

# Department of Justice



## **Report and Recommendations of the Sexual Harassment Steering Committee Concerning the Department of Justice's Sexual Misconduct Policies and Procedures**

**January 20, 2023**

## **Use of this Report**

This Report was drafted by the Sexual Harassment Steering Committee as part of a review of the Department of Justice's sexual misconduct policies and procedures. The Deputy Attorney General further tasked the Committee with making recommendations as to whether changes should be made to existing Department sexual misconduct policies and procedures. The Report is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing in this Report, including the policy recommendations, should be construed to impair or otherwise affect the authority granted by law to a department or agency, or the head thereof, or the functions of government officials relating to budgetary, administrative, or legislative proposals. Recommendations will be implemented only as determined by relevant Department officials and as consistent with applicable law and subject to the availability of appropriations. Both implementation and application of policy recommendations involve the exercise of judgment of relevant Department officials.

## **I. Background and Findings**

In keeping with the Department of Justice's (Department or DOJ) commitment to ensure a safe workplace and advance gender equality, the Deputy Attorney General empaneled a Steering Committee to review the Department's sexual misconduct policies and procedures, and evaluate whether they serve the needs of its workforce. The Deputy Attorney General further tasked the Sexual Harassment Steering Committee (SHSC) with making recommendations as to whether changes should be made to existing Department sexual misconduct policies and procedures to ensure that the Department is proactive and effective in preventing and responding to sexual misconduct in the workplace.

The SHSC comprises members from components across the Department, including the Justice Management Division (JMD), the Civil Rights Division (CRT), the Office on Violence Against Women (OVW), the Office for Victims of Crime (OVC), the Federal Bureau of Investigation (FBI), the Executive Office for U.S. Attorneys (EOUSA), the Office of the Deputy Attorney General (ODAG) and the Office of the Associate Attorney General (OASG). Among its members are general counsels, victim services and gender-based violence experts, DOJ employee representatives, senior management administrators, and trial attorneys with experience enforcing federal civil rights laws. The SHSC members carefully examined material it collected, engaged in rigorous debate and deliberation, and learned a great deal from outside experts and each other.

In an effort to assess the Department's sexual misconduct policies and procedures, the SHSC gathered relevant policies from the Department as a whole and DOJ components, held panel discussions with experts both inside and outside DOJ, examined best practices and efforts undertaken in other agencies and in the private sector, reviewed results of focus groups and a survey designed by the SHSC, reviewed the Administration's Executive Order and strategic plan on diversity, equity, inclusion and accessibility (DEIA), considered Equal Employment Opportunity Commission (EEOC) studies and guidance on effective anti-harassment strategies, and examined data on harassment from the EEOC and the U.S. Merit Systems Protection Board (MSPB), as well as statistics specific to DOJ. The SHSC consulted with DOJ's Office of the Inspector General (OIG), as well as several larger components, including law enforcement components, about their investigation practices, tracking processes, harassment points of contact programs, trauma resources, tables of penalties, disciplinary action protocols, and training programs. The SHSC also reviewed anti-harassment policies that were implemented at a state or local level pursuant to consent decrees entered into with DOJ to ensure that any recommendations the SHSC might make are consistent with the positions DOJ has taken in enforcement matters.

In undertaking its work, the SHSC was mindful that sexual misconduct exists on a broad continuum, ranging from actions such as off-hand sexual comments to criminal conduct such as sexual assault. Ignoring low-level gender-biased conduct, such as talking over or sidelining women and other marginalized groups, allows for more severe forms of misconduct, including sexual misconduct, to flourish. An effective workplace anti-sexual misconduct program will develop trainings and responses that address specific complaints of sexual misconduct, and work to reduce the types of conduct and attitudes that lead to it.

The SHSC concluded that there are deficiencies in the way the Department handles sexual misconduct allegations, which in turn impact workplace safety and employee confidence about how sexual misconduct complaints are handled. The SHSC offers 11 recommendations to improve the Department's handling of sexual misconduct allegations, understanding that the Department's efforts to fully assess and address sexual misconduct must be ongoing. If implemented, the SHSC believes that these recommendations will go a long way toward improving workplace safety and instilling confidence in how the Department prevents and responds to sexual misconduct.

### **Defining the Problem**

Various reports from the OIG<sup>1</sup> and the media<sup>2</sup> over the years, in addition to experiences that employees have shared through the survey and focus groups the SHSC assembled, have

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<sup>1</sup> See, e.g., DOJ OIG, "Review of the Handling of Sexual Harassment and Misconduct Allegations by the Department's Civil Division," Evaluations and Inspections Report (May 2017), available at <https://oig.justice.gov/reports/2017/e1703.pdf>; DOJ OIG, "The Handling of Sexual Harassment and Misconduct Allegations by the Department's Law Enforcement Components," Evaluations and Inspections Report (March 2015), available at <https://oig.justice.gov/reports/2015/e1504.pdf>; DOJ OIG, "Bonuses and Other Favorable Personnel Actions for Drug Enforcement Administration Employees Involved in Alleged Sexual Misconduct Incidents Referenced in the OIG's March 2015 Report," Evaluations and Inspections Report (October 2015), available at <https://oig.justice.gov/reports/2015/e1601.pdf#page=1>.

