Report and Recommendations

Oregon Law Commission

Oregon State Capitol Workplace Harassment Work Group

EXECUTIVE SUMMARY

True workplace equity has yet to be realized. Statutes have long prohibited harassment and discrimination in workplaces and places of public accommodation, but even a cursory review of news reports and social media feeds demonstrates that the fight against harassment and discrimination is ongoing. To address this issue at home, Oregon's legislative leaders have asked the Oregon Law Commission to recommend ways to make the Oregon State Capitol a model workplace where everyone feels safe and can participate freely in the democratic process.

In response to this charge, the Commission appointed the Oregon State Capitol Workplace Harassment Work Group. Work Group members possessed a broad range of experience and professional expertise: employment lawyers representing employees and management, former legislators and legislative staff, registered lobbyists, a retired Oregon Supreme Court justice, an academic in the field of implicit bias, and several professionals with extensive experience preventing and responding to harassment in professional and educational settings. Work Group members invested a substantial amount of personal and professional time in the project over the course of seven months.

The Work Group conducted an extensive outreach program, creating and publicizing multiple ways in which interested persons could engage the Work Group, including through the submission of anonymous comments. The members of the Capitol community who participated were consistent and clear: Systematic procedural and cultural reform is needed.

The enclosed report includes specific recommendations that are intended to address both sides of the reform equation: cultural change and enforcement. The report also proposes an implementation schedule, contemplating the adoption of certain improvements immediately, while recognizing that other changes will require longer-term commitment. Although Work Group members represented a broad array of constituencies, they adopted the majority of the enclosed recommendations unanimously. The Work Group believes that these sound and balanced steps would help change culture, provide avenues for addressing harassment when it happens, protect the rights of complainants and respondents in harassment cases, and ultimately continue and improve upon legislative leaders' ongoing efforts to create a safer and more welcoming State Capitol.

To the extent there is a single, take-home point underlying this report, it is this: The strongest policy imaginable will ultimately be ineffective unless and until there is a genuine and sustained effort to change the Capitol culture. Given the power dynamics in the State Capitol, cultural change must begin with—and can only be sustained by—the Capitol's most powerful leaders. While the Oregon Law Commission and its Work Group can only make recommendations, the ability to take real, concrete steps towards true equity lies with the 80th Legislative Assembly.

TABLE OF CONTENTS

I. The Legislative Request

In 2017, two Oregon state senators filed formal complaints alleging sexual harassment by another senator. An investigation determined that the accused senator had engaged in harassment, but the senator ultimately resigned before the complaints could be formally resolved by the Senate. In response to these local events and to the national rise of the #metoo movement, Senate President Peter Courtney and House of Representatives Speaker Tina Kotek asked the Oregon Law Commission for help in their effort to make the Oregon State Capitol a model workplace where everyone feels safe and can work without fear of harassment. The Presiding Officers asked the Commission to advise the Legislative Assembly on how best to revise its laws and policies related to workplace harassment. The formal request laid out several specific tasks. Specifically, the Commission was asked to:

- Review the Legislative Assembly's legal ability to discipline members of the Legislative Assembly for misconduct, including whether the Oregon State Constitution may or must be amended to facilitate timely discipline.
- Review the Legislative Assembly's legal ability to impose intermediate safety measures when a member is accused of misconduct, including restrictions on the time, place, and manner of a member's access to the State Capitol.
- Review the laws and rules that govern harassment among members and employees of the Legislative Assembly, lobbyists, and members of the public, including complaint processes and procedures that will protect persons who file complaints from retaliation.
- Make recommendations for adding to, amending, or otherwise improving the adequacy, clarity, effectiveness, timeliness, and other relevant aspects of the constitutional provisions, statutes, rules, policies, and procedures that govern the Legislative Assembly's ability to prevent and respond to workplace harassment.
- Make any other recommendations that in the Commission's professional judgment will better enable the Legislative Assembly to create and maintain a workplace that is free of harassment.
- Engage and provide an adequate and significant opportunity for legislators, employees, lobbyists, and members of the public to provide input into the Commission's review, examination, and recommendations.

The Commission was asked to conduct this review on an expedited schedule and to report back to the Presiding Officers no later than December 31, 2018.

II. The Oregon Law Commission

The Oregon Law Commission is uniquely suited to consider the complex legal issues surrounding harassment in the State Capitol. Established in 1997 for the purpose of conducting a continuous program of law reform, the Commission is comprised of representatives from all three branches of state government—trial and appellate judges, current and former legislators, the Attorney General, and a gubernatorial appointee—as well as representatives from the Oregon State Bar and Oregon's law schools.

On April 17, 2018, the Commission accepted the Presiding Officers' request and entered into a Memorandum of Understanding concerning the work. Thereafter, the Commission promptly

appointed the Oregon State Capitol Workplace Harassment Work Group. The Work Group included employment lawyers representing employees and management, former legislators and legislative staff, registered lobbyists, a retired Oregon Supreme Court justice, an academic in the field of implicit bias, and several professionals with extensive experience preventing and responding to harassment in professional and educational settings. Fully constituted, the Work Group was comprised of the following individuals:[1]

- P.K. Runkles-Pearson, Chair—Oregon Law Commission Member, partner, Miller Nash Graham & Dunn LLP
- Representative Vicki Berger—Oregon House of Representatives (2003-2014)
- Representative Terry Beyer—Oregon House of Representatives (2001-2012)
- Mark Comstock—Oregon Law Commission Member, Garrett Hemann Robertson P.C.
- Dr. Erik Girvan—Associate Professor and Co-Director of the Conflict and Dispute Resolution Program University of Oregon School of Law
- Elizabeth Howe—president, Howe Public Affairs
- Scott Hunt—partner, Busse & Hunt
- Wendy Johnson—League of Oregon Cities, former deputy director of the Oregon Law Commission
- Amy Klare—Civil Rights Division, Oregon Bureau of Labor and Industries
- The Honorable Jack Landau—Oregon Supreme Court (2011-2017), Oregon Court of Appeals (1992-2011)
- Dr. Melody Rose—Marylhurst University President and former Chancellor of the Oregon University System
- Jackie Sandmeyer—TIX Education Specialists
- Carolyn Walker—Stoel Rives LLP, and then counsel at Portland General Electric
- Angela Wilhelms—University of Oregon

III. Public Involvement in the Work Group's Process

The composition of the Work Group reflected the Law Commission's view that a collaborative response from a diverse group of professionals would be most beneficial to the project. The Work Group similarly sought to hear the full range of stakeholder opinions and spent considerable time discussing ways to learn about and from the Capitol community. The underlying goal was to ascertain basic factual information, while also hearing first-hand reports about Capitol culture and any concerns with the existing harassment policy.

In seeking to cast a broad net and welcome as many perspectives as possible to the discussion, the Work Group recognized a fundamental difficulty: Many individuals may have relevant information to share, but would prefer not to engage in a public process. As multiple Work Group participants noted—in multiple contexts and at multiple times—there is a cultural view that openly discussing workplace harassment can limit one's future professional opportunities.

These considerations led the Work Group to implement a multi-pronged outreach effort. In addition to inviting formal written testimony, the Work Group created a mechanism for

[1] Additional biographical information is included in Attachment C.

interested persons to anonymously submit comments on the Commission website. The Work Group posted the formal written testimony on the Commission website and began each of its public meetings with a summary of any new written testimony or anonymous comments. The Work Group solicited public testimony at two public hearings held in the State Capitol: an initial opportunity to provide the Work Group with information and a subsequent opportunity to respond to the Work Group's preliminary recommendations. Throughout the course of the project, the Work Group regularly published and disseminated draft versions of these recommendations and invited the public to respond through any of the above-described methods. The Work Group widely published all of these mechanisms for public comment, along with its meeting times—including times for subgroup meetings—and made its deliberations publicly available by streaming video, by telephone, and by welcoming visitors who attended meetings in person.

The Work Group also sought to learn from the experiences of those involved in the recent workplace harassment complaint and investigation at the State Capitol. It specifically invited testimony from the parties and their attorneys, the investigator, the Legislative Counsel and the legislative Human Resources department. The Commission and its Work Group are grateful for each and every person who was able to provide information.

IV. Factual Background

A. The Capitol, Its People, and Its Culture

The Capitol is not just a workplace for legislators. The Legislative Assembly employs both partisan and nonpartisan staff, while also providing opportunities for interns, volunteers, and pages to gain professional experience. In addition to being a workplace, the Capitol is a public place that welcomes contractors, vendors, executive and judicial branch officials, professional lobbyists, constituents, and other Capitol visitors. The Work Group recognized that any of these people could either engage in or experience harassment, and that the widely varying power dynamics between and among these groups make the Capitol a particularly complex workplace.

Power differentials are unavoidable in any workplace, but they are amplified exponentially in the Legislative Assembly. This is, unfortunately, a function of any legislative environment. Decisions made by legislators can have a profound impact on the health, safety, and financial well-being of all Oregonians. Individual legislators can wield enormous power within this decision-making process. Unlike the staffers who surround them, legislators cannot be fired or disciplined by their employer, at least not in any traditional sense. They are elected and, given their role in our constitutional democracy, the law limits the circumstances under which they can be removed from office.

Legislators hire staff to help carry out their legislative duties on behalf of constituents. Such "partisan staff" who work directly for legislators hold a different place in the power structure than "nonpartisan staff" who work for the Legislative Assembly as a whole. Work Group participants noted that the power exercised by partisan and nonpartisan staff can vary widely. In some instances, both partisan and nonpartisan staff may exert real influence on the passage of legislation. At the opposite end of the spectrum, lower-level staffers, interns, volunteers, and pages may be particularly vulnerable to abuses of this power.

Third parties can also exercise widely varying degrees of power. Both public and private sector lobbyists are fixtures in the workplace and regularly influence legislation and, in some cases, the outcome of elections. The same is true of nonlegislative branch officials who have offices or otherwise regularly work in the Capitol.

Throughout the process of creating a recommended harassment policy, Work Group participants sought to recognize and account for these power imbalances in a constitutionally thoughtful way. One point, however, must be emphasized—the strongest policy imaginable will ultimately be ineffective in eradicating discrimination from the Capitol, unless and until there is a real effort to change culture. Given the power dynamics just discussed, cultural change must begin with—and be sustained by—the Capitol's most powerful leaders.

B. Rule 27—Identified Concerns

Legislative Branch Personnel Rule 27 currently governs harassment in the State Capitol. While the rule recognizes the obligation of the Legislative Assembly to prevent and correct harassment from any source, formal complaints under the rule may only be filed by legislators and legislative employees, interns, or volunteers. No other person who experiences harassment in the State Capitol may file a formal complaint under the current policy. Similarly, the complaint process does not protect legislators and legislative employees from harassment by people other than legislators or legislative employees. Anecdotally, legislative staff described experiences involving both complainants and respondents beyond the reach of Rule 27.

Rule 27 includes two methods of addressing workplace harassment claims: a formal complaint process and an informal reporting process. The rule describes the informal reporting process as an avenue available to persons who "simply want particular conduct to stop, but may not want to go through a formal complaint process or legal proceeding." While this goal is certainly laudable, and the Work Group was sensitive to staff reports that the informal process frequently resolved issues in a manner satisfactory to all, the Work Group discussed a number of criticisms about informal reports. Specifically, Work Group participants were informed, or themselves noted, that the informal reporting process:

- Failed to clearly describe the circumstances under which the report would or would not remain confidential.
- Failed to require the maintenance of relevant records.
- Failed to clearly describe the circumstances under which the respondent would be provided with notice of the allegations.
- Without more, could not lead to discipline of a legislator.
- Operated to delay, and potentially muddle, subsequently filed formal complaints.

Legislative staff did emphasize one significant benefit of informal reports: Rule 27 contemplates the possibility that a reporter of harassment may remain anonymous. The Work Group considered this a significant benefit. As legislative staff and Work Group participants frequently noted, anonymity is a significant concern for many potential reporters; providing anonymity leads to an increase in reporting incidents of harassment. Many have speculated that complainants infrequently use the formal complaint process because it contains no mechanism for anonymity.

