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Pennsylvania General Assembly Sexual Misconduct Policy Recommendations

Introduction

The sexual misconduct allegations currently plaguing the Pennsylvania State General Assembly are troubling and require an expeditious, thoughtful response. Yet, well over a year after a wave of #MeToo reports hit the legislature, very little has changed. The CSE Institute submits these recommendations as a response to the failure of our state government to self-regulate when it comes to sexual misconduct allegations.¹ Our team of student externs, research assistants, and full-time legal fellows spent over 60 hours reviewing the current policies, analyzing their adequacy, evaluating similar policies and legislation in other states, and compiling this report, which outlines our findings and recommendations. Our research demonstrates that the current policies and procedures to address sexual misconduct in the

¹ The Institute to Address to Commercial Sexual Exploitation (“CSE Institute”) at Villanova University Charles Widger School of Law is an internationally respected policy-generating organization that has partnered with numerous organizations united against sexual exploitation. While our primary mission is focused on sexual exploitation in the context of sex trafficking/prostitution, we recognize the interconnectedness of this form of commercial sexual exploitation and other forms, including workplace sexual harassment. Indeed, where the condition of one’s access to gainful employment includes being subjected to sexual harassment, there is a clear connection to commerce/economic activity and thus to commercial sexual exploitation. Moreover, the scope of our concern extends beyond workplace harassment, to include all forms of sexual misconduct, including non-workplace harassment, assault, and misconduct. As such, when asked to comment on best practices for the Pennsylvania General Assembly in addressing sexual misconduct amongst legislators and their staff, we agreed to research this issue and provide our recommendations.

Pennsylvania State General Assembly are cumbersome, obscure, insufficient, and impractical. Included in this report are extensive recommendations for the legislature to remedy the shortcomings in these current policies and procedures. If the General Assembly adopts these recommendations, it will take a significant step toward the goals of transparent governance, accountability, and victim-centered justice.

Sexual Misconduct in the Pennsylvania General Assembly

The problem of sexual misconduct in the Pennsylvania General Assembly is part of a larger pattern of sexual harassment throughout the government of the Commonwealth. Indeed, a Joint State Government Commission report recently revealed that in the last five years alone, almost 600 sexual harassment claims were reported by Pennsylvania state employees across the Commonwealth's various systems and agencies.² The report found that the total number of awards and monetary settlements exceeded \$1.9 million. As *The Caucus* reported in December 2017, the political environment in Harrisburg contributes to a culture that promotes sexual misconduct: “[T]he lack of workplace diversity, significant number of young adult employees, ‘gender power disparities,’ alcohol consumption ‘during and around’ work hours, crude jokes and banter [are ingredients for sexual harassment].”³

Multiple allegations of sexual misconduct in the Pennsylvania General Assembly suggest a culture of sexual harassment and violence in our state legislature that has gone unchecked.⁴

For example, in March 2018, Representative Nick Micarelli of Delaware County was accused of

² Joint State Government Commission, *Sexual Harassment and Misconduct in The Workplace: Survey of Claims and Policies in Pennsylvania Governmental Agencies: Staff Study* (June 2019), available at http://jsg.legis.state.pa.us/publications.cfm?JSPU_PUBLN_ID=485.

³ Paula Knudsen and Brad Bumsted, “The Culture of Silence.” *The Caucus*, pp. 6-9 (December 12, 2017).

⁴ In what follows, the term “sexual misconduct” will be used to refer both to workplace sexual harassment (where the Pennsylvania General Assembly is the relevant “workplace”) and to non-workplace sexual misconduct committed by Members of the Pennsylvania General Assembly and staff members employed by the General Assembly.

domestic violence and sexual assault.⁵ Although he denied wrongdoing, a state House investigation found the complaints credible and forwarded them to Dauphin County District Attorney.⁶ While the House was entitled under its rules “to launch an ethics investigation, strip Miccarelli of committee assignments, reduce his staff, or attempt to expel him” as a Representative, it chose not to do so. Instead, Miccarelli never faced disciplinary proceedings while in office and simply chose not to seek re-election. As such, he continues to receive benefits and (as things presently stand), he will also receive a generous pension.⁷