<sup>2</sup> See, e.g., Eric Tucker & Jim Mustian, "Whistleblower: 665 left FBI over misconduct in two decades," ASSOCIATED PRESS (October 6, 2022), available at <https://apnews.com/article/business-personnel-sexual-misconduct-chuck-grassley-merrick-garland-9ca9ea18036814bdf12e8c62a20e08d9>; Jim Mustian, "'Skilled Predator' FBI Boss Harassed 8 Women, Watchdog Finds," ASSOCIATED PRESS (April 12, 2021), available at <https://apnews.com/article/fbi-james-hendricks-sexually-harassed-8-women-b2b7653303d5d56c5bee61c137ec4b22>; Tal Kopan, "Bad conduct, leering 'jokes'—immigration judges stay on bench: U.S. Justice Department lacks strong harassment oversight for judges," SAN FRANCISCO CHRONICLE (January 22, 2020), available at <https://www.sfchronicle.com/politics/article/Sexually-inappropriate-behavior-runs-rife-in-15889003.php>; Jim Mustian, "'Under the Rug': Sexual Misconduct Shakes FBI's Senior Ranks," ASSOCIATED PRESS (Dec. 10, 2020), available at <https://apnews.com/article/fbi-sexual-misconduct-investigation-a0d33e4770acef8ff5f4a48f0267202c>; Zoe Tillman, "They Allowed It: A Justice Department Employee Said She Was Raped By A Senior Official. New Documents Show A Pattern Of Harassment At The Department," BUZZFEED NEWS (November 5, 2019), available at <https://www.buzzfeednews.com/article/zoetillman/justice-department-metoo-sexual-harassment-assault-aponte>; Caitlin Dickerson, "Hazing, Humiliation, Terror: Working While Female in Federal Prison," N.Y. TIMES (November 17, 2018), available at <https://www.nytimes.com/2018/11/17/us/prison-sexual-harassment-women.html>; Katie Benner, "At the Justice Dept.'s Death Penalty Unit, Accusations of Favoritism, Gender Bias and Unwanted Groping," N.Y. TIMES (March 31, 2018), available at <https://www.nytimes.com/2018/03/31/us/politics/justice-department-harassment-bias.html>; Jessica Schneider, "ATF agent alleges retaliation for exposing sexual harassment at Justice Department," CNN (January 23, 2018), available at <https://www.cnn.com/2018/01/22/politics/atf-agent-sexual-harassment-lawsuit/index.html>; Sari Horwitz, "Inspector General says mishandling of sexual harassment complaints at Justice Department is a

identified significant concerns with the way that the Department handles sexual misconduct allegations. As the OIG explained to the SHSC, sexual misconduct at DOJ is prevalent and substantially underreported, and effectively handling sexual misconduct allegations is complex. Indeed, in a 2017 memorandum to Department leadership, the Inspector General identified systemic issues with Department components' prevention and handling of sexual misconduct allegations, noting in particular its prevalence.<sup>3</sup> As the Inspector General stated, sexual misconduct profoundly affects not only complainants<sup>4</sup> but also the Department's reputation and credibility, which in turn lowers employee productivity and morale.

The frequency of sexual misconduct in the Department is difficult to ascertain. Using reporting data as a metric will always be of limited value because it generally is understood that sexual harassment and misconduct is widely underreported. EEO reporting data reveals that DOJ employees filed 184 *formal* complaints of sexual misconduct between 2018 and 2020.<sup>5</sup> Of course, most sexual misconduct reports either do not proceed to the formal EEO complaint process or are made outside the EEO complaint process. As JMD informed the SHSC, between 2018 and 2020, DOJ employees submitted 439 non-EEO complaints of sexual misconduct. Additionally, as of January 2022, the OIG has reviewed more than 600 complaints of sexual misconduct in the past five years involving victims who are not inmates or detainees.<sup>6</sup> A recent

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'systemic' problem," WASH. POST (Dec. 26, 2017), available at [https://www.washingtonpost.com/world/national-security/inspector-general-says-mishandling-of-sexual-harassment-complaints-at-justice-department-is-a-systemic-problem/2017/12/26/ed51abf6-dc35-11e7-b1a8-62589434a581\\_story.html](https://www.washingtonpost.com/world/national-security/inspector-general-says-mishandling-of-sexual-harassment-complaints-at-justice-department-is-a-systemic-problem/2017/12/26/ed51abf6-dc35-11e7-b1a8-62589434a581_story.html).

<sup>3</sup> DOJ OIG, Management Advisory Memorandum, The Handling of Sexual Misconduct and Harassment Allegations by Department of Justice Components (May 2017), available at <https://www.oversight.gov/sites/default/files/oig-reports/1705-v2.pdf> (Attached at Appendix 1)

<sup>4</sup> Individuals who report sexual misconduct are interchangeably referred to as victims, survivors, complainants, and individuals with lived experiences. Best practices recommend deferring to individuals who have experienced sexual misconduct on which label they prefer. For purposes of consistency throughout this memorandum, the SHSC uses the term "complainant." The one exception is for discussions of services and supports for individuals who report sexual misconduct, when we use the common nomenclature of "victim services."