Rule 27 also allows for formal complaints, which trigger an investigatory process. When a formal complaint is filed against a legislator, Rule 27 prohibits legislative employees from investigating that complaint. For complaints against all other personnel, the rule allows discretion in selecting an investigator. The investigator makes preliminary factual findings that may be modified by legislative staff. The investigator also directs all legislators and employees involved in the investigation to keep information confidential. The rule recognizes that some complainants may wish to remain anonymous, while also noting that legislative records are subject to public records requests.

If the respondent is a legislator, Rule 27 contemplates a meeting of the Conduct Committee that may result in only four possible outcomes: reprimand, censure, expulsion or no action. Finally, the rule requires a two-thirds supermajority for either chamber to impose any sanction. The Work Group identified a number of issues with this process that would benefit from additional review:

- Should there be a truly confidential reporting mechanism?
- Who should investigate allegations of harassment, and who should appoint the investigator?
- Should the investigator be limited to finding facts, or should the investigator also determine whether those facts constitute a policy violation and make recommendations regarding remedial measures?
- Is it appropriate to allow the Office of Legislative Counsel or Human Resources to make corrections to an investigator's findings of fact?
- Can the timelines, from investigation to the determination of whether a remedial measure should be imposed, be streamlined?
- Should remedial measures, other than expulsion, require a two-thirds vote of the chamber?
- Should the scope of remedial measures be expanded or clarified?

While Rule 27 is perhaps imperfect, it should be noted that the National Conference of State Legislatures has cited it as an example of a strong legislative harassment policy.

V. Legal Background

Although the Work Group had broad latitude to recommend improvements, the scope of its charge was narrow: To focus on forward-looking improvements to internal policy in a single workplace. Nonetheless, the laws that cabin the Work Group's recommendations are complex and touch on the very foundations of our constitutional democracy. To create an enforceable harassment policy in a legislative environment, the Work Group needed to consider more than just the requirements of antidiscrimination laws that govern workplaces and places of public accommodation. The Work Group also thoughtfully considered a variety of other important legal issues, including civil liberties protected by the Oregon and federal constitutions, the separation of governmental powers, the extent of the Legislative Assembly's prerogative for internal self-government, and the rights of constituents to meaningful representation. The Work Group also reviewed how states across the country have addressed similar issues in their legislatures. While the Work Group thought it unnecessary to submit a legal treatise explaining

the nuances of all of these sources of law, a brief synopsis of the key issues here may provide useful context.

A. Anti-Discrimination Law

A variety of antidiscrimination laws protect visitors to places of public accommodation and the employees who work there. For example, relevant Oregon statutes include ORS 659A.403 (barring discrimination in public accommodations because of race, color, religion, sex, sexual orientation, national origin, marital status, or age), ORS 659A.030 (barring discrimination in employment because of the same protected statuses), ORS 659A.142 (barring discrimination in public accommodations because of disability), and ORS 659A.112 (barring discrimination in employment because of disability). Other statutes bar discrimination on the basis of many other protected characteristics.

The Work Group also had extended discussions about Title IX of the Education Amendments Act of 1972, 20 U.S.C. §1681 *et seq*. (Title IX), which prohibits discrimination based on sex in educational programs and activities. While Title IX does not apply to the Legislative Assembly, the experiences of colleges and universities in implementing Title IX served as a partial model for components of the Work Group recommendations. For many years, colleges and universities have been at the forefront of identifying and responding to sexual harassment, and many Work Group participants have real-world experience in this context. The ability to build upon the broader experiences of these institutions and individuals working to eliminate harassment was invaluable.

B. Legislative Authority Under the Oregon Constitution

The Work Group spent considerable time contemplating two, related provisions of the Oregon Constitution. First, Article IV, section 11 of the Oregon Constitution (the Rules of Proceeding Clause) provides that "[e]ach house when assembled, shall…determine its own rules of proceeding. . .". Second, Article IV, section 15 of the Oregon Constitution (the Punishment Clause) provides that "[e]ither house may punish its members for disorderly behavior, and may with the concurrence of two thirds, expel a member; but not a second time for the same cause." Notably, these provisions grant authority not to the Legislative Assembly as a whole, but to each "house" individually—the Senate and the House of Representatives.

Although there is very little judicial guidance in Oregon on these provisions, there are substantially similar provisions in the federal constitution and nearly all of the other 49 state constitutions. The Work Group reviewed a number of appellate cases and procedural records from these other jurisdictions, in an effort to ascertain the likely scope of the Oregon Constitution. See Attachment E (Constitutional Subgroup Recommendations).

In the Work Group's view, the Rules of Proceeding Clause and the Punishment Clause should not be viewed in isolation, but as part of the overall constitutional principle of separation of powers. This principle is one of the defining characteristics of American representative democracy. Our constitutional framers recognized that consolidated power can lead to corruption, and they sought to create structural mechanisms to prevent its accumulation into the hands of any single person. Thus, the legislative power may not be exercised by judicial or

executive branch officials, and vice versa. It is through this decentralization of government power that the framers sought to protect individual freedoms. Unlike the federal constitution, the Oregon Constitution contains an express provision dividing these powers; Article III, section 1 of the Oregon Constitution provides that, "no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as this Constitution expressly provided."

The Work Group concluded that the Oregon Constitution provides broad authority for the Legislative Assembly to regulate conduct that occurs on Capitol grounds. This includes the activities of third parties (including professional and citizen lobbyists) who access the building and participate in Capitol affairs.

While the Oregon Constitution gives the Legislative Assembly broad authority to regulate itself "when assembled," it sharply limits the ability of one body to bind a subsequent body. For example, the 79th Legislative Assembly could not create legislative rules (or potentially even statutes) that would bind the 80th in administering its own affairs.

C. Individual Constitutional Rights

Any public workplace harassment policy necessarily implicates individual constitutional rights; protecting these rights increases a policy's complexity. For example, even an ordinary, politically unaffiliated employee who is accused of harassing other employees is entitled to due process under the federal constitution. In the State Capitol, a workplace harassment policy can also implicate state constitutional rights to free expression and to assemble and petition one's government for redress, as well as their federal analogues in the First Amendment to the United States Constitution. Equally significant, Work Group participants remained mindful of the impact that harassment complaints, investigations, and remedies could have on legislators and, by extension, the constitutional rights of the voters the legislators represent.

D. Laboratories of Democracy

From a policy perspective, there is no better time to review the State Capitol's harassment policy. At this inflection point in our collective history, state legislatures from across the country are working on similar issues and can share ideas and learn from one another. The Work Group took advantage of this work and, very early in its process, endeavored to collect and review as many of these policies and reports as possible. Thus, in addition to leveraging the experience of Work Group participants, the final recommendations also incorporated best practices from legislatures across the country.

VI. The Process and Core Principles

After gathering factual and legal information relevant to its charge, the Work Group sought to identify an initial set of best practices in workplace harassment prevention, reporting, investigation, and adjudication—in a vacuum, apart from the legislative process. The Work Group then sought to apply these best practices to the various classes of individuals in the State Capitol, making modifications where legal or practical realities require it. Proceeding in this manner allowed the Work Group to utilize the experience of its participants, and deliberately

apply to the Legislative Assembly those lessons learned in industry, higher education, and in other state capitols.

Through this process, the Work Group identified several core principles:

- Harassment policies are a supplement to cultural change. Robust enforcement mechanisms are necessary, but to truly address workplace harassment, an organization must also take active steps to improve its culture.
- Harassment policies should be designed to address behavior that has an impact on the workplace, whether the accused person is a legislator, legislative employee, or a third party.
- The Legislative Assembly should encourage reporting. Legislative leaders must value reports of harassment and see them as an opportunity to promote positive change.
- The Legislative Assembly should fully inform and empower people who have been harassed in the workplace. A truly confidential reporting mechanism should be available and reporters of workplace harassment should be able to decide whether their experience becomes public. This is important to encourage reporting.
- Due process of law must protect persons subject to discipline for workplace harassment. Investigatory and adjudicatory procedures should require evidentiary proof. Persons accused of harassment should know the allegations against them and have an opportunity to respond before any decision is made about whether they are responsible or what discipline should be imposed.
- The Legislative Assembly should have maximum flexibility to design a response to workplace harassment that is both proportional and appropriate to factual and legal circumstances.

VII. Recommendations

A. Training and Culture

1. The Equity Office

Consensus Recommendations: The Legislative Assembly should establish and fund an Equity Office. The Equity Office should be a neutral and independent office comprised of professionals employed full time by the Assembly. Staff in the office should be hired by, and report to, a standing, joint legislative committee ("Conduct Committee"), with an equal number of members appointed by each of the four caucuses.

The office should be provided with as much independence as possible—including independent physical space—and should have at least two staff, with duties as follows:

- Staff #1: Conducting investigations, writing investigative reports, and making recommendations regarding interim safety measures. This person should not have access to confidential information in the possession of the second staff member.
- Staff #2: Conducting outreach and training, administering regular climate surveys, receiving confidential disclosures, and providing confidential process advice that includes an explanation of the formal complaint, confidential disclosure, and nonconfidential reporting processes.

The office should be expressly authorized to outsource work when workload or other practical factors require. When work is outsourced, highly qualified individuals should be selected to provide training and conduct surveys. The Work Group expressly contemplates that outsourcing may be required when a complaint is high profile.[2]

The office should conduct regular culture (and climate) surveys to identify broader cultural issues and specific training needs. Survey results, or a summary of the results, should be disclosed to create a continuous cycle of improvement.

The office should submit a report to the Conduct Committee and appear before it at least annually. The annual report should include:

- A description of the activities of the office since the last report.
- Deidentified statistics that list the number of confidential disclosures, nonconfidential reports, and formal complaints made under the policy, as well as the number of investigations conducted.
- The results, or a summary of the results, of the most recent climate survey.

The office should recruit and recognize a Capitol Leadership Team. The team should:

- Be comprised of leaders from across the Capitol community who have an interest in promoting a productive and inclusive environment.
- Be provided with advanced respectful workplace training related to implementing cultural change that could lead to a credential or certification.
- Serve as a mentor or informal resource for colleagues who are interested in promoting a more respectful workplace.
- Identify additional services and training needs and communicate those needs to the Equity Office.

The office should build constructive relationships with outside organizations and groups who regularly interact with members of the Capitol community (e.g., the Oregon State Bar, the Capitol Club, colleges and universities) for the purpose of coordinating communications and sharing resources.

Commentary: Any meaningful review of workplace harassment necessarily includes a hard look at policies and procedures designed to remediate harassment and discipline those who engage in it. But policies and procedures are reactive, not preventative. Eliminating harassment from the workplace requires a culture where each individual participant understands that discrimination and harassment in any form is unacceptable and is not tolerated. The recommended Equity Office is intended to manage both tasks: administering a remedial policy, while also working to change the Capitol culture.

Loosely modeled on Title IX, the duties of the Equity Office are divided between two officers who work together towards a shared goal, but share information on a limited basis. This structure arose out of several factors.

[2] The role of the Equity Office in conducting and outsourcing investigations is discussed in Section VII, B, 7—Investigations, below.

As an initial matter, Work Group participants identified the need for a single location to act as a clearinghouse where individuals who are experiencing harassment can obtain information and discuss options for reporting or other support. At least one Work Group participant envisioned an individual approaching the Equity Office with a fact pattern, discussing whether that fact pattern might constitute workplace harassment, and learning about the differences between the confidential disclosure and nonconfidential reporting process. Ultimately, then, this confidential process advice is intended to empower members of the Capitol community by providing them with all of the relevant information before a decision is made that starts an unstoppable, and potentially very public, process.

Relatedly, testimony submitted to the Work Group expressed a clear need for a confidential option. Work Group participants believed it necessary to separate confidential disclosures and "process advising" from the investigative function. That is, if an employee is required to take active steps to mitigate workplace harassment, it may not be possible to receive and hold information in confidence. For these reasons, then, the Work Group recommends a structure where the investigatory arm of the Equity Office does not have access to confidential information. This confidential information, however, may nonetheless be useful to the office. Aggregate, de-identified information may highlight the need for training in a particular department or on a particular issue. Similarly, the results of a climate survey may be used to assess workplace culture and improve training. And the training itself will allow the Equity Office staff to develop rapport with members of the Capitol community, potentially increasing confidential disclosures. Ideally, this model creates a virtuous cycle of disclosure, training, and culture change.

