Hong Kong government to consider enacting a comprehensive whistleblower protection regime in line with international standards and practices without delay.

Internal protection for whistleblowers

The Australian Banking Association, in its *Review of Whistleblowing Protections by Australian Banks* (August 2016), emphasised that having a whistleblower programme should be a standard part of corporate governance and risk management practice. 'Effective whistleblower programmes, capable of receiving and responding to disclosures from whistleblowers in an efficient and effective way, and of protecting them from inappropriate retaliation, are a critical element of modern corporate governance and risk management frameworks.'

Although the current laws of Hong Kong do not require employers to have a whistleblowing policy in place, it is good practice for employers to implement appropriate measures, not only to stave off wrongdoing that could develop into a corporate disaster, but also to demonstrate their commitment to solving problems by listening to their employees' concerns.

Whistleblowing policy

Every company is different. Employers should therefore be proactive in developing their own whistleblowing policies to meet their own ethical and moral concerns. In any case, a good whistleblowing policy should be clear and easy to understand and include guidelines for the effective management of whistleblowing. Companies should consider the issues highlighted below – based on the guide issued by the UK Department for Business Innovation & Skill (Whistleblowing: *Guidance for Employers and Code of Practice*, March 2015).

- A list of the type of concerns that should be reported.

- The procedures for raising concerns.
- An assurance to train employees at all levels of the organisation on whistleblowing policy and any applicable laws.
- An assurance to treat all disclosures appropriately, consistently and fairly.
- An assurance to take all reasonable steps to maintain the confidentiality of the whistleblower where this is requested.
- Ways in which the organisation will respond to the whistleblower.
- An assurance that victimisation of a whistleblower is not acceptable.
- Clear channels for making disclosures. Alternative reporting procedures should also be made available in the event that employees do not feel comfortable approaching their line managers. For example, organisations may establish whistleblower hotlines with their legal advisers for the reporting of misconduct.

Awareness-raising, communication and training

To ensure cooperation, participation and support by employees, the purpose and goals of whistleblower protection should be promoted through effective awareness-raising, communication and training, such as providing a clear explanation to employees of their rights and obligations when disclosing wrongdoing. The following approaches, based on the OECD's *Good Practice Guidance on Internal Controls, Ethics and Compliance* (2010), represent some of the best practices an employer could adopt for raising awareness of the whistleblowing policy or procedures:

- Making the policy accessible on the staff intranet, briefing at team meetings, including the policy in staff handbooks and new staff induction packs.
- Introducing training to all employees on how disclosures should be made.
- Introducing training to managers on how to handle disclosures, protect personal information, receive reports, and recognise and prevent occurrence of discriminatory and disciplinary actions taken against whistleblowers.
- Conducting regular training for managers and employees to help refresh their minds on the whistleblowing policy and procedures.

Conclusion

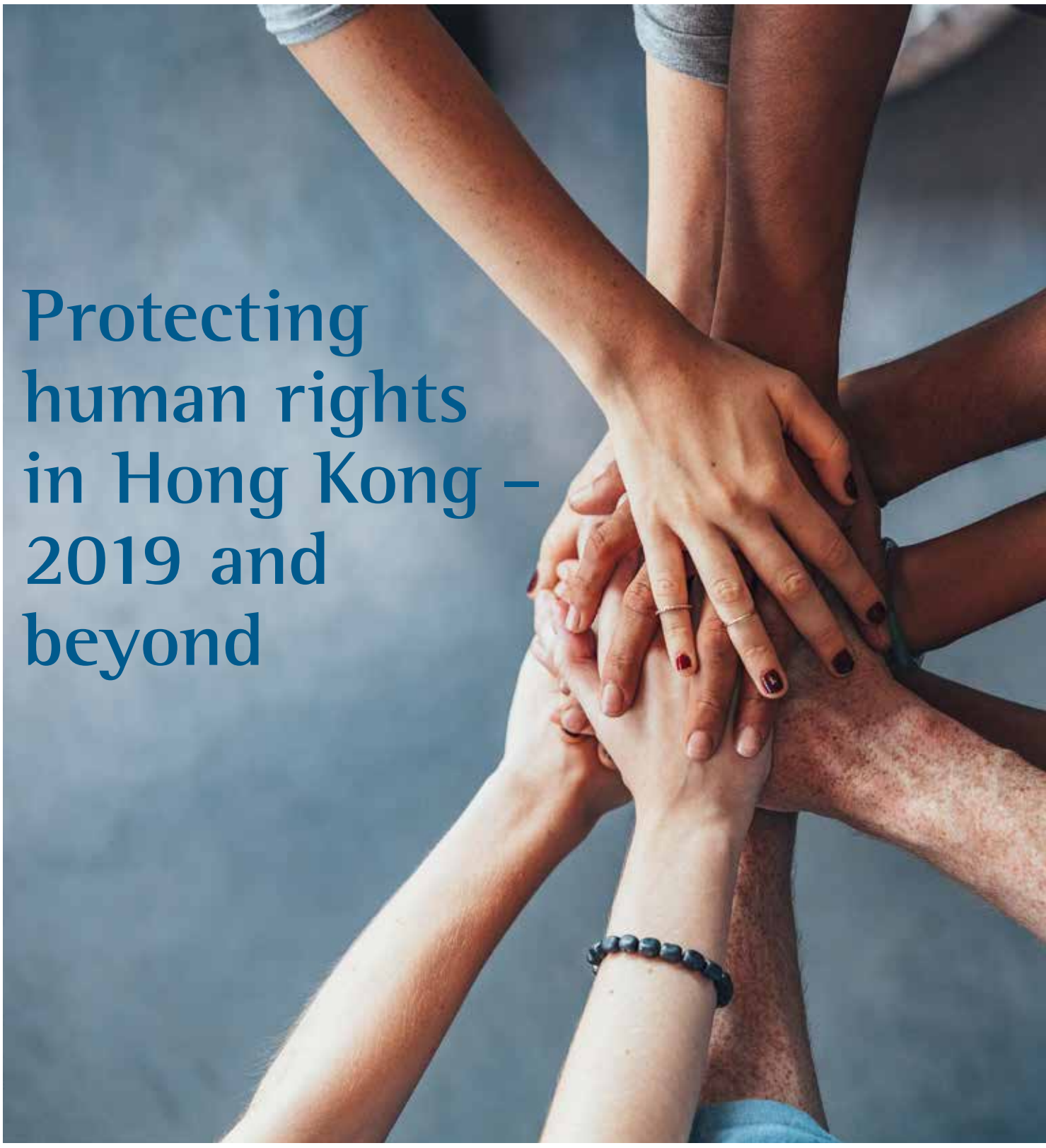
The OECD's *The Role of Whistleblowers and Whistleblower Protection* (2017), found that whistleblowers who are provided with internal reporting protection can help companies detect wrongdoing earlier and therefore avail themselves of the earliest opportunity to deal with it before it turns into a crisis. Whistleblowing is a powerful internal system of checks and balances for a company to maintain business integrity, thereby promoting a healthy working culture. Compared to the more developed UK model, the existing legislative framework in Hong Kong is clearly inadequate, which calls for urgent reform by the government to provide better protection for whistleblowers.

In the meantime, for companies that do not have whistleblower policies, it is in their best interests to develop and adopt whistleblower protection programmes as part of their corporate governance/ integrity management, and to introduce such programmes to their employees through awareness-raising initiatives. Companies that already have policies in place should review them periodically to ensure compliance with the legislative framework in force, and update them as and when reform is introduced.

Cynthia Chung, Partner
Deacons

Further reading

- *Whistleblower Protections: A Guide* (The International Bar Association, April 2018) – www.ibanet.org.
- *Foreign Bribery Report* (2014); *Committing to Effective Whistleblower Protection* (2016); *Whistleblower Protection: Encouraging Reporting* (2012); *Good Practice Guidance on Internal Controls, Ethics and Compliance* (2010); and *The Role of Whistleblowers and Whistleblower Protection* (2017) (the Organisation for Economic Co-operation and Development) – www.oecd.org.
- *Gaps in the System: Whistleblower Laws in the EU* (Blueprint for Free Speech, 2018) – www.fibgar.org.
- *Review of Whistleblowing Protections by Australian Banks* (The Australian Banking Association, 2016) – www.ausbanking.org.au.



Protecting human rights in Hong Kong – 2019 and beyond

New legislation is expected in the coming year to better protect equality and eliminate discrimination in Hong Kong. Peter Reading, Legal Counsel, Equal Opportunities Commission, highlights this changing compliance environment and looks at the work that still needs to be done to ensure rights are protected in the years ahead.

The 10th of December 2018 marks the 70th anniversary of the signing of the UN Universal Declaration of Human Rights (UDHR), the foundation of modern human rights protections globally.

One of the key rights protected under the UDHR is the right to equality and non-discrimination, which is also incorporated into many of the other subsequent UN human rights conventions. It is also incorporated in Hong Kong, both under the Bill of Rights, and through Hong Kong's four anti-discrimination laws.

Companies have a crucial role in promoting equality and eliminating discrimination, whether as employers, service providers or housing providers.

The anniversary therefore marks a poignant moment to reflect on the evolution of protections from discrimination in Hong Kong, the work of the Equal Opportunities Commission (EOC) to modernise the anti-discrimination laws and the proposed government amendments to these laws that are likely to come into operation in 2019.

Current protections from discrimination in Hong Kong

Hong Kong, similar to many other jurisdictions and countries, has three layers for promoting equality and eliminating discrimination against different groups in society: international human rights obligations, constitutional legislation protecting human rights and civil anti-discrimination legislation.

The UDHR was the predecessor to a number of UN human rights conventions, to which most countries are parties, and that have effect in Hong Kong. These

Highlights

- evidence from a number of studies around the world indicate that companies that effectively promote equality in employment are generally more successful and productive
- all companies in Hong Kong need to ensure that they and their staff fully understand the amendments to Hong Kong's four anti-discrimination laws likely to come into effect in 2019
- the EOC will be producing guidance to help companies understand the effect of the new provisions

include the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of all Racial Discrimination (CERD); the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD). A fundamental right under all of these conventions is the right to equality and non-discrimination.

In addition, at a constitutional level the Hong Kong Basic Law and Bill of Rights provide protections of human rights, including provisions prohibiting discrimination. The Hong Kong Bill of Rights Ordinance (BORO) contains the Bill of Rights and came into effect in June 1991. It implements into Hong Kong law most of the provisions of the ICCPR, including the right to be free from discrimination on '...any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

Both the Bill of Rights and the Basic Law are legally binding on the government, all public authorities and those acting on their behalf. However they are generally not legally binding upon private bodies or individuals, including companies.

Finally, specific anti-discrimination legislation has been developed incrementally over the last 22 years. Currently, Hong Kong has four anti-discrimination laws: the Sex Discrimination Ordinance (SDO) and the Disability Discrimination Ordinance (DDO), which both came into operation in 1996; the Family Status Discrimination Ordinance (FSDO), which came into operation in 1997; and the Race Discrimination Ordinance (RDO), which came into operation in 2009.