<sup>5</sup> Not all complaints merit investigation, and not all investigated complaints are sustained. But many complaints are meritorious and should be sustained, with the subjects being fully held accountable for their misconduct – in some instances with criminal prosecution. The volume of reported complaints alone is cause for concern, especially given the well understood phenomenon that many more instances of sexual misconduct go unreported.

<sup>6</sup> Sexual misconduct perpetrated by BOP officials against BOP inmates presents unique issues and was addressed separately by recommendations made to the Deputy Attorney General by a working group (BOP Working Group) established at her direction.

study from the Merit Systems Protection Board found that at the Department between 2014 and 2016, 16% of women and 7% of men experienced sexual harassment.<sup>7</sup>

### **Results from Surveys and Focus Groups**

Results from the survey<sup>8</sup> and focus groups<sup>9</sup> conducted by the SHSC were particularly helpful in understanding problems with the Department's sexual misconduct policies and practice, as well as the Department culture and perception relating to sexual misconduct. While some respondents believed their office properly addressed behavior that may be seen as sexual misconduct, many respondents stated the opposite, commenting on the casual, dismissive, and joking responses to sexual misconduct or training, including by those in senior positions. And while some respondents commented that Department managers condemn sexual misconduct in the workplace, they also observed that managers do not appear to have the training to handle it effectively when it does occur.

Many respondents also shared negative views or attitudes of how their components treat allegations of sexual misconduct, stating that the allegations are often not taken seriously, intentionally ignored, or not handled appropriately. Other employees commented on the lack of transparency and knowledge about sexual misconduct and the investigative process that makes it challenging to fully understand how their components view sexual misconduct. Some respondents commented that the investigation process takes far too long and does not always result in much information being shared with complainants. A few commented that they believed their component made it difficult to report by not providing easy access to information on how to report, who to report to, what the reporting process entails, how long it will take, and who will be involved, among other concerns. Only 60% of those surveyed agreed or strongly agreed with the statement that the Department and their component take allegations of sexual misconduct seriously, and more than 20% disagreed or strongly disagreed with that statement.

While survey respondents generally agreed that they knew how to report allegations of sexual misconduct, employees in the survey and focus groups expressed concern over the people with whom they are expected to report such allegations, questioning whether they are trained properly, whether they will be respectful of the sensitive nature of the report, and whether they will maintain confidentiality. In addition, participants pointed out that they are often expected to

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<sup>7</sup> "Sexual Harassment in Federal Workplaces: Understanding and Addressing the Problem," U.S. Merit Systems Protection Board, December 2022. See [MSPB Sexual Harassment Study 2022 Update](#).

<sup>8</sup> The SHSC created an online survey that was open to all DOJ employees and contained both open-ended and close-ended questions centered on five topics relating to sexual harassment and misconduct: 1) climate/culture; 2) reporting process; 3) investigation and response; 4) retaliation; and 5) recommendations for improvement. In total, 3,843 employees participated in the survey. Appendix 2 presents graphs depicting responses to the close-ended questions asked in the survey.

<sup>9</sup> The SHSC also held a series of 10 focus group sessions with DOJ employees, covering the same topics as the survey. Each session was capped at 22 people to allow 220 employees from across the Department to participate and provide input. Registration in the sessions was first come, first served. 451 people from 68 different components or offices requested to enroll in the focus groups. 220 people participated in the groups from 48 different components or offices.

report to their supervisor, who may be the perpetrator. Many participants expressed concern that employees do not report sexual misconduct due to concerns over the impartiality of the person receiving the report; fear of formal and informal retaliation from the accused, supervisors, or colleagues; a lack of anonymous reporting options; and confusion over what exactly constitutes sexual misconduct. Only 55% of survey respondents found the reporting process to be effective or very effective.

Several employees in the survey and focus groups noted lengthy delays in deciding whether to investigate an allegation, as well as how long it takes to investigate and respond to sexual misconduct allegations once an investigation begins, ranging from several months to several years, regardless of who is responsible for the investigation. Many respondents recommended that investigations should be handled by a “neutral party” outside of the immediate office/component, who can be objective and has no perceived bias. Just under 46% of respondents agreed or strongly agreed that the Department or their component effectively investigates sexual misconduct allegations, and nearly 20% disagreed or strongly disagreed with that statement. Respondents expressed concern about retaliation from supervisors and colleagues in response to reporting sexual harassment incidents, which they believe signals to staff at all levels that sexual harassment is acceptable in the workplace. Nearly 25% of respondents stated that retaliation for reporting sexual misconduct was likely or very likely, and only 28% of respondents stated that retaliation was not at all likely. Respondents also requested support for complainants from outside the component to guide them throughout the process.

