

# Subcommittee on Sexual Harassment **REVISED** Prevention & Response

## *Chair/Vice-Chair DRAFT Recommendations – June 20, 2018*

The Subcommittee on Sexual Harassment Prevention and Response (Subcommittee) convened its first hearing on January 24, 2018, to hear experts testify as to the importance of culture change to reducing sexual harassment in the Legislature. In essence, reducing sexual harassment in the Legislature requires more than simply a new policy. It requires a policy as well as the practices that support culture change.

The Subcommittee therefore has focused its recommendations to the Joint Committee on Rules on transforming the Legislature's workplace culture to promote respect, civility and diversity. Culture transformation is the first recommendation and the other recommendations support that transformation.

The Subcommittee makes the following recommendations in light of five informational hearings and a workplace climate survey. The hearings, available on the Legislature's websites, addressed the following topics:

- Best Practices for Changing Culture on Sexual Harassment
- Defining Sexual Harassment and Identifying Challenges
- Best Practices for Reporting Sexual Harassment and Protecting Victims
- Investigation and Response to Sexual Harassment Allegations
- Preventing Sexual Harassment through Training and Culture Change

After completing the informational hearings, the Legislature arranged for a workplace climate survey. In the interim, the Subcommittee's Chair and Vice-Chair developed these recommendations for consideration by the Subcommittee.

### ***I. Transform the Legislature's Workplace Culture to Promote Respect, Civility and Diversity and Every Person's Responsibility to Build that Culture.***

- A. Adopt "Policy on Appropriate Workplace Conduct" (Policy).** The accompanying Policy reflects an aspirational policy for moving the Legislature in the direction of a workplace that all members and staff wish to work. Actions will be judged on whether the action promotes respect, civility and diversity. "**Inappropriate conduct toward others**" is unacceptable and all reports of such conduct will be addressed, in order to improve the workplace culture. An independent workplace conduct unit will address those incidents of conduct affecting a protected class, while each house's human resources unit will address other reports. The Policy applies to members, employees, interns, volunteers, and applicants.
- B. Create engaging training program.** Implement a comprehensive training program that engages members and staff to understand how they can contribute to making the Capitol a workplace of respect, civility and diversity. Training programs may include in-person training and on-line programs, as well as implicit bias and bystander training. The training will give all staff and volunteers the tools they need to recognize and prevent inappropriate conduct toward others when they see it.

- C. Promote respect and civility in the legislative workplace.** Following the leadership of the Assembly Speaker and the Senate President Pro Tem, members and supervisors will promote respect and civility in the Capitol community. The legislative workplace extends beyond the Capitol, to the Legislative Office Building, district offices, and work-related social events. With training, members and supervisors will gain the understanding to recognize developing problems in their office and seek assistance with addressing the problem and promoting the values inherent to the Policy.
- D. Protect employees who suffer or report inappropriate conduct based on a protected class, harassment or discrimination.** While the law already bars retaliation against legislative employees for reporting sexual harassment, the Legislature should take action to protect and support victims, such as continuing the contract with WEAVE for confidential, voluntary pre-reporting counseling. Employees in offices where the member is the subject of an investigation will receive support from the relevant rules committee.
- E. Bolster anti-retaliation policies.** Retaliation for reporting sexual harassment is not only illegal, but an unacceptable contradiction to the Policy. The Legislature will not allow retaliation by its members or staff. Reports to the independent unit established under the Policy will be a “protected disclosure” under the Legislature’s anti-retaliation statute. Retaliation may include more than an adverse tangible employment action or material changes to the terms and conditions of employment. It could include harassment (*e.g.*, ostracism) or bad mouthing the complainant outside of the workplace. The training program will build understanding of the breadth of the retaliation that the law and the Policy prohibit. Members, supervisors and co-workers will be subject to corrective action for retaliation.

## ***II. Address Problems Early.***

- A. Establish legislative workplace conduct unit in the Legislative Counsel Bureau.** In order to create a bicameral, independent advisory, reporting and investigation operation that makes incident reporting accessible and straightforward, the Legislative Counsel will oversee the Legislature’s independent legislative workplace conduct unit (independent unit). The Legislative Counsel will have the responsibility, authority and budget to provide for reporting, assessment, investigation, and independent reports about inappropriate conduct toward others based on protected class. Investigators will have specialized workplace investigation training on sexual harassment and discrimination.
- B. Encourage reporting of all incidents that diminish respect and civility.** Witnesses testified that, generally, reports are submitted for only about 25% of incidents of sexual harassment. When it occurs, some may not recall how to report such incidents. Therefore, make **reporting as straightforward and accessible as possible**, including consideration of on-line apps for reporting. The independent unit will accept **both named and** anonymous reports, and respond to the extent it has sufficient information to proceed with an assessment and/or an investigation. **The independent unit also will accept reports of inappropriate conduct by lobbyists and other third parties.** The person who allegedly conducted themselves inappropriately shall be the “subject” of an assessment, investigation and determination, as necessary.
- B-C. Refer reports of conduct that may be criminal to law enforcement. The assessment, investigation and panel process may proceed, depending on the circumstances.**

~~C.D.~~ **Require Supervisors to ~~should~~ report complaints of inappropriate conduct immediately so the complaint can be resolved. ~~any incident of inappropriate conduct toward others by members or staff that they see or learn about.~~** Supervisors include members, chiefs of staff, and chief committee consultants. The independent unit will offer advice to supervisors to help them determine when reporting is ~~appropriate~~necessary.

**E. Offer complainants alternatives for addressing problems.** As part of intake, an internal investigator will explore with the person who submits the report whether there is any interest in addressing the alleged problem independent of the formal process, which continues in any case. This may include mediation between the person who allegedly suffered and the employer (not the subject of the investigation). These alternatives will be at the sole discretion of the person who suffered the alleged inappropriate conduct. Alternatives will not interfere with the assessment, investigation, and determination. The Legislature has a duty to investigate and prevent sexual harassment, which exists without regard to the preferences of those who are involved in an incident.

~~D.F.~~ **Inform complainant as to the process. The independent unit will provide appropriate updates to the complainant as to the status of the case.**

~~E.G.~~ **Expand the range of responses to inappropriate conduct toward others.** In order to address problems early, the responses to reports will include actions to address the problem, such as additional training. The responses may not necessarily be disciplinary, and may start with informal counseling, to help everyone understand how to help build a workplace culture of respect, civility and diversity.

~~F.H.~~ **When appropriate, engage the entire office team.** When a report suggests that a legislative office is encountering actions that challenge the Policy, the office may be offered training formulated specifically for its needs.

### ***III. Investigate Reports Promptly.***

**A. Assess reports immediately, by subject-matter expert.** The independent unit would review the report and contact the one who the report suggests was impacted by the inappropriate conduct immediately. The intake assessment will allow for determination as to the need for immediate response.

**B. Classify reports for further action.** In order to determine the appropriate process for the report to be addressed, the subject-matter intake expert would examine whether the report relates to a protected class and whether an independent panel review is required. The categories and the responses would include:

- “A” (within Policy jurisdiction, requiring full investigation and panel briefing)
- “B” (within Policy jurisdiction but initial investigation is sufficient with recommendation targeted to be delivered to the employer within 30 days)
- “C” (not within Policy jurisdiction, referred back to house of origin’s human resources division)

**C. Investigators collect evidence, including documents and interviews.** While independent unit investigators would lead most investigations, external investigators may be authorized for investigations related to members, or to legislative staff who outrank the unit’s investigators. The staff members who outrank the unit include senior staff of leadership offices, rules committees and the Legislative Counsel Bureau. Productive investigations will require cooperation from all who are connected to the incident of

inappropriate conduct. The subject of the investigation will have an opportunity for an interview with the investigator, who will collect evidence that addresses all perspectives on an incident. The evidence, from either internal or external investigators, will be submitted to the independent panel without the investigator making any factual findings.

#### ***IV. Create an Independent Panel of Subject-Matter Experts to Determine Facts and Recommend the House's Response to Reports.***

- A. Appoint a 5-member panel of subject-matter experts.** These experts will have decades of experience in addressing employment-related issues, particularly related to employment discrimination (including sexual harassment). This panel of experts will be responsible for making factual findings (substantiated or unsubstantiated) and recommendations to the relevant house as to how the house should respond. Request that the Chief Justice appoint a majority of panelists, while each house will appoint one panelist. The panelists will be under contract with the Legislative Counsel.
- B. Provide each panel with the evidence developed by investigators.** A panel of three of the five panel experts, in rotation, will have a period of time to review the evidence. This panel will then have an opportunity to discuss the evidence and develop preliminary findings and recommendations.
- C. Provide briefing between supervisor/employer and review panel.** After the panel has reviewed and discussed the evidence, an appropriate supervising person or persons would be invited to a briefing to discuss the panel's preliminary findings. The appropriate person to participate as the supervising person or persons will depend on the circumstances. It may be the Secretary of the Senate or the Assembly Chief Administrative Officer. Or it may be a member or a chief of staff, or the Senate President Pro Tempore or the Assembly Speaker in the case where a legislator is the subject of the investigation.
- D. Direct panel to make factual findings and recommend the response to substantiated facts.** After the briefing, the panel will deliberate and determine the substantiated facts, make findings as to whether the conduct violated the Policy, and recommend how the relevant house should respond to those findings. Findings and recommendations would require unanimous support from the three panelists.

#### ***V. Retain House Authority to Determine Appropriate Response to Reports.***

- A. Allow each house to determine how it wishes to respond to panel recommendations.** Each house will determine who responds to the panel's reports and makes the final decisions as to how to respond pursuant to the Policy to an incident of inappropriate conduct toward others based on protected class. The chair of the relevant rules committee will receive a copy of each report.
- B. The house's decision-maker documents decisions.** The house's decision-maker may adopt the panel's recommendations or may take other action to respond to the panel's report of inappropriate conduct pursuant to the Policy. If the house's decision-maker differs with the panel's recommendations, the reasons for the differences will be documented and maintained by the Secretary of the Senate or the Chief Administrative Officer of the Assembly.

- C. **The house decision-maker will prepare a decision to present to the subject.** The decision will summarize the findings and describe what corrective action will be taken to address the substantiated facts.

## ***VI. Maintain Policy on Disclosure Related to Sexual Harassment.***

- A. **Protect confidentiality of certain reports, investigations and determinations of inappropriate conduct toward others.** This entire process is an internal management process. Reports of inappropriate conduct, including sexual harassment, are more likely to be made if the reporter can be offered some level of confidentiality. As a public body, however, the Legislature cannot guarantee confidentiality, but it can make an effort to maintain the confidentiality where the law allows. This reflects a balance between the Legislature's duties to provide transparency and protect the privacy of its employees. Documents related to complaints of inappropriate conduct toward others will remain confidential.
- B. **Disclose certain documents as to members and senior legislative staff.** The house will release certain documents in cases where the panel determines that facts related to sexual harassment claims have been substantiated against a member or a high-level legislative employee, and the house has imposed discipline or has determined that the allegations are well-founded. The documents to be released will be the claim filed and the letter provided to the subject of the investigation, which will include a summary of the panel's factual findings. All documents will redact the personally identifying information of the accuser and witnesses, for privacy reasons.

***California Legislature***  
***DRAFT Policy on Appropriate Workplace Conduct:***  
***Creating a Culture of Respect, Civility and Diversity***

The Legislature is responsible for debating and enacting California law and policy, on behalf of all Californians. Members and staff engage the public, advocates, and each other in vigorous discussion of what is best for California. The Legislature’s success depends on creating a culture of respect, civility and diversity.

In creating that culture, the Legislature faces unique challenges. Members are elected by the people, not employed by the Legislature. Legislative staff includes some just entering the workforce and others with decades of experience. Legislation often addresses sensitive issues. The legislative calendar includes times of long hours, fast action, and stress, as well as times of more deliberate analysis and review. These challenges have led to incidents that counter efforts to promote respect, civility and diversity.

The California Legislature therefore adopts this Policy on Appropriate Workplace Conduct (Policy) to build a workplace culture based upon the values of respect, civility and diversity. All Members and legislative staff are required to conduct themselves in accordance with the Policy as well as all applicable local, state, and federal laws. They are encouraged to judge their own actions through the prism of these core values for a professional workplace. The Legislature seeks to build a workplace where all community members are respected, interaction and engagement is civil, and diversity is valued. Building that workplace will require time and the Legislature will need to invest the resources necessary to support that effort.

The purpose of this Policy is to preserve the dignity, respect, and professionalism of the legislative workplace as well as to protect the right of employees to be free from unlawful discrimination, sexual harassment and all other forms of unlawful harassment, retaliation and inappropriate conduct toward others based on a protected status. Retaliation, as well as discrimination, sexual harassment, other forms of harassment, and inappropriate conduct toward others based on a protected status, is contrary to the values of the Legislature. For the protections of individuals under this Policy, the term “employee” shall include unpaid interns, fellows, volunteers, applicants, and persons providing services pursuant to a contract. In addition, Members are both protected by this policy and required to abide by its terms.

As a preventive measure, the Legislature will not tolerate inappropriate conduct toward others, even if the conduct does not meet the legal definition of unlawful discrimination, harassment, or retaliation. The Legislative Counsel’s Legislative Workplace Conduct Unit (“Workplace Conduct Unit”) accepts all reports of inappropriate conduct, but will focus its investigations on conduct related to a protected class. Each house’s human resources unit will address other reports of inappropriate conduct. All legislative employees are responsible for conducting themselves in accordance with this Policy and its associated procedures. Violation of the Policy and/or procedures will lead to prompt and appropriate remedial action. Appropriate action includes a broad range of actions to promote a culture of respect, civility, and diversity, and may not always be disciplinary in nature.

Inappropriate conduct toward others is any physical, verbal, or visual conduct based on or because of sex, gender, gender identity or expression, race, color, ancestry, religious creed,  
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national origin, age (40 and over), physical or mental disability, sexual orientation, marital status, military or veteran status, medical condition, genetic information or any other characteristic protected by state or federal employment law when such conduct reasonably would be considered inappropriate for the workplace. This Policy prohibits inappropriate conduct by coworkers and third parties, as well as supervisors and managers, with whom the employee comes into contact.

This provision is intended to prevent inappropriate conduct based on a protected status before it becomes unlawful discrimination or harassment. As such, the conduct need not meet legally actionable state and/or federal standards of severe or pervasive conduct to violate this Policy. An isolated derogatory comment, joke, racial slur, sexual innuendo, etc., may constitute conduct that violates this Policy and provide grounds for response. Similarly, the conduct need not be unwelcome to the party against whom it is directed; if the conduct reasonably would be considered inappropriate for the workplace, it may violate this Policy. Depending on the facts, the relevant house's response may include counseling, training or other corrective action up to and including termination of employment of staff or suspension or expulsion of a Member.

Conduct which violates this Policy may take many forms and includes, but is not limited to, slurs, jokes, statements, gestures, pictures, or cartoons that relate to a protected class, such as those that have a racial, sexual, disability-related, religious, age or national origin connotation, or derogatory comments about religious differences and practices. Specific examples of conduct which may be found to violate this Policy are:

- 1) Offering employment benefits in exchange for sexual favors.
- 2) Making or threatening reprisals after a negative response to sexual advances.
- 3) Verbal sexual advances or propositions; or pressuring or repeatedly asking an employee for dates.
- 4) Visual conduct: leering, sexual gestures, or a display of offensive images, objects, pictures, cartoons, calendars or posters that has a derogatory connotation to any protected class.
- 5) Verbal conduct: degrading or derogatory comments, epithets, slurs or jokes that have a derogatory connotation to any protected class; frequently questioning someone about his or her personal life or speculating about his or her sex life.
- 6) Written conduct: suggestive or obscene letters, notes, electronic mail messages, or invitations, or similar written conduct that has a derogatory connotation to any protected class.
- 7) Physical conduct: unwelcome touching, assault, or impeding or blocking normal movement.
- 8) Other unwelcome conduct based upon any protected class which is unbecoming of Members and staff and that creates an intimidating, hostile or offensive work environment.

The procedures associated with this Policy support the Legislature's movement toward a workplace culture of respect, civility and diversity. Each complaint will receive a timely response and will be investigated timely and impartially by qualified personnel. The Workplace Conduct Unit will receive, document, and investigate complaints, and track them for reasonable progress.

Employees do not have to complain to their direct supervisor, but may go directly to the Workplace Conduct Unit. Employees may also go to Human Resources or any supervisor in their house. Supervisors (including Members) must report any complaints of misconduct to the Workplace Conduct Unit immediately so that the complaint can be resolved. All employees are strongly encouraged to report any violation of this Policy to the Workplace Conduct Unit. All

legislative employees and Members are responsible to fully and honestly cooperate in any investigation by either house's Human Resources Department or the Workplace Conduct Unit.

No one may retaliate against an employee for complaining about a violation of this Policy or for participating in an investigation.

The procedures for investigation by the Workplace Conduct Unit provide details for independent assessment and investigation of complaints, and an independent panel to make findings related to alleged violations of the Policy. The Workplace Conduct Unit and the independent panel will conduct a fair, timely, and thorough investigation that reaches reasonable conclusions based on the evidence collected. The Workplace Conduct Unit and the independent panel will close investigations in a timely manner. Each house will have responsibility for considering the panel's findings and recommendations, and determining whether the Policy has been violated and the appropriate response that will promote a workplace culture of respect, civility and diversity.

Confidentiality of the process encourages reporting, and the Legislature will work to maintain the confidentiality of the investigation and determination process to the extent possible and consistent with this Policy. The Legislature, however, is a public body. In balancing the interests in confidentiality and transparency, the Legislature will maintain the confidentiality of these personnel matters, except as follows: Certain documents will be released in cases where the panel determines that facts related to sexual harassment claims have been substantiated against a member or a high-level legislative employee, and the house has imposed discipline or has determined that the allegations are well-founded based on the independent panel's findings. The documents to be released will be the claim filed and the letter provided to the subject of the investigation, which will include a summary of the panel's factual findings. All documents will redact the personally identifying information of the accuser and witnesses, for privacy reasons.

Employees also may direct complaints to the California Department of Fair Employment and Housing (DFEH) at 1-800-884-1684 or <https://www.dfeh.ca.gov>.