In another case, Representative Brian Ellis of Butler County, who is accused of drugging and sexually assaulting a woman at a bar in 2015, resigned in light of the allegations.⁸ In May, sources revealed to the media that a Dauphin County grand jury had been convened to investigate the allegations against Ellis.⁹ In yet another case, Representative Thomas Caltagirone of Berks County, also alleged to have engaged in sexual misconduct, entered into a settlement with his accuser, which included a non-disclosure agreement and included a \$245,000 payment to his accuser from a taxpayer-funded state insurance fund.¹⁰

⁵ Angela Couloumbis, Brad Bumsted and Paula Knudsen, “PA Rep. Nick Miccarelli, accused of abusing two women, to forgo reelection,” *Philadelphia Inquirer* (March 21, 2018), available at: http://www.philly.com/philly/news/politics/state/pennsylvania-rep-nick-miccarelli-physical-sexual-abuse-accusations-201an_80321.html

⁶ Angela Couloumbis & Brad Bumsted “Pa. House report: Accusers of Delco Rep. Nick Miccarelli 'credible',” *Philadelphia Inquirer* (March 16, 2018), available at: <https://www.inquirer.com/philly/news/breaking/rep-nick-miccarelli-pennsylvania-pa-house-investigation-accusers-credible-20180316.html>.

⁷ Jan Murphy, “After assault accusations, Rep. Nick Miccarelli to leave House post with benefits, pension intact,” *Penn Live* (November 28, 2018), available at: <https://www.pennlive.com/politics/2018/11/rep-nick-miccarelli-set-to-leave-house-post-with-benefits-pension-intact.html>.

⁸ Mark Scolforo, “Brian Ellis resignation requires special election for 11th House District in Butler County,” *Associated Press* (March 19, 2019), available at: <https://www.wtae.com/article/pennsylvania-state-rep-brian-ellis-resigns-butler-county/26860815>.

⁹ Angela Couloumbis and Brad Bumsted, “Grand jury now investigating ex-Pa. lawmaker accused of sexual assault,” (May 22, 2019), available at: <https://www.inquirer.com/news/brian-ellis-grand-jury-da-sexual-assault-20190522.html>.

¹⁰ Jen Fifield, “Why taxpayers pay when legislators are accused of sexual misconduct,” PBS News Hour (February 8, 2018), available at: <https://www.pbs.org/newshour/nation/why-taxpayers-pay-when-legislators-are-accused-of-sexual-misconduct>.

While not all cases of sexual misconduct involve sexual violence, the culture in the Pennsylvania General Assembly often lends itself to the risk and realities of sexually inappropriate conduct. For example, in a recent investigation conducted by the law firm Eckert Seamans into allegations against Senator Daylin Leach, investigators concluded that he repeatedly called one of his intern/employees “thong girl” (referring to her underwear).¹¹ Moreover, the report cited numerous allegations of “inappropriate sexualized comments” by Leach that, together, “could work together to form the basis of a hostile work environment claim.”¹² Although it did not expressly conclude that Senator Leach made all of the comments, investigators did warn that his conduct has “the potential to create a hostile work environment.”

Importantly, the report summary declined to offer any explicit conclusion regarding allegations against Senator Leach that he sexually assaulted the daughter of a client while in private practice before being elected to the Senate.¹³ According to the published summary of the report, investigators merely concluded that, “[u]ltimately, credibility disputes occasioned by the passage of time, among other things, may only be resolved through a contested hearing held under oath where witnesses are subject to either criminal or civil process, rules and sanctions.”¹⁴ While this is an accurate statement of the adjudicative process as it currently stands (where the only options are civil or criminal proceedings), it begs that question of the Pennsylvania Senate’s responsibility for creating a process in which witnesses are sworn under oath, and where the Senate can reach its own credibility determinations regarding these serious allegations. In this regard, it is noteworthy and concerning that Senators waited for *more than a year* to investigate these allegations and, now that the investigation is complete, they are merely calling on Senator

¹¹ Investigation into Allegations Against Senator Daylin Leach, Prepared for the Senate Democratic Caucus (June 5, 2019), available at: <file:///Users/michelledempsey/Downloads/Eckert%20Seamans%20PPT.pdf>.