The Equity Office cannot be successful unless it is perceived as both effective and impartial. Work Group participants agreed that efforts should be taken to eliminate any appearance of partisanship or bias. Participants described a university model where a culture of investigatory independence is fostered by independent physical space and a direct reporting line to individuals in power. The Legislative Assembly should seek to emulate this culture and should provide the Equity Office with as many indicia of independence as is possible.

The Work Group also believed that concrete steps should be taken to ensure that the Equity Office is not viewed as an extension of the governing majority. Each caucus, House and Senate, majority and minority, should be allowed to appoint an equal number of Conduct Committee members. This balanced representation should generate "buy-in" from all of the caucuses and reduce the likelihood that actions taken by the office are perceived as partisan. Of course, the Committee must also seek to avoid actual partisanship if their work is to be effective.

The recommended oversight structure recognizes not only the importance of the Equity Office, but that the issues it will face differ substantially from those faced by other legislative offices. A dedicated committee will allow legislators to develop subject matter expertise and provide focused oversight of the office.

In an ideal world, the Conduct Committee would adjudicate allegations against all members of the Legislative Assembly, regardless of the chamber in which they serve. As a constitutional matter, however, it appears that this bicameral approach was not contemplated—the Punishment Clause authorizes either house to punish "its members." The Work Group nonetheless

recommends that the Committee meet jointly at all times, reasoning that there is inherent value in participating in the process jointly, even if members of one chamber may not vote on the discipline of members in the other chamber.

The Work Group also recommends that the Equity Office report to the Conduct Committee on an annual basis. Regular and transparent oversight is likely to inspire public confidence in the office. Additionally, there are significant benefits to a public discussion of statistical data, climate survey results, and training needs and opportunities. These conversations can raise awareness of the underlying issues, aid in the culture shift, highlight problem areas and demonstrate the concrete actions that are being taken to eradicate workplace harassment.

The Work Group recommends that the Equity Office recruit and identify a Capitol Leadership Team. The Team should be comprised of individuals who are interested in promoting cultural change and should include leaders from a cross section of the Capitol community (e.g., legislators, lobbyists, blue and white collar staff, etc.). Team members can receive advanced training in this area and a credential upon completion. They can engage in organic problem solving and serve as informal points of contact for other members of the Capitol community. By modeling positive behaviors (including being active bystanders), and using the concepts and vocabulary taught in trainings, Team members can provide the Capitol community with secondary exposure to principles of a respectful workplace. In addition, Team members can help the Equity Office better understand the environment and can identify problems and training needs.

2. Training

Consensus Recommendations: The Equity Office should be responsible for ensuring that all members of the Capitol community are familiar with the workplace harassment policy by providing training on the policy and making policy-related information available on the Internet.

The Equity Office should also make at least two hours of respectful workplace training available on multiple occasions throughout the year. The participation or presence of high-level management at the training should be encouraged. In-person, interactive training should be required in the vast majority of circumstances. Online training should, however, be available as a last resort.

The Equity Office should have a general mandate to maximize attendance at annual trainings. At least initially, the policy should:

- Make records of legislator attendance at annual trainings publicly available and require legislators to sign an acknowledgement of the policy, similar to those signed by employees. If attendance problems develop, the imposition of sanctions via chamber rule should be considered at that time.
- For legislative staff, including interns, attendance at training should be mandatory.
- Lobbyists required to register with the Oregon Government Ethics Commission should be required to take in-person workplace harassment training provided by the Equity Office. The training should be completed within the first quarter of registering and annually thereafter. Out-of-state lobbyists can be exempted from the obligation to attend training

in-person and the Equity Office should consider approving equivalent training provided in other states.
- Contractors should be required to attend an appropriately designed training and should be compensated for their attendance.
- Executive and Judicial branch employees who regularly work in the Capitol should be invited to attend trainings. Equity Office employees should work with their counterparts in state government to promote consistency and universal coverage in trainings and policies.

As a component of registration, the Oregon Government Ethics Commission should be required to track which registered lobbyists have and have not attended the required training and should be required to notify the Conduct Committee of any registered lobbyists who fail to timely complete the required training. Working in conjunction with the Committee, the Legislative Administrator should be empowered to impose fines or other remedial measures on registered lobbyists who fail to timely complete the training.

Training curriculum should be reviewed to identify improvements in substance and delivery. While the Equity Office should be generally empowered to identify best practices, potential substantive training improvements include:

- More clearly describe conduct that constitutes workplace harassment under the policy.
- Provide training on available methods of reporting under the policy, supervisor obligations to report violations of the policy, and the statutory obligation of legislators and other legislative employees to report suspected child abuse.[3]
- Address the fact that any person may withdraw consent to intimate conduct and address the challenges associated with consensual relationships in the workplace.
- Provide concrete examples of positive behaviors and constructive working relationships.[4]
- Encourage and train "active bystanders" about how to interrupt and oppose harassing behavior they observe in the workplace.
- Discourage behaviors—regardless of whether they violate the policy—that do not promote a productive, inclusive work environment.
- Communicate the human impact and harm to the work environment that harassment causes.
- Tailor training to individual groups in the Capitol community, while using consistent terms, concepts, and frameworks across trainings.

The Equity Office should use technology to fulfill its mission of creating a respectful workplace. Work Group suggestions include:

- Use cell phone applications that allow members of the Capitol community to submit questions anonymously or otherwise interact with the Equity Office or trainer.
- Use online conferencing software that allows for interactive training, whenever in-person training is impractical.

[3] There may be fact patterns involving interns, volunteers, or pages that both violate the harassment policy and trigger a mandatory reporter's obligation to report suspected child abuse.
[4] *See, e.g., Elizabeth Tippett, Harassment Trainings: A Content Analysis*, 39 Berkeley J. Lab & Emp. L. ___ (2018).

Commentary: Workplace harassment training is an essential tool for eradicating discrimination from the workplace. It is, however, but one tool and its effectiveness can vary. The Work Group recommends that the Equity Office hire an experienced individual who is committed to staying abreast of best practices in the field.

Substantively, workplace harassment training frequently focuses on the issue from a liability perspective, describing egregious conduct that may lead to a harassment complaint and suggesting that the conduct be avoided. For many individuals, this form of training is ineffective. That is, even those individuals who may be likely to engage in harassing conduct may not relate to exaggerated examples used in training. For everyone else, the training is a missed opportunity to teach the skills necessary for individuals to become active bystanders who promote culture change and a healthy work environment.

A related concern with liability-based training is that it may miss an opportunity to address more subtle forms of discrimination and harassment. Workplace harassment frequently involves pervasive—as opposed to severe—conduct. In these situations, harassment results from the culmination of many incidents that may, in isolation, otherwise be lawful. Training towards these forms of harassment may produce a more productive workplace than training that has a focus on egregious conduct.

Work Group participants also discussed the importance of demonstrating positive behavior and providing attendees with useful workplace skills. For example, trainings could demonstrate how to respectfully intervene when a colleague uses an offensive phrase or gesture. These kinds of interpersonal skills can reduce harassing behavior, while also promoting productive workplace relationships.

The Work Group strongly recommends the regular use of culture surveys. Culture surveys can demonstrate the scope of workplace harassment in the Capitol and identify specific training needs. Conducting them on a regular basis, and providing the results to the Capitol community, will allow members of the community to judge the effectiveness of the response and identify trends over time, while working to keep the institution focused on problem solving. As with training, best practices in climate surveys are continually evolving; the Work Group emphasized the need to employ professionals who would stay abreast of the latest developments.

The Work Group was unanimous in their support for the provision of workplace harassment and respectful workplace training. Some work group participants advocated for making these trainings mandatory, through the use sanctions, if necessary. Other participants described a contrary view, noting the negative psychological effect of mandating training. As these participants explained, it is difficult for many individuals to meaningfully engage in training that is made mandatory in response to an egregious incident or for the express purpose of limiting liability. Instead, the ideal is an interactive training that provides individuals with useful skills for navigating the workplace and models “what to do” instead of “what not to do.” These individuals can then employ these skills and describe the benefits of the training to their colleagues. This approach is more likely to lead to culture change than the mandatory 'check-the-box' variety of training. For these reasons, Work Group participants ultimately reached consensus around an approach that would rely on requiring, or strongly encouraging, trainings—

at least initially—but that, over the long term, would empower the Equity Office to employ best practices to maximize attendance.

Regardless of whether trainings are mandatory, strongly encouraged or fully optional, participants noted a need to expand the availability of training and to make sure the training is of the right kind. The Equity Office should make every effort to provide in-person training on many occasions throughout the year. Scheduling conflicts should not prevent individuals from attending training.

Related, the Work Group noted that there are many registered lobbyists who never, or infrequently, visit the State Capitol. The Work Group agreed that there must be a sufficient number of trainings, in a sufficient number of forms, to allow registered lobbyists to pursue their vocation without impediment. While online training was disfavored, it was viewed as a necessary backstop, particularly in circumstances where the alternative is no training. For similar reasons, the Work Group recommends that Equity Office consider approving trainings provided in other states as an acceptable alternative.

3. Interns, Volunteers, and Pages

Consensus Recommendations: The name and contact information of every intern, page, and volunteer in the State Capitol should be provided to Human Resources via a standard form. Human Resources should develop a form that may include other required information.

The Equity Office should ensure that appropriate information and in-person training on the workplace harassment policy is provided to each intern, volunteer, and page as soon as practicable.

The Equity Office should proactively attempt to conduct exit interviews with interns, pages, and volunteers. As resources allow, the Equity Office should consider expanding these interviews to all staff, perhaps beginning with legislative assistants.

The Equity Office should build constructive relationships with universities and other institutions that regularly recommend legislative interns, volunteers, or pages, for the purpose of reaching those interns, volunteers, or pages.

Commentary: Work Group participants noted the Capitol's varying processes for hiring interns, volunteers, and pages. That is, while a formal Capitol internship program does exist, Work Group participants noted that many other individuals obtain work experience in the Capitol through less formal means. These are important opportunities that should continue to be provided to our future leaders. But the Work Group strongly recommends that each and every intern, volunteer, and page be identified by, and required to provide contact information to, Human Resources.

The Work Group agreed that the precise definition of the person providing services in the State Capitol—as intern, volunteer, page, or other—is immaterial; the name and contact information of every individual who does so in any capacity should be recorded in a central location and in a timely manner. To ensure this obligation is upheld in practice, several Work Group participants expressed support for providing legislators and legislative staff with training on the obligation.

Interns, volunteers, and pages are among the most vulnerable members of the Capitol community. For many, this experience in a professional workplace may be both new and transitory, lasting only a few weeks or months. For others, it may be the first foray into what is hoped to be a lengthy career—in a political world that is both insular and defined by a formal power structure. Perhaps more so than their legislative employee colleagues, interns, volunteers, and pages operate in the State Capitol at a significant power differential. As a result, the Work Group believed that providing them in-person training on the policy was essential. Interns, volunteers, and pages should be equipped to identify inappropriate conduct when they see it and to know where to safely discuss or report that conduct. This training should be provided to each intern, volunteer, and page, at the earliest opportunity. One model discussed by the Work Group contemplates the Equity Office providing regular (e.g., weekly), in-person training on the harassment policy for all newly hired interns, volunteers, and pages.

Given the vulnerabilities of interns, pages, and volunteers, the Work Group also recommends a proactive effort to learn from their experiences. While the Work Group supports the Equity Office engaging with these individuals during their service, participants believed that these individuals would be more likely to provide useful feedback at the conclusion of their service, and if contacted in the first instance by a trained professional in the Equity Office. At a minimum, the Equity Office can use their feedback to assess Capitol culture and identify specific training needs.

As many of the Title IX coordinators from Oregon's universities noted to the Work Group, not only do university students regularly add substantial value to the democratic process through their service to the Legislative Assembly, but they have a unique set of concerns and vulnerabilities. The Equity Office should partner with university staff throughout the region, to ensure a positive Capitol experience for these future leaders.