### **Assessment of Current DOJ Policies**

In assessing current DOJ sexual misconduct policies, a principal problem identified by the SHSC is the decentralized and inconsistent approach the Department and its components have employed in addressing sexual misconduct. The Department instituted a zero-tolerance policy regarding sexual harassment in 1993 that it reaffirmed in 2015. In April 2018, following the OIG’s 2017 memorandum on sexual harassment in Department components, the Department issued two new directives related to sexual misconduct, including a definition of prohibited sexual harassment and misconduct, and general guiding principles for discipline that apply to all components.<sup>10</sup> The directives reiterated the requirement that components refer all nonfrivolous allegations of criminal wrongdoing or serious administrative misconduct to the OIG and security staff, and instructed components to take interim corrective action, such as separating the complainant from the alleged harasser, while the OIG investigation is pending.

The directives also required that all components have or put policies and procedures in place that ensure consistent discipline for substantiated allegations, including directing that the presence of certain “aggravating factors”<sup>11</sup> in a substantiated incident of sexual misconduct

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<sup>10</sup> These Directives are attached at Appendix 3.

<sup>11</sup> The 2018 Memorandum, Appendix 3, identified “aggravating factors,” as sexual assault, stalking, the subject’s supervisory role vis-a-vis the victim, repetition, situations involving quid pro quo for official actions, any form of voyeurism (such as peeping), retaliation for reporting prior misconduct, and prior

should result in a proposal of disciplinary action with a penalty ranging from a 15-day suspension to removal; ensure that employees are informed of all avenues for reporting allegations; develop a process for tracking allegations; and develop a policy regarding consideration of allegations of, or disciplinary actions for, sexual misconduct in making decisions about awards, public recognition, or other favorable personnel actions. The Department maintains a public-facing website entitled “Reporting, Investigating, and Taking Action on Allegations of Sexual Harassment and Sexual Misconduct,” which contains general information about the 2018 directives and four other related policies with links to copies of them.<sup>12</sup>

The SHSC has found, however, that the 2018 directives have not resulted in uniform or effective policies for preventing and addressing sexual misconduct. Components do not have consistent standards for reporting sexual misconduct complaints, and many employees across the Department lack confidence that if they report sexual misconduct, it will be handled appropriately and effectively. Sexual misconduct investigations are too often handled by individuals who lack proper guidance and training for handling these types of investigations, and the investigations often take too long. Based on information the SHSC gathered, including from focus groups, surveys, and expert panels, discipline appears inconsistent and does not appear to uniformly abide by the guidelines set forth in the 2018 directives. Because of a lack of transparency and centralized record keeping, it is difficult to fully assess the appropriateness of investigative findings and discipline across components.

The SHSC surveyed 36 Department components regarding their harassment-related policies and practices. About half (16) of the components, including the primary law enforcement components and many of the larger Offices, Boards, and Divisions (OBDs), have component harassment/sexual misconduct policies (or EEO policies that also cover harassment). Several mid-size components and most of the smaller components, including JMD, do not have their own written policies, but instead indicated that they follow the general DOJ policies or the 2018 directives. Some component policies address the mandatory elements from the 2018 directives, but others do not, and there is considerable variation from component to component.

Some policies do not provide a clear description of what conduct is prohibited, something the OIG raised as a significant obstacle in making findings of policy violations. Some policies provide examples; others do not. Most do not address critical issues that account for many misconduct complaints, including misconduct outside of work, on social media or DOJ phones/equipment, or involving employees from other components or non-DOJ employees. Some but not all policies provide a clear prohibition on and definition of retaliation. The policies are inconsistent in making clear that supervisors must report harassment to a higher-level

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discipline for sexual harassment or misconduct. The memorandum set forth certain minimum penalties and guidelines for discipline depending on the circumstances.

<sup>12</sup> <https://www.justice.gov/policies-and-directives-effect-relating-and-duty-conduct-including-sexual-misconduct>.



supervisor, legal counsel or human resources official (HR), and most do not address the need to impose that reporting requirement on employees serving in acting or quasi-supervisory roles.

All component policies have some information about where employees should go to make internal complaints, but they vary on where employees are directed. Some do not have accurate or clear information about how to file a complaint within the component or with the EEO office, and some require digging through multiple policies or links to find where to go.

The law enforcement components, including the FBI, Drug Enforcement Administration (DEA), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Bureau of Prisons (BOP), and U.S. Marshals Service (USMS), which together have approximately 94,000 employees and represent about 80% of DOJ's workforce, have established centralized internal affairs units that investigate misconduct (or supervise/monitor local investigations), including allegations of sexual misconduct. The other components, including EOUSA and the other Department Offices, Boards and Divisions (OBDs), do not have internal affairs units. Instead, investigations are generally handled by supervisors, managers, or harassment points of contact with guidance from component or JMD counsel, HR, or employee-labor relations staff.

Most components, including those with internal affairs units, indicated that the individuals who conduct investigations do not receive training specific to sexual misconduct investigations or interacting with trauma victims, and are not provided with written guidance regarding how to conduct such investigations. During the focus groups, employees relayed that they lack confidence in the neutrality of internal investigations, particularly where the individual conducting the investigation is the accused employee's supervisor or someone with whom the accused employee has worked for years. The SHSC heard from a panel of internal DOJ experts, who relayed the benefits of a centralized investigation structure, including increased confidence in the independence and neutrality of the process, which results in increased willingness of victims to come forward and cooperate; reduced risk of retaliation and bias because investigators do not know the complainant or the accused employee; mitigation of the reality or perception that some offices do not take sexual misconduct seriously; a fairer process due to standardization; and better protection of the alleged harasser's due process rights.