¹² Id. at p. 16.

¹³ Id. at p. 22.

¹⁴ Id.

Leach to choose to step down of his own accord, rather than engaging in a process to evaluate the allegations and take action if discipline is warranted.

Despite growing concerns about the workplace culture in Harrisburg and the seriousness of the allegations leveled against members of the legislature, the General Assembly has not proven itself up to the task of conducting its own investigations and holding offenders accountable. In the remainder of this report, we will identify key failings in the current system and provide recommendations to improve the General Assembly's response to allegations of sexual misconduct.

Key Failings of the Current System

The General Assembly is desperately in need of an effective system to report, investigate, and respond to allegations of sexual misconduct involving Members and employees. Presently, there are five key areas in which the General Assembly has failed to adequately respond to such allegations. While some of these failures are more obvious in the House and some are more obvious in the Senate, it remains the case that neither chamber is adequately addressing the problem of sexual misconduct.

1. Lack of Transparency and Clarity in Existing Policies and Procedures

In researching how the Pennsylvania General Assembly addresses sexual misconduct allegations against its Members and/or staff, one of the most striking things we found was how difficult it was to find relevant information. To assess the quality of the current policies and procedures, one must first be able to access the relevant documents and identify the relevant actors who have the authority to enforce the current policies. Yet, the very task of locating such documents and identifying such persons presented a significant barrier in our research.

Moreover, once (some of) the relevant documents were identified, the lack of clarity in these documents made it impossible to determine with reasonable certainty just what policies and procedures govern the General Assembly's response to sexual misconduct.

When it comes to workplace sexual harassment, one would reasonably expect that the relevant policies and procedures would be found in an employee handbook. However, when the employer is a state government, there are numerous places where such policies may be documented. When it comes to Members, the ethics rules of the House and Senate set out a basic framework for how each chamber addresses allegations of misconduct. (More on this point below.) However, there may be additional policies and procedures that apply to members of the Democratic or Republican Caucus of each chamber. Further, when it comes to non-Members (*e.g.*, staffers), an employee handbook may establish different rules. Our use of the word “may” in the previous sentences is intentional: we can only assume that such employee handbooks exist, but they are not transparently available for inspection by the People of the Commonwealth of Pennsylvania. Meanwhile, when it comes to non-workplace sexual misconduct, there is either a failure to address such misconduct (discussed below), or at very least, there is a lack of clarity regarding the existing policies.

It is a basic principle of representative democracy that lawmakers should abide by the rule of law and be held accountable by the electorate. In order for lawmakers to abide by the rule of law, there must be clear rules that regulate their conduct while in office. Specifically, as it relates to sexual misconduct, there must be clear policies and procedures that lawmakers must follow in the wake of allegations of one of their number. Moreover, such policies and procedures must be made known to the public, so that the public can be assured that its lawmakers are being

held accountable when such allegations arise. Without a high degree of clarity and public transparency, it is impossible to ensure that our political institutions are governed by the rule of law, rather than the rule of men.

Through our research, we determined that there are ethical rules that apply to each chamber in the bicameral legislature: the House's¹⁵ and Senate's¹⁶ respective General Operating Rules, as well as a copy of the Senate's Ethical Conduct Rules.¹⁷ Yet, we also determined that these are not the only protocols in play when reporting and responding to instances of sexual misconduct in the General Assembly. Indeed, there are potentially four distinct protocols, across two parties and two chambers. We are aware that each respective caucus (Democratic and Republican) has additional rules that govern the conduct of caucus members and caucus employees in both the House and the Senate. Through our research, we obtained a copy of the Employee Handbook for the House Democratic Caucus but could not locate any similar document from the House Republican Caucus, Senate Democratic Caucus, or Senate Republican Caucus. None of these documents are available online, and while it may be possible to obtain them by filing a Right-to-Know Request, principles of transparency and accountability weigh strongly in favor of making such documents publicly accessible without requiring citizens to petition their government for this information.

