Background Report for Hearing on *Investigation and Response to Sexual Harassment Allegations*

March 6, 2018 – 1:30 pm

The Joint Committee on Rules Subcommittee on Sexual Harassment Prevention and Response has held hearings on changing culture, defining, identifying challenges, reporting, and protecting victims of sexual harassment in the Legislature. This hearing will examine how the Legislature may consider reforming its process for investigating and responding to allegations of sexual harassment by the Legislature's staff and members.

I. Investigation and Response

When either house learns of allegations of sexual harassment, the Fair Employment and Housing Act (FEHA) requires the house "to take immediate and appropriate corrective action" in response to any conduct about which it knows or "should have known." Cal. Gov't Code § 12940(j)(1). The statute also requires employers to "take all reasonable steps necessary to prevent discrimination and harassment from occurring," and to post information on how to file a sexual harassment complaint, either internally or with the Department of Fair Employment and Housing (DFEH). Cal. Gov't Code § 12940(j), (k); §12950. FEHA regulations require employers to develop a written harassment, discrimination and retaliation prevention policy, which includes the process for the employer to address the complaint. 2 Cal.C.Regs. §11023.

A. Initial Response to Reported Allegations

The employer's duty to take appropriate action starts with temporary steps to deal with the situation while it determines whether the complaint is justified. *Swenson v. Potter*, 271 F.3d 1184, 1192-93 (9th Cir. 2001). Those temporary actions may include separating the alleged harasser and victim, although an employer may reasonably decide that the employees must continue working together while awaiting the outcome of the investigation. *Id.* Once those temporary steps are taken, state/federal law and regulation provide for an investigation, as part of the employer's policy. Investigation may provide one part of "appropriate corrective action." In the legislative context, as the investigation gets underway, preliminary responses may include:

- *Contact with Affected Legislative Office:* In addition to considering separation of the alleged harasser and victim, other staff in the affected office may need assistance. Staff may need reminders about access to counseling resources, at WEAVE and CalHR's Employee Assistance Program. There may be decisions as to administrative leave. If a member is involved, the staff may need clarification as to who signs documents usually signed by the member and legislative actions requiring member approval when the member is not available.
- *Who Is Informed*: Decisions may be required as to who should be informed as to the existence of a sexual harassment report or the nature of the allegations. Supervisors and/or members may need reminders about the policy against retaliation. As discussed below, issues of confidentiality and privacy may affect who receives information about the allegations and the investigation.

B. Investigation of Sexual Harassment Allegations

While state law requires corrective action, federal law recognizes a "prompt, fair investigation" as part of an employer's affirmative defense, to show that it has exercised reasonable care to prevent and correct promptly any sexually harassing behavior. "The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified." *Swenson*, 271 F.3d at 1193. So a fair investigation and then immediate and appropriate corrective action can demonstrate how the Legislature fulfills its responsibility to prevent sexual discrimination and harassment.

Completing a fair investigation and taking corrective action in the Legislature will require consideration of a number of issues. In some cases, those issues may apply differently to staff than to members. After a report of sexual harassment comes in, decisions as to investigations will be required:

- *Who Decides on Investigation:* The Legislature has many options for identifying who decides. According to the Assembly's current *Policy Against Sexual Harassment*, the Chief Administrative Officer makes the initial decision as to whether a "report" is deemed a "complaint" that requires an investigation. The Senate has engaged a law firm to accept reports and initiate investigations.
- *Whether Investigation Warranted:* State law requires "appropriate" corrective action, so decisions as to whether an investigation is "appropriate" may be required. Employers adopt a wide range of standards for determining whether their policy was violated and an investigation is warranted, from "unprofessional conduct" to actions prohibited by law. Reports may or may not require a formal investigation, depending on a range of factors, including whether law/policy was allegedly violated or whether there are sufficient resources for a comprehensive investigation. In 2016, for example, DFEH received 23,510 reports of discrimination, but only 11,268 were possibly subject to investigation by DFEH. (The other 12,242 reports were requests for authority to sue the employer.) Of that smaller amount, only 4,799 resulted in formal complaints for investigation.
- *Who Investigates:* Deciding who investigates a sexual harassment complaint may depend on a number of factors, including severity of the allegations, identity of the victim and the alleged perpetrator, who has accepted the report (*e.g.* law enforcement), and availability of investigation resources. In companies, the investigation may be done internally, usually by human resources staff, or externally by an outside law or investigation firm. Current legislative practices are similar, but other options may be available, including DFEH or another state agency or commission, which could be given statutory authority to investigate. Some states have an ethics commission with authority to investigate legislators. *See*, NCSL chart showing how each state regulates the activities of state officials.