In terms of disciplinary action for substantiated allegations of sexual misconduct, the OBDs utilize a system where they follow the ordinary discipline process with consideration of the required *Douglas* factors;<sup>13</sup> consult with legal counsel and HR; have the employee's supervisor or a higher-level manager make decisions regarding appropriate discipline for non-attorneys and some types of discipline for attorneys; and/or propose more serious discipline for attorneys (other than AUSAs) to the Office of Attorney Recruitment and Management (OARM),

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<sup>13</sup> In the ordinary discipline process, one official is designated a proposing official and a second, higher-level official serves as the deciding official. Discipline is imposed following consideration of the *Douglas* factors. The *Douglas* factors, which were derived from an MSPB case from 1981 and have not been updated since then, are supposed to be considered when determining the severity of discipline. *Douglas v. Veteran's Administration*, 5 M.S.P.R. 280 (1981). Depending on the level of discipline, the subject generally can appeal the discipline decision to a higher-level official or to the MSPB.

which is a centralized office that issues decisions on attorney suspensions of more than 14 days, demotions, and removals.

Most of the larger law enforcement components, including FBI, DEA, ATF, and USMS, have centralized disciplinary processes for sexual misconduct with designated career officials outside of the subject employee's supervisory chain who propose and determine the level of discipline with guidance from legal counsel and HR, though some indicated that less serious forms of misconduct may be handled at a local level by the employee's supervisors. For BOP, discipline is usually handled at the local level at a prison facility with penalty guidance from HR and legal counsel.

Although instructed to do so in the 2018 directives, most components did not issue policies to ensure that misconduct is considered in connection with awards, promotions, and other favorable personnel actions. Many of the smaller OBDs indicated that they follow JMD's policy, but JMD itself did not issue a policy. Because of the time that often elapses between when an allegation is made and the imposition of discipline for misconduct, a number of individuals evade discipline by retiring or resigning either during or after the completion of a sexual misconduct investigation, but before a disciplinary decision is issued.<sup>14</sup>

Six components (ATF, FBI, DEA, BOP, USMS, and OIG) have tables of penalties, but those tables vary widely both in terms of the offense labels and the penalty ranges, with inconsistent penalty ranges for similar misconduct; the remaining 30 components do not use a table of penalties. ATF lists the aggravating factors identified in the 2018 directives; the other component tables were not updated to be consistent with those directives. Several of the tables use offense labels – such as “sexual harassment” and/or reference Title VII – which the MSPB has made clear will then require DOJ to prove the elements of a Title VII claim if an employee appeals the disciplinary action, making reversal more likely. Some of the tables would apply to all types of harassment (such as based on race or disability, for example), while others apply only to sexual misconduct. Some tables include an offense for a supervisor failing to report allegations of misconduct, but others do not. Some, but not all, of the tables have a general caveat that the penalty may be more severe than the range listed depending on the particular circumstances.

As part of its work, the SHSC reviewed sexual misconduct policies of other agencies and received presentations on how those agencies have addressed the challenges presented by sexual misconduct allegations. This included reviewing policies from the Departments of Labor, State, Health and Human Services, Commerce, Treasury, and Homeland Security, as well as USAID and the Peace Corps. The SHSC also learned about how the Department of Defense recently addressed the way in which it handles sexual misconduct allegations.<sup>15</sup> Moreover, the SHSC

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<sup>14</sup> See, e.g., [Sen. Grassley letter to AG Garland and Director Wray](#), dated October 5, 2022, which asserts that, based on whistleblower reports, between 2004 and 2020, 665 FBI employees retired or resigned post investigation but before final disciplinary action.

<sup>15</sup> OVC Director Kris Rose, a representative on the SHSC, was instrumental in the Department of Defense's efforts to address sexual misconduct policies and procedures. Prior to joining OVC, Director

gathered helpful information from the Interagency Working Group on Sexual Misconduct, which comprises dozens of officials from agencies across the federal government who share practical tips and best practices for creating effective systems to address sexual misconduct.