B. The Workplace Harassment Policy

1. Prohibited Conduct

Consensus Recommendation: The workplace harassment policy should affirmatively promote a respectful and inclusive environment by prohibiting more conduct than the law requires it to prohibit. The policy should apply to conduct that occurs in any setting, including electronic media, when the conduct creates an environment that is intimidating, hostile, or offensive. Conduct that occurs outside the Capitol building or after hours may create such an environment. The policy should include examples of prohibited conduct, as well as examples of conduct that may not be prohibited but that are inadvisable. The policy should include and explain protections against retaliation and describe how to make a report or complaint about retaliation, in the same way as making a report or complaint about harassment. A proposed definition of "harassment," with examples, is included as Attachment A.

Commentary: The State Capitol can be a challenging place to work during legislative sessions. Given the pace, the breadth of policy issues and the deeply held beliefs of many involved, individuals in the Capitol may engage in conduct that is less than exemplary. While anti-harassment laws only prohibit unwelcome conduct on the basis of a protected characteristic that rises to the level of "severe or pervasive," all such inappropriate conduct may have a detrimental

impact on work productivity. Furthermore, various instances of inappropriate conduct may, in the aggregate, become "severe or pervasive." While every workplace should strive for model behavior at all times, the Work Group's task was to address harassing behavior: inappropriate and unwelcome conduct that is based on a person's status as a member of a protected class.

Work Group participants declined to recommend that the policy define harassment by explaining what harassment "does not include." For example, many policies expressly exclude "petty slights" or "annoyances" from their coverage. These exclusions are counterproductive. Potential reporters of workplace harassment often read harassment policies in detail; such exclusions can cause them to refrain from reporting, if they think the exclusions could apply to them. Moreover, as a legal matter it can be difficult to distinguish workplace bullying (which is a lawful but regrettable behavior) from unlawful harassment based on a protected class. And conduct that appears benign in isolation, may nonetheless constitute workplace harassment when it is motivated by implicit bias or is part of a pervasive pattern. For these and other reasons, the workplace harassment policy should strive to prohibit all conduct that could reasonably be included as a component of workplace harassment.

2. Reporting Harassment

Consensus Recommendation: The workplace harassment policy should include:

- A confidential disclosure process. The confidential disclosure process allows an individual who wishes to remain anonymous to report conduct that violates the policy. It also can include confidential "process advice" for individuals who believe they may have been subjected to conduct that violates the workplace harassment policy and to individuals who are, or believe they may be, the subject of a complaint.
- A nonconfidential reporting process. Individuals who believe they may have been subjected to conduct that violates the workplace harassment policy, or who believe they may have witnessed or otherwise become aware of such conduct, may make a nonconfidential report to a supervisor or other legally responsible person, to Human Resources, or to the Equity Office.
- A nonconfidential, formal complaint process. The formal complaint process is designed to trigger an investigation that may lead to discipline of respondents who have engaged in harassment.

The Equity Office should ultimately receive all reports of harassment and be empowered to investigate as appropriate.

Commentary: This structure seeks to balance several competing interests. As a matter of principle, the Work Group believes that individuals subject to the policy should have access to accurate information about the reporting options and adjudicatory consequences under the policy. The Work Group believes that more people will seek out this information, and that more people will report harassment, if there is a confidential option. Concerns surrounding due process and fundamental fairness, however, prevent taking formal disciplinary action based on these confidential communications. Thus, while the Work Group strongly recommends the creation of a confidential disclosure option, the consequences of a confidential disclosure must necessarily be limited.

In addition to this confidential option, the Work Group also recommends two nonconfidential reporting options. The nonconfidential reporting process is available as a standard workplace reporting option that may lead to an investigation and the imposition of discipline. The nonconfidential reporting option is, however, limited in other respects. As it does not require a formal complainant, it may not result in the meaningful discipline of a legislator. The nonconfidential, formal complaint process is available when a complainant wishes to trigger an investigation and pursue concrete remedies. Because this process may result in the discipline of a legislator, it is a public process that is likely to generate significant public interest.

This structure is intended to provide reporters as much certainty as possible – in advance – about how reports, disclosures, and complaints will be made and used. While the Assembly may not be able to provide as much confidentiality as the Work Group would have liked,[5] the Work Group recommends that every effort be made to provide as much confidentiality as possible. In addition, reporters should be fully informed of any limits on that confidentiality.

3. Confidential Disclosures

Consensus Recommendation: The non-investigatory half of the Equity Office should be empowered to receive confidential disclosures from anyone who has experienced or witnessed harassment.

The identity of the person making a confidential disclosure should remain confidential, subject to two exceptions: (a) when necessary to prevent imminent physical harm to any individual and (b) when disclosure is required by law.

Because a respondent has a due process right to know about the basis for any potential discipline, confidential disclosures may not be used as the basis for any disciplinary action. Nevertheless, the office may use other, nondisciplinary and nonpunitive methods to respond to confidential disclosures, when it is possible to do so without revealing the identity of the reporter directly or indirectly. For example, the Equity Office could provide a respondent or a particular group of employees formal or informal training or advice regarding expected standards of behavior. It could also reach out to complainants who make confidential disclosures to encourage them to come forward voluntarily in a nonconfidential way.

Both Equity Office staff may access and use aggregate, deidentified data based on confidential disclosures. This data will allow the institution to observe patterns of behavior, take non-investigatory steps to remedy training, culture, or climate, encourage reporters to come forward in a nonconfidential way, and take other necessary actions.

The Legislative Assembly should adopt a statute, modeled on ORS 40.264, that creates a privilege for communications made to the non-investigatory half of the Equity Office. The privilege would protect communications from intrusion by state legal processes. Because federal courts are not required to follow state privilege laws, the recommended privilege statute would not necessarily protect communications from disclosure in response to federal legal processes. Members of the Capitol community should be fully informed of any limitations on the privilege, however theoretical.

[5] As will be described in more detail below, there may be limits to what confidentiality is possible.

Commentary: Testimony received by the Work Group was consistent with the experience of the participants with complaints in the State Capitol and elsewhere: Given the power differential in the State Capitol, and the fears of those with little power, many complaints go unreported. One significant way to increase reporting is to provide a confidential avenue.

One participant emphasized the value of having limited exceptions to confidentiality, noting a direct correlation between the number of exceptions to confidentiality included in a policy and reduced reporting. As the participant explained, the more exceptions that are conveyed to a person, the more likely the person will hear "this isn't really confidential."

Another participant raised a different confidentiality concern, describing fact patterns where individuals seek out information, support, and guidance, but may not wish to initiate a formal process. For this participant, it was important to avoid a system where an individual unwittingly initiates a formal process, particularly given the possibility that the process is a public one that generates widespread interest.

The Work Group recommendation reflects the view that the legislature should take every step possible to provide confidentiality when a person who has experienced workplace harassment seeks it. There are, however, two significant challenges to providing confidentiality.

First, as the Work Group discussed at length, an employer who is "on notice" that harassment may exist has a legal duty to respond reasonably to prevent future harassment. Thus, the Legislative Assembly could be exposed to liability under employment discrimination laws if Equity Office employees know about workplace harassment and fail to take remedial measures because they are keeping a complaint confidential.

The Work Group recognizes this risk. But it is usually possible to manage this risk while still honoring a complainant's request for confidentiality. This is because an investigation that discloses a confidential disclosure and results in discipline for a harasser is only one way of responding reasonably to a complaint. For example, training and discussion—and maintenance of a culture that encourages reporting—may be equally effective responses in many circumstances. In extreme cases, such as those in which immediate physical harm might result, an employer might need to breach confidentiality in order to act reasonably. But in other instances, it is reasonable for an employer to honor a complainant's request for confidentiality and turn to other mechanisms to correct and prevent future harassment.[6] This is especially true when the employer has clearly communicated a venue where a complainant may make a nonconfidential complaint that triggers an investigation.[7] When receiving a confidential disclosure, the Equity Office should reinforce this communication by reminding a complainant that nonconfidential reporting exists and explaining the different remedies that confidential disclosures and nonconfidential reports provide. When a complainant knowingly chooses a

[6] *See, e.g.*, *Hardage v. CBS Broad., Inc.*, 427 F.3d 1177, 1188 (9th Cir. 2005), *amended on denial of reh'g*, 433 F.3d 672 and 436 F.3d 1050 (9th Cir. 2006) (employer not liable for failing to act where complainant specifically requested employer not make use of its remedial and preventative procedures); *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997) (employer did not breach duty to remedy racial and sexual harassment by honoring employee's request to keep the matter confidential).

[7] *See*, *e.g.*, *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997) (for employer to be on notice, complaint must come to the attention of someone who has or is reasonably believed to have a duty to act).

confidential, noninvestigatory avenue to report, it may be reasonable in many cases for an employer not to take remedial measures that require disclosure, but to take other reasonable measures to end harassment.

But there is one other problem. Regardless of whether the institution is "on notice" or not, records of confidential Equity Office conversations (and the memory of its participants) are subject to discovery in a future lawsuit. And even if the legislature were to create a state-law privilege that would protect confidential reports in state court lawsuits (as the Work Group recommends), *federal* courts may decline to recognize such a privilege.[8] This could force the Equity Office to provide "confidential" records in federal employment litigation.

Given these limitations, the Work Group was unable to formulate a recommendation that would allow the legislature to protect confidentiality in all circumstances. Nonetheless, the Work Group believes that the legislature should support an individual's ability to remain confidential as much as possible. To support their autonomy to make their own decisions, the Equity Office should fully inform individuals of these limitations and should remain cognizant of the limitations at all times. Further, in light of these limitations, Equity Office staff should be trained in appropriate methods of recordkeeping. For example, the Equity Office may choose not to request the names of individuals who make confidential disclosures.

4. Nonconfidential Reports

Consensus Recommendation: The Equity Office should be empowered to receive nonconfidential reports from anyone who believes they have experienced or witnessed harassment. Additionally, legislative supervisors and other legally responsible persons should be required to make a nonconfidential report to Human Resources or the Equity Office if there is a reasonable possibility that workplace harassment or discrimination may have occurred. This duty is triggered whenever an employee makes a complaint to a supervisor or other legally responsible person. It is also triggered when the supervisor or other legally responsible person receives information through direct observation, rumor, or otherwise, that the policy has been violated. Supervisors should not attempt to determine whether the information relates to harassment or not. If they have reason to believe the information could possibly be related to harassment, they should report it. Non-supervisors should be encouraged to make such reports. This form of reporting is not confidential.

Human Resources should determine whether the report is potentially a report of workplace harassment based on protected class, or whether it involves interpersonal difficulties or other matters. If the report is potentially a report of workplace harassment, Human Resources will forward the report to the Equity Office. If it is not, Human Resources should address the report.

Third parties who contract with the Legislative Assembly should be contractually obligated to report conduct that may constitute harassment to the Equity Office.

Commentary: As described earlier, if a legislative supervisor or other legally responsible person knows or reasonably should know about workplace harassment, the institution as a whole

[8] *See, e.g., Sony Comput. Entm't Am., LLC v. HannStar Display Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.),* 835 F.3d 1155 (9th Cir. 2016) (federal common law generally governs claims of privilege).

is also "on notice" and has a duty to take reasonable measures to stop the harassment. This reporting mechanism is standard to all work environments. Legislative supervisors should be trained to report all issues to Human Resources or the Equity Office, allowing that office to determine whether conduct does or does not constitute workplace harassment. All members of the community should be encouraged to report.

5. Formal Complaints

Consensus Recommendation: The Equity Office should be empowered to receive formal complaints from anyone who believes they have experienced or witnessed harassment. To reduce the potential that complaints will be "weaponized" in a partisan environment, complaints should be required to be submitted under penalty of perjury.

Commentary: As currently constituted, Rule 27 only allows legislators and legislative employees to file a formal complaint. The Work Group recommends that any person who experiences or witnesses harassment should be able to file a formal complaint. Expanding the class of potential complainants is consistent with a recent trend in other state legislatures, examples of which can be seen in policies recently adopted by the Utah legislature, the Vermont legislature, and the Wyoming legislature.