These issues arise in the legal context of what constitutes a sufficient sexual harassment policy and an adequate investigation under federal and state law.

C. Confidentiality of Investigations

Victims of sexual harassment commonly seek confidentiality for their reports and how those reports are addressed. Witnesses at the February 26 hearing testified as to the centrality of the confidentiality issue in victim decisions on whether to report sexual harassment. While victims may seek confidentiality, state and federal law may limit the availability of confidentiality, particularly in the Legislature. EEOC Guidelines recognize those limitations by requiring that sexual harassment policies provide an assurance that confidentiality will be protected "*to the extent possible*" (emphasis added). Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, June 18, 1999, No. 915.002. The Legislature is also subject to "sunshine laws" that limit confidentiality, including the Legislative Open Records Act.

Confidential Counseling by Sexual Assault Counselors. While some information may be deemed public, sexual assault counselors enjoy a privilege from disclosure. Article 8.5 of Chapter 4 of Division 8 of the California Evidence Code (commencing with §1035) provides a privilege from disclosure of communications between sexual assault counselors and victims under certain circumstances. The counselors at WEAVE, for

example, can provide confidential counseling to legislative staff pursuant to the Evidence Code and the contracts the Senate and Assembly have executed. This counseling does not constitute reporting to the Legislature, which the Evidence Code prevents from learning this confidential information. WEAVE provides only "de-identified data" regarding sexual harassment in the Capitol. In discussing this arrangement with Assembly staff, WEAVE noted that one of its primary topics for counseling regarding reporting sexual harassment is the risk of losing confidentiality. WEAVE advises victims that the Legislature cannot guarantee confidentiality if the victim reports to the Legislature.

Legislative Documents. The Legislature is subject to the Legislative Open Records Act (LORA). Cal. Gov't Code §§ 9070-9080. Enacted in 1975, LORA has different provisions than the California Public Records Act (Cal. Gov't Code § 6250 *et seq*.) that applies to state and local agencies. While LORA makes legislative documents generally open to inspection, it includes exemptions that prevent disclosure. Its exemptions from disclosure reflect the different nature of legislative work and legislators.

The LORA exemption that may be relevant to sexual harassment investigations provides that LORA does not authorize disclosure of "[r]ecords of complaints to or investigations conducted by, or records of security procedures of, the Legislature." Cal. Gov't Code § 9075(k). Other exemptions that may apply to records relating to sexual harassment complaints and investigations include "[p]reliminary drafts, notes, or legislative memoranda"; "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy"; "[c]orrespondence of and to individual Members of the Legislature and their staff"; "[r]ecords the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege"; and records for which "the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." Cal. Gov't. Code §§ 9074, 9075(a), (c), (h), (i); Evidence Code § 954. The two houses, however, recently established a policy of disclosing certain documents arising out of substantiated claims of sexual harassment by members and senior staff, including the complaint (with victim and witness identities redacted) and any documents reflecting the resolution of the complaint, including discipline.

D. Reports of Investigation

Reports of investigation of sexual harassment can take many forms. It may be written or oral, lengthy or brief, with supporting documents or a summary. Investigations done by attorneys receive confidentiality protection under the attorney-client communication privilege. Evidence Code § 954. In that case, the client employer generally has control over access to records related to the investigation and the attorney's report of the investigation. The final investigation report describes the facts that support the investigator's conclusions. The investigator's selection of the facts and information supporting the conclusions enjoy protection under both the attorney work product doctrine and the attorney-client communication privilege. The client may request that the attorney-investigator provide a summary report intended for public distribution, which would not constitute a waiver of the attorney-client privilege. In setting the terms for consideration of the report of investigation, the Subcommittee may consider:

- who has access to the final report and/or summary
- the nature of the investigator's conclusions (*e.g.* substantiation of facts)
- whether the report includes recommendations of consequences
- level of detail in reporting on interviews and specific documents

II. Accountability for Sexual Harassment

Once an investigation is complete, the organization has the responsibility to take permanent remedial steps "reasonably calculated 1) to end the current harassment, and 2) to deter future harassment from the same offender or others." *Yamaguchi v. U.S. Dept. of Air Force,* 109 F.3d 1475, 1483 (9th Cir. 1997). State law requires the employer to "take immediate and appropriate corrective action . . .[and] all reasonable steps to prevent harassment from occurring." Cal. Gov't Code § 12940(j). In essence, the law holds the employer,

including the Legislature, accountable for sexual harassment in the work place, and requires "corrective action," which may include holding the perpetrator accountable. In the Legislature, accountability for sexual harassment may raise several issues, as to the process and decisions that lead to holding a perpetrator accountable, particularly if the perpetrator is a member of the Legislature.