The SDO, DDO, FSDO and RDO apply not only to the government, but also to private bodies such as companies. Generally speaking they prohibit discrimination in

Proposed legislative changes

The EOC's Discrimination Law Review recommendations of particular relevance to companies that the government plans to implement are highlighted below.

- Prohibition of direct and indirect discrimination and victimisation on the grounds of breastfeeding under the SDO.
- Expansion of the definition of 'associate' under the RDO. For example, it will be unlawful to discriminate against or harass another person because of the race of the latter's 'associate' in employment, including work colleagues – previously the definition of associate was restricted to near relatives.
- Amendments to the RDO to cover direct and indirect racial discrimination and harassment by 'imputation' that a person is of a particular race or member of a particular racial group. For example, this would cover situations where a person is refused an interview because he or she is believed to be of a particular race and the employer does not wish to employ such a person.
- Amendments to the SDO, RDO and DDO prohibiting sexual, racial and disability harassment between workplace participants. As discussed above, this is important to cover situations where there is no employment relationship between the parties when harassment occurs, such as contract workers and commission agents. The government currently has not agreed to cover the situation of volunteers or interns.
- Aligning provisions in the RDO and DDO with the SDO to offer protection for a person providing goods, facilities or services from racial and disability harassment by a customer. Protections from sexual harassment by customers of employees were introduced in December 2014, but there are no equivalent protections relating to racial or disability harassment.
- Repealing existing provisions in SDO, RDO and FSDO preventing damages being awarded for indirect discrimination where no intention to discriminate is established. This is to ensure consistency with the DDO, and is important as intention should not be a determining factor as to whether damages are awarded.

> companies have always had a vital role in promoting equality and eliminating discrimination, but that role is even more critical today

a wide range of fields of everyday life: employment and vocational training; the provision of goods, facilities and services; education; management and disposal of premises; and government functions (except the RDO).

The anti-discrimination laws also established and set out the functions and powers of the EOC, which commenced operating in 1996 and is Hong Kong's statutory equality body to promote equality and eliminate discrimination in society under the four anti-discrimination laws.

The role of companies in promoting equality

Companies have always had a vital role in promoting equality and eliminating discrimination, but that role is even more critical today for a number of reasons.

Firstly, Hong Kong anti-discrimination laws and international human rights standards apply to companies in a number of capacities, including as employers, organisations that provide services and facilities to the public, or as providers of housing. At an international level, the UN has recently emphasised the obligations on companies to promote and protect human rights in all aspects of their work. In 2011 it issued a set of principles called *Guiding Principles on Business and Human Rights*. These include requirements to respect and monitor compliance with human rights obligations in their work, including the right to equality and non-discrimination.

Secondly, from a compliance point of view recent examples of high-profile cases of discrimination are a reminder that non-compliance with legal obligations can have significant financial and reputational consequences for companies.

In the UK in January 2018, a media investigation of the President's Club Charity Trust uncovered widespread sexual harassment of women employed at an annual charity event. The treatment of the women attracted comprehensive condemnation from the government, while several of the children's hospitals that received donations from the organisation returned all monies and the organisation was forced to close down.

Thirdly, evidence from a number of studies around the world indicate that companies that effectively promote equality in employment are generally more successful and productive. For example, a report published by McKinsey & Company on gender equality globally (*Women Matter*, published in October 2017) indicates a strong correlation between the presence of women in top management positions and better financial results. The report analysed 300 companies in 10 countries around the world and found a difference in average return on equity of 47% between the companies with most women on their executive committees and those with none, and a 55% difference in average operating margin.

In light of the above factors, it is crucial for companies to be aware of how changes in anti-discrimination laws will affect their operations, as well as consider how they can better promote diversity within their organisations.

> “recent examples of high-profile cases of discrimination are a reminder that non-compliance with legal obligations can have significant financial and reputational consequences for companies”

EOC Discrimination Law Review and related work

Given that it is now more than 20 years since the first anti-discrimination laws were introduced in Hong Kong, recently the EOC has done considerable work to review the existing laws and conduct research on whether new anti-discrimination laws should be introduced. This work has been driven by the need to ensure that the legal provisions preventing discrimination meet the changing needs of Hong Kong society.

1. Discrimination Law Review recommendations

The EOC conducted extensive public consultation on modernising the existing four anti-discrimination laws and, in March 2016, published its submissions to the government. It made 77 recommendations for reform, with 27 identified as higher priorities. Some of the priority recommendations that are of particular relevance to the work of companies are discussed below.

Reasonable accommodation for persons with disabilities. For persons with disabilities in Hong Kong, an area in which the EOC receives many complaints is the lack of accommodation for them in employment or access services. Under the UN CRPD, there is a requirement to provide reasonable accommodation for persons with disabilities. Article 2 of the CRPD defines reasonable accommodation as: ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.

In many international jurisdictions such as the UK, the EU and Australia, there are specific duties to make reasonable accommodation for persons with disabilities in a range of fields. The denial of reasonable accommodation is also defined as a distinct form of discrimination.

In Hong Kong under the DDO, there is no requirement to make reasonable accommodation, which is inconsistent with the above international human rights obligations. The EOC therefore recommended that a distinct duty to make reasonable accommodation should be introduced, and that it apply to key aspects of public life such as employment, education and accessing services and premises.

Breastfeeding. The attitudes towards, and demographics of, breastfeeding women has significantly changed over the last 15 years in Hong Kong. There are increasing numbers of women and families that recognise the health benefits of breastfeeding their babies. As a result, the percentage of mothers breastfeeding their newborns has increased from 66% in 2004 to 86% in 2014. This means it is increasingly important to ensure that breastfeeding women are protected from discrimination in key areas of public life such as employment and the provision of services.

The EOC recommended that new provisions be introduced to prohibit discrimination against breastfeeding women in all areas of public life such as employment, the provision of services, and education. This would apply not only where women are actually breastfeeding, but also where they are expressing milk, for example while they are at work.

Sexual and other harassment. The #metoo campaign around the world has highlighted the issue of sexual harassment and violence against women. In Hong Kong it is clear that sexual harassment is also a major problem. For example, for the financial year 2016/17, there were 264 complaints made under the SDO. Of those, 242 were employment-related allegations and of those, 45% (108 cases) involved sexual harassment.

One of the areas where there is a gap in protection concerns situations where persons work in the same workplace but there is no employment relationship between them. Currently, in relation to workplaces, protection is restricted to where there is a relationship of employment or contract workers. The EOC recommended that the protections be expanded to cover common workplaces. One area that raises particular concern is sexual harassment of persons who are interns or volunteers.

In such circumstances there is usually no employment relationship between the intern/volunteer and the organisation. Given that in Hong Kong there are increasing numbers of people doing internships or volunteering to secure future work, the EOC recommended that they be protected. Such protections exist in some other jurisdictions, such as the states of New South Wales and Victoria in Australia.

2. EOC research: LGBTI anti-discrimination legislation

The EOC has also recently done detailed research on introducing new anti-discrimination legislation in relation to protecting people from discrimination on grounds of being lesbian, gay, bisexual, transgender or intersex (LGBTI). Such protections are common in many other developed jurisdictions and have been recommended by the UN.

In January 2016, the EOC published a report on its *Feasibility Study on Legislating against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status*. The study was conducted by the Gender Research Centre of the Hong Kong Institute of Asia-Pacific Studies at the Chinese University of Hong Kong.

The study found that there was evidence of widespread discrimination against LGBTI people in many aspects of life such as employment, services, education and housing. Of the LGBTI people interviewed, 88% said they had been discriminated against in the last two years and 30% had attempted suicide in their lifetime. In relation to specific sectors of employment, provision of services and housing, respectively 32%, 50% and 21% of LGBTI people interviewed said they had been discriminated against in the last two years.

The study also found that there were changing attitudes of the general public towards the introduction of such LGBTI anti-discrimination legislation, with 55.7% of those surveyed indicating that they agreed with the introduction of such legislation.

Based on all the above evidence and considerations, the EOC recommended that the government should start consultation on introducing comprehensive LGBTI anti-discrimination legislation.

Government response to EOC recommendations

The government has indicated that it will implement eight of the EOC's Discrimination Law Review recommendations and plans to introduce a bill in the Legislative Council by the end of 2018 (see 'Proposed legislative changes'). This means the provisions are likely to come into effect sometime in 2019.

Whilst the EOC is pleased that the government is taking forward eight of the Commission's recommendations, it is disappointed that the government has not agreed to implement the other higher priority recommendations. The EOC continues to call on the government to reconsider its position. The EOC notes that under the 2018 Policy Agenda, the government would study anti-discrimination measures in other jurisdictions to determine whether there should be legislation to protect people of different sexual orientations and transgender persons from discrimination. The EOC believes that, given the clear evidence from our research of the need for such legislation because of the discrimination faced by LGBTI people, it would be appropriate to proceed with consulting on introducing LGBTI anti-discrimination legislation on an expedited basis.

In relation to the eight recommendations that the government is implementing, the EOC will be producing guidance to help relevant sectors including companies to understand the effect of the new provisions. All companies should review and amend their policies and practices to take into account the amendments. This should also include considering what other measures should be taken, for example by providing information-sharing sessions and training to staff on the amendments.

Conclusion

Hong Kong is one of the jurisdictions in Asia which has relatively well-developed protections of the right to equality and non-discrimination. However all protections of human rights need to evolve to the changing needs of society, whether it is evidence of discrimination, shifting demographics and attitudes, or international human rights obligations. Such evolution has been a hallmark of all the developments in anti-discrimination laws in other similar developed jurisdictions.

It is a positive step that the government is implementing amendments to the four anti-discrimination laws in a number of respects, and all companies should ensure that they and their staff fully understand those changes. However we need leaps, not steps forward, in Hong Kong to ensure that the anti-discrimination laws are modernised to better protect key groups experiencing discrimination in society.

Peter Reading, Legal Counsel
Equal Opportunities Commission

Corporate governance – challenges and opportunities in the digital age

How successfully companies address the challenges and seize the opportunities of emerging technologies will be a key factor of business success in the years ahead, argues the winning paper in the Institute's latest Corporate Governance Paper Competition.

Companies need to adapt their approaches to corporate governance to better manage the opportunities and mitigate the risks of the digital age. This article will look at some of the major challenges and opportunities for corporate governance in the digital age, and will assess the responsibilities of directors, company secretaries and managers in upholding effective IT governance.

1. Challenges for corporate governance in the digital age

Data breaches

One of the biggest challenges for corporate governance in the digital age is data breaches – the unauthorised transfer of confidential information from a computer or data centre to the outside world. Due to advances in technology, access to data has become relatively easy and this helps in the accidental spreading of confidential data.

According to the Privacy Commissioner for Personal Data (PCPD), there was a nearly 20% increase in data breach notifications received by the PCPD office in 2017 compared to the previous year. This shows how technological advancement not only makes it more difficult to protect an organisation's internal data, but also creates huge impacts on the business environment because of data leakage.

Let's look at one example. In 2018, the Hong Kong Broadband Network (HKBN) was hacked and data relating to 380,000 customers was stolen, including 43,000 credit card numbers. Francis Fong, President of the Hong Kong Information Technology Federation, commented that it was negligent for an internet service provider of this scale to be hacked and he questioned whether the company had afforded the same level of protection to all its databases. This led to a fall in the company's stock price, showing the damage that can be done by a data leakage to a company and its customers.