Wholly apart from any liability concerns, the Work Group reasoned that harassment against any person is unacceptable and should be reported and remedied promptly. Not only should witnesses be encouraged to play a role in eradicating harassment, but Work Group participants observed that workplace harassment may create a hostile work environment for those who witness the harassment. Further, as one participant noted, expanding the class of potential complainants would reflect and amplify the Legislative Assembly's commitment to culture change.

This expansion to new groups of complainants is not without risk. Testimony submitted to the Work Group raised the possibility that the rule could be abused to obtain leverage over legislators. Work Group participants echoed these sentiments on multiple occasions, noting the unique nature of the State Capitol as a politically charged work environment. Work Group participants regularly discussed the possibility that the complaint process could be "weaponized" to harm political opponents.

To address this concern, the Work Group considered recommending a policy that expressly penalizes false complaints. But several participants expressed concern with this approach, because such penalties would discourage potential reporters of harassment. The Work Group ultimately reached consensus on a balanced approach; the formal complaint process, like the confidential disclosure and nonconfidential reporting options, should be opened to allow any person who has experienced or witnessed workplace harassment to file a complaint. But the policy should require formal complainants to submit their complaints under penalty of perjury. Notably, a statement is perjury only when a person provides a false statement while knowing that it is false. Thus, this standard would not punish complaints that were erroneous but not knowingly false. The Work Group declined to recommend a specific provision stating that false reports could be the basis for discipline, because such a provision would unnecessarily chill reporting.

The Work Group also discussed whether, after receiving a sufficient number of confidential disclosures about a single individual, the Equity Office itself could be a complainant. One Work Group participant proposed a model where confidential disclosures are funneled to a single individual and remain confidential, unless the individual determines that the complaints, collectively, meet a level of risk that the individual is trained to assess. At that point, several participants believed that the institution should have standing to initiate a formal complaint, reasoning that the institution is aware of a pattern and should take action. Other participants, however, emphasized that even if the institution has standing to initiate a formal complaint, adjudicating that complaint would still require individuals to provide evidence about which they have personal knowledge.

Several related consequences were discussed. First, all potential complainants would need to be informed of this possible exception to confidentiality. Second, because of due process concerns, the Equity Office would still have to disclose any evidence to a respondent. Thus, the disclosure itself would reveal the identity of the individual making a confidential disclosure. Third, given the need for evidence, it may be that the institution would feel pressure to compel testimony from an unwilling witness. The Work Group believed that all of these consequences would create a chilling effect on the reporting of workplace harassment. As indicated above, the confidential half of the Equity Office should be empowered to reach out to complainants to determine if they would like to make a nonconfidential report or file a nonconfidential complaint. For these reasons, the Work Group recommends that neither the institution itself, nor the Equity Office, should have "standing" to initiate a complaint.

Who may be a respondent?

Consensus Recommendation: Any individual over whom the Legislative Assembly has the power to impose a remedy may be the subject of a complaint. This includes but is not limited to legislators, legislative employees (partisan and nonpartisan), government contractors, public and private sector lobbyists, and members of the public who visit the building.

Commentary: For reasons similar to those in allowing any person to be a complainant, the Work Group believes that any person who engages in harassment in the State Capitol should be a respondent under the workplace harassment policy. The Legislative Assembly has a legal and moral obligation to prevent harassment of its employees and others in the State Capitol, regardless of the source, and including any person as a possible respondent is the only way to ensure that every victim of harassing conduct in the State Capitol has a potential remedy. This approach is consistent with recent policies adopted by the New Mexico legislature, the Utah legislature and the Washington State Senate, as well as recommendations made by the Massachusetts House Counsel. The Nevada legislature has taken a slightly more narrow approach, expanding jurisdiction under its policy to include registered lobbyists, pursuant to Nevada Joint Standing Rule 20.5.

While the Work Group spent considerable time discussing whether the Legislative Assembly has the power to punish various discrete classes of individuals, participants ultimately concluded that the Legislative Assembly has the constitutional authority through the Rules of Proceeding Clause to control conduct in the State Capitol. Throughout these conversations, the Work Group remained cognizant of the multitude of state and federal constitutional rights that are implicated by one's mere presence in the State Capitol, including the right to free speech, to assemble, and

to petition one's government. The Work Group expects that the Legislative Assembly would remain cognizant of these individual rights and exercise jurisdiction in a manner consistent with its constitutional obligations.

Should there be time limitations?

Majority Recommendation: There should be no time limitation on complaints. Rule 27's one-year time limitation for making complaints should be eliminated.

Commentary: Rule 27 currently allows harassment complaints within one year of the offending behavior. No single issue was the subject of more debate by Work Group participants than this. While the debate revealed strongly held views on both sides of this issue, the Work Group participants were unanimous in their conviction that the one-year limitation is woefully inadequate.

A majority of the Work Group participants believed that there should be no time limitation on complaints. A substantial minority believed that the existing limit should be extended to four years or more. The Work Group forwarded both views to the Commission.

The full Commission voted to recommend no time limitation. As with the Work Group, a substantial minority would have imposed some limit. At least one commissioner would have recommended a ten year limitation.

In the Commission's view, the time limitation should be eliminated entirely, for the following reasons:

- No employer should ignore a complaint simply because it falls outside an arbitrary limitations period. Ignoring a complaint when an employer is "on notice" that there may be a problem can subject the employer to legal liability. This is particularly concerning when a serial harasser engages in multiple serious acts of harassment over a period of time.
- Investigations of "old" allegations regularly uncover additional instances of harassment that should be remedied, including additional victims of the same perpetrator and information about others who covered up or failed to report the misconduct.
- The obligation may not even end after the offending employee leaves the workplace, because the investigation of older incidents could identify a need to make structural reforms.
- Imposing a time limitation on complaints confuses the employer's internal obligation to identify and eliminate harassment (which should have no limitation) with a complainant's ability to obtain an external judicial remedy (which might be time limited).
- Operating consistently with trauma-informed practices, many Work Group participants believed that a person who experiences harassment may not be inclined to come forward until they have left the political environment, and that eliminating the time limitation would accommodate this reality. Similarly, members of the Capitol community regularly leave the environment for a time and return in new roles; such re-engagement may recreate opportunities for renewed harassment by a former abuser. Harassment that was past may become present, causing new incentives to report.

A substantial minority of commissioners and Work Group participants believed that the above needs would also be met with a finite time limitation of at least four years. They noted that:

- The historical reasons behind statutes of limitation are compelling. These include the interest in timely resolution for the complainant, the respondent, and the Legislative Assembly; the difficulty in preparing a defense when witnesses cannot be located or have faded memories; and the possibility of irreparable harm to a respondent.
- A political environment magnifies these difficulties, because a mere allegation and subsequent investigation could become a useful campaign tool.
- In many instances, legislators in positions of power frequently have had longer careers, making them more susceptible to the weaponization of older allegations.
- Eliminating time limitations could lead an individual with a legitimate claim to withhold it and report later, at a more politically useful time.

While the Work Group could not reach agreement on this single matter, all participants agreed that the current one-year limitation is substantially too short.

6. Protecting Reporters, Complainants, and Respondents

Interim Safety Measures

Consensus Recommendation: The policy should support interim safety measures (if any) that are appropriate to the situation, including but not limited to temporary reassignment, alternative work environments, paid and unpaid leave, no contact orders, and the temporary removal of potentially offending individuals. Under no circumstances, however, should the policy authorize interim safety measures that prejudice a complainant. The policy should also recognize the need to involve law enforcement in severe situations.

If the investigator determines that interim safety measures are necessary to protect either the complainant or the integrity of the investigation, the investigator should immediately communicate that determination to the person or entity authorized to impose remedial measures under the policy (e.g., an employee's supervisor). The investigator should identify appropriate interim safety measures and may recommend that the person or entity impose those measures or may enter into a voluntary agreement with the respondent to follow the measures. All legislators and legislative supervisors should be required to cooperate with the investigator in imposing interim safety measures and should be required to provide a written explanation for declining to follow the recommendation of the investigator.

Commentary: Once an employer is on notice that harassment may be occurring, the employer has an obligation to stop any harassment. The obligation has two parts. The first consists of the temporary steps the employer takes to deal with the situation while it determines whether the complaint is justified. The second consists of the permanent remedial steps the employer takes once it has completed its investigation. *Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001). Thus, interim safety measures are an essential component of a scheme to address workplace harassment policy as they provide protections for the parties, the institution, and others, while an investigation is conducted.

Interim safety measures can be implemented for legislative employees without much legal difficulty. The legal challenge with interim safety measures, much like the challenge with the

imposition of remedial measures, is that the state and federal constitutions may require procedural modifications or limit the potential range of options in certain circumstances. Interim safety measures may not, for example, unlawfully impair a person's right to petition their government for redress or engage in protected speech. Similarly, while the Work Group believes that interim safety measures may be imposed on legislators in appropriate circumstances, here, as in many other situations, it is important to remain cognizant of constitutional limits.

Constitutionally permissible interim safety measures likely include prohibitions on contact with specific individuals or classes of individuals, restrictions on unaccompanied movement in the State Capitol, or requirements to participate remotely in the legislative process. Particularly for legislators, safety measures must be narrowly tailored to avoiding the safety risk; punitive measures likely require a determination that a member has engaged in disorderly behavior. Interim safety measures are most defensible in those situations where:

- The measures do not limit a legislator's ability to engage in core legislative functions (e.g., voting).
- The measures are otherwise narrowly tailored to address immediate safety concerns that are based on credible allegations.
- An affected legislator is provided with notice and an opportunity to be heard on the proposed interim safety measures, in advance when possible.

It is likely that the Rules of Proceeding Clause would allow each house to adopt rules delegating the authority to impose interim safety measures to a subgroup of the full body (e.g., to a committee, such as the Conduct Committee, or the Presiding Officer.) Delegating this authority may prove particularly effective in those situations where a nimble response may be required.

Finally, it is important to note that employment law prohibits retaliation against any person who files a workplace harassment complaint. Interim safety measures that prejudice a complainant may not be imposed.

Transparency to Complainant and Respondent

Consensus Recommendation: The policy should require the Equity Office investigator to check in with complainants and respondents on a regular basis or upon request.

Commentary: Work Group participants acknowledged that investigations under the policy may very well take a toll on both complainants and respondents. Every effort should be made to reduce this toll; checking in with the parties on a regular basis should be a component of a broader approach. Regular check-ins can also be used to determine whether harassment has been mitigated and the effectiveness of any interim safety measures.

Privacy During an Investigation

Consensus Recommendation: The policy should require the Equity Office to provide as much privacy as possible, given the need to investigate and provide interim safety measures.

The investigator should keep information obtained during the investigation as confidential as possible. The policy should not prohibit other individuals from discussing the investigation, but the investigator may request that individuals not discuss the investigation in order to protect its

integrity. The investigator may disclose the fact of the investigation and any relevant details to Human Resources, the supervisor of the complainant or respondent, the Conduct Committee, or any other person or entity authorized to take action under the policy, if the investigator determines that there is a legitimate need to disclose the information.

Except for the contents of a formal complaint, records relating to an ongoing investigation should be exempt from disclosure under public records laws. The results of the investigation and the investigative file should at least be subject to disclosure at the end of the disciplinary process. But in light of the public interest in transparency, the Legislative Assembly may want to make the investigation and investigative file publicly available at the end of the investigation but before the final discipline is imposed. This public interest is especially strong when a legislator is under investigation. Other existing exemptions (e.g., medical records or internal advisory communications) should continue to apply. Workplace harassment reports (confidential or nonconfidential) that do not result in an investigation should generally be exempt from disclosure.

Commentary: Work Group participants, many of whom have experience conducting workplace investigations, believed that the unnecessary disclosure of investigative facts impair the accurate and efficient progress of an investigation. However, participants were concerned that an absolute prohibition on discussing the investigation (as in the current Rule 27) limits the ability of individuals to discuss matters of great public importance and would unlawfully impair the ability of employees to discuss the conditions of their employment. In addition, testimony provided to the Work Group suggested that an overly broad prohibition on discussing the investigation could create an opportunity for additional harassment to continue. The Work Group sought to balance these competing considerations by encouraging (but not requiring) confidentiality from participants while requiring it from the investigator, unless there is a legitimate need to disclose the information.

