



**STATE OF VERMONT**  
OFFICE OF LEGISLATIVE COUNCIL

**MEMORANDUM**

To: Rep. Mitzi Johnson, Speaker of the House  
From: Luke Martland, Director and Chief Counsel  
CC: Michael O'Grady, Deputy Director of Legal; Jennifer Carbee, Legislative Counsel; Damien Leonard, Legislative Counsel; Katie McLinn, Legislative Counsel; and BetsyAnn Wrask, Legislative Counsel  
Date: December 12, 2017  
Subject: Potential changes to the House Prevention of Sexual Harassment Policy

**I. Introduction and Background**

This memorandum has been prepared in response to your request for a list of potential changes to the House Prevention of Sexual Harassment Policy ("Policy"). It is divided into two sections:

- Technical changes intended to clarify certain aspects of the policy that should not be controversial.
- Substantive changes that may raise policy considerations or may be controversial.

For the sake of brevity, this memo focuses on summarizing issues, and not on providing remedial language. We can provide such language as requested. We recognize that this memo suggests a broad array of potential changes. We are not proposing that all of these changes should necessarily be adopted; instead, our goal is to bring these issues to your attention for discussion purposes.

It should also be emphasized that the current Policy is an improvement over the prior policy and the work of the Prevention of Sexual Harassment Panel ("Panel") in developing the current policy, and increasing awareness of these issues is deeply appreciated. The suggestions in this memorandum are not intended to indicate otherwise.

As background, the House and Senate have each adopted their own policies, which are substantially similar but not identical. There is no joint policy that covers both bodies. The House Policy serves two main functions. First, to protect certain individuals from experiencing sexual harassment. Second, to cover or regulate the behavior of a smaller group of individuals. For example, the Policy protects not only Representatives and employees of the Speaker's and Clerk's offices from harassment, but also members of the public, members of the press, and lobbyists from harassment perpetuated by Representatives and employees of the Speaker's and Clerk's offices. However, the

Policy only covers or regulates the behavior of Representatives and employees of the Speaker's and Clerk's offices because the House cannot regulate the behavior of members of the public. The Office of Legislative Council has adopted both the House and Senate policies as part of our internal policies and procedures.<sup>1</sup>

## **II. Technical Changes**

We suggest the following technical amendments to the Policy:

- The introduction to the Policy states that it is intended to provide for a workplace “free from harassment,” which can be read as implying that the Policy covers all forms of harassment and not merely sexual harassment (Policy p. 1). House Rule 90 was amended to establish a separate panel to address discrimination. To avoid confusion, it might be helpful to state that this Policy only refers to sexual harassment.
- The Panel may want to state explicitly that the Policy protects employees of the Office of Legislative Council, Joint Fiscal Office, and the Sergeant at Arms. This appears to have been assumed, but it may be helpful to indicate this more clearly.
- Similarly, it appears that both the House and the Senate intend that their policies cover or regulate the behavior of individuals who work for the Office of Legislative Council, the Joint Fiscal Office, and the Sergeant at Arms. For example, complaints against staff of these offices will be adjudicated by a joint panel referenced in both policies. However, it may be helpful to state explicitly that employees of these offices are subject to the policies.
- It would be helpful to clarify that the Policy applies to the full two-year term of each Representative.
- In addition, there are other minor corrections that might be helpful. If the Panel is considering amending the Policy, we can bring these to the Panel's attention.

## **III. Substantive Changes**

As noted in the introduction, the suggestions included in this section are more substantive in nature, and therefore may require policy deliberations. We have attempted to bring to your attention as many issues as possible and we are not necessarily suggesting that all of these changes should be adopted. Any consideration of potential changes should include a range of perspectives and it may be advisable to consult an outside expert as to best practices regarding sexual harassment prevention policies.

### **A. Different standards of culpability**

In the existing policy, there appear to be three different standards as to culpability:

1. For some behavior the complainant must indicate that the conduct is unwelcome before the conduct may rise to the level of harassment. For example, touching

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<sup>1</sup> It is our opinion that the Director can take disciplinary action against a person who engages in harassment and who works for the Office of Legislative Council, regardless of whether the victim wishes to file a complaint with the Panel or not.

- any part of a person's body can constitute harassment "after that person has indicated that such physical contact is unwelcome" (Policy, p.1).
2. Other behavior is prohibited if the accused knew, or "should have known" that the conduct was unwelcome or inappropriate. For example, "calling a person a sexualized name" constitutes harassment "if it is known or should be known that the person does not welcome the behavior" (Policy, p.1).
  3. Some behavior is prohibited regardless of whether the perpetrator knew or should have known the conduct was inappropriate. For example, "touching or grabbing a sexual part of a person's body" is *per se* prohibited (Policy, p.1).

Having such different standards of culpability may be appropriate depending on the severity of the misconduct, but the Panel should carefully think about what the appropriate standard may be as to each distinct type of misconduct. In addition, the Panel may want to review the number of standards and how the level of culpability should be defined as to each. In doing so, the Panel may want to take into account that under some circumstances requiring a complainant to indicate lack of consent, or that behavior is unwelcome, may be difficult if there is a power imbalance between the perpetrator and subject.<sup>2</sup>

B. Encouraging victims to identify objectionable conduct

In a similar vein, the Policy states that victims of harassment are "encouraged, but not required to" identify objectionable behavior to the person responsible and "to resolve issues informally" (Policy, p.2). Although it certainly is appropriate for individuals to, if they wish, indicate that behavior may be unwelcome or inappropriate, we have concerns that "encouraging" such actions might be read as placing a burden on a victim to confront a harasser. As noted above, this may be difficult if there is a power imbalance between the two parties. As a result, the Panel may wish to consider modifying this language to avoid any such implication.

C. Informal resolutions

Currently, the Policy requires that a written complaint be filed before the Panel can investigate or take action. However, it may also be appropriate for someone to approach a Panel member informally to discuss conduct that might make him or her uncomfortable, and for the Panel member to, with the person's consent, take steps to address the situation; for example, by speaking to the perpetrator. It might be beneficial for the policy to clarify whether such informal resolutions are appropriate, the role of Panel members in any such informal resolutions, and how information or evidence should be handled or retained.<sup>3</sup>

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<sup>2</sup> As to the requirement that an individual indicate that conduct is unwelcome, the Panel may wish to clarify whether nonverbal indications, such as physically pulling away, might be sufficient to meet this threshold.

<sup>3</sup> If a Panel member participates in such an informal resolution, she or he might have to recuse herself or himself from any subsequent investigation or other action by the Panel, and this should be addressed in the Policy.

D. Clarifying potential sanctions

It may be advisable to include examples of at least some of the possible sanctions that the Panel could recommend to the Rules Committee.

E. Limitations on who may file a complaint and the form of a complaint

As noted above, under the Policy only a victim of harassment can file a complaint with the Panel. In most situations, someone who witnesses harassment, or learns about it afterward, cannot initiate a complaint. It may be appropriate for the Panel to consider allowing a person who has observed harassment or, under some circumstances, an individual who is subsequently made aware of harassment, to initiate a complaint.<sup>4</sup> Any discussion of these changes should include the policy considerations relating to mandatory vs. discretionary reporting [section III(F)] and confidentiality [section III(J)]. In addition, the Policy requires that any complaint must be in writing and signed. The Panel may want to discuss if those requirements are necessary or should be modified.

F. Mandatory vs. discretionary reporting

Under the current Policy, reporting is discretionary. In other words, victims are not required to report harassment to the Panel. As a result, the Panel may not be informed of all harassment cases, especially if complainants are afraid to come forward out of fear of retaliation. If the Panel wishes to increase reporting, it may want to consider requiring reporting, at least under some circumstances. If the Panel does so, it will have to weigh the penalties for a failure to report. It should be recognized that such a change raises policy concerns and potential conflicts between the goals of ensuring that all complaints are brought to the Panel's attention and respecting the wishes of victims as to whether or not they wish to lodge a complaint. For example, if a complainant does not wish to proceed, a mandatory reporting approach would force him or her to do so. And, if who can make a complaint is expanded to include witnesses or others who may hear of misconduct, a mandatory reporting regime may result in a situation in which a victim does not want to proceed, but the witness will be required to file a complaint with the Panel.

G. Reopening complaints and repeat offenders

The Policy states that the Panel can only adjudicate a complaint concerning misconduct committed during the current biennium. The Panel is authorized to "reopen a closed complaint" if the accused "demonstrates a pattern of improper behavior" (Policy, p.3). Records are confidential and kept by the Office of Legislative Council (which provides legal and administrative support to the Panel) and the Clerk. The Panel may want to clarify how long information should be retained, how repeat offenses or patterns of misconduct should be tracked, how information from confidential records will be brought

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<sup>4</sup> We believe that under the current Policy, a person who observes harassment may be able to initiate a complaint if what he or she observes creates a hostile or offensive working environment as to himself or herself. However, the Panel may want to clarify this.

to the Panel's attention, and whether to extend the length of time during which complaints can be reopened. These issues are also relevant to confidentiality, discussed in section III(J) below. In addition, under the current Policy, the Panel cannot take action on a complaint if there is a pending criminal charge. The Panel may wish to clarify that the time period to adjudicate a complaint will be tolled for any such period of time.

#### H. The accused's role in determining potential resolutions

Under the Policy, the Panel must first conduct an investigation and decide if there is enough evidence to support a potential violation of the Policy. If there is not enough evidence, the complaint is closed. If, on the other hand, the Panel determines that there is sufficient evidence, there are three potential options to resolve a complaint. First, the complainant and accused may enter into "a mutually agreed to resolution" (Policy, p.3). Second, the Panel may enter into a "confidential stipulation" with the respondent that may include a warning or discipline such as a reprimand. Third, if the respondent chooses not to accept the confidential stipulation, the Panel will draft charges and proceed to a hearing.

These options may give the impression that the accused has more influence over how a complaint is resolved than the complainant. For example, the Panel may only enter into a confidential stipulation if the accused agrees, but apparently there is no requirement that the complainant also agree. The Panel will proceed to a hearing if the accused rejects a confidential stipulation, but the complainant has no similar right to "veto" the confidential stipulation or demand a hearing. Once a hearing begins, it is unclear if the complainant can call witnesses or present evidence, and whether the Panel will be neutral or will assume the role of presenting the evidence against the accused. Therefore, the Panel may wish to clarify these issues, and perhaps require both parties to agree to certain options, or leave any decision to the Panel alone concerning how to proceed, without requiring that either the complainant or accused consent.

#### I. Support person or advocate

The Panel may want to consider allowing a complainant to bring a support person to a hearing. Under the current policy, if a staff person accuses a Representative of harassment, the staff person will have to appear before a panel composed exclusively of Representatives, with the accused present, and potentially with the accused's private attorney also present. In such a situation, the option of having a person of the complainant's own choosing present to provide support or to advocate on his or her behalf might be beneficial.

#### J. Confidentiality

Under the current Policy, most information concerning complaints is confidential except for an annual report with identifying information removed. On one hand, confidentiality protects the privacy of the complainant and accused. However, confidentiality may also shield repeat offenders, disguise systemic problems, feed an impression that little if

anything is done in response to complaints, erode faith in the Policy and Panel, and discourage victims from coming forward. As a result, the Panel should carefully consider how best to balance these competing interests. In addition, whether confidentiality is intended to preclude a complainant from subsequently discussing the matter or pursuing other avenues of redress should be discussed and perhaps clarified. Finally, confidentiality relates to record keeping and tracking repeated misconduct as mentioned in section III(G) above.

K. Clarifying when harassment based on sexual orientation and gender identity may constitute sexual harassment

The definition and examples of sexual harassment include “derogatory or provocative remarks about or relating to a person’s sex or sexual orientation,” and “harassing acts or behavior directed against a person on the basis of the person’s sex or sexual orientation” (Policy, p.2). This broad language could be read as pulling harassment based on sexual orientation within the other examples of sexual harassment. However, whether this is the Panel’s intent should be discussed and perhaps clarified. In addition, the Panel may want to add “gender identity.”

There may be situations in which alleged conduct may arguably constitute both harassment based on sex, sexual orientation, or gender identity, and also discrimination based upon these criteria. As a result, it will be important that both panels work together to clarify when conduct might be under the jurisdiction of one panel or the other.

L. Expanding the Panel to include non-Representatives

Currently, if a Representative is accused of harassment by a staff person, the accused will be judged by a Panel composed of fellow Representatives. This may create an impression that the “deck is stacked” against a complainant who is not a Representative. To address this, it has been suggested that the Panel include staff members. If this change is made, it is important to remember that only the House Rules Committee or the full House would be able to impose any disciplinary sanction upon a Representative. See, Vt. Const. Chap. II § 14 (The House of Representatives “shall have power to ... judge of the elections and qualifications of their own members”). It has also been suggested that the Panel be further expanded to include individuals who are neither Representatives nor staff. Under such a scenario, additional concerns such as confidentiality might be raised.

M. Allowing an appeal from key Panel decisions

Currently, there is no appeal from the Panel’s decision as to whether there is sufficient evidence of misconduct to support a potential violation of the Policy, whether to resolve the complaint with a confidential stipulation, whether to proceed to a hearing, or as to the Panel’s decision after that hearing. As noted above, in section III(H), the current policy may give the impression that the accused has more influence over some of these steps than the complainant. The Panel may wish to consider allowing parties to appeal certain

Panel decisions. Of course, if this is adopted, the Panel will have to determine to whom an appeal may be made and establish guidelines and procedures for any such appeal.

#### N. Alternative models

As this memorandum has made clear, there are a number of issues with the current Policy. Alternative models as to how to investigate and adjudicate complaints may be worth considering. For example, once a complaint is filed, the Panel is tasked with conducting an investigation. However, Panel members may not have the time, training, or experience to carry out this essential first step effectively. In addition, as noted above, there may be a perception that the accused has more influence over the process than the complainant. Alternative models might address some of these issues. For example, the House could contract with an attorney with experience in personnel-related investigations to gather evidence, interview witnesses, carry out an impartial investigation, and make findings of fact. These findings could be presented to the Panel for review and a decision as to how to proceed. Similarly, a neutral hearing officer could be required for all hearings, removing any perception of potential bias.

#### IV. **Conclusion**

We hope that the above suggestions are helpful. As noted in the introduction, our goal is to bring potential issues to your attention, and we are not necessarily advocating that all these ideas be adopted. We are very willing to assist the Panel in further exploring these ideas, and providing potential language, if this would be helpful. However, it must be emphasized that we are not experts on sexual harassment prevention policies, and it may be appropriate to consult an expert regarding best practices for workplace policies. In addition, according to media reports, the Executive Branch is reviewing its sexual harassment policy, and it may be worthwhile to review its work product.

Regardless of which, if any, changes are made, it is preferable to have identical House and Senate policies or one combined policy that covers all members and all staff. Although each body is independent, having two separate policies might create confusion. Finally, within the House of Representatives, it will also be important to ensure that sexual harassment complaints and complaints concerning other forms of harassment or discrimination are dealt with in a similar manner. As a result, the Prevention of Sexual Harassment Panel and the newly formed panel concerning discrimination should discuss where their jurisdictions may overlap and coordinate as to policies and procedures.