Of particular interest was the approach taken by the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA). To deal with issues in how it handled sexual assault allegations, NOAA created the Workplace Violence Prevention and Response (WVPR) unit. Led by a Director, the WVPR began with one other employee in 2018 and by 2023 is expected to have 12 staff members. WVPR was designed to create victim services for the entire agency, develop a new sexual misconduct policy, create a centralized sexual misconduct reporting process, and develop a helpline for complainants of sexual misconduct. WVPR's overall mission is to provide victim services and centralized options; enact prevention measures; respond to all affected by sexual misconduct; improve training; and develop robust sexual misconduct policies. The WVPR also is enhancing its ability to itself conduct investigations and has developed training on a trauma-informed approach to conducting sexual misconduct investigations. This appears to have been a successful approach to dealing with sexual misconduct allegations at NOAA, and one that other federal agencies regard as a model.<sup>16</sup>

### **Overview of the SHSC's Recommendations**

Based on its work and careful study of the Department's sexual misconduct policies and procedures, the SHSC recommends that the Department implement new policies and procedures to move the Department closer to the goal of creating an environment where employees are safe and enjoy a workplace free from sexual misconduct. In all, the SHSC makes 11 recommendations that would improve sexual misconduct reporting, strengthen investigations, provide support for complainants, and help ensure that those responsible for sexual misconduct are held accountable. In some instances, the SHSC recommends a best practice for long-term implementation, while also offering interim steps that could be achieved more quickly and would enhance the Department's handling of sexual misconduct cases while the best practice is being implemented or otherwise evaluated. These interim steps would respond to the concerns animating the larger recommendation but do so to varying degrees while posing different limitations and challenges. For example, the SHSC recommends that the Department adopt a structure in which all sexual misconduct investigations are conducted by neutral investigators who are well trained and have been given formal guidance on how to conduct fair and effective investigations. This could best be accomplished by centralizing sexual misconduct investigations, although the SHSC recognizes that there would be practical challenges to creating a centralized investigations unit, and the Department would need to consider how best to develop a centralized unit over time. Accordingly, the SHSC offers options for how improvements to investigations might best be achieved over time.

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Rose served on the Department of Defense Independent Review Commission on Sexual Assault in the Military.

<sup>16</sup> Indeed, OPM and the White House Gender Policy Council have held out NOAA's approach as a model worth replicating.

The recommendations made by the SHSC derive from the principles that the Department must be committed to protecting its workforce from sexual misconduct and addressing such misconduct appropriately when it occurs. These recommendations are focused on the Department taking a more centralized and unbiased approach to addressing and investigating sexual misconduct allegations, so that the Department can protect complainants' safety and health and prevent retaliation against them. The recommendations also are designed to foster immediate and appropriate corrective action when the Department substantiates an allegation of sexual misconduct. Accordingly, the recommendations focus not only on improving reporting and enhancing investigations, but also on promoting disciplinary action, when appropriate, that is consistent, fair, and commensurate with the seriousness of the offense.

Chief among the SHSC's 11 recommendations is that the Department create a Sexual Misconduct Response Unit (SMRU).<sup>17</sup> The SMRU would be a centralized unit responsible for developing, managing, and executing a comprehensive sexual misconduct policy applicable across the entire Department.<sup>18</sup> Members of the SMRU would receive trauma-informed, victim-centered training on responding to reports and conducting investigations of sexual assault, sexual harassment, stalking, and other forms of sexual misconduct. As well as being an additional resource for taking sexual misconduct complaints, the SMRU would have the ability to conduct investigations in certain circumstances. The SMRU would provide training to components other than the OIG across the Department on how to effectively respond to and conduct investigations (to the extent other investigation units continue to investigate sexual misconduct allegations) of complaints of sexual misconduct.<sup>19</sup> In addition, the SMRU would monitor investigations and disciplinary actions in sexual misconduct matters conducted by components (other than the OIG), to the extent they continue, to ensure they are unbiased, fair, and efficient. The SMRU also would track the status of OIG investigations so that they can be included in leadership reports relating to sexual misconduct reporting, investigations, and discipline. To enhance transparency, the SMRU would gather information about investigations and discipline and would prepare a semi-annual report for Department leadership. Based on its work, the SMRU would on a semi-annual basis evaluate the Department's handling of sexual misconduct allegations and make recommendations to Department leadership on improvements. The SHSC has designed its

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<sup>17</sup> There are not existing resources for such a unit. In the FY 2024 budget formulation process, JMD submitted a funding proposal for leadership consideration to stand up the SMRU with a small staff in anticipation of the recommendations in this memorandum.

<sup>18</sup> Because of its work on these issues, the SHSC could serve an important role in assisting or advising the SMRU Director in development of a new, Department-wide policy. *See infra* Recommendation No. 1. Such a policy was the subject of considerable discussion by the SHSC and is discussed in more detail below. The SHSC already has begun work on drafting a policy, but the policy itself depends in part on how the Department decides to implement the SHSC's recommendations.

<sup>19</sup> Nothing in this report is intended or should be construed to affect the OIG's primary jurisdiction to investigate alleged misconduct by Department employees and contractors, including alleged sexual misconduct. Consistent with current OIG policy and practice, component investigation of alleged sexual misconduct, monitored by the SMRU, would occur if after the OIG's review of the complaint, it refers the matter to the component for handling. Most sexual misconduct investigations across the Department are referred to and handled by components and are not handled by the OIG.

recommendation so that the SMRU could begin quickly with more limited staff but grow – and expand its responsibilities – over time.<sup>20</sup>

Other recommendations are intended to clearly define sexual misconduct, including the circumstances in which the policy applies (i.e., work-related functions held off-site); ensure those involved in the process are trauma-informed and properly trained to handle sexual misconduct complaints and investigations; enhance centralization of reporting and investigations; create more uniform, consistent, and appropriate penalties when sexual misconduct occurs; and improve tracking and transparency of sexual misconduct allegations and their disposition. By implementing these recommendations, the Department will create a safer work environment and uphold its commitment to providing a workplace free from sexual harassment and misconduct.