Access to Other Resources

Consensus Recommendation: The policy should provide the contact information for outside entities such as the Equal Employment Opportunity Commission and the Bureau of Labor and Industries.

Commentary: The workplace harassment policy is only one possible method of addressing workplace discrimination. Providing contact information for other mechanisms is consistent with the Work Group's goal of ensuring that members of the Capitol community have access to complete and accurate information. It may also be that publicizing the ability of these other entities to intervene incentivizes cultural improvements.

Due Process

Consensus Recommendation: The respondent should be provided with notice of the specific allegations of the complaint and an opportunity to respond to the allegations and provide witnesses, testimony, and other evidence.

When a person who serves in an official capacity under the workplace harassment policy is a respondent under the policy, the person should be prohibited from serving in any capacity in the investigation or adjudication of the matter, including service on the Conduct Committee.

Commentary: For any individual subject to the policy, a workplace harassment complaint can lead to reputational damage, loss of professional status, or the loss of privileges. The Due Process Clause requires the provision of notice and an opportunity to be heard. Furthermore, Work Group participants believed that both fundamental fairness and the quest for accurate decision-making also require that respondents be provided with notice of the specific allegations and an opportunity to respond in a meaningful manner. Work Group participants noted that, in the context of Title IX investigations, concerns about due process to respondents have begun to threaten the perceived legitimacy of investigations. Creating a process that is viewed as fundamentally fair is necessary, both for its own sake and for the credibility of workplace harassment complaints going forward.

Similarly, conflicts of interest can also threaten the legitimacy of the process. Thus, the Work Group recommends an express provision indicating that individuals may not participate in the investigation, adjudication, imposition of remedial measures, or any other aspect of a complaint in which they are the named respondent or otherwise have a personal interest in the outcome (e.g., a family member is the respondent).

7. Investigations

Consensus Recommendation: The Equity Office should evaluate complaints to determine whether an investigation is necessary to determine if harassment occurred. If the office determines that an investigation is necessary, it should initiate an investigation promptly.

The office should be required to outsource investigations in which the respondent is a legislator or holds other specifically identified influential positions. For example, one possible list could include the Chief Clerk of the House of Representatives, the Secretary of the Senate, the chief of staff for each Presiding Officer and each of the four caucus offices, the Human Resources Director and the heads of the legislative service agencies. The Conduct Committee should identify standards for selecting investigators and should utilize a limited number of qualified and effective investigators in an effort to achieve consistent and unbiased results.

All investigations under the policy should be completed as soon as practicable. The investigation into a formal complaint and the submission of a final investigative report should ordinarily be completed within 84 days. The Equity Office may extend the timeline for good cause by providing notice to the complainant and respondent and explaining the justification for the extension. Both the complainant and respondent should be made aware of the investigative timelines and status of the investigation on a regular basis and upon request.

Before the investigator completes the investigative report, the investigator should give every respondent and every complainant notice of the proposed factual findings and, and if applicable, proposed conclusions as to whether a policy violation has occurred. The respondent and complainant should be afforded no more than seven days to respond. This period is included within the 84-day investigation window.

For any **legislator** alleged to have engaged in conduct that violates the workplace harassment policy, the investigator should make findings of fact. At the conclusion of the investigatory period, the investigator should provide a final investigative report to the complainant, the

respondent, and the Conduct Committee. The complainant and the respondent may submit to the Committee a written challenge to the investigator's factual findings, within seven days after receiving the final investigatory report. The challenge must specifically identify the factual findings that are the subject of the challenge and articulate the reason those findings are in error. The Committee should make a final determination of the facts, determine whether the facts constitute a violation of the policy, and impose or recommend any remedial measures no later than 28 days after receiving the final investigative report. The seven-day response period is included in the 28-day window. If a legislator resigns, the Committee should nonetheless make factual findings and determine whether the facts constitute a violation of the policy within 28 days.

For any **non-legislator** alleged to have engaged in conduct that violates the workplace harassment policy, the investigator should determine the facts and determine whether the facts constitute a violation of the policy. The investigator should provide a report to the person or entity who will determine remedial measures for the violation, as described in the section on remedies, below.

Any **non-legislator** respondent may appeal the investigator's findings and conclusions in writing to the Conduct Committee no later than seven days after the imposition of remedial measures. The appeal is limited to presenting newly discovered evidence, process error, or bias. The appeal should not delay the imposition of any remedies.

Commentary: Few issues generated more external feedback than the Work Group's discussion on the length of investigations. Many believed that the limit identified by the Work Group was too long. The investigator who testified cautioned against making it too short. It is worth noting several points about the Work Group's recommendations on the time limit.

First, there was universal acceptance for the proposition that investigations conducted under the policy should proceed with all deliberate speed; the well-being of complainants, respondents and, in some cases, the state's democratic process are at stake. The Work Group expects that investigations will be given the support of the Capitol community, adequately monitored by the Conduct Committee, and completed as expeditiously as possible under the circumstances.

Second, the limit recommended by the Work Group may be extended when the investigator determines there is good cause to do so. Participants argued that the alternative—a fixed end date—would, under the best of circumstances, result in an investigative report that specifically identified the investigatory steps that would have been taken, but that were not because of the deadline. Incomplete or unnecessarily hurried investigations serve no constructive purpose.

Third, the Work Group has recommended that the Legislative Assembly impose interim safety measures during the pendency of investigations conducted under the policy. These measures, which are designed to fit the circumstances, should be utilized to protect complainants and respondents during the pendency of an investigation.

Finally, the Work Group heard testimony from the attorney who conducted the most recent workplace harassment investigation at the State Capitol that it could be difficult to complete a

complex investigation within 60 days. This was consistent with the experiences of Work Group participants who had conducted or participated in complex investigations.

While recognizing that reasonable persons may reach a different conclusion, the Work Group recommends that the presumptive maximum length of an investigation be 84 days (12 weeks).[9] In the interests of promoting transparency and accountability, however, an investigator who seeks to extend an investigation beyond this period should be required to provide the justification for the extension to the complainant and respondent.

Additionally, and independent of the investigatory period, the Work Group recommends that complainants and respondents be provided with investigative timelines and information about the procedural status of the investigation both on a regular basis and upon request. This requirement does not, however, require the investigator to disclose substantive investigatory information, but it is intended to allow the parties to understand what to expect and when to expect it.

Work Group participants believed that providing the complainant and respondent with an opportunity to address proposed factual findings and conclusions was consistent with due process and likely to increase the factual accuracy of investigations. A one-week period, before the investigatory report is completed, was viewed as a meaningful opportunity to correct any factual error. To ensure that the review period does not delay the process, the Work Group recommendation includes this one-week period within the investigatory timeline.

This fact-finding process recognizes two competing principles. First, after much discussion, the Work Group ultimately concluded that in the case of discipline against a legislator, factual, policy, and remedial decisions affecting legislators must be made by other legislators. These decisions, quite literally, have the potential to temporarily disenfranchise voters. On the other hand, there are concerns that political motivations could influence the manner in which investigative facts are determined. Balancing these concerns, the Work Group recommends that the investigator make an initial factual determination and that the parties be provided with an opportunity to correct mistakes, but that a final determination of the facts be made, in a public, committee setting.

Cases that do not involve a legislator may have great impact to the parties, but they do not have the same impact on the legislative process. In those cases, to avoid the appearance of political influence, the Work Group recommends that the investigator be empowered to both find the facts and determine whether those facts constitute a policy violation. Empowering an independent investigator to make these determinations for non-legislators is likely to inspire confidence in the process, without directly impacting the electorate.

In a similar vein, the Work Group recommends that in those cases where a legislator resigns before the conclusion of the process, the Conduct Committee should nonetheless make factual findings and conclusions of policy. Participants were ultimately persuaded by three factors. First, formal complainants who have publicly made an accusation may have their own credibility questioned; requiring the Committee to make factual findings may protect against unfair reputational damage. Second, there is both a practical and cultural benefit to the Committee

[9] For ease of calculation, the Work Group suggests measuring timelines in one-week increments.

making a public determination of whether specific facts constitute a policy violation. It is important to put to rest any doubts about whether the behavior at issue was appropriate or not. Finally, the respondent may subsequently seek to re-engage in the legislative process in some capacity. If, for example, the respondent seeks to run for public office or engage in lobbying, participants felt there was substantial value in completing the formal process and requiring the Committee to make a public determination.

8. Remedial Measures

Consensus Recommendation: For any **legislator** who violates the policy, the Conduct Committee should impose remedial measures or recommend remedial measures to the full body. The Committee should be empowered, via chamber rule, to impose any remedial measures that are appropriate under the circumstances, subject to two exceptions. First, the Committee should not have the power to expel or censure a legislator; these remedial measures (or their equivalents) should be recommended to the full body of which the respondent is a member. Except for expulsions, where the Constitution requires a two-thirds vote, action under the policy should require a majority vote of the Committee or of the full body. The second exception should be for committee assignments—if the Committee concludes that a change in committee assignments is an appropriate remedial measure, the Committee should recommend that the Presiding Officer take action.

For **nonpartisan legislative employees** who violate the policy, the respondent's supervisor, in consultation with Human Resources, should impose any remedial measures. The supervisor should notify the employee of the proposed remedy and give the employee an opportunity to respond before making a final determination. A final decision regarding remedial measures should be made within 14 days after the respondent receives the final investigatory report.

For **partisan legislative employees** who violate the policy, the Conduct Committee should recommend remedial measures to the supervising legislator. The legislator should consider the recommendation, notify the employee of the proposed remedy, and give the employee an opportunity to respond before making a final determination. A final decision regarding remedial measures should be made within 14 days after the respondent receives the final investigatory report. The legislator should be required to provide the Equity Office with a description of the remedial measures imposed. If the office determines that the remedial measures imposed are substantially different than those that were recommended by the Committee, the office should notify the Committee who can hold a hearing to direct the legislator to follow the recommendation or, in appropriate circumstances, a modified version of the recommendation.

For **any other third party** (public and private sector lobbyists, members of the public, contractors, etc.) who violates the policy, the Legislative Administrator should be empowered, via chamber rule, to impose an appropriate remedy that, depending on the circumstances, may include a monetary fine or a limitation on the respondent's access to the Capitol building. The Legislative Administrator should provide the third party notice of the proposed remedy and give the third party an opportunity to respond before making a final determination. A final decision regarding remedial measures should be made within 28 days after the respondent receives the final investigatory report.

If the third party's conduct occurred within the scope of employment, the Legislative Administrator should provide notice of the determination and any remedial measures that are imposed to the third party's employer. If the third party is a member of the Capitol Club, the Legislative Administrator should provide notice to the Capitol Club. If the third party is a member of any other association or regulatory body that is related to the third party's Capitol activities, the Legislative Administrator should provide notice to the association or body.

Commentary: Remedial measures exist for the purpose of correcting past misconduct and preventing future harassment from occurring. While the Work Group did discuss specific measures, it recommends that decision-makers in the Legislative Assembly be provided with flexibility. That is, any remedies identified in this report or in an updated legislative policy should be treated as illustrative and not exclusive. Any remedy that can lawfully be imposed and that advances the goals of the policy should be available. The Work Group expects that remedies proportional to the offending conduct will be imposed and that, over time, a body of precedent will guide the Legislative Assembly in imposing remedies.

The Work Group ultimately recommended remedial processes for four different classes of individuals: (1) legislators, (2) partisan legislative staff, (3) nonpartisan legislative staff, and (4) third parties. These classifications are a function of both constitutional and practical considerations. For example, while action taken with respect to employees must comport with due process, employees have different free speech rights than a citizen seeking to petition their government for redress.

Given the constitutional limitations that do exist, it is important to note that remedies imposed under the workplace harassment policy should be designed to remediate harassing conduct, without impairing the many core constitutional rights that are exercised in the State Capitol. Thus, particularly in regard to legislators and third parties, the Work Group expects that legislative decisionmakers will remain cognizant of the multitude of applicable constitutional rights and impose proportional remedial measures in appropriate circumstances. While it is not difficult to construct a hypothetical fact pattern where a harassment policy is misapplied to constitutionally protected speech, it does not follow that the Legislative Assembly should cede its authority to eradicate harassing conduct from the State Capitol.