A. Existing Processes for Enforcing Legislative Policies Against Sexual Harassment

Both houses have had policies against sexual harassment since 1993, and they have been updated over the years. The Subcommittee has posted those policies on its hearing webpage. As required by state law and regulation, they provide all employees with information about the sexual harassment complaint process and how the houses address those complaints. Each house's process for investigating and holding perpetrators accountable also has received greater public attention in recent months.

Assembly Process. The Assembly Rules Committee documents all reports of sexual harassment (and other employment issues) that it receives. Each report is addressed in some way. When the Chief Administrative Officer (CAO) determines that a report requires a formal investigation, the report becomes a "complaint." At that point, the Assembly process includes several steps in order to determine how to provide accountability:

1) **Investigation.** The CAO decides who investigates a sexual harassment complaint, either an internal investigator or an independent investigator, who usually is a lawyer.
2) **Investigation Report.** The fact finder submits a written report to the CAO, who reviews the report in concert with the Director of Human Resources and legal counsel (usually outside counsel). As a practice, the CAO discusses the report with the Chair of the Rules Committee.
3) **Determination and Consequences.** The CAO determines, after consultation with legal counsel, whether a violation of the *Policy Against Sexual Harassment* (*Policy*) has occurred. At that point, the imposition of consequences and ensuring accountability for staff and members take separate paths:
    a) **Staff.** The CAO imposes corrective action on the staff member who has violated the policy. The accused or the complainant may appeal the CAO's decision to the Chair and Vice-Chair of the Rules Committee. If the Chair and Vice-Chair both determine that the accused or the complainant has been denied a fair evaluation of the complaint, the Chair and Vice-Chair directs the CAO to take remedial action. Remedial action may include any form of discipline, sanctions or further investigation.
    b) **Members.** If the CAO concludes that the fact finder report confirms a violation of the *Policy* by an Assemblymember, the *Policy* requires the CAO to report to both the Rules Committee Chair and Vice-chair, who the *Policy* requires to consult with the Speaker and the Minority Leader. The Chair and Vice-Chair may bring the matter before the Committee in closed session. The Committee may decide on informal discipline, including, but not limited to, additional training or counseling about sexual harassment and/or a recommendation to the Speaker to change the member's budget, committee assignments, or leadership positions. The Committee also may vote to present a resolution to the floor for formal discipline of a member, which may include a reprimand, censure, or expulsion.

Senate Process. The Senate Rules Committee tracks all complaints of sexual harassment (and other employment issues) that it receives. Each complaint is addressed in some way. For sexual harassment complaints, the process is as follows:

1) **Reporting and Investigation.** Complaints can be submitted through a dedicated toll-free hotline (1-800-729-1443). Complaints also may be reported using a dedicated website (https://castatesenreporting.com/). All reported sexual harassment complaints are referred to two outside independent law firms (the law firms of Gibson, Dunn & Crutcher, and Van Dermyden Maddux). The independent law firms are authorized to conduct investigations into allegations of sexual harassment by or against members, staff and third parties. These complaints may be reported directly to the law firm using a dedicated toll-free hotline or through Human Resources. If reported to Human Resources, the complaint will be forwarded immediately

to the independent law firm by Human Resources or through the Senate's outside counsel. (Complaints against members that are not related to sexual harassment will be referred to other outside law firms for an independent investigation.)

2) **Investigation Report.** The independent law firms conduct thorough, impartial, and prompt investigations of allegations of sexual harassment and related misconduct and report their findings to the Rules Committee through a written investigation report.