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<sup>20</sup> The SMRU is modeled after NOAA's WVPR. NOAA is a substantially smaller agency than the Department. An agency within the Department of Commerce, NOAA is comprised of approximately 12,000 civilian employees. Nonetheless, the WVPR's experience in addressing sexual misconduct provides an effective roadmap in how the Department may stand up and implement the SMRU. In fact, the Commerce Department appears to be moving toward adopting NOAA's model Department-wide and has created an agency-wide position of Director for Sexual Assault and Sexual Harassment Prevention and Response.

## **II. Recommendations to Improve the Department’s Handling of Sexual Misconduct Allegations**

The SHSC recommends that the Department consider and implement the following 11 recommendations.

### **1. The Department should develop a Department-wide sexual misconduct policy.**

The SHSC recommends the Department develop and issue a comprehensive Department-wide sexual misconduct policy to replace the 2018 Sexual Harassment and Sexual Misconduct directives, as well as any portions of the Department’s anti-harassment policy or components’ policies that cover the same topics and do not adhere to the new minimum standards established in the new policy. Having a Department-wide policy will better underscore its importance and help ensure that sexual misconduct is addressed appropriately and consistently throughout all DOJ components. The Committee recommends that the policy:

- provides a clear explanation of prohibited conduct by including a comprehensive definition of sexual misconduct with accompanying examples of conduct that would violate the policy;
- be broad enough to cover conduct that may not be severe or pervasive enough to constitute unlawful harassment in violation of Title VII;
- applies to conduct occurring outside of work (including after hours, at off-site locations, on social media, or on DOJ or personal devices);
- addresses application of the policy to contractors and others who are not DOJ employees, including how to report sexual misconduct in those circumstances;
- ensures that discipline is imposed for sexual misconduct fairly and consistently, that the employee’s personnel file permanently reflects instances of substantiated misconduct, and that those who are found to have engaged in sexual misconduct are not merely transferred to another assignment;
- sets minimum standards for how supervisor-subordinate relationships are to be addressed, including how those relationships should be reported; and
- makes clear that components can impose additional mandates that exceed the Department-wide mandatory minimums (e.g., if the Department-wide policy does not require bystander reporting, a component would still be able to do so).

The policy should set forth the roles and responsibilities of both managers and non-managers in creating a workplace culture that does not tolerate sexual misconduct of any kind. It should clearly prohibit sexual misconduct directed at anyone doing business with the Department, not just other federal employees.<sup>21</sup> The policy should also provide the framework for an effective complaint review procedure by:

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<sup>21</sup> As noted above, sexual misconduct perpetrated by BOP officials against BOP inmates presents unique issues and was addressed separately by recommendations made to the Deputy Attorney General by a working group established at her direction.

- clearly informing employees of the various avenues by which they can report sexual misconduct, as well as reminding management officials of their obligation to report serious administrative misconduct to their leadership, law enforcement, and/or a component's security staff;
- requiring that all non-frivolous allegations be referred to the OIG as required by Department regulations;
- requiring that, if the OIG returns the matter to the component or the SMRU for handling, the allegations be investigated in a prompt, thorough, and impartial manner, including basic parameters for when an investigation is warranted, how investigations should be conducted, and how long it should generally take to start and conclude an investigation;
- clarifying that complainants should be informed of how components are responding to reports of sexual misconduct, and define the scope of information components are allowed to legally provide to complainants;
- requiring that components take immediate and appropriate action when it is determined that sexual misconduct has occurred, and providing direction about the specific preventative and corrective actions that should be taken (i.e., administrative action and discipline), depending on the nature of the allegations;
- ensuring that components take appropriate mitigation steps during the pendency of the investigation to protect the safety of the complainant and other employees, and largely eliminating the practice of simply transferring those who are accused of or are found to have committed sexual misconduct to other offices;
- providing accountability provisions for managers who fail to meet their obligations under the policy; and
- mandating that sexual misconduct allegations or findings be considered in award determinations, promotions, and other favorable employment actions.

Additionally, the policy should assure employees that those who report or participate in investigations about sexual misconduct will not be retaliated against and that their confidentiality will be protected to the extent possible. In that regard, the policy should make certain that complainants know how to report retaliation when it occurs and should mandate prompt investigation of such claims, with those engaging in such behavior being held accountable. Lastly, the policy should acknowledge the Department's commitment to providing victim support services and provide information on how employees can learn more about available services (e.g., a dedicated intranet site).

By developing a single, comprehensive Department-wide policy, the SHSC believes managers and non-managers can easily find guidance in one location, rather than having to piece together policies with separately issued guidance memoranda, as is currently the case. The SHSC further believes that the issuance of a Department-level policy will better illustrate the Department leadership's commitment to these important issues.