¹⁵ <http://www.house.state.pa.us/rules.cfm>

¹⁶ <http://www.pasen.gov/rules.cfm>

¹⁷ <http://www.pasen.gov/rules.cfm?rules=ethical>

Below is a chart of the documents that the CSE Institute searched for, could not find, and in some cases, ultimately discovered and then analyzed:

House	Status	Senate	Status
Operating Rules	Accessible online ¹⁸	Operating Rules	Accessible online ¹⁹
Members' Handbook on Ethics	Inaccessible online	Ethical Conduct Rules	Accessible online ²⁰
Democratic Caucus Employee Handbook	Not available online, accessed via inside source	Democratic Caucus Employee Handbook	Inaccessible online
Republican Caucus Employee Handbook	Inaccessible online	Republican Caucus Employee Handbook	Inaccessible online
Legislative Code of Ethics	Accessible Online ²¹		

In addition to the lack of transparency regarding the policies and procedures that govern the Pennsylvania General Assembly's response to sexual misconduct, there is an abysmal lack of clarity in those policies and procedures that are publicly available. The lack of clarity extends both to the substantive conduct that is regulated by the policies, and the procedures by which complaints may be initiated.

¹⁸ <https://www.house.state.pa.us/rules.cfm>

¹⁹ <https://www.pasen.gov/rules/2011SenEthicalRules.html>

²⁰ <https://www.pasen.gov/rules/2011SenEthicalRules.html>

²¹ <https://www.legis.state.pa.us/WU01/LI/LI/US/PDF/1968/0/0154..PDF>

First, when it comes to the *substantive* conduct regulated by the policies, the Senate Ethical Conduct Rules are unclear regarding whether sexual misconduct is covered, and if so, to what extent. Indeed, the following words and phrases are not found anywhere in the 2019-2020 Senate Operating Rules, nor are they found in the 2019-2020 Senate Ethical Conduct Rules: “sex”, “sexual misconduct”, “sexual harassment”, “sexual assault” or even simply “harassment”. In sum, the Pennsylvania Senate currently does not have a specialized protocol for reporting and responding to instances of sexual misconduct.

Second, there is a concerning lack of clarity regarding the *procedures* by which complaints may be initiated. While both the Senate and House Operating Rules explain how each respective Ethics Committee may *respond* to a complaint, there are few details regarding how a complaint can be *initiated* by a victim. For example, House Rule 3.E states that the Ethics Committee “may receive complaints against Members and House employees alleging unethical conduct under the Legislative Code of Ethics [46 P.S. § 143.1] or the Rules of the House, and complaints against Members and officers of the House for violations of Rule 2.1 E.” The Rules fail, however, to explain the process of filing such complaints—beyond merely noting that complaints must be in writing, signed by the person filing the complaint, and that it must set forth in detail the actions constituting the ethical violation. Given that the House Ethics Committee has the power to dismiss a complaint if it “is insufficient as to form,” it should provide more details as to the proper form of a complaint. To whom and/or where should a

victim submit the complaint?²² What details must be set forth in the complaint? Is there a template for victims to use if they are complaining without counsel?

The current reporting and response procedures in the Senate Operating Rules reflect similar ambiguities and inadequacies. Senate Rule 34(c) states that, “The committee shall receive complaints against any Senator alleging unethical conduct in violation of a Senate Rule, statute, or constitutional provision governing the ethical conduct of a Senator.”²³ The “form” of complaint must meet the same basic requirements as a complaint in the House. However, the Senate’s failure to specifically prohibit sexual misconduct and harassment in its Operating Rules or Ethical Conduct Rules makes filing such a complaint to the Senate difficult, since victims cannot point to a specific “sexual misconduct” rule in any Senate Rule.²⁴ As such, the process of alleging sexual misconduct by a Senator or Senate Officer puts victims in a difficult position. In addition to navigating the personal and social consequences of disclosing sexual misconduct or harassment, they have to find a way to make their complaint legally sound and perhaps must confer with counsel. This can be costly and time-consuming for victims who simply want to live free from sexual harassment and misconduct by their state legislators.²⁵

²² On this point, we note that the Senate Standing Committee website does not include any information regarding the Committee on Ethics. It lists contact information for 22 committees – from Aging and Youth to Veterans Affairs – but it provides no information regarding the Committee on Ethics.