Highlights

- board members need to keep updating themselves about the latest IT developments so as to supervise strategy development in these areas
- regarding cybersecurity hygiene, directors, company secretaries and managers can be role models for middle and front-line employees
- taking advantage of the increased efficiency offered by technology, companies can improve their shareholder engagement and transparency

Insider threats

Awareness of the insider threat issue – the threat that someone close to an organisation with authorised access may misuse that access to negatively impact the organisation's critical information or systems – has increased over the previous decade. A survey for *Insider Threat Report* in 2018 from CA Technologies found that 53% of respondents confirmed there had been insider attacks against their organisation in the previous 12 months, while 27% of organisations said that insider attacks had become more frequent. These results suggest that the main factors behind insider attacks are:

- too many users enjoy excessive access privileges
- there are more devices with access to sensitive data, and
- there has been an increase in complex technologies that are difficult to control.

Network attacks

According to the *Quarterly Threat Report*, published by McAfee Labs in September 2017, browser, brute force and denial-of-service (DDoS) attacks were the top three types of network attacks in 2017.

Browser attacks. These attacks often appear on legitimate but vulnerable websites. When new visitors arrive, the infected site tries to force malware to spread into their systems by exploiting vulnerabilities in their browsers. The popular web browsers – Microsoft Internet Explorer, Google Chrome and Mozilla Firefox – were shown to be the most vulnerable web browsers in 2016.

For example, assume a corporate system uses JavaScript. Malware authors then use it to accomplish attacks by embedding an obfuscated Adobe Flash file within JavaScript. First, the Flash code invokes PowerShell, a powerful operating system (OS) tool that can perform administrative operations. Then, Flash feeds instructions to PowerShell through its command line interface. Next, PowerShell connects to a stealth command and control server owned by the attackers. After that, the command and control server downloads a malicious PowerShell script to the victim's device that captures sensitive data and sends it back to the attacker. By complying with these instructions, the attackers successfully get into victims' systems.

Brute force attacks. In this type of attack, the attacker tries to discover the password for a system or service through trial and error. Since this is time consuming, attackers usually use software to automate the task of typing hundreds of passwords.

Denial-of-service attacks. This refers to an interruption in an authorised user's access to a computer network, typically caused with malicious intent. According to a Kaspersky Labs survey of 5,200 people from businesses in 29 countries, half of respondents agreed that DDoS attacks

How technology facilitates the engagement of shareholders and stakeholders

More and more companies are leveraging technology to engage with shareholders as the combination of digital technologies and social media can enable companies to reach shareholders more quickly and easily. There has been a rise in virtual shareholder meetings, for example, with usage increasing sharply in the first six months in 2018 globally.

New technologies also assist companies to provide shareholders with a way to participate in voting via the internet and to receive information from issuers. Technology can also ensure better transparency in proxy participation. There are many secure online voting platforms that can collect votes automatically and provide information to shareholders before a general meeting. These systems not only secure companies' confidential information but also speed up the process of collecting voting instructions.

Taking advantage of the increased efficiency offered by technology, companies can improve their shareholder engagement and transparency.

New communication channels are also facilitating the conversation between companies and wider stakeholder groups, helping to clarify misunderstandings and prevent misinformation. Users can upload and express their views, as well as disseminate current social movements and content. Companies can choose adequate interaction partners, make necessary decisions, select effective strategies for future development and finally engage with shareholders and stakeholders effectively.

are growing in frequency and complexity. This reveals that network attacks are a growing trend in the 21st century.

Ransomware

Ransomware is a kind of cyber attack in which the perpetrators encode an organisation's data and then a monetary payment is demanded via cryptocurrencies, such as Bitcoin, for the decode key. 2017 was a pivotal year for ransomware as three unprecedented attacks expanded the number of victims. One significant case was the WannaCry ransomware attack which occurred in May 2017. Hong Kong companies were among the victims with at least three reported cases of companies that had not updated their Windows 7 operating systems and Internet browsers.

Renault, a car manufacturer, had to close its largest factory in France due to WannaCry. In June, Honda's production facilities and 55 speed cameras in Victoria, Australia, were also forced to shut down. Estimates are that there were nearly three-quarters of a million victims in this incident. Over the past year, the number of reported ransomware incidents almost doubled, from 54,000 in 2016 to more than 96,000 last year. This implies that ransomware has become the leading source of cyber attacks and has affected corporates severely.

2. Opportunities for corporate governance in the digital age

IT governance

Business leaders increasingly recognise that IT is important for delivering the organisation's strategy. IT governance ensures that IT investment follows business values and mitigates IT risks. Moreover, research among private-sector organisations has found that top performing enterprises succeed in obtaining value by implementing effective IT governance to support their strategies and institutionalise good practice.

> "for many board members, technology may not be their area of expertise, but almost all of the hot topics in governance nowadays are technology-related and IT issues need to be integrated into corporate strategy"

The International Board for IT Governance Qualifications (IBITGQ) is an examination board that specifies a syllabus and learning outcomes related to IT governance. The key training areas include: EU General Data Protection Regulation (GDPR), cybersecurity and compliance with the Payment Card Industry Data Security Standard (PCIDSS). This qualification is mainly aimed at the heads of large companies and government officers.

By adopting IT governance, companies can create a culture of security awareness and cybersecurity hygiene. Encryption is one of the significant technologies for data and system security. By using encryption, companies can help maintain integrity as it can deter data being altered to commit fraud and corruption. Moreover, encryption can be an effective way to help protect the internal data by meeting compliance requirements.

Compliance and risk management

Digital transformation is also making changes to the practice of regulatory compliance and risk management. Compliance with new data privacy requirements, for example, is a major issue. In Hong Kong, the Personal Data (Privacy) Ordinance (PDPO) has been in force since 2012 and contains six data protection principles. In accordance with these principles, company secretaries must help collect personal data in a lawful and accurate way. They should also protect personal data from unauthorised access and make known to the public the proposed use of data. Moreover, the data subject must be given access to the personal data and be allowed to make corrections if the data is inaccurate.

ISO 27001, a specification for an information security management system, can also help companies convince their clients and other stakeholders that they are managing the security of the companies' information. Compliance with ISO 27001 will assist to:

- protect client and employee information
- manage risks to information security effectively
- achieve compliance with regulations such as the EU GDPR, and
- protect the company's brand image.

The EU GDPR took effect on 25 May 2018. In the wake of technological

> “top performing enterprises succeed in obtaining value by implementing effective IT governance to support their strategies and institutionalise good practice”

developments, globalisation and the constitutionalisation of the right to data protection in the EU, the GDPR aims to harmonise the framework for the digital single market, put individuals in control of their data and formulate a modern data protection governance. This new regulation enhances the right to notice on data processing, to erasure (establishing the right to be forgotten) and to object to data processing. The GDPR also establishes new rights to restriction of processing and to data portability. The reason why the GDPR is relevant to Hong Kong organisations is that when the PDPO was drafted, reference was made to the relevant requirements under the Organisation for Economic Co-operation and Development (OECD) Privacy Guidelines in 1980 and EU directives, hence the PDPO and the GDPR share a number of common features.

3. Roles of the key governance stakeholders

Directors, company secretaries and managers play a crucial role in upholding effective governance but they often need to enhance their IT security awareness. For many board members, technology may not be their area of expertise, but almost all of the hot topics in governance nowadays are technology-related and IT issues need to be integrated into corporate strategy. Thus, board members need to keep updating themselves about the latest industry developments so as to supervise strategy development in these areas.

Company secretaries also need to consider the importance of IT in their corporation as this determines the level of IT security awareness throughout the company. For example, company secretaries should be monitoring the effectiveness of cybersecurity measures and informing the board members of progress and threats from time to time.

Regarding cybersecurity hygiene, directors, company secretaries and managers can be role models for middle and front-line employees. They should implement a series of security protection policies, such as regular software updates, two-factor authentications, overseeing third-party access carefully, regulating data backups and being alert against phishing attacks. Over time, management has to review the effectiveness of these policies and revise their guidelines if the overall performance does not meet the required standards.

Regarding compliance, management needs to review the effectiveness of the IT security policies in order to lessen the probability of cyber attacks. Take cybersecurity as an example. One of the most prevalent standards is to observe if there is a downward trend in these kinds of incidents. The level of seriousness is also significant as it reflects the overall performance of compliance with the requirements. By these means, credit can be given to staff if their performance is satisfactory, which boosts staff morale. However, stricter rules or punishments can be used if performance is far below the target, so as to create an incentive for further improvement.

Regarding IT auditing, company secretaries have to integrate technology risks into the company's audit plan, as well as inform the board or relevant committees, such as the risk management committee, about this.

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> *Since 2006, the Institute has been running its annual Corporate Governance Paper Competition to promote awareness of good corporate governance among local undergraduates. This year's competition concluded with an awards presentation held on 8 September 2018. More information is available on the Institute's website: www.hkics.org.hk.*

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授課日期：2019年1月19日、1月20日、1月26日及1月27日
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授課地點：港島區其中一所教學中心

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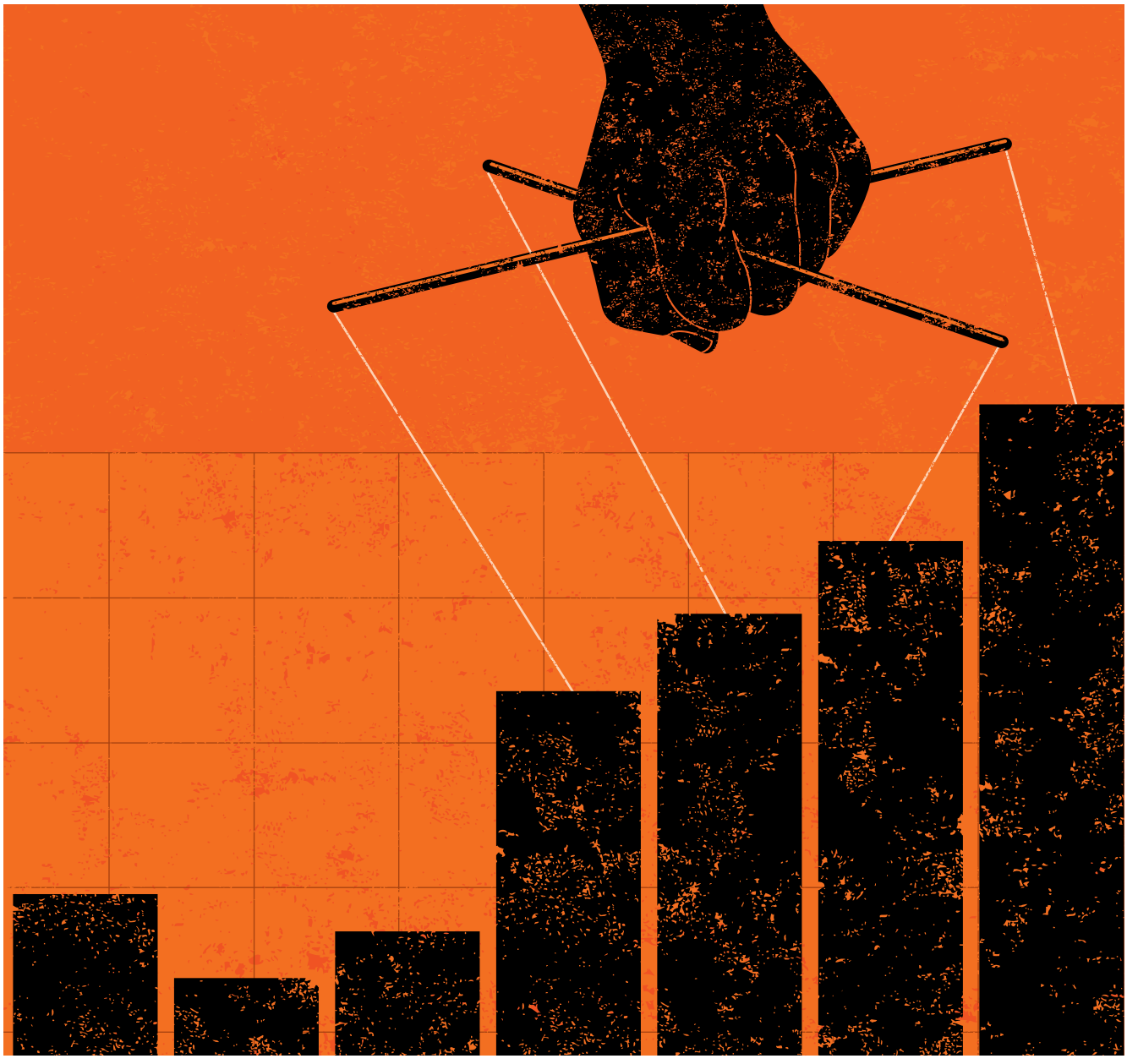
Directors' duties