As regards legislators, it is likely that the Punishment Clause authorizes a broad array of sanctions, including censure, reprimand, the imposition of fines or training requirements, modification of committee assignments, and the loss of an office or parking space. Restrictions on core legislative functions, however, may be impermissible because they have the potential to interfere with the constitutional rights of a legislator's constituents to representation. In this regard, the Work Group suggests that the Legislative Assembly explore the use of technology to allow legislators to remotely participate in the legislative process, as it may, on appropriate facts, provide an effective balance between the constitutional rights of the voters and the need to provide a safe State Capitol. It is also likely that the Punishment Clause authorizes either house to punish its members based on a majority vote. For reasons that are less than clear, Rule 27 currently requires a supermajority vote for sanctions that likely may be imposed by a majority. Finally, the Work Group believes that it is likely that the Punishment Clause would allow a house to delegate its disciplinary authority by rule to a smaller group of legislators (e.g., to a committee or Presiding Officer).

While the Work Group was not convinced that partisan staff share the constitutional protections provided to legislators, the recommendations recognize that these partisan staffers are hired and fired by individual legislators and perform work, at the direction of that legislator, on behalf of specific constituents. While these partisan employees may not be as susceptible to the political misuse of the policy as legislators, the impact of any such misuse would be felt in an individual legislative district. Work Group participants were also concerned that partisanship or bias could result in a legislator choosing not to impose remedial measures where they would otherwise be warranted. Testimony provided to the Work Group described precisely this fact pattern. The Work Group recommendation reflects an effort to balance these competing considerations by providing the legislator-employer with an opportunity to follow a recommendation, while ultimately granting the authority to create a safe Capitol environment to the Conduct Committee.

Finally, the Work Group believes that, in many instances involving third parties, notification to an employer, client or professional organization—and the resulting stigma—may remediate harassment without requiring the imposition of more severe sanctions.

Throughout the Work Group process, participants described the possible impact that workplace harassment allegations, investigations, determinations and remedies could have on political and policy processes. Concerns that the workplace harassment policy could be weaponized as a political tool were frequently raised. While the Work Group recommendations were designed to limit this possibility, they cannot eliminate it. The decision to apply the workplace harassment policy in an equitable and nonpartisan manner lies with the Legislative Assembly.

Attachment A
Suggested Definition of Workplace Harassment

This policy applies to all behavior that creates an impact on the work environment of Capitol employees or on the ability of third parties to access the Capitol environment free of harassment. This may include behavior that occurs electronically, outside the Capitol, or after hours, when the behavior has an impact on the Capitol environment.

What is a Protected Class?
A protected class is one that is protected by applicable law. Protected classes include:

- Sex.
- Race.
- National Origin.
- Disability.
- Age.
- Religion.
- Marital status.
- Pregnancy.
- Sexual orientation.
- Gender identity or expression.
- Engaging in whistleblowing activity.
- Opposing an employer's actions when the employee reasonably believes them to be unlawful.
- Taking leaves protected by law (such as OFLA, FMLA, disability-related leave)
- Injured worker status.
- Any other classes protected by applicable law (provide link to list of applicable statutes).

What Is Harassment? Harassment is verbal or physical conduct or visual displays that denigrate or show hostility or aversion toward a person or group because of a protected class. This may include behavior such as:

- Name-calling.
- Slurs.
- Stereotyping.
- Threatening, intimidating, or hostile acts that relate to a protected class.
- Belittling, demeaning, or humiliating a person because of a protected class.
- Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of a protected class.

Behavior creates a hostile work environment when (a) it is unwelcome and (b) it is so severe or pervasive that it either affects a person's ability to function effectively in the workplace or denies someone the benefits of the workplace. "Severe" means that one incident could be significant enough to create a hostile environment; "pervasive" means that a series of less significant incidents, taken together, could create also create a hostile environment.

The legislature prohibits all harassing behavior, even if it does not rise to the level of creating a hostile environment.

Examples of harassing behavior:

- Telling a non-white employee to "go back where you came from."
- Imitating a person's physical disability or referring to an employee with a mental health disorder as "unhinged," a "head case," or someone likely to "go postal."
- Assuming that a black employee is an expert on hip-hop music or basketball.
- Questioning a gay employee about the mechanics of sex between him and his partner or implying that he must have a sexually transmitted disease.
- Suggesting an older worker should retire, is unable to adapt to new technology, or is "behind the times"; complaining that the workplace needs fewer "gray hairs" or more "young blood."
- Intentionally referring to a transgender employee by the wrong pronoun or using the employee's former name associated with the wrong gender ("deadnaming").
- Use of ethnic slurs, such as calling someone from the Middle East a "Camel Jockey"; calling someone from Mexico a "Wet Back"; or calling an African-American the "n-word" or "boy."

What Is Sexual Harassment? Sexual harassment is harassment based on sex. Sexual harassment occurs when it meets the criteria for harassment described above.

In addition, it may also include unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, when submission to the conduct is made an explicit or implicit term or condition of employment or submission to or rejection of the conduct is used as a basis for employment decisions.

The legislature prohibits all sexually harassing behavior, even if it does not rise to the level of creating a hostile environment.

Sexual harassment may include but is not limited to:

- Unwanted sexual advances, flirtations, or propositions.
- Demands for sexual favors in exchange for favorable treatment or continued employment.
- Sexual jokes.
- Verbal abuse of a sexual nature.
- Verbal commentary about an individual's body, sexual prowess, or sexual deficiency.
- Leering, whistling, touching, or physical assault.
- Using sexually suggestive, insulting, or obscene comments or gestures.
- Display in the workplace of sexually suggestive objects or pictures.
- Sending or forwarding e-mail of an offensive or graphic sexual nature.
- Discriminatory treatment based on sex.

Examples of sexually harassing behavior:

- A female employee is usually asked to make coffee while male employees of equal status are not.

- An employee eyes a coworker's rear end and comments that they must be "great in the sack."
- On Monday mornings, the supervisor emails everyone a "dirty joke of the week."
- A staffer keeps a calendar of semi-nude women posted in his office, despite a coworker's statement that she finds the calendar demeaning.
- An employee hugs coworkers even though they pull away, explaining "oh, come here, I'm just a hugger."
- A lobbyist pitches a bill regarding nonprofit boards. The legislator laughs and says, "well, sure, honey, if you got on my "board" I'd show you some results. . ." The lobbyist protests, but the legislator shrugs, "well, I'm just trying to lighten the conversation. If you don't like these meetings, you don't have to be here."
- A male supervisor excludes female employees from after-hours meetings because he "does not want to be accused of sexual harassment later."
- A supervisor tells an employee that he could get her a better assignment if she sleeps with him.

What Is Retaliation? Retaliation is the treatment of a person less favorably because the person exercised a legal right, made a good-faith complaint about unlawful conduct (such as prohibited discrimination, harassment, or retaliation), or participated in an investigation about unlawful conduct.

The legislature prohibits all retaliatory behavior, even if it does not rise to the level of behavior that the law recognizes as retaliation.

Examples of retaliatory behavior:

- In a staff meeting, a supervisor complains about all of the disruption that an employee's complaint is causing.
- An employee is not selected for an assignment because he is "not a team player" since he supported another employee's complaint.
- An employee returns from parental leave and is criticized because his attendance is unreliable.

Attachment B
Implementing Work Group Recommendations

From its first meeting to its last, the Work Group wrestled with what form various components of the workplace harassment policy should take: a legislative rule, a statute or a constitutional amendment.

Several Work Group participants expressed concerns about the transitory nature of legislative rules. The Legislative Assembly could adopt significant process improvements and workplace protections one session, and remove them the next. Such havoc would only undercut the goal of creating reliable mechanisms to combat harassment.

The Work Group considered whether the legislature should enact its policies in a more stable way, but this inquiry did not reveal workable solutions. Constitutional amendments take time and substantial political will to enact; thus, constitutional law is unlikely to provide prompt relief. Similarly, constitutional provisions are difficult to amend—so constitutional law is a poor vehicle for detailed policies that may require revision for practical reasons over time.

Statutory measures are also problematic. The Oregon Constitution gives the sitting legislature broad constitutional authority to govern itself "when assembled." Thus, it is uncertain whether a statute enacted by a previously assembled body would have the authority to govern a later-assembled body. And absent exceptional circumstances, it is likely that courts might abstain from reviewing legislative action that falls within or even touches on "political questions" reserved to legislative discretion.

The below table identifies the form of codification (legislative rule, statute or constitutional amendment) that the Work Group recommendations could take. In terms of the range of possibilities, the Work Group believes a chamber rule is sufficient to regulate legislators, though a constitutional amendment would have the benefit of ensuring the longevity of policy decisions. For legislative employees, a legislative rule would suffice, as would a statute or constitutional amendment. For third parties, the Work Group believes that the Legislative Assembly has the constitutional authority to regulate conduct in the State Capitol directly, via legislative rule. A statute or constitutional amendment could also provide jurisdiction.

The table below also identifies the timing within which a recommendation could be implemented, i.e., whether it could be implemented immediately or whether there are legal or practical reasons that a longer time frame may be required. As a general matter, this document presumes that legislative rules could be adopted immediately and statutes could be adopted in the medium term.

Work Group Recommendation	Codification	Implementation
Training and Culture		
• Continuous efforts from legislative leadership to improve the Capitol culture.	N/A	Immediate and Ongoing
The Equity Office		
• Establish Equity Office, with oversight by Conduct Committee.	Statute[10]	Medium Term
• Hire Equity Office employees and identify physical space.	N/A	Long Term
Training		
• Provide training on the workplace harassment policy and make policy publicly available on Internet.	N/A	Immediately
• Require respectful workplace training for all staff and contractors. Invite third parties and public legislator attendance records.	Rule	Immediately
• Begin conducting regular climate surveys.	Rule or N/A	Medium Term
• Recognize a Capitol Leadership Team.	Rule or N/A	Medium Term
• Require respectful workplace training for registered lobbyists.	Rule	Medium Term

[10] Regardless of whether a statute is legally required, it would put the office on the same footing as the Office of Legislative Counsel (ORS 173.111), the Legislative Fiscal Office (ORS 173.410), the Legislative Policy and Research Office (ORS 173.605), Legislative Administration (ORS 173.710), and the Legislative Revenue Office (ORS 173.800).

Work Group Recommendation	Codification	Implementation
• Require Oregon Government Ethics Commission to notify Conduct Committee whether registered lobbyists have attended training.	Statute	Medium Term
• Provide training on multiple occasions throughout the year. Develop online training.	N/A	Medium Term
• Review training curriculum and use of technology.	N/A	Long Term
Interns, Volunteers, and Pages		
• Require that the name and contact information of every intern, page, and volunteer be provided to Human Resources.	Rule	Immediately
• Provide in-person, workplace harassment training to every intern, volunteer, and page, as soon as practicable.	Rule	Immediately
• Conduct exit interviews.	Rule or N/A	Medium Term
• Build relationships with universities and other institutions that regularly refer interns.	N/A	Long Term
Prohibited Conduct		
• Adopt proposed definition of "harassment," with examples. Include prohibitions on retaliation.	Rule	Immediately
Reporting Harassment		
• Create three reporting avenues.	Rule	Immediately

Work Group Recommendation	Codification	Implementation
Confidential Disclosures		
• Create ability to make confidential disclosures, subject to limited exceptions and authorize informal contacts with complainants and respondents.	Rule	Immediately
• Provide external protections for confidentiality under state law, by adopting privilege statute.	Statute	Medium Term
Nonconfidential Reports		
• Mandate reporting by supervisors.	Rule	Immediately
• Encourage reporting by new contractors.	New Contracts	Immediately
Formal Complaints		
• Authorize any individual to file a complaint, subject to penalty of perjury.	Rule	Immediately
• Exercise jurisdiction over third parties accused of harassment in the State Capitol.	Rule	Immediately
• Extend or eliminate time limitations on complaints.	Rule	Immediately
Protecting Reporters, Complainants, and Respondents		
• Authorize imposition of interim safety measures.	Rule	Immediately
• Require investigator to check in with complainants and respondents on a regular basis or upon request.	Rule	Immediately