²³ To their credit, the Senate rules do not require a formal complaint to be filed. Rule 34(i) provides: “In addition to action on formal complaints as provided in subsection (c), a majority of the members of the Senate Committee on Ethics may initiate a preliminary investigation of suspected unethical conduct in violation of a Senate Rule, statute, or constitutional provision governing the ethical conduct of a Senator.” That is, unlike the House, the Senate Ethics Committee does not need a formal filed complaint in order to investigate the unethical conduct of one of its senators; it may do so *sua sponte*.

²⁴ In cases of workplace sexual harassment prohibited by Federal law (Title VII) and State law (Pennsylvania Human Relations Act), these statutes may be cited

²⁵ These procedures are also far more arduous and demanding than is typical in the private sector, where employees who experience sexual harassment can report the conduct to a manager or supervisor, who is then charged with the responsibility of ensuring that the harassment is addressed.

Finally, there is an inexcusable lack of transparency when it comes to identifying the actors who are responsible for enforcing the ethical rules in the Senate.²⁶ Per Rule 34 of the Rules of the Senate, “there shall be a Senate Committee on Ethics which shall be composed of six members appointed by the President Pro Tempore.” However, on the website of the Senate’s Standing Committees, there is no information about the Committee on Ethics.²⁷ Moreover, on the Senate website that lists the committee assignments for each Senator, *not one single Senator is listed as a member of the Committee on Ethics.*²⁸ Indeed, it was only through contacting the office of President Pro Tempore, Senator Joseph Scarnati, that we were able to identify the members of the current Committee on Ethics.²⁹ This utter lack of transparency about the crucial issue of ethics in the Commonwealth’s Senate is indefensible.

In sum, the Pennsylvania General Assembly lacks transparency and clarity in both substance and procedure regarding what constitutes sexual misconduct and how it will respond to such misconduct. This lack of transparency and clarity violates the rule of law, leaves our lawmakers free to engage in misconduct without accountability, and presents unreasonable burdens on victims seeking justice.

2. Lack of Accountability

Under the current policies and procedures, Members of the House of Representatives and Senate can effectively avoid accountability by simply resigning from their positions. As the case of Representative Nick Micarelli demonstrates, a Member accused of serious sexual misconduct

²⁶ This problem does not apply to the House.

²⁷ <https://www.legis.state.pa.us/cfdocs/CteeInfo/StandingCommittees.cfm?CteeBody=S> (last accessed, July 11, 2019)

²⁸ https://www.legis.state.pa.us/cfdocs/legis/home/member_information/senators_ca.cfm (last accessed, July 11, 2019).

²⁹ According to an email received in response to our request, we learned that the current members of the Senate Committee on Ethics include Senators Yaw (Chair), Blake, A. Williams, Tartaglione, Gordner, and K. Ward.

and domestic violence can avoid accountability in the House by retiring – all the while retaining a generous taxpayer-funded pension and benefits. There is nothing in the current rules that require credible allegations to be investigated, or to impose any form of discipline on those who have been found to have engaged in sexual misconduct. So, too, consider the case of Senator Daylin Leach – in which the Senate waited for more than a year from the time the allegations were made public before launching an investigation. This case illustrates the current system’s propensity to ignore allegations of sexual misconduct until political pressure builds. There is simply nothing in their own ethical rules to require action in the face of a credible allegation. Indeed, even now, upon receipt of a report from the lawyers retained to investigate the allegations against Senator Leach, it seems unlikely that the complainant(s) in his case will obtain due process required to present their allegations under oath in a formal hearing before the Senate.³⁰

3. Failure to Address Non-Workplace Sexual Misconduct

As noted above, the precise scope of what constitutes grounds for investigating and disciplining a Member of the Pennsylvania General Assembly for sexual misconduct remains indefensibly vague (especially in the Senate, where the ethical rules do not even mention anything relating to sexual misconduct). That said, it seems fairly clear that current rules are primarily focused on *workplace* sexual harassment (such as those promulgated in House Ethics Rules 2.1 E – which is limited to workplace sexual harassment).

Yet, elected officials should be accountable for their sexual misconduct where ever and whenever it occurs. The policies and procedures designed to deter such conduct, investigate

³⁰ As noted above, the law firm retained to investigate this matter noted that “[u]ltimately, credibility disputes... may only be resolved through a contested hearing held under oath where witnesses are subject to either criminal or civil process, rules and sanctions.”

allegations, and discipline offenders should not be limited to the “workplace” sexual misconduct (harassment), for two reasons.

First, it is notoriously difficult to determine and clearly define what counts as the “workplace” for Members of the General Assembly. Clearly, conduct in their offices with staffers counts as conduct in their “workplace.” So, too, would work conducted on the House or Senate floors with fellow Members, work conducted in Committee meetings, etc. Yet, what about fundraising events? Meetings with constituents? Attending parades and ribbon cutting ceremonies? The problem is evident: our elected legislators are always working for the People of the Commonwealth during their terms in office. As such, it makes little sense to sharply delineate their sexual misconduct “in the workplace” from their sexual misconduct elsewhere.³¹

Second, elected officials should be held to a higher standard of conduct than private citizens. Sexual misconduct by private citizens calls for accountability only when it is prosecuted as a criminal offense (*e.g.*, sexual assault charges) or a civil cause of action (*e.g.*, suit filed under Title VII or the Pennsylvania Human Rights Act for workplace sexual harassment). However, Members of the General Assembly should be held accountable for their sexual misconduct even when criminal charges are not brought, and civil proceedings are not pursued. Consider a case in which a Representative or Senator engages in commercial sexual exploitation, buying sex from a prostituted-person, yet the local prosecutor declines to prosecute. Clearly, the Member should be held accountable to the House or Senate (and, by extension, by the citizens represented by those Members of the House or Senate). This accountability should ensue irrespective of the local prosecutor’s discretionary choice to decline charges. Similarly, conduct that would constitute

³¹ Perhaps for this reason, HB 1000 of 2019 (discussed below) declines to define “workplace” and attempts to delineate the scope of the sexual harassment policy in terms who is an “employee.” As discussed below, we are concerned that this limitation unduly narrows the proper scope of accountability for Members of the General Assembly.

sexual harassment if it were committed within the Member's workplace should be regarded as sexual misconduct and form the basis for accountability for our elected officials. Consider a case in which a Representative or Senator engages in harassing conduct toward a waitress at a restaurant, or simply someone with whom he shares an elevator ride. The Member makes lewd and sexually inappropriate comments about the woman's body and repeatedly propositions her despite her lack of interest. This sort of conduct does not constitute workplace sexual harassment, because it does not occur in the Member's workplace. Yet, clearly, the Member should be held accountable to the House or Senate and, if the conduct cannot be adequately justified or excused, the Member should face discipline by his respective chamber of the General Assembly.

4. Inadequate Timeframes for Reporting

Under current policies and procedures, the time limits for reporting sexual misconduct under the House and Senate rules are too short. In the House, there is a five-year limit for reporting unethical conduct, including sexual harassment.³² In the Senate, the time limitation is not clear, since there are no ethical rules explicitly addressing any kind of sexual misconduct. Rather, the Senate ethical rules concern mostly financial and campaign ethics. With respect to those ethical rules, there is a one-year time limitation.³³ As applied to reports of sexual misconduct, these time limitations are unjustified insofar as it will deny recourse to many victims of sexual misconduct, who often bring claims many years after their victimization. There are many factors that can prevent a victim from making a timely report of sexual harassment.

³² *Ethical and Professional Conduct Rules of The House of Representatives*, Rule 3 E: "The Committee shall not have jurisdiction over, shall not accept for review or action and shall return to the complainant with a notice explaining the Committee's lack of jurisdiction... a complaint filed later than five years following the occurrence of the alleged unethical conduct or violation..."

³³ *Ethical Conduct Rules of the Senate, Rule 3(a)(4)*: "A report of a possible violation of these rules must be filed within one year of the alleged conduct."

Victims of sexual misconduct may not feel comfortable bringing a claim at the time of an incident for fear of retaliation, shock and disbelief, or other challenges generated by trauma. One can surmise that especially in cases where the accused has held office for decades, a victim would feel powerless to come forward. As such, there should not be a time limitation for reporting sexual misconduct committed by a Member of the House or Senate.

5. Inadequate Confidentiality Protections

The House rules are the only ones that address victim confidentiality. (As noted previously, the Senate rules do not even address any form of sexual misconduct.) While the House Rules call for general confidentiality protections for victims, they are deficient in two respects. First, under the House Ethics Rule 3 E, the Ethics Committee “may make an appropriate referral of a complaint to a law enforcement agency at any point in the proceedings.” There is nothing in the rule to protect victim confidentiality, since this referral to law enforcement can be made with or without the consent of the victim. This rule thus compromises confidentiality and should be amended. Second, the rule allows for identification of the victim and the facts of the allegation, without the victim’s consent, “to Members, Officers of the House or House employees as needed in order to implement...adjustments,” such as making changes to the complainant's or the accused’s “work hours, assignment or duties or location.” This exception to the general rule protecting victim confidentiality is further evidence that the legislature lacks a victim-centered approach to allegations of sexual misconduct, and opens the door for an employer to disclose information to other employees in the interest of institutional efficiency.³⁴ A breach of the complainant’s confidentiality should never be necessary to

³⁴ Other states have adopted victim-centered approaches to confidentiality. For example, Massachusetts’ legislation states that individuals working on a complaint are obligated to ensure that “all assessments, investigations and

effectively address allegations of workplace sexual misconduct. The current rule risks exposing the victim's identity and factual allegations in the complaint, which could have a chilling effect on future reports of sexual harassment.

Recommendations

In light of the key failings of the current system discussed above, we recommend the following:

We recommend that the ethical rules of the House and Senate be revised so that everyone (including the Pennsylvania electorate) has access to transparent and clearly stated policies regarding what conduct is prohibited. Moreover, the procedures for enforcing such rules should be revised so that victims can clearly understand precisely how to raise concerns regarding sexual misconduct without requiring advice from legal counsel.

We recommend, with respect to securing remedies for victims of workplace sexual harassment, that a process similar to that outlined in HB 1000 of 2019 be adopted. This bill provides for a transparent and clear process for addressing workplace sexual harassment, and provides important protections and remedies for victims. However, insofar as it is limited to workplace sexual harassment and, more specifically, protecting employees of legislative agencies, we view it as an incomplete solution to the general issue of sexual misconduct in the General Assembly.

We are broadly in support of HB 1000 of 2019, although we would suggest the following amendments in order to maximize protection against workplace sexual harassment:

reports are confidential to the fullest extent practicable under the circumstances.” 2017 Massachusetts House Bill No. 4311, 190th General Court of the Commonwealth of Massachusetts.

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- We recommend that HB 1000 include a statement that sexual harassment, as defined in the bill, may occur within or outside regular working hours and regular working locations, and may be committed by Members, employees of legislative agencies, third-party vendors or contractors, visitors, or any individual the employee encounters in the workplace setting.³⁵
- We recommend revising the definition of “Party” in §2103 such that it encompasses any person who is the subject of a complaint, rather than only an elected official who is the subject of a complaint.
- We recommend revising §2105 to strike the retaliation exception for “employee[s] who [are] the subject of a complaint or against whom a civil action has been filed.”
- We recommend §2113(c) be amended to make clear that, by pursuing a complaint via the procedure set forth in HB 1000, an employee is in no way limited from pursuing a complaint with the Equal Employment Opportunity Commission, Pennsylvania Human Relations Commission, or applicable local agency, or from pursuing civil action in a court of law. HB 1000 already acknowledges that, by filing a complaint, an employee will not be prohibited from speaking to law enforcement about alleged criminal conduct.
- We recommend §2114(a)(3) be amended to limit the distribution of complaints to only the Chair of the caucus, in order to maintain confidentiality.