## **2. The Department should create a centralized Sexual Misconduct Response Unit.**

To ensure that the Department's sexual misconduct policy is fully executed and enhanced, as needed, over time, the Department should create a centralized unit within the Justice Management Division called the Sexual Misconduct Response Unit (SMRU). The SMRU would help to ensure consistent treatment of complaints across the Department, improve the response to sexual misconduct allegations, and provide complainants a reporting option outside of their components.

### ***A. Responsibilities of the SMRU***

The SMRU would have a number of responsibilities, many of which would address the SHSC's other recommendations. The SMRU would develop and implement the Department-wide policy described in Recommendation No. 1. Further, the SMRU would provide another avenue to receive sexual misconduct complaints and ensure that Department employees are aware of reporting options; handle and oversee sexual misconduct investigations not conducted by the OIG; gather and track data and information relating to sexual misconduct allegations, investigations, and discipline; and coordinate training relating to handling sexual misconduct allegations across the Department. Each of these areas of responsibility is described below, and in the remaining recommendations that follow.

#### **Create and maintain an intranet site.** The site should include:

- the Department-wide sexual misconduct policy;
- a portal for employees to submit complaints about sexual misconduct to the SMRU;
- clear information for complainants and bystanders about the various reporting channels they can pursue (*e.g.*, the complaint portal, EEO, OIG, human resources, supervisors, other designated reporting officials), and details about what the process for each avenue entails;
- contact information for a telephone helpline that employees can use to submit complaints or seek answers (*see infra* Recommendation No. 9);
- contact information for a range of internal and external victim support services and legal assistance options;
- information for complainants and respondents about their privacy and due process rights, as well as how they can obtain status updates about investigations; and
- links to all current training modules.

#### **Handle and Oversee Investigations, and Provide Victim Support.** The SMRU should:

- track referrals to the OIG as necessary to foster efficient communication concerning whether the OIG will conduct an investigation. If the OIG declines to investigate, ensure that SMRU or component investigations are timely initiated;
- conduct sexual misconduct investigations (*see infra* Recommendation No. 6);



- in coordination with JMD OGC, CRT’s Employment Litigation and Criminal Sections, and investigative components, develop and update an investigation manual (*see infra* Recommendation No. 5);
- work with the components to ensure that prompt remedial action is being taken to prevent further sexual misconduct while the complaint is investigated or while the OIG decides whether to investigate; and
- manage a victim-support system, (*see infra* Recommendation No. 9).

With respect to investigations not handled by the OIG, all SHSC representatives agreed that the Department would be better served by a structure in which investigations are conducted by neutral investigators from the SMRU who are well trained and given formal guidance on how to conduct fair and effective investigations. In Recommendation 6, the SHSC lays out the best practice for accomplishing this goal, with other options that would enhance the Department’s handling of sexual misconduct investigations in the interim or if the recommendation were not fully implemented.

**Data Gathering, Analysis & Semi-Annual Report.** The SMRU should:

- set forth minimum requirements for all components to keep and provide data on sexual misconduct complaints, investigation outcomes, timeliness in imposing discipline, and disciplinary actions in a consistent and usable format;
- prepare a semi-annual report for designated Department leadership that includes data about sexual misconduct in the DOJ workplace, investigation outcomes, disciplinary outcomes, hotspots where such misconduct occurs frequently (in a particular location, job position, etc.), and any relevant survey results;
- make recommendations in the semi-annual report and as needed to designated Department leadership about actions that should be taken to promote greater compliance with the policy, including holding components accountable to address employees/positions/locations where misconduct occurs;
- track sexual misconduct matters, including referrals to the OIG, on a regular basis to ensure sexual misconduct allegations are being handled efficiently and effectively in a timely manner, especially as it relates to matters where the OIG is considering whether to conduct an investigation or refer it back to the SMRU or a component for investigation;
- coordinate regular climate surveys and other workforce assessments to gauge the effectiveness of this policy, using Department resources and third-party contractors who have the expertise to conduct such studies (*see infra* Recommendation No. 11); and
- consistent with applicable laws and regulations, track allegations of sexual misconduct and their outcomes, and require components to take such matters into account in a vetting process when proposing awards, public recognition, and favorable personnel action for employees.

**Coordinate Training.** The SMRU should coordinate effective training throughout the Department by:

- setting minimum notification requirements for all components to ensure that the new sexual misconduct policy is disseminated, posted, and accessible to all Department staff, along with contractors, interns, applicants for employment, and other non-employees;
- developing, procuring, and coordinating training for all managers, supervisors, and others in quasi-supervisory roles regarding their responsibilities in preventing, reporting, and responding to allegations of sexual misconduct;
- developing, procuring, or reviewing and providing comment on training for non-managerial staff, including bystander training;
- ensuring that trainings are tailored for different components and offices based on regional considerations and the composition of their workforces;
- reviewing and approving all No FEAR Act training (or other EEO training) provided to DOJ staff to ensure it includes specific information about the prohibition of sexual misconduct in the workplace, trauma resources available to complainants, and the role of the SMRU;
- developing, procuring, and coordinating implementation of trauma-informed training for all Department staff involved in investigating and/or responding to allegations of sexual misconduct;
- coordinating with components to track compliance with training requirