



NEW YORK  
CITY BAR

**COMMITTEE ON GOVERNMENT ETHICS  
AND STATE AFFAIRS**

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March 9, 2018

The Honorable Andrew M. Cuomo  
Governor of New York State  
Executive Chamber, State Capitol  
Albany New York 12224

The Honorable Carl Heastie  
Speaker of the New York State Assembly  
Legislative Office Building Room 932  
Albany, New York 12248

The Honorable Brian Kolb  
Minority Leader of the New York State Assembly  
Legislative Office Building Room 933  
Albany, New York 12248

The Honorable John J. Flanagan  
Majority Leader of the New York State Senate  
Room 330, State Capitol  
Albany, New York 12247

The Honorable Jeffrey D. Klein  
Coalition Co-Leader, New York State Senate  
Legislative Office Building Room 913  
Albany, New York 12247

The Honorable Andrea Stewart-Cousins  
Minority Leader of the New York State Senate  
Legislative Officer Building Room 907  
Albany, New York 12247

**Re: A.9511-A/S.7511-A (Budget Article VII), Subparts E and F (Part I) - Preventing Sexual Harassment in State Government**

Dear Governor Cuomo and Legislative Leaders:

The Committee on Government Ethics and State Affairs of the New York City Bar Association is comprised of members interested in, and typically with expertise concerning, government ethics and/or state government. It has been active in commenting on the ethics enforcement in New York. It has joined with others in issuing for comment a proposed constitutional amendment to strengthen enforcement of ethics and workplace misconduct rules including sexual and other forms of harassment by creating a new single and independent enforcement entity for the Legislative and Executive Branches.<sup>1</sup>

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<sup>1</sup> See [www.committee2reform.org/proposed\\_anti\\_corruption\\_amendment](http://www.committee2reform.org/proposed_anti_corruption_amendment).

As more fully described below, the Committee respectfully recommends that Subpart E, which would give the Joint Committee on Public Ethics (“JCOPE”) express authority to receive and investigate sexual harassment complaints, not be enacted until steps have been taken to replace JCOPE and the Legislative Ethics Commission (“LEC”) with a truly independent enforcement body able to investigate and impose sanctions on a consistent basis. Subpart F, which requires the creation and enforcement of sexual harassment policies within the three branches of government, should be strengthened and its scope expanded to cover all forms of harassment. This would be a reasonable interim solution pending the creation of a new entity to replace JCOPE and the LEC.

## **THE PROPOSAL**

Under the Constitution, the Governor each year submits legislation to implement the proposals that underlie the revenue estimates and expenditure authorizations in the proposed Executive Budget. These are called Article VII bills because they are submitted pursuant to the State Finance Article VII of the Constitution. This year, the Article VII bills commendably include a Women’s Agenda package and an important part of that package focuses on preventing sexual harassment.

This report focuses *only* on the parts of the Governor’s sexual harassment proposal designed to prevent sexual harassment in state government. The proposal seeks to do this in two ways; we address, in turn, Subpart F followed by Subpart E.

### **Subpart F**

Subpart F of the proposal requires the three branches of government to develop sexual harassment policies and sets out certain standards for those policies. Among other things, the policies are required to establish procedures for the investigation of complaints and the preparation of reports of investigations which complaints and investigations are required to be kept confidential.<sup>2</sup>

In the Executive Branch, the policies would be established by the Governor’s Office of Employee Relations<sup>3</sup> (“GOER”), the investigation would be conducted by a person in each agency designated by GOER who would forward a report to the general counsel of the agency for review and recommendation of “appropriate administrative action” consistent with law and collective bargaining agreements.

In the Legislative Branch, the sexual harassment policy would be prepared by the Legislative Ethics Commission (“LEC”), a nine-member body comprised of four legislators and five outside members appointed by the legislative leaders. The investigation would be conducted

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<sup>2</sup> The proposal is ambiguous whether the reports of investigation must also be kept confidential.

<sup>3</sup> GOER should not be confused with the New York State Public Employee Relations Board (“PERB”) which is a neutral and independent agency with mediation and adjudication authority. GOER, on the other hand, is the Governor’s representative in labor negotiations.

by a person designated by the LEC who would forward the report of investigation to another person designated by the LEC for review and recommendation of appropriate administrative action.

In the Judicial Branch, the sexual harassment policy would be prepared by the Office of Court Administration which would designate a person to conduct investigations and another person to undertake review and recommendations of appropriate administrative action.

### **Subpart E**

Subpart E of the Governor's proposal expands the investigative jurisdiction of the Joint Commission on Public Ethics ("JCOPE") to include complaints of sexual harassment. It does this by adding a new section to the State Code of Ethics proscribing sexual harassment. JCOPE already has the power to investigate violations of the State Code.

Next, the legislation would impose a fine of up to \$10,000 for a sexual harassment violation. Under the law creating JCOPE, this fine could be imposed by JCOPE on officers and employees in the Executive Branch. Only the LEC could impose this fine on an officer or employee in the Legislative Branch.

This enhanced penalty provision also makes violators subject to proceedings for suspension or removal "by the attorney general or in the manner otherwise provided by law or collective bargaining agreement." JCOPE would be required to establish a unit to receive and investigate complaints of sexual harassment and the sexual harassment policy of each branch of government must notify covered persons of their right to file a complaint with JCOPE.

## **CONCLUSION**

First, both Subparts E and F should be amended to cover all causes of workplace harassment and not just sexually motivated harassment. For example, harassment based on race, religion or sexual orientation or identity should be included.

Second, we support the goals of Subpart F, but believe it can be strengthened in the following ways.

Subpart F as it applies to the **Executive Branch** should be amended to require that the report of investigation contain a recommendation as to the sanction to be imposed, that the authority passing on the recommendation give written reasons for any departure from that recommendation and that the complainant and the respondent have a right to receive a copy of the report of investigation and to comment on it to the deciding authority and, upon final decision, disclose publicly any report of investigation finding a violation as well as the decision reached by the deciding authority with the reasons for any departure from the recommendation made in the report of investigation.

Subpart F as it applies to the **Legislative Branch** should be amended in the same manner as described in the case of the Executive Branch. In addition, consistent with the law creating JCOPE, JCOPE should concur in the designation of the person to conduct the investigation and prepare the investigative report and sanction recommendation. Also consistent with that law, the authority to make the final decision should be fixed by rule adopted by each house of the Legislature.

Subpart F as it applies to the **Judicial Branch** should be amended in the same manner as described in the case of the Executive Branch. In addition, consistent with Article VI of the Constitution, complaints of sexual or other forms of harassment by judges should be decided by the Commission on Judicial Conduct created in that Article.

Third, we oppose adoption of Subpart E until JCOPE and the LEC have been replaced with an agency to enforce the State Code of Ethics that is credible in its non-partisanship and independence.

### **Reasoning**

In cases of sexual harassment, as in other cases of ethics violations and workplace misconduct, a strong power of enforcement is critical. That enforcement power must be exercised without fear or favor and in the political climate of state government doing that can present a real challenge. Moreover, in cases of harassment that enforcement must be particularly vigorous and consistent because it is not infrequent that the appropriate way to prevent sexual or other forms of harassment, both as a matter of deterrence and needed remedial outcome, is the removal of the repeated or egregious violator from the workplace. Accordingly, particularly in the context of the Executive and Legislative Branches of state government, enforcement by a single non-partisan entity independent of political pressure is necessary to assure that appropriate enforcement, including termination of public service, is consistently achieved.

In an ideal world, that vigorous enforcement would come through a single, independent, non-partisan agency charged with enforcing, subject to due process and judicial review, rules designed to secure transparent and ethical government and a safe state government workplace for all.

Unfortunately, such an agency does not exist in New York. The natural candidate is JCOPE and this fact is reflected in the proposal. JCOPE, however, suffers from a lack of independence and credibility because its structure is fatally flawed. Unlike the Commission on Judicial Conduct, which has worked well, JCOPE is not made up of appointees from all branches of state government. Other states include appointees of their Chief Judge, but the JCOPE structure does not. Also, unlike the Commission on Judicial Conduct, JCOPE does not operate by majority vote. As few as two members of the 14-member Commission can veto an investigation or a finding of violation. JCOPE has no rule barring ex parte contact by a Commissioner with that Commissioner's appointing authority thereby enhancing the appearance and possibility of political control. It has no power to even call for the termination of a state official or employee and no power to impose any form of sanction on a member of the

Legislature or a legislative employee. JCOPE is not guaranteed secure funding, which guarantee is necessary to secure its independence. As an enforcement mechanism, JCOPE is designed to fail.

There are those who seek to justify JCOPE's structure on the ground that the voting structure prevents politically motivated investigations. The problem with this argument is that any politician charged with wrongdoing will always claim that it is a political pursuit. Giving the political allies of that politician the veto power, as does New York, means that nothing will ever happen. Giving the political allies of that politician the veto power as does New York, means that nothing will ever happen.

Accordingly, until the flaws in JCOPE are corrected, no reasonable reliance can be placed on it to adequately enforce a sexual or other harassment policy.

While the right solution to this problem is to replace JCOPE with an effective enforcement agency<sup>4</sup>, in the meantime the sensible course is to strengthen the likelihood of strong enforcement under the mechanisms outlined in Subpart F of the proposal.

We propose doing that through increasing transparency, accountability and due process. As outlined above, by giving the complainant or the respondent, in cases where there has been a finding of a violation, the right to make public the complaint, the investigative finding and the decision ultimately reached, the public can be the judge of the appropriateness of the sanction in light of the facts established. By requiring the investigator to make a recommendation, the person who heard the testimony will make the initial recommendation for sanction. By providing both the complainant and the respondent the opportunity to comment on the investigative report and recommendation before a final decision is made, due process will be improved. Requiring the person with decision making authority to explain any departure from the initial recommendation promotes both transparency and accountability.

There is one area where we believe JCOPE should be involved. The statute creating JCOPE also created the LEC. JCOPE has exclusive investigative jurisdiction and the LEC has review and sanction recommendation jurisdiction. Allowing the LEC to investigate sexual harassment allegations would be contrary to that distinction. We view it as important that the role of the LEC not be expanded when the right course is to merge it into a single enforcement agency. A practical interim solution is to maintain JCOPE's investigative role by requiring that it concur in the designation of an investigator.

The enhancement of Subpart F is a reasonable interim solution pending the replacement of JCOPE. In the long term, internal agency enforcement will not be enough because it is by definition not independent. For example, the proposal assigns a large role to agency general

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<sup>4</sup> The Committee believes that the steps to fix the flaws in JCOPE should be done by constitutional amendment replacing both JCOPE and the LEC with the New York Government Integrity Commission similar to the Commission on Judicial Conduct which was created in the Constitution 40 years ago and has worked well.

counsels who are, in essence, political appointees of the Governor. But until we have an effective independent enforcement agency, internal agency enforcement is a good way to begin.

Respectfully submitted,



Jennifer Rodgers

Cc:

The Honorable Janet DiFiore, Chief Judge of the State of New York

The Honorable Seth H. Agata, Executive Director NYS Joint Commission for Public Ethics

The Honorable Lisa P. Reid, Executive Director NYS Legislative Ethics Commission