Mohan Datwani FCIS FCS(PE), the Institute's Senior Director and Head of Technical & Research, looks at two recent decisions of the Listing Committee of The Stock Exchange of Hong Kong Ltd that reiterate the importance of full compliance with the law in the fulfilment of directors' duties in Hong Kong.



Director duties now stand at the core of regulatory philosophy of Hong Kong Exchanges and Clearing Ltd (HKEX) relating to listed companies. A company is a legal creation and directors are its agents. It is therefore incumbent upon directors to perform their duties prescribed by law to discharge the trust and confidence placed upon them. Systemically, this underlying regulatory philosophy of HKEX as to the proper discharge of director duties is critical to Hong Kong's position as a quality market where listed companies abide by high standards of corporate governance. HKEX therefore takes compliance with director duties seriously.

Under Rule 3.08 of the Main Board Listing Rules (and GEM Board equivalent), the legal position is reiterated – directors are both individually and collectively responsible to fulfil fiduciary duties and the duties of skill, care and diligence required of them to at least the standards required under Hong Kong law. Directors need to act honestly and in good faith for proper purpose. Directors must be answerable for the application of assets, avoid actual or potential conflicts of interest and duty, and disclose fully and fairly any interest in contracts with listed companies. In short, doing the right thing for the company as principal in the context of the trust and confidence placed on them as agents for the listed company.

Checks and balances

On 22 January 2018, the Listing Committee of The Stock Exchange of Hong Kong Ltd (Listing Committee) censured RCG Holdings Ltd (now known as China E-Wallet Payment Group Ltd) and a number of its current and former directors for breaching the listing rules and/or the director's undertaking. This decision is a good lesson as to what not to do in terms of being a director. It also illustrates how the Listing Committee views explanations as to failings in the discharge of director duties as enforcers of the listing rules.

In summary, the company announced a loss of HK$12 million in its interim financial results and the market reacted to the negative news. The share price and trading volume of the company's shares dropped 13% and 37%, respectively. One month later, the company issued a clarification that it had in fact made a profit of HK$281 million. This was a HK$293 million swing, which affected the fair value of the company's assets. It was stated that this was due to an error in the recognition of an investment. The share price then went up 18%, settling at a 9% increase for the day. The trading volume was up 2.1 times. This sequence of events naturally drew regulatory scrutiny from HKEX and eventually resulted in the Listing Committee sanction decision.

The Listing Committee decision stated that the investment portfolio of the company was managed by an executive director, who was the chief executive officer of the company (the responsible director). He had authority to invest 5% of the company's assets without board approval. In this regard, he was sole signatory of a subsidiary used to invest the company's funds in listed shares. He was the only person who was authorised to receive the relevant statements and who had electronic access to the trading account.

In terms of checks and balances, there was an investment committee with another executive director/managing director of the company (the other director). This investment committee was briefed in summary manner by the responsible director after investments were made. The accounting records would be posted by the responsible director to the chief financial officer (CFO), who would then prepare monthly management accounts. For some six months, the responsible director missed reporting the fair value changes of the investments to the CFO, which led to the reporting error.

There were no requirements to report to the board, except for half-yearly investment reports. Apparently, the investment committee would also self-report where there was a 40% decrease in investment value to the board that the board did not know about. The board took this 'hands-off' approach reportedly because the investments were apparently

Highlights

- no individual director should be given complete control of a part of the company's business without appropriate checks and balances on the exercise of this power
- directors need to understand and follow the procedures required in situations where they have an actual or potential conflict of interest
- all directors must take an active interest in the affairs of their companies and exercise their function as a check and balance on executive decisions

> “the Stock Exchange and its Listing Committee are determined to enforce the legal requirements for the fulfilment of directors’ duties in Hong Kong”

only a small part of the group's business. At least, this was the explanation proffered.

The problem as to why there was the error in financial reporting turned out to be that the responsible director was not well and the board did not know this. Because of his illness, after the statements were mailed out from China where the responsible director resided, the responsible director forgot to call the CFO about the large profit. This was because he was hospitalised from an undisclosed illness. It was asserted that, once the responsible director realised the mistake, he informed the CFO.

In the context of these facts, the Listing Committee found deficiencies in the internal controls of the company. Specifically, there was no effective monitoring system of investments, given that there was only a half-yearly reporting regime to the board. The check-and-balance system was therefore deficient. This was in the context that the investments were found, in fact, to be significant to the company – an earlier announcement stated that the trading of investments was one of the company's core businesses.

As to the responsible director's excuse that he was sick, this was found to be unacceptable to the Listing Committee as an explanation for the error. As a director, the Listing Committee found that the responsible director must exercise his duties as a reasonable director would have done. He cannot just be concerned with formal meetings only. He must take an active interest in the company's affairs. In this connection, the Listing Committee referred to the Companies Registry's published guidelines on director duties, which state that directors need to keep accounting records with reasonable accuracy. The other director on the investment committee was similarly in breach of director duties. As to the other independent non-executive directors (INEDs) and audit committee members, they were also in breach for failure to monitor the integrity of the financial statements.

Under the decision, the Listing Committee expressed certain regulatory concerns. These included that shareholders should have accurate information that is not misleading, otherwise there could be prejudice to their interests. The directors must therefore ensure announcements are accurate and complete in all material respects. Further, no individual should be given complete control of a part of the company's business without appropriate measures, under a proper reporting system, to maintain appropriate checks and balances as part of the internal controls of a listed company.

Aside from the public censure of the directors, the company had to put into place a number of remedial steps. These included the hiring of a professional consultant for a review of the internal controls. Also, a qualified accountant had to join the accounting team. The external auditors would assist the company to prepare future financial results and statements. The responsible director and the other director on the investment committee were required to attend 24 hours' training within a specified period. The former directors were required to attend training should they desire to become directors of other listed companies.

The decision shows that the Stock Exchange and its Listing Committee are determined to enforce the legal requirements for the fulfilment of directors' duties in Hong Kong. That is, executive directors who are parties to breaches of directors' duties under the listing rules can expect public censure and other consequences in the absence of cogent reasons.

The decision also reiterates that INEDs should be concerned with the systems of checks and balances that a listed company has in place. Further, they should not allow delegation of a part of the company's business to any individual director without adequate reporting as part of their regulatory oversight of the affairs of the company. All directors must take an active interest in the affairs of a listed company and understand what is going on.

Conflicts of interest

On 30 January 2018, the Listing Committee censured Chen Jing in absentia for failing to fulfil his fiduciary duties and duties of skill, care and diligence to a

standard at least commensurate with the standard established by Hong Kong law.

Mr Chen was a former executive director of TC Orient Lighting Holdings Ltd, and also president of another Chinese company. He signed a guarantee, without the knowledge of the board, in which a subsidiary of the listed company became a guarantee of his and his Chinese company's borrowings.

The company only learned about these arrangements when the group was sued under the guarantee. In fact, under the listing rules, the guarantee was a major and connected transaction of the company requiring shareholders' approval prior to its entry into force. When the company was sued on the guarantee, the executive director and his Chinese company repaid the borrowings and reported the matter to the relevant Mainland authorities. When HKEX commenced investigations on the matter, it received no response from the executive director.

This case is highly disturbing as the executive director had wanton disregard for the listing rules and his duties to assist in regulatory investigations in accordance with his director undertakings filed with HKEX to support his directorship.

The Listing Committee found breaches to Listing Rules 3.08(a), (d) and (f). Specifically, these relate to the duties of directors to act honestly and in good faith, to avoid actual and potential conflicts of interest and duty, and to apply such degree of skill, care and diligence as would be reasonably expected of a director with the knowledge and experience and holding an office within the listed company.

The Listing Committee commented that the company and its subsidiaries could have derived no benefit from the guarantee. The exposure was significant in terms of financial liabilities and was not brought to the attention of the board. Apparently, the only explanation given was that the third parties who lent the executive director money coerced the executive director into providing the guarantee.

The Listing Committee also specifically commented on the breach of the fiduciary duty of the executive director in terms of his conflict of interest under Rule 3.08(d). The director should have disclosed and abstained from voting at the time of provision of the guarantee. Also, in terms of the duty of skill, care and diligence under Rule 3.08(f), the director should have known that he was a connected person and that shareholders' approval was required. The guarantee would be a notifiable and connected transaction. The director was accordingly censured and his suitability to be director of the listed company was called into question.

Lessons to learn

The two Listing Committee decisions discussed above are certainly instructive as to the interpretation of directors' duties requirements in Hong Kong. Company secretaries and governance professionals should arrange periodic training for directors on their duties and responsibilities. We should remind them that, under Hong Kong law, directors are agents of their listed companies. Therefore, they must faithfully adhere to common law principles relating to their fiduciary duties, including not being in a position of conflict, along with their statutory duty under Section 465 of the Companies Ordinance to exercise reasonable skill, care and diligence as with any reasonable director, or a higher standard where they have specific skill sets and experiences. In all cases, their conduct must be that of a reasonable director under Hong Kong law.

Fundamentally, we must remind directors that, under Hong Kong law, all directors serve as directors to a unitary board. That is, they all have duties and responsibilities irrespective of the designation as executive, non-executive and/or independent directors. INEDs, because they are not concerned with the day-to-day implementation of business affairs of the company, must be particularly diligent in carrying out their function as a check and balance on executive decisions, including ensuring that there are systems of controls to deal with risk mitigation and over-concentration of powers.

Directors of companies listed in Hong Kong may come from jurisdictions with different laws and regulations on directors' duties, but they must at least comply with Hong Kong legal standards. They should know that HKEX does take its regulatory functions seriously, and when things do go wrong, directors' actions and inactions will be scrutinised by HKEX and its Listing Committee. This mean that directors, aside from carrying out day-to-day functions, should be mindful of the governance aspects relating to the running of listed companies, supported no doubt by the company secretary as governance professional.

Mohan Datwani FCIS FCS(PE), Senior Director and Head of Technical & Research

The Hong Kong Institute of Chartered Secretaries

More information is available on the HKEX website: www.hkex.com.hk.

Data ethics – new guidance

A new report by the Privacy Commissioner for Personal Data highlights the need for advanced data processing activities to follow ethical principles and be fair to all stakeholders.

Advanced data processing activities, such as data analytics and artificial intelligence, have brought significant changes to the scale and ways in which personal data is collected, processed and used. The Privacy Commissioner for Personal Data (Privacy Commissioner), Stephen Kai-yi Wong, warns in a recently released report that these developments are challenging the data privacy frameworks of jurisdictions around the world.

The report – *Ethical Accountability Framework for Hong Kong China* – points out that Hong Kong's Personal Data (Privacy) Ordinance of Hong Kong (Cap 486) is based on concepts such as 'notice and consent', 'use limitation', and 'transparency', but sophisticated data mining, analytics and profiling techniques mean that, often, individuals are not even aware that their personal data has been collected or shared.

The report is based on a consultancy study, the Legitimacy of Data Processing Project, commissioned by the Privacy Commissioner to look into the issues of ethical and fair processing of personal data in advanced data processing activities. Over 20 organisations in Hong Kong from various sectors, including banking, insurance, telecommunications, healthcare services and transportation, participated in the project by providing comments and feedback on the draft project deliverables, to ensure that the recommendations of the project are relevant and practicable in the business environment and day-to-day operations.

The *Ethical Accountability Framework for Hong Kong China* report seeks to foster a culture of ethical data governance and address the personal data privacy risks brought about by information and communications technology while balancing the interests of all stakeholders. It emphasises that organisations should ditch the mindset of conducting their operations to meet the minimum regulatory requirements only. 'They should instead be held to a higher ethical standard that meets stakeholders' expectations alongside the requirements of laws and regulations. Data ethics can therefore bridge the gap between legal requirements and the stakeholders' expectations', Mr Wong said at the launch of the report.

The findings of the report are summarised below.

Data stewardship accountability

The report outlines a number of ethical data stewardship accountability elements, calling for organisations to:

- define data stewardship values, develop them into guiding principles and then translate them into organisational policies and processes for ethical data processing
- use an 'ethics by design' process to translate data stewardship values into data analytics and data use design processes so that society, groups of individuals, or individuals themselves, and not just the organisation, gain value from the data processing activities
- require Ethical Data Impact Assessments (EDIAs) when advanced data analytics may impact people in a significant manner and/or when data-enabled decisions are being made solely by machines automatically
- use an internal review process that assesses whether data stewardship accountability elements and EDIAs have been properly conducted
- be transparent about processes; ensure thorough communications on managing the advanced data processing activities and the rationale behind the decisions; and address and document all societal and individual concerns and design individual accountability systems that provide appropriate opportunities for feedback, relevant explanations and appeal options for impacted individuals, and
- stand ready to demonstrate the soundness of internal processes to regulatory agencies when data processing is, or may be, impactful on people in a significant manner.

Data stewardship values

The report also recommends three data stewardship values for Hong Kong organisations when carrying out advanced data processing activities: respectful, beneficial and fair.

Respectful

- All parties that have interests in the data should be taken into consideration.
- Organisations are accountable for conducting advanced data processing activities so that the expectations of the individuals to whom the data relate and/or the individuals who are impacted by the data use are considered.
- Decisions made about an individual and the decision-making process

Highlights

- the *Ethical Accountability Framework for Hong Kong China* report seeks to foster a culture of ethical data governance and address the personal data privacy risks brought about by information and communications technology
- organisations should be held to a higher ethical standard that meets stakeholders' expectations alongside the requirements of laws and regulations
- organisations should carry out Ethical Data Impact Assessments to assess the impact of advanced data processing activities on stakeholders

> “I hope that in the not-too-distant future, ethical data stewardship will become a well-received norm in personal data protection among organisations in Hong Kong”

should be explainable and reasonable.

- Individuals should be provided with appropriate and meaningful engagement and control over advanced data processing activities that impact them.
- Individuals should always be able to make inquiries, obtain relevant explanations and, if necessary, appeal decisions regarding the advanced data processing activities that impact them.

Beneficial

- Where advanced data processing activities have a potential impact on individuals, the benefits and potential risks of the advanced data processing activity should be defined, identified and assessed.
- Once all risks are identified, appropriate ways to mitigate those risks and to balance the interests of different parties should be implemented.

Fair

- Advanced data processing activities must avoid actions that seem inappropriate or might be considered offensive or causing distress. Unequal treatment or discrimination should also be prohibited.
- The accuracy and relevancy of algorithms and models used in decision-making should be regularly reviewed to reduce errors and uncertainty, and should be evaluated for any bias and discrimination.
- Advanced data processing activities should be consistent with the ethical values of the organisation.

Assessment models

In order to help organisations implement the data stewardship recommendations discussed above, two models are recommended.

1. ***The Model Ethical Data Impact Assessment***. This assesses the impact to all stakeholders' interests in data collection, use and disclosure, and in data-driven activities.
2. ***The Process Oversight Model.*** This looks at how an organisation translates organisational ethical values into principles and policies and into an 'ethics by design' programme. It also considers how the internal review processes, such as conducting EDIAs and establishing effective individual accountability systems, are implemented.

The report sets out the guiding questions of the above two assessment models to help organisations complete the assessment tasks.

Launching the report in October this year, the Privacy Commissioner spoke of his hopes that it would help bring about a cultural change in personal data privacy protection. 'I hope that in the not-too-distant future, ethical data stewardship will become a well-received norm in personal data protection among organisations in Hong Kong,' Mr Wong said.

Source: The Office of the Privacy Commissioner for Personal Data

The 'Ethical Accountability Framework for Hong Kong China' report is now available on the Office of the Privacy Commissioner for Personal Data website: www.pcpd.org.hk.

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New guidance notes

Two additions to the Institute's Interest Group guidance note series give advice on responding to investigations by regulators and public bodies, and on the complex considerations relevant to buyers and sellers in merger and acquisition transactions.

In the three years since its launch, the Institute's Interest Group guidance note project has added a substantial body of guidance to the Institute's website for the benefit of the Institute's members and the wider profession and community. The seven Interest Groups set up under this project have so far produced 16 guidance notes on key topics in governance and company secretarial practice. This article reviews the two latest additions to this series.

Ethics, Bribery and Corruption

The first two guidance notes published by the Institute's Ethics, Bribery and Corruption (EB&C) Interest Group gave an overview of the regulatory landscape in Hong Kong and highlighted elements of an effective compliance system. The third in this series, published in October 2018, gives advice on how to prepare, manage and respond to investigations by regulators and public bodies. How can organisations cooperate with an investigation while minimising disruption to its business? The guidance note emphasises that it pays to have a well-thought-out investigation readiness plan.

Key elements of an investigation readiness plan

Investigation readiness plans should state who will take charge of any investigation, together with several fallbacks in case key people are unavailable. This individual will be responsible for liaising with lawyers and authorities, and for coordinating the organisation's resources in response to the investigation.

The guidance note also emphasises the need to ensure that all relevant staff know what to do in the event of a visit by an investigation team. This includes reception or security staff since they will be the first point of contact when investigators arrive at the premises. Training for investigation readiness should also cover the scenario where investigators interview staff members. 'Interviews can be extremely daunting for employees, but the general rule is to answer questions simply and honestly and to avoid divulging more than is necessary,' the guidance note states.

The guidance note stresses the need for staff to adopt a polite, courteous and cooperative manner when communicating with investigators. 'You're unlikely to become best friends, but anything you can do to welcome them and build a rapport may prove valuable later on,' it states.

Some authorities will reduce penalties for suspects that assist with their investigations. The Hong Kong Monetary Authority and the Securities and Futures Commission (SFC) have recently published guidance on the benefits organisations who cooperate with their investigations can expect. The guidance note points out that preserving evidence and voluntarily reporting misconduct is likely to save time and effort in the long run.

Maintaining confidentiality

As the company's 'keeper of secrets', the company secretary will be involved in maintaining confidentiality during live investigations. Investigations by the police, Independent Commission Against Corruption (ICAC), SFC or Competition Commission, for example, need to be handled with great discretion, and all internal staff involved will need to be briefed about the confidentiality requirements. The public relations team should also have a game plan for dealing with media enquiries or public rumours.

> "full and accurate disclosure by the seller is a key part of ensuring fair dealing in M&A transactions"

'Allegations of bribery or corruption can send shockwaves through your organisation and emotions may run high. It will help if you reassure staff that the matter is being dealt with in a calm, professional and controlled manner, and that there are procedures in place to minimise any damage,' the guidance note suggests. It adds, however, that it is a good policy to clear any proposed communications with officials before sending them.

Highlights

- staff should adopt a polite, courteous and cooperative manner when communicating with investigators
- investigations by regulators and public bodies can help organisations address weaknesses in their operations and internal controls
- full and accurate disclosure in M&A transactions is in both the seller's and the buyer's interests

Learning valuable lessons

Investigations, while they may be a daunting prospect for any organisation, can bring important benefits and the EB&C guidance note gives advice on follow-up measures that will help organisations learn any necessary lessons. It emphasises the need for organisations to conduct a shadow review of any investigation – reviewing the content of relevant documents and interviewing relevant staff – to gain insights into what, if anything, has gone wrong.

'Though your heart might skip a beat when the ICAC comes knocking at your door, official investigations are rarely a death sentence for a company. Through a combination of advance planning, effective management and prudent follow-up measures, a well-prepared organisation may emerge unscathed. The lessons learned could even make you stronger, and leave you better equipped to deal with new threats as your business grows and enters new territories and markets,' the guidance note points out.

Mergers and Acquisitions

The third in the series of guidance notes produced by the Institute's Takeovers, Mergers and Acquisitions (TM&A) Interest Group was also published in October 2018. It addresses the complex considerations relevant to buyers and sellers in merger and acquisition (M&A) transactions.

Buyer beware?

While it is generally not required by law, it is standard practice for parties to M&A transactions to enter into a written sale and purchase agreement (SPA) to document the commercial terms of the transaction. These commercial terms are not limited to the question of the price that the buyer will pay for the target. For example, the SPA typically also sets out restrictions on the conduct of the seller before the closing of the deal. There may be a long gap between the signing of the M&A deal and its actual implementation, and the SPA will usually set out how the target should be managed or operated in the interval to ensure that the target will continue its business in its ordinary and usual course and to protect the value of the target.

> "though your heart might skip a beat when the ICAC comes knocking at your door, official investigations are rarely a death sentence for a company"

The SPA may, for example, include a restrictive covenant prohibiting the seller

About the Interest Groups

Members of the Institute, together with their professional network both locally and internationally, represent a significant body of expertise in corporate governance and corporate secretaryship.

The Institute set up seven Interest Groups under its Technical Consultation Panel in 2016 to channel this expertise for the benefit of HKICS members and the wider profession and community. The seven Interest Groups created under this project are:

1. Company Law
2. Competition Law
3. Ethics, Bribery and Corruption
4. Public Governance
5. Securities Law and Regulation
6. Takeovers, Mergers and Acquisitions
7. Innovation

The members of the Ethics, Bribery and Corruption Interest Group are: Dr Brian Lo FCIS FCS (Chairman), Lily Chung, Miang Lee, Michael Chan, Ralph Sellar, Robert Hunt and William Tam.

The members of the Takeovers, Mergers and Acquisitions Interest Group are: Michelle Hung FCIS FCS (Chairman), Dr David Ng FCIS FCS, Henry Fung, Kevin Cheung, Lisa Chung, Patrick Cheung and Philip Pong.

Mohan Datwani FCIS FCS(PE) serves as secretary. Please contact Mohan Datwani, the Institute's Senior Director and Head of Technical & Research, if you have any suggestions about topics relevant to this interest group at: mohan.datwani@hkics.org.hk.

from starting a business in competition with the target company. The guidance note points out, however, that restrictive covenants are unenforceable if they infringe applicable competition laws, or if they conflict with the common law prohibition on restraints of trade. The covenants should therefore be no wider than reasonably necessary to protect the buyer's legitimate business interest.

The SPA may also include warranties and indemnities setting out the agreed behaviour of the seller before the closing of the deal. The guidance note explains the difference between warranties and indemnities. Warranties give assurances that the seller will not behave in ways that will reduce the value of the target. 'Therefore, warranties could perform the function of a post-completion price adjustment mechanism, to the extent that unknown liabilities arise and the buyer suffers loss,' the guidance note states.

By contrast, an indemnity is a promise to pay the buyer a sum for a particular liability, and therefore is a claim for a debt rather than in damages. Indemnities are usually used where the buyer had knowledge of the subject matter before entering into the transaction to apportion risk to the seller for that specific event, or where a damages claim would not be an adequate remedy.

It is common for a seller to give indemnity on certain matters such as tax liabilities, or breach of environmental or other statutory regulations. For example, if the target is involved in any unresolved legal disputes, the parties may decide that the seller should bear the risk on the outcome of the litigation in the form of an indemnity. Unlike warranties, indemnities reimburse the buyer for its out-of-pocket amount on a dollar-for-dollar basis.

The benefits of full disclosure

Full and accurate disclosure by the seller is a key part of ensuring fair dealing in M&A transactions. Sellers usually make disclosures via a disclosure letter, which is a key document in any sale and purchase transaction.

The guidance note makes the point that full and proper disclosure is in both the seller's and the buyer's interests. Disclosure allows the seller to disclose matters relating to the warranties in the SPA. A failure to do so may result in the seller being sued for breach of warranties that could have been avoided. For the buyer, full disclosure supplements the due diligence exercise in giving a fuller picture of the target's business.

> *The 16 guidance notes produced by the Institute's Interest Groups, including the guidance notes reviewed in this article, are available from the Publications section of the Institute's website: www.hkics.org.hk.*

Casting the regulatory net over virtual assets

William Hallatt, Hannah Cassidy and Michael KS Tan, Herbert Smith Freehills, explore the Securities and Futures Commission's new regulatory framework for virtual assets.

The Securities and Futures Commission (SFC) has published a statement (Statement), together with a press release, setting out its new regulatory framework for virtual assets (also known as cryptocurrencies, crypto-assets and digital tokens).

Ashley Alder, the Chief Executive Officer of the SFC, made clear in his speech during the Hong Kong FinTech Week that the SFC's aim in setting up this framework is 'to step up as much as we are able to protect investors who trade virtual assets', in particular from the unique risks associated with a rapidly expanding industry.

The Statement was published in parallel with a circular on the expectations around the distribution of virtual asset funds and a circular on the content of the Statement.

What problem is the SFC trying to solve?

The explosion of crypto

Together with security regulators around the world, the SFC has taken note of growing public interest in virtual assets. The industry has grown exponentially. Over 2,000 different digital tokens are currently traded around the world with substantial trading volumes and an estimated total market capitalisation of over US$200 billion. In particular, there is a growing demand for funds which invest in virtual assets.

The primary concern with these developments relates to investor protection and the unique risks associated with virtual assets (see 'Risks to investors').

The existing regime

The SFC is principally mandated to regulate 'securities' and 'futures contracts'. Where virtual assets fall under the definition of 'securities' or 'futures contracts', these products and related activities are likely to fall within the SFC's jurisdiction. The problem is that many virtual assets do not fall within the meaning of either 'securities' or 'futures contracts', and in fact they are often purposely designed that way. This means that:

- these out of scope (OS) virtual assets will not fall within the SFC's jurisdiction
- the operators of platforms which only provide trading services for OS virtual assets also do not fall within the SFC's jurisdiction, and
- managing funds solely investing in OS virtual assets does not fall within the SFC's remit (note however that if the firm is a licensed corporation, they are currently required to notify the SFC if they intend to provide trading and asset management services involving crypto-assets).

Currently, certain activities relating to OS virtual assets are already within the SFC's jurisdiction and firms engaged in such activities are required to be licensed by, or registered with, the SFC. This includes:

- distribution of funds which invest in OS virtual assets (requires a type 1 licence), and
- managing fund of funds where the underlying fund invests in OS virtual assets (requires a type 9 licence).

The new regulatory framework pushes the SFC's jurisdiction to its limits in order to expand the scope of regulation over virtual assets as much as possible.

Crypto fund managers and distributors of crypto funds

The SFC is seeking to impose further regulatory requirements on firms that it currently regulates (see 'Who is in scope?').

Licensing terms and conditions

The SFC will regulate the management activities by imposing a set of terms and conditions as licensing conditions. The terms and conditions will cover requirements around the type of investors and disclosure to investors, safeguarding of assets, portfolio valuation, risk management, auditors and liquid capital. In particular, only professional investors will be allowed to invest into a portfolio invested in

Highlights

- over 2,000 different digital tokens are currently traded around the world with substantial trading volumes and an estimated total market capitalisation of over US$200 billion
- virtual asset trading platform operators who have demonstrated a commitment to high standards can join the SFC's Regulatory Sandbox
- the new regulatory regime is likely to receive mixed reactions, with some seeing it as an unwelcome brake on innovation and others welcoming the SFC's efforts to legitimise the crypto industry through regulation

virtual assets (subject to the *de minimis* threshold). Further details about the terms and conditions can be found in Appendix 1 to the SFC's Statement.

Licensing process

The SFC will first seek to understand the firm's business activities. If the firm appears to be capable of meeting the expected regulatory standards, the terms and conditions will be provided to the firm, and the SFC will discuss and vary them with the firm in light of its business model so as to ensure that the terms and conditions proposed by the SFC are reasonable and appropriate.

Failure to agree to comply with the proposed terms and conditions by an applicant or existing licensed corporation will respectively lead to the licensing application being rejected or the inability to manage any virtual asset portfolios.

Risks to investors

Valuation, volatility and liquidity	• No intrinsic value – not backed by physical assets or guaranteed by the government and no generally accepted valuation principles • Volatile by nature – prices on the secondary market are driven by supply and demand and are short term • Liquidity issues – liquidity pools for virtual assets can be small and fragmented
Accounting and auditing	• No agreed standards and practices among accounting professionals relating to existence and ownership or valuations
Cybersecurity and safe custody	• Clients' assets stored in online hot wallets can be prone to hacking • Limited availability of qualified custodian solutions
Market integrity	• Nascent market which does not operate under recognised and transparent rules • Outages, market manipulation and abusive activities are not uncommon
Money laundering and terrorist financing	• Virtual assets are generally transacted or held on an anonymous basis • Fiat/crypto exchange platforms are inherently susceptible to higher risks of money laundering and terrorist financing
Conflicts of interest	• Virtual asset trading platform operators may act both as agents for customers and principal dealers trading their own book
Fraud	• Insufficient product due diligence may lead to virtual assets being used as a means to defraud investors

Conceptual framework for crypto trading platforms

Conceptual framework and sandbox

The SFC has also set out a conceptual framework for the potential regulation of virtual asset trading platforms. The SFC plans to work with interested virtual asset trading platform operators who have demonstrated a commitment to adhering to the high expected standards by placing them in the SFC Regulatory Sandbox. Further details of the conceptual framework are set out in Appendix 2 to the Statement.

For an operator to join the sandbox, it would need to fall within the jurisdiction of the SFC, and therefore it should:

- operate an online trading platform in Hong Kong
- offer trading of at least one or more virtual assets which fall under the definition of 'securities' on its platform, and
- provide for trading, clearing and settlement services for virtual assets and have control over investors' assets.

Exploratory stage

The SFC intends to discuss its expected regulatory standards with participants, observe the live operations of the trading platforms, and consider the effectiveness of the proposed regulatory requirements in addressing risks and providing adequate investor protection.

The aim of this information gathering exercise is to allow the SFC to determine whether or not it is able to effectively regulate such trading platform operators. In order not to confuse the public about the regulatory status of platform operators, the identity of the sandbox applicants in

Who is in scope?

Licensed or registered firms	Current activity subject to regulation	New activity subject to regulation
Firms holding a type 9 licence that manage portfolios that invest (solely or partially) in OS virtual assets with: (i) a stated investment objective to invest in virtual assets; or (ii) an intention to invest 10% or more of the gross asset value (GAV) of the portfolio in virtual assets (*de minimus* threshold)	Management of portfolios invested in securities and/or futures contracts	Management of portfolios invested in virtual assets
Firms holding a type 1 licence that manage collective investment schemes solely investing in OS virtual assets and distribute the same in Hong Kong	Distribution of collective investment schemes solely investing in OS virtual assets	Management of collective investment schemes solely investing in OS virtual assets

this stage and the discussions will be kept confidential.

Of course, it remains possible that the SFC will conclude that the risks involved cannot be properly dealt with under the standards it would expect and that investor protection still cannot be ensured.

Licensing and intensive review stage

If on the other hand the SFC decides that operators are suitable for regulation, this is likely to lead to the imposition of standards comparable to those applicable to existing licensed providers of automated trading services. A licence by the SFC would give a trading platform a clear competitive advantage over its unlicensed peers. It will act as an indicator to the market and investors that the operator is willing to adhere to a high level of standards and practices.

> “the new regulatory framework pushes the SFC’s jurisdiction to its limits in order to expand the scope of regulation over virtual assets as much as possible”

Where the SFC grants a licence to an operator, licensing conditions would be imposed and the operator would proceed to the next stage of the sandbox. This might involve more frequent reporting, monitoring and reviews under the SFC's supervision so that the platform operators can implement robust internal controls and address the SFC's concerns arising from the conduct of their business.

Exiting the sandbox

After a minimum 12-month period, the operator may apply to the SFC for removal or variation of some licensing conditions and exit the sandbox.

Concluding thoughts – legitimisation through regulation

There will be mixed reactions to the steps taken by the SFC. As noted by Ashley Alder, there will be 'many in the Fintech world [who] see regulation as an unnecessary or unwelcome brake on innovation'. This is largely reflective of the efforts by those in the crypto industry, and in particular virtual asset issuers, who have sought to ensure that virtual assets do not fall within the scope of securities and futures contracts.

However, a large part of that same industry has been waiting patiently for the SFC to take affirmative steps to bring order to this expanding industry through regulation. As recognised by Ashley Alder, 'responsible players in this industry also recognise that clear and effective regulation will be essential for them to establish the trust and legitimacy they need to make their businesses credible'.

This will no doubt include a substantial number of those targeted by the new regulatory framework who will likely welcome the SFC's efforts to legitimise crypto through regulation.

William Hallatt, Hannah Cassidy and Michael KS Tan
Herbert Smith Freehills

More information is available on the SFC website: www.sfc.hk.

Professional Development

Seminars: October and November 2018

5 October

Company secretarial practical training series: change in directors, officers, committees and other corporate positions (re-run)

Speaker: Ricky Lai FCIS FCS, Company Secretary, HKC (Holdings) Ltd

15 October

All you need to know about shareholder activism

Chair: Professor CK Low FCIS FCS, Institute Technical Consultation Panel member, and Associate Professor in Corporate Law, CUHK Business School

Speakers: Melvin Sng, Partner; and Denise Fung, Partner; Linklaters

19 October

Practical company secretarial workshops: part 3 – how to communicate effectively with your management, shareholders and other stakeholders, module 7 – annual general meetings

Speaker: April Chan FCIS FCS, Institute Past President and Technical Consultation Panel Chairman, and Inaugural President, CSIA

19 October

Company secretarial practical training series: notifiable and connected transactions (re-run)

Speaker: Ricky Lai FCIS FCS, Company Secretary, HKC (Holdings) Ltd

26 October

Practical company secretarial workshops: part 1 – how to manage board meetings effectively, module 2 – board dynamics at meetings (re-run)

Speaker: April Chan FCIS FCS, Institute Past President and Technical Consultation Panel Chairman, and Inaugural President, CSIA

29 October

Negotiating corporate governance codes

Chair: Professor CK Low FCIS FCS, Institute Technical Consultation Panel member, and Associate Professor in Corporate Law, CUHK Business School

Speaker: Professor Pamela Hanrahan BA (Hons) LLB (Hons) (Melb) LLM (CWRU) SJD (Melb), Professor and Deputy Head of the School of Taxation and Business Law, UNSW Sydney

29 October

Getting big corporations to 'do the right thing'

Chair: *Professor CK Low FCIS FCS, Institute Technical Consultation Panel member, and Associate Professor in Corporate Law, CUHK Business School*

Speaker: *Professor Pamela Hanrahan BA (Hons) LLB (Hons) (Melb) LLM (CWRU) SJD (Melb), Professor and Deputy Head of the School of Taxation and Business Law, UNSW Sydney*

30 October

Overview of anti-money laundering (re-run)

Chair: *Alberta Sie FCIS FCS(PE), Institute Professional Services Panel member, and Company Secretary & Director, Reanda EFA Secretarial Ltd*

Speakers: *Roy Lo, Managing Partner, Shinewing (HK) CPA Ltd; and Gloria So, Principal, Shinewing Risk Services Ltd*

31 October

Hong Kong's OFC – the launch of a new fund vehicle

Chair: *Ernest Lee FCIS FCS(PE), Institute Council member and Audit Committee Chairman, and Partner, Audit & Assurance, Deloitte China*

Speaker: *Ming Chiu Li, Senior Associate, Deacons*

1 November

How to plan a 'regulator ready' AML program and streamline your KYC/CDD processes

Chair: *Philip Miller FCIS FCS, Institute Professional Development Committee member and Technical Consultation Panel member, and Deputy Corporation Secretary, HSBC*

Speakers: *Penghui Kee, Head of Sales for North Asia; and Traven Chai, Business Solution Specialist; Accuity*

2 November

Practical company secretarial workshops: part 4 – what you can do more, module 8 – strategy: development and analysis

Speaker: *April Chan FCIS FCS, Institute Past President and Technical Consultation Panel Chairman, and Inaugural President, CSIA*

2 November

Company secretarial practical training series: share capital and debentures, share buyback and share option scheme (re-run)

Speaker: *Ricky Lai FCIS FCS, Company Secretary, HKC (Holdings) Ltd*

Professional Development (continued)

ECPD forthcoming seminars

Date	Time	Topic	ECPD points
9 January 2019	6.45pm–8.15pm	Company secretarial practical training series: formation of common vehicles in Hong Kong	1.5
10 January 2019	6.45pm–8.15pm	Setup and maintenance of PRC company and WFOE	1.5
18 January 2019	3pm–5.30pm	ESG – a good idea; what could possibly go wrong?	2

For details of forthcoming seminars, please visit the CPD section of the Institute's website: www.hkics.org.hk.

Online CPD (e-CPD) seminars

For details, please visit the CPD section of the Institute's website: www.hkics.org.hk. For enquiries, please contact the Institute's Professional Development Section at: 2830 6011, or email at: ecpd@hkics.org.hk.

HKICS/HKU SPACE joint PRC Corporation Practice Programme

The module 'PRC Corporate Governance' of the PRC Corporation Practice Programme jointly organised by the Institute and HKU SPACE will be held from 19 January 2019 to 27 January 2019. 18 ECPD points will be awarded to Institute members and graduates who acquire 75% attendance and complete other necessary requirements for the module.

For further details, please refer to page 23 of this month's journal.

Membership

New graduates

The Institute would like to congratulate our new graduates listed below.

Chan Yin Man	Lau Chun Ying, Priscilla	Lee Na	Tse Ka Wing
Cheng Man Hin	Lau Hiu Wa	Li Wai Nok, Oscar	Tseong Ka Wai
Cheung Yuk Tak	Lau Sum Chuen	Lo Chung Shun	Wong Ka Chung
Hsu Kiu Laam	Lau Wai Chi	Mak Man Ling	Wong Shin Yee
Ku Wai Sheung	Lau Wing Yan	Ng Yin Ling	Yan Yongge

Members' activities highlights: October and November 2018

21 October

16th Summer Vigor Mini Dragon Boat Race 2018 (第十六屆夏日活力小龙赛)

7 November

Fun & Interest Group (香薰精油伸展工作坊)

Membership (continued)

Forthcoming membership activities

Date	Time	Event
7 December 2018	6.30pm–8.30pm	Mentorship Programme – Closing Ceremony for 2018 cum Launch of 2019 Programme (by invitation only)
12 December 2018	6pm–9pm	Annual Christmas Drinks (co-hosted with Michael Page Legal)
15 December 2018	8.45am–4.30pm	Fun & Interest Group – Organic Farm Day-tour in Sha Tau Kok
5 January 2019	10.30am–12pm	Community Service – Visit to Po Leung Kuk

For details of forthcoming membership activities, please visit the Events section of the Institute's website: www.hkics.org.hk.

Advocacy

HKICS receives delegation from IAC

On 29 October 2018, Institute President David Fu FCIS FCS(PE) together with Immediate Past President Ivan Tam FCIS FCS, Past President Maurice Ngai FCIS FCS(PE), Council member Bernard Wu FCIS FCS and Senior Manager Ken Yiu ACIS ACS(PE) received the delegation of the Insurance Association of China (IAC). The delegation was led by Deputy Secretary General of IAC Li Xiaowu, Director of Property and Casualty Insurance Department II Liu Yang, Assistant Director of Life Insurance Department II Fu Yunbo, Deputy Director of Liaison and Cooperation Department Sun Yue, and Supervisor of Liaison and Cooperation Department Wu Huihui. The visit provided an opportunity for in-depth discussions on future collaboration opportunities in promoting good corporate governance practices and standards.

Hong Kong Competition Exchange 2018

Institute Council member David Simmonds FCIS FCS and Senior Director and Head of Technical & Research Mohan Datwani FCIS FCS(PE) attended Hong Kong Competition Exchange 2018 organised by the Competition Commission on 1 and 2 November 2018. The event, of which the Institute was a supporting organisation, offered the opportunity to exchange views and share experiences amongst distinguished judges, practitioners, academics and enforcers in the field of competition law and policy.

Uncertified Securities Market (USM) Working Group meeting

Institute Senior Director and Head of Technical & Research Mohan Datwani FCIS FCS(PE) attended a meeting of the USM Working Group on 5 Novmeber 2018. The Institute contributed to a soft consultation arranged by the Hong Kong Exchanges and Clearing Ltd with the Federation of Share Registrars Ltd. The Institute also made oral presentation and written submissions on legal and practical governance-related issues.

Advocacy (continued)

Listed Enterprises of the Year 2018

The Chinese edition of *Bloomberg Businessweek* held the Listed Enterprises of the Year 2018 event, of which the Institute was one of the supporting organisations. Institute Council member Bernard Wu FCIS FCS attended the award ceremony held on 9 November 2018.

Discussion on International Internship Exchange Programme

The Institute is in discussions with the Worshipful Company of Chartered Secretaries and Administrators (WCCSA) in London, UK, on establishing an International Internship Exchange Programme. On 30 October 2018, ICSA International President and HKICS Past President Edith Shih FCIS FCS(PE), HKICS Former Vice-President Paul Stafford FCIS FCS and Chief Executive Samantha Suen FCIS FCS(PE), met with WCCSA Master Christina Parry FCIS, WCCSA, Senior Warden Ted Nicholl FCIS and representatives of the WCCSA trustees at the Guildhall in London, to discuss the possibility of establishing an International Internship Exchange Programme for undergraduates (in Hong Kong and the UK) who aspire to become a Chartered Secretary/Chartered Governance Professional. It is envisaged that the Exchange Programme would be launched in the summer of 2019. Further details will be reported in future editions of *CSj*.

Other divisions within The Institute of Chartered Secretaries and Administrators (ICSA) are also interested to join this International Internship Exchange Programme.

At the meeting

Edith Shih speaks at a networking event of WCCSA in London

On 30 October 2018, Edith Shih spoke at a special networking event of the Worshipful Company of Chartered Secretaries and Administrators (WCCSA) in London organised for its members and those of ICSA. Ms Shih updated participants on the work of ICSA International Council and its committees, as well as the development of the profession internationally, including Hong Kong and Mainland China; and her vision as ICSA International President.

At the networking event

Studentship

Student Ambassadors Programme – visit to Tricor Services Ltd

On 7 November 2018, the Institute arranged a visit to Tricor Services Ltd for the members of its Student Ambassadors Programme (SAP) who are local undergraduates. The visit kicked off with an opening speech by Institute Past President and current Council member Natalia Seng FCIS FCS(PE), who is also Chief Executive Officer – China and Hong Kong of Tricor Group and an Executive Director of Tricor Services Ltd. It was followed by a presentation to introduce Tricor's business and a tour of Tricor's office. The Tricor staff members then shared their career paths and working experiences with the SAP members who were very active in asking questions.

At Tricor Services

The Institute would like to thank Tricor Services Limited for their continued support.

International Qualifying Scheme (IQS) examinations

December 2018 diet reminders

Examination postponement applications

Candidates who are absent from a scheduled IQS examination due to illness must submit a satisfactory medical certificate to apply for examination postponement. Such applications must be submitted to the Institute within three calendar weeks from the end of the December examination diet, that is, on or before Friday, 28 December 2018.

IQS Study Packs (online version)

The Institute launched online versions of four IQS study packs on 9 January 2017. This service, which is free for all registered students, enables students to schedule their professional learning and studies more flexibly, economically and in an environment-friendly manner. Students are highly encouraged to activate their online account and obtain access to the study packs for examination revision as soon as possible. For further questions regarding the online study packs, please contact Leaf Tai at the Institute at: 2830 6010, or email at: student@hkics.org.hk. For technical questions regarding the PrimeLaw account, please contact Wolters Kluwer Hong Kong (WKHK)'s customer service: HK-Prime@wolterskluwer.com.

May 2019 diet schedule

	Tuesday 28 May 2019	Wednesday 29 May 2019	Thursday 30 May 2019	Friday 31 May 2019
9.30am–12.30pm	Hong Kong Financial Accounting	Hong Kong Corporate Law	Strategic and Operations Management	Corporate Financial Management
2pm–5pm	Hong Kong Taxation	Corporate Governance	Corporate Administration	Corporate Secretaryship

Policy – payment reminder

Exemption fees

Students whose exemption was approved via confirmation letter in September 2018 are reminded to settle the exemption fee by Saturday, 22 December 2018.

Studentship renewal

Students whose studentship expired in October 2018 are reminded to settle the renewal payment by Saturday, 22 December 2018.

New Corporate Governance Code and related listing rules

The Stock Exchange of Hong Kong Ltd (the Exchange), a wholly owned subsidiary of Hong Kong Exchanges and Clearing Ltd (HKEX), reminds issuers that, following the Exchange's publication of its *Consultation Conclusions on Review of the Corporate Governance Code and Related Listing Rules* (Consultation Conclusions), new amendments to the Code and related listing rules will come into effect on 1 January 2019.

Important changes that relate to independent non-executive directors (INEDs) include requiring greater disclosure on the process of their identification as a possible INED, their time commitment and their potential contribution to the board, including diversity. It will be mandatory for issuers to have and to disclose their board diversity and nomination policies. The criteria determining an INED's independence has also been enhanced. For details of these and other changes to the Code and related listing rules, the Exchange encourages issuers to read the Consultation Conclusions to gain a better understanding of the new corporate governance regime.

'In light of the new corporate governance regime, it is an opportune time for issuers to review their policies and practices on important corporate governance issues such as board diversity, particularly gender diversity, and their INEDs' availability and time commitment to the board', said David Graham, HKEX's Head of Listing.

In a related development, the Exchange has published the findings of its latest review of listed issuers' corporate governance practices (the review). The review examined issuers' corporate governance disclosures as well as their level of compliance with the Corporate Governance Code and Corporate Governance Report. 'This review is a part of the Exchange's ongoing commitment to promote and maintain high corporate governance standards amongst issuers. Whilst the review noted an improvement in some aspects of reporting, it also gives valuable insight and guidance on ways in which corporate governance reporting can be improved', said Mr Graham.

The Exchange has also updated its *How to prepare an ESG report?* and Frequently Asked Questions (FAQs) on its ESG-related listing rules, taking into account recent international climate-related disclosure recommendations and with an emphasis on the issuer's governance structure for ESG reporting. 'We are seeing increased demand for effective ESG reporting frameworks as more market participants become interested in sustainable economic development', said Mr Graham. 'We plan to review our framework and have informal discussions with stakeholders with a view towards consulting the market in mid-2019 on proposed changes to our rules.'

More information is available on the HKEX website: www.hkex.com.hk.

SFC amends AML/CFT Guideline

The Securities and Futures Commission (SFC) has released consultation conclusions on proposals to amend its *Guideline on Anti-Money Laundering and Counter-Financing of Terrorism* (AML/CFT Guideline). The amendments seek to make the AML/CFT Guideline more useful and relevant in light of industry developments.

Under the revised AML/CFT Guideline, the categories of politically exposed persons (PEPs) will be expanded to include international organisation PEPs who are persons entrusted with a prominent function by an international organisation. The enhanced scrutiny for foreign PEPs will be extended to domestic PEPs and international organisation PEPs where their business relationships with a firm are assessed to be of high risk.

In addition, the changes allow firms the flexibility to adopt reasonable risk-based measures to verify customer identification information. To facilitate non-face-to-face customer onboarding, firms are allowed to take a mix of supplementary measures to guard against impersonation risk.

'The amendments ensure our regulations are in line with the latest international standards', said Ashley Alder, the SFC's Chief Executive Officer. 'Whilst firms will still be required to apply effective measures to detect and prevent money laundering and terrorist financing, the changes provide more flexibility for firms to apply those measures using a risk-based approach.'

More information is available on the SFC website: www.sfc.hk.

Access to meetings – disability discrimination concerns

Participants at a recent Institute seminar raised a question as to whether companies should provide special facilities to help persons with a disability attend and participate in shareholder meetings. In particular, could the organisers of a meeting be subject to disability discrimination claims if they failed to make arrangements to facilitate the attendance and participation of wheelchair users or persons with hearing or visual impairment?

A related issue concerns the service of notice for a meeting. Should the organisers of a meeting use alternative means of communication for the notice of the meeting to ensure that the information is accessible to those with a disability?

The Chair of the seminar, Mohan Datwani FCIS FCS(PE), Institute Senior Director and Head of Technical & Research, and a member of the Board of the Equal Opportunities Commission (EOC), took the matter up with the EOC Chief Legal Counsel. The EOC has subsequently sent out an advisory letter giving guidance on best practice in shareholder meetings from a disability discrimination point of view.

The letter reminds meeting organisers that, under the Disability Discrimination Ordinance (Section 26, Part 4), it is stipulated inter alia that 'it is unlawful for a person who, whether for payment or not, provides goods, services or facilities, to discriminate against another person with a disability by refusing to provide that other person with those goods, services or facilities'. Taking people with a hearing impairment as an example, the letter points out that they would be discriminated against if they requested alternative ways of communication to be provided (for example, sign language) but such a request was refused by the organiser of the meeting.

The letter cites the recent Australian decision *King v Gosewisch [2008] FMCA 1221*, which addresses this issue. A chamber of commerce held an open meeting on the first floor of the local golf club, which was inaccessible to two attendees who used wheelchairs. The meeting was eventually transferred to the ground floor, which was accessible to the two attendees. This defeated an indirect discrimination case, but not without the court's observing that, had the venue not been changed, there may well have been indirect discrimination to provide a service or to make the facilities available.

The letter urges meeting organisers to be mindful of disability discrimination law related issues. It suggests that they should ask potential participants to indicate in advance whether attendees need special arrangements to assist them in participating at the meeting. This could be done via the inclusion in the notice of the meetings of a standard notification asking attendees to indicate whether they have a disability and need special arrangements to participate in the meeting.

The letter acknowledges that, where special requests from participants would impose unjustifiable hardship to the organiser, or where participants have failed to notify the organiser in advance, the organiser would not normally be held liable. However, this is dependent on the facts of each case.

Companies Ordinance guidance

The Institute recently raised a question with the Companies Registry concerning the interpretation of Section 758 of the Companies Ordinance. Under Section 758, it is stipulated that the former director of a company must keep a dissolved company's books and papers for six years. This applies whether a company is dissolved under Sections 226A, 227, 239 or 248 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, which covers all forms of winding-up and dissolution.

However, Section 758 is not clear as to whether the dissolved company's books and papers have to be kept in or outside Hong Kong. Where a professional liquidator is appointed to liquidate a company for a multinational client (MNC), in many instances, at the end of a members' voluntary liquidation (MVL) for example, the MNC would typically keep the books and papers, including any significant controllers register (SCR) for disclosure for the beneficial ownership of the company, at its headquarters outside Hong Kong where the compliance function is located. The Institute asked the Companies Registry for a clarification

as to whether Section 758 would allow for this.

In response, the Companies Registry has kindly confirmed that Section 758 of the Companies Ordinance does not prescribe the place where the books and papers of a company shall be kept after the dissolution of the company. 'Wherever the SCRs, as with the other books and papers, are kept after a company's dissolution, it remains the duty of every person who was a director of the company immediately before its dissolution to ensure that they are kept for at least six years after the date of dissolution, and it should also be noted that the Financial Action Task Force requires timely access to the beneficial ownership information of a company by the competent authorities,' the Companies Registry stated. It added that, where books and papers are to be returned, post-dissolution, outside Hong Kong, this should be done with the knowledge and consent of the former directors, and on the express basis that FATF requires timely access to the beneficial ownership information of a company by the competent authorities.

More information is available on the Companies Registry website: www.cr.gov.hk.

HKICS responds to Exchange consultation paper

Earlier this year, the Stock Exchange of Hong Kong Ltd (the Exchange), a wholly owned subsidiary of Hong Kong Exchanges and Clearing Ltd (HKEX), published a consultation paper seeking feedback on a proposed suspension requirement for listed issuers with disclaimer or adverse audit opinion on their financial statements.

The consultation paper – Proposal relating to Listed Issuers with Disclaimer or Adverse Audit Opinion on Financial Statements – proposes the suspension of trading in an issuer's securities if the issuer publishes a preliminary results announcement for a financial year and the auditor has issued, or has indicated that it will issue, a disclaimer of opinion or an adverse opinion on the issuer's financial statements.

The suspended issuer must take action to resolve the issues that resulted in the disclaimer or adverse opinion to bring itself into re-compliance with the listing rules and resume trading.

The proposal is intended to apply to preliminary results announcements of listed issuers for the financial years commencing on or after 1 January 2019. For the avoidance of doubt, in respect of issuers currently with disclaimer or adverse opinion on their financial statements, unless the issuers continue to receive such opinion on their financial statements for the financial years commencing on or after 1 January 2019, they will not be required to suspend trading under the proposed listing rules.

The Institute made a submission to the consultation paper in November 2018 supporting the proposals being put forward by the Exchange. While there are risks involved in the suspension proposal, the Institute's submission considers the risk of allowing the trading of securities of a poor or distressed quality to be the larger concern. Another factor that weighed in for the support is the opportunity provided to listed issuers, once suspended, to take action to resolve the issues giving rise to the disclaimer or adverse opinion to bring itself into re-compliance with the listing rules and to resume trading.

'Overall, we submit that the consultation paper proposals will ensure that they address developments in the market and international best practice, and also represent acceptable standards which help promote investor confidence, and we support the consultation paper proposals,' the submission states.

The Institute's submission on consultation paper, 'Proposal relating to Listed Issuers with Disclaimer or Adverse Audit Opinion on Financial Statements,' is available on the Institute's website: www.hkics.org.hk.

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