3) **Determination and Consequences.** The Rules Committee meets in closed session to determine, after consultation with legal counsel, whether a violation of Senate policy (including, but not limited to, the Zero Tolerance Against Harassment, Discrimination and Retaliation Policy and the Code of Conduct) has occurred. If a violation is not found, then the Rules Committee directs staff to provide appropriate closure letters. If a violation has occurred, the process is as follows:

   a) **Staff.** The Rules Committee directs the Secretary of the Senate and Human Resources to impose corrective action on the staff member who has violated the policy. Corrective action may include any form of discipline, up to and including termination. Corrective action can include lesser sanctions, such as a suspension, letter of warning, or a requirement to get additional training, or any combination of those sanctions. The Rules Committee also directs staff to notify complainants of the conclusion reached by the Rules Committee with respect to the complaint.

   b) **Members.** The Rules Committee may vote to present a resolution to the floor for formal discipline of a member, which may include a censure, suspension, or expulsion. The Rules Committee also may decide on lesser discipline, including, but not limited to, a letter of reprimand from the Rules Committee, additional training or counseling about sexual harassment, and/or a recommendation to the Pro Tem to change the member's budget, committee assignments, or leadership positions.

B. Imposing Consequences

Imposing consequences on staff versus members raises fundamentally different issues. Staffers are employees of their house and may be disciplined as any other employee may be disciplined. State law requires employers to "take all reasonable steps necessary to prevent discrimination and harassment from occurring." Cal. Gov't Code § 12940(j). In contrast, voters elect members, and the rules committees may have a narrower set of consequences that it may be authorized to impose without a vote of the entire house.

Other contexts may offer insight into how the Legislature may address the issues arising out of imposing consequences. While sentencing in criminal law may offer one example, there may be consequences for sexual harassment that does not reach the level of a crime. The discussion here is presented only for the purpose of identifying the questions or issues that may be raised in assessing appropriate consequences. Sexual harassment is a violation of the civil, not criminal, law. Since the 1980's, states and the Federal Government have debated structures for sentencing – mandatory sentencing, sentencing guidelines. The controversy over the sentencing of Brock Turner, a Stanford student convicted of rape, led two commentators to state "inflexible mandatory minimum sentences, like the kind the California legislators want, are not the answer to our anger." Alexandra Brodsky, Claire Simonich, "Helping Rape Victims After the Brock Turner Case," *New York Times*, August 11, 2011. Beyond mandatory sentences, judges may consider a broader range of information in determining a sentence – facts shown at trial or admitted by the defendant, report from probation officers, sentencing guidelines, statutory sentences, or testimony from victims or the defendant's family.

For contexts more directly related to sexual harassment, the Subcommittee may consider how higher education addresses violations of sexual harassment policies. Title IX in federal education law imposes requirements on colleges and universities to create systems that address sexual harassment. Universities also have increased attention to reducing campus sexual assault. *See*, Michelle Anderson, "Campus Sexual Assault Adjudication and Resistance to Reform," 125 Yale L.J. 1940 (2016). Colleges have chosen a range of sanction regimes:

- **University of New Hampshire** specifies *factors* to be considered in selecting sanctions from among three sanction levels. Misconduct may include sexual harassment, "unwanted sexual contact" and "sexual misconduct." "Misconduct that harms others because of their particular race, color, religion, sex, age, national origin, sexual orientation, gender identity or expression, disability, veteran status, or marital status" receives Level III (highest) sanctions, up to dismissal. UNH *Student Code of Conduct* Article IV: Conduct Resolution Procedures (2017).
- **Spellman College** identifies "harassment" as a "Level IV Violation" (the highest) and specifies a range of possible "sanctions" up to dismissal from the college. Spellman *Student Handbook*, p 51-53.
- **Rutgers University** may impose "active" and/or "inactive" sanctions to achieve four *objectives* and considering eight criteria. *See*, *Student Policy Prohibiting Sexual Harassment, Sexual Violence, Relationship Violence, Stalking and Related Misconduct*, Article VII (Sanctions and Other Remedial Measures).

The Subcommittee may consider recommending a sanction regime or other ways to respond to sexual harassment allegations. In recommending consequences for substantiated cases of sexual harassment, the Subcommittee may consider one or more of the following factors:

- **Due Process:** The Fifth Amendment of the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law." The Sixth Amendment provides, in criminal proceedings, that defendants have a right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." In the legislative context, the California Supreme Court has held, in the context of expelling members:
  "The Senate having expelled the petitioners in the manner prescribed by the Constitution, in the exercise of the power therein given, it is not true that they have been deprived of the right to the office without due process of law." *French v. Senate of the State of California*, 146 Cal. 604, 609 (1905).
- **Consistency:** In recent decades, states have debated the concept of consistency in how convicted criminals are sentenced. That debate reflects differing views on the value of consistency in trying to promote fairness to defendants/victims, and balance the scales of justice. Some states have specified the punishment for specific crimes, while others have adopted sentencing guidelines (*e.g.*, factors requiring the judge's consideration) or set voluntary recommendations for judges imposing sentences. *See*, National Center for State Courts, *Assessing Consistency and Fairness in Sentencing*.
- **Range of Available Consequences:** As shown by the college sanctions regimes for sexual harassment, a broad range of sanction alternatives allows greater flexibility and discretion in applying sanctions to specific circumstances. It may foster achievement of the legal standard to take prompt action that is "reasonably calculated to end the harassment" by the perpetrator and others in the future. *Swenson*, 271 F.3d at 1192. The Legislature's current policies provide for corrective action. The Senate policy provides "appropriate action as necessary and appropriately tailored to the circumstances." The Assembly *Policy* identifies specific options for staff: "reprimand, suspension without pay, reduction in pay, demotion, or termination. In addition, an employee may be required to participate in additional training or individual counseling about sexual harassment and the responsibilities of personnel to maintain a working environment free from harassment." For members, the California Constitution requires a 2/3 vote of the house to suspend or expel a member. Cal. Const. Art. IV, Section 5. In some recent cases, the Assembly Speaker has removed members from chairmanships during investigations.
- **Standards of Proof:** Investigations of sexual harassment allegations by independent investigators hired by either house make a determination as to whether the alleged facts "more likely than not" occurred, which is the traditional "preponderance" of the evidence standard used in civil actions in court. Criminal decisions require proof "beyond a reasonable doubt." Some states have different levels of jury decisions, from majority-vote to unanimity. There are some claims that do not go to a jury, with a decision by the judge on the facts and the outcome.

- **Traditional Criteria:** The criteria that Rutgers University applies in setting sanctions in sexual harassment cases reflect many of the traditional criteria that judges may use in sentencing decisions: (1) the nature of the prohibited conduct at issue (such as penetration, touching under clothing, touching over clothing, unauthorized recording, etc.); (2) the circumstances accompanying the lack of consent (such as force, threat, coercion, intentional incapacitation, etc.); (3) the Respondent's state of mind (intentional, knowing, bias-motivated, reckless, negligent, etc.); (4) the impact of the offense on the Complainant; (5) the Respondent's prior disciplinary history; (6) the safety of the University community; (7) the Respondent's conduct during the disciplinary process; and (8) precedent established by previous sanctions. *See*, Student Policy, Article VII.

This hearing may raise other factors that the Subcommittee may wish to consider in its recommendations for how to respond to sexual harassment allegations.

C. Accountability from Restorative Justice

"Restorative justice" offers an alternative method for responding to sexual harassment allegations. It focuses on repairing the harm that crime causes victims and others. After the fall of *apartheid* in South Africa, a "Truth and Reconciliation Commission" used restorative justice practices to heal the nation. "The mandate of the commission was to bear witness to, record and in some cases grant amnesty to the perpetrators of crimes relating to human rights violations, reparation and rehabilitation." *See*, South African History Online.

This hearing will include testimony from Fania Davis, co-founder of Restorative Justice for Oakland Youth, whose website contrasts restorative justice with the traditional criminal justice system:

> **What is Restorative Justice?**
> Restorative justice invites a fundamental shift in the way we think about and do justice. In the last few decades, many different programs have arisen out of a profound and virtually universal frustration with the dysfunction of our justice system. Restorative Justice (RJ) challenges the fundamental assumptions in the dominant discourse about justice.
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> **Our criminal justice system asks these three questions:**
> 1. What law was broken?
> 2. Who broke it?
> 3. What punishment is warranted?
>
> **Restorative justice asks an entirely different set of questions:**
> 1. Who was harmed?
> 2. What are the needs and responsibilities of all affected?
> 3. How do all affected parties together address needs and repair harm?
>
> **An emerging approach to justice rooted in indigenous cultures, restorative justice is reparative, inclusive, and balanced. It emphasizes:**
> 1. Repairing harm
> 2. Inviting all affected to dialogue together to figure out how to do so
> 3. Giving equal attention to community safety, victim's needs, and offender accountability and growth
>
> **Restorative justice repairs the harm caused by crime**. When victims, offenders and community members meet to decide how to do that, the results can be transformational.
>
> **It emphasizes accountability**, making amends, and — if they are interested — facilitated meetings between victims, offenders, and other persons.