³⁵ Both Colorado and Massachusetts have expansive definitions of “third party,” such that legislative employees in Massachusetts are protected from sexual misconduct by “any person visiting the House of Representatives, or conducting official business or work with any member, officer, or employee of the House,” and employees in Colorado are protected from sexual misconduct by “any newsperson, lobbyist, and member of the general public who is doing business with legislative service agencies, the Senate, or the House of Representatives.” Interim Workplace Harassment Policy of the Colorado General Assembly. Nov. 8, 2018; 2017 Massachusetts House Bill No. 4311, 190th General Court of the Commonwealth of Massachusetts.

- We recommend §2114(e)(3) be amended to specify that the complainant may bring an individual to the hearing for support, and that other parties (including the accused) may bring an individual to the hearing for support at the discretion of the hearing officer.
- We recommend §2114(h)(1)(i) be amended to specify that the identity of the complainant shall be confidential.
- We recommend, regarding §2114(h)(2) and §2126(c), that the default position should be to redact the complainant’s name and any facts that might lead to identification of the complainant, rather than redacting this information only upon the complainant’s request.
- We recommend that §2122 be revised to make clear that (1) out-of-pocket costs associated with seeking counseling will be covered, and (2) an employee can seek treatment from a duly licensed psychologist or therapist of his or her choosing, without limitation to a therapist “trained in psychological issues arising out of subsection by the employee to sexual harassment constituting a violation” of HB 1000.

We recommend that §2131 be revised to require the training program to include information regarding other available remedies for victims of sexual misconduct, including pursuing (1) a complaint with the Equal Employment Opportunity Commission, Pennsylvania Human Relations Commission, or applicable local agency, (2) civil action in a court of law, or (3) a criminal complaint with the appropriate law enforcement agency.

We recommend, with respect to holding Members accountable for sexual misconduct generally, that an Independent Legislative Conduct Review Board for both the House and Senate be established. This Review Board will provide accountability for non-workplace sexual misconduct, as well as impose discipline for sexual misconduct committed by Members. We are broadly supportive of the proposal outlined in the Senate and House Co-Sponsorship Memoranda filed by Senator Lisa Baker and Representative Tarah Toohil.³⁶ Such a review board would have “jurisdiction over allegations against Senators and House members for unethical conduct in violation with any rule, statute or constitutional provision governing the ethical conduct of legislators.” The review board should have the “power to receive complaints, investigate them, and render judgment as to their credibility.” While the co-sponsorship memoranda do not mention it explicitly, the review board should also have the power to issue subpoenas and administer oaths to witnesses. Importantly, in populating the Review Board, it is crucial that both experts in sexual misconduct and lay persons be appointed. This way, Members will no longer be able to delay, obscure, and ignore sexual misconduct by those in their ranks.

We recommend that information regarding the Legislative Conduct Review Board (including membership, meetings, and any internal procedures) be made publicly available online, along with clear and uncomplicated directions for filing complaints.

³⁶ Senator Lisa Baker, Senate Co-Sponsorship Memoranda, “Legislative Conduct Review Board” (February 1, 2019);

We recommend that the Legislative Review Board have jurisdiction over allegations of sexual misconduct by a sitting Member, even when the misconduct occurred prior to his taking office.³⁷

We recommend that the Legislative Review Board have jurisdiction over allegations of sexual misconduct by a former Member who is still receiving a pension or other benefits from their time as a sitting Member.³⁸

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³⁷ For example, the Review Board should have jurisdiction over the allegations against Senator Daylin Leach and they should not be deemed time-barred. Even in the absence of a Legislative Conduct Review Board, we recommend that the Senate Ethics Committee follow the process outlined in Rule 34 of the Senate Operating Rules, which provides for a formal investigation and hearing in which the “Chair of the committee may administer oaths or affirmations, examine and receive evidence, or rule on any objections raised during the course of [the] hearing.” This process would allow for the credibility determinations noted above, as called for in the summary report by Eckert Seaman (“credibility disputes occasioned by the passage of time, among other things, may only be resolved through a contested hearing held under oath where witnesses are subject to either criminal or civil process, rules and sanctions.”).

³⁸ For example, the Review Board should have jurisdiction over the allegations against Representative Nick Micarelli and, if the allegations are proven, the General Assembly should have the authority to revoke some or all of the benefits he continues to receive due to his time as a sitting Representative.