Work Group Recommendation	Codification	Implementation
• Adopt public records exemption.	Statute	Medium Term
• Adopt confidentiality rules applicable to investigator and provisions authorizing investigator to ask individuals not discuss the investigation to protect its integrity.	Rule	Immediately
• Include and explain protections against retaliation.	Rule	Immediately
• Provide contact information for outside entities.	Rule or N/A	Immediately
• With regard to nonconfidential reports, require that notice of specific allegations be provided to respondent and respondent be given an opportunity to respond to the allegations and provide witnesses, testimony and other evidence.	Rule	Immediately
Investigations		
• Adopt investigation timeline, obligation to keep parties informed of investigative timelines and status, and require provision of preliminary factual findings and recommendations to parties.	Rule	Immediately
• For legislators, authorize investigator to make factual findings subject to Conduct Committee review and authorize Conduct Committee to determine whether the facts constitute a policy violation.	Rule	Immediately
• For non-legislators, authorize investigator to find facts and make policy determination.	Rule	Immediately

Work Group Recommendation	Codification	Implementation
• For non-legislators, authorize appeal to Conduct Committee.	Rule	Immediately
Remedies		
• Empower Conduct Committee to impose and recommend remedial measures on legislators.	Rule/Constitutional Amendment	Immediately/Long Term
• Authorize majority vote, when constitutionally permissible.	Rule/Constitutional Amendment	Immediately/Long Term
• For nonpartisan employees, empower supervisors, in consultation with Human Resources, to impose remedial measures.	Rule	Immediately
• For partisan employees, empower the Conduct Committee to make recommendations to supervising legislator for remedial measures and to direct the implementation of those measures, in appropriate circumstances.	Rule	Immediately
• For third parties, empower the Legislative Administrator to impose remedial measures.	Rule	Immediately

Attachment C
Work Group Membership[11]

P.K. Runkles-Pearson (Chair) – Ms. Runkles-Pearson is a partner with the law firm of Miller, Nash, Graham & Dunn, where she specializes in employment, education, and public/constitutional law. She helps institutions of higher education and public, nonprofit, and mission-driven entities address their complex legal needs. Ms. Runkles-Pearson was the past Chair of the Oregon State Bar's Constitutional Law Section. She currently serves as Governor Kate Brown's appointee to the Oregon Law Commission.

Vicki Berger – Representative Berger served as a Republican member of the Oregon House of Representatives representing District 20 (West Salem) from 2002-2014, where she focused on tax policy, serving as a member of the Revenue Committee for 12 years.

Terry Beyer – Representative Beyer served as a Democratic member of the Oregon House of Representatives representing District 12 (Springfield) from 2001-2012. During her service in the Legislative Assembly, Representative Beyer served as the Chair of the Transportation Committee.

Mark Comstock – Mr. Comstock is a shareholder at the law firm of Garrett Hemann and Robertson P.C., where his practice focuses on bankruptcy, creditors' rights, business and corporate law, and school and public entity law. Mr. Comstock has served as a member of the Oregon Law Commission since 2008.

Erik Girvan – Professor Girvan is an Associate Professor and faculty co-director of the Conflict and Dispute Resolution Program at the University of Oregon School of Law. Professor Girvan conducts research on how stereotypes, attitudes, and other biases might impact decisions in the legal system, and conducts trainings and workshops nationwide on the subject of implicit bias.

Elizabeth Howe – Ms. Howe is a former legislative staffer, a registered lobbyist and member of the Capitol Club, and the founder of Howe Public Affairs, where she serves a wide variety of clients including private corporations and non-profit organizations.

Scott Hunt – Mr. Hunt is a partner with the law firm of Busse and Hunt, where he represents employees in wrongful discharge claims and all types of discrimination, harassment, retaliation, and whistleblowing actions, as well as claims for unpaid wages. Mr. Hunt is a member of the College of Labor and Employment Lawyers, and is one of only two Oregon fellows to practice exclusively in the area of plaintiff's employment law.

Wendy Johnson – Ms. Johnson is an intergovernmental relations associate for the League of Oregon Cities. In that role, she focuses her advocacy on finance, taxation, and economic development. Ms. Johnson is a registered lobbyist and a member of the Capitol Club.

[11] Jennifer Middleton of Johnson Johnson Lucas & Middleton was initially appointed to the Work Group but withdrew for personal reasons.

Previously, she served as the Deputy Director and General Counsel for the Oregon Law Commission from 2001-2015.

Amy Klare – Ms. Klare serves as the Director of the Civil Rights Division of the Oregon Bureau of Labor and Industries. The Civil Rights Division exists to defend the rights of all Oregonians to equal opportunity in employment, housing, public accommodations and career schools. Previously, Ms. Klare worked as a lobbyist and has held several staff roles in the Legislative Assembly.

The Honorable Jack Landau – Justice Landau recently retired from the Oregon Supreme Court, where he served since 2011. He served as a Judge on the Oregon Court of Appeals from 1993-2010. Justice Landau has also taught Legislation and Statutory Interpretation to law students at each law school in Oregon.

Dr. Melody Rose – Dr. Rose is the outgoing President of Marylhurst University and previously served as the Chancellor of the Oregon University System. She has also served on the faculty of Portland State University, where she held multiple leadership positions. Dr. Rose is a published author and scholar on topics including the U.S. Presidency, social policy, women and politics, and elections.

Jackie Sandmeyer – Ms. Sandmeyer is the founder and principal of TIX Education Specialists, where she works with higher education institutions, law enforcement, prosecutors, and community-based service providers to identify and create some of the nation's leading models in Title IX and student victim services.

Carolyn Walker – Ms. Walker currently serves as an Associate General Counsel at Portland General Electric. Previously, she was a partner at the law firm of Stoel Rives LLP, where she specialized in representing management-side clients in employment matters. Ms. Walker serves on the board of the Oregon Community Foundation and the Oregon Alliance of Independent Colleges and Universities.

Angela Wilhelms – Ms. Wilhelms serves as the University Secretary for the Board of Trustees at the University of Oregon, where she manages the work of the board, advises the university president and executive administration, and serves as the liaison between the board and the larger UO Community. Previously, Ms. Wilhelms worked in the Oregon Legislative Assembly as Chief of Staff in the House Minority Office and House Co-Speaker's Office.

Staff:

Joshua Nasbe – Mr. Nasbe serves as committee counsel in the Oregon Legislative Assembly. Previously, he litigated criminal cases and served as legal counsel in both the judicial and legislative branches of state government, managing a wide variety of legal and policy matters.

Sandy Weintraub – Mr. Weintraub serves as the Director of the Oregon Law Commission. Prior to his work for the Commission he was Director of Student Conduct and Community Standards

at the University of Oregon, and as an Assistant Dean of Students at the University of California Los Angeles. Mr. Weintraub is a 2010 graduate of the University of Oregon School of Law.

Attachment D
Work Group Meetings

Meeting Dates	Recording
May 15, 2018	Audio/Video Recordings and documents related to each meeting can be found at the following website: https://law.uoregon.edu/explore/olc-workplace-project
June 19, 2018	
July 19, 2018	
August 21, 2018	
September 13, 2018	
September 27, 2018	
October 12, 2018	
October 23, 2018	
November 8, 2018	
November 30, 2018	
December 17, 2018	
Training and Culture Subgroup	September 14, 2018
	October 9, 2018
	November 1, 2018
Constitutional Subgroup	October 18, 2018

Attachment E

Constitutional Subgroup Recommendations

The subgroup considered a number of open constitutional questions before the full work group. It largely focused on the ability of the Legislative Assembly to impose interim safety measures and discipline on respondent-legislators. The conversation focused largely on two provisions of the Oregon Constitution: Article IV, section 11, and Article IV, section 15. They provide, in pertinent part:

> "Each house when assembled, shall…determine its own rules of proceeding…." Article IV, §11.
>
> "Either house may punish its members for disorderly behavior, and may with the concurrence of two thirds, expel a member; but not a second time for the same cause." Article IV, §15

Consensus: Oregon's appellate courts have not yet had the opportunity to construe either of the clauses in a meaningful way. But the clauses are substantially similar to clauses in the United States Constitution and the constitutions of most other states, and there is case law in some of those jurisdictions. Based on a review of cases in these other jurisdictions, and an understanding of the methodology Oregon's appellate courts use to interpret the Oregon constitution, the subgroup reached consensus on the likely scope of the Oregon provisions. While this document represents the subgroup's considered opinion on likely outcomes, the actual outcome is far from certain. The only way to guarantee that a particular policy choice would survive constitutional scrutiny is to amend the Oregon Constitution.

Article IV, section 11

Consensus: The 'rules of proceeding clause' gives each house broad authority to conduct legislative business in the manner it sees fit. Absent exceptional circumstances, it is unlikely that an Oregon court would review legislative action that falls squarely within the clause, including the failure of a house to follow either its own rules or a state statute. In some instances, federal courts have considered suits based on the federal constitutional rights of individual legislators, such as the right to free speech or due process. A properly structured rule for discipline or interim measures should be able to avoid such challenges.

Consensus: The subgroup recommends that discipline of legislators occur pursuant to rule or constitutional amendment. Given the body's broad constitutional authority to govern itself "when assembled," it is uncertain whether a statute enacted by a previously assembled body would have the authority to govern a later-assembled body. A rule plainly would govern, though its staying power is uncertain from session to session. The only way to ensure the longevity of a rule is via constitutional amendment.

Consensus: Article IV, section 11, is quite broad; it likely authorizes the imposition of interim safety measures, including prohibitions on contact with specific individuals or classes of individuals, restrictions on unaccompanied movement in the State Capitol or requirements to participate remotely in the legislative process. Such safety measures should be narrowly tailored to avoiding the safety risk; punitive measures could be considered "punishment" that would fall under Article IV, section 15, rather than the rules of proceeding clause.

Interim safety measures are most defensible in those situations where:

- Interim safety measures do not limit a legislator's ability to engage in core legislative functions (e.g. voting).
- Interim safety measures are otherwise narrowly tailored to address immediate safety concerns that are based on credible allegations.
- The affected legislator is provided with notice and an opportunity to be heard on the proposed interim safety measures, in advance when possible.

Consensus: It is likely that the rules of proceeding clause would allow each house to adopt rules delegating the authority to impose interim safety measures to a subgroup of the full body (e.g. to a committee or Presiding Officer).

Article IV, section 15

Consensus: Either house may punish its members for "disorderly behavior." There is a strong argument the Legislative Assembly is constitutionally empowered to determine for itself whether certain conduct constitutes "disorderly behavior," and that its determination is not reviewable by a court. And harassing behavior, even if not strictly unlawful, has already been considered "disorderly behavior" by the U.S. Congress. But even if a court reviewed such a determination, it is likely that it would determine that harassing ore retaliatory behavior is "disorderly behavior."

Consensus: It is likely that the 'punishment clause' authorizes a broad array of sanctions, including censure, reprimand, the imposition of fines or training requirements and the loss of committee assignments. Restrictions on core legislative functions, however, may be impermissible because they have the potential to interfere with the constitutional rights of a legislator's constituents to representation.

Consensus: The clause requires "punishment" to be for "disorderly behavior" and not for suspected disorderly behavior. Thus, a legislator likely may not be punished until the body has determined that disorderly behavior occurred. This means that a legislature may not require "punishment" as an interim measure. Interim measures must not go beyond what is necessary for safety, or they may be considered impermissible punishment.

Consensus: The punishment clause requires a two-thirds vote for expulsion but does not specify the required vote margin for other punishments. It is likely that the punishment clause authorizes either house to punish its members based on a majority vote. It is likely that the punishment clause would allow a house to delegate this disciplinary authority by rule to a smaller group of legislators (e.g., to a committee or Presiding Officer).

Consensus: To avoid unnecessary partisanship, the Conduct Committees should continue to include the same number of members from the majority and minority parties.

Consensus: The use of technology to allow legislators to remotely participate in the legislative process should be considered, as it may provide an effective balance between the constitutional rights of the voters and the need to provide a safe state Capitol.

Consensus: While it may be legally permissible for either house to delegate the authority to impose punishment (except for expulsion), this mechanism may prove more effective in the context of interim safety measures where a more nimble response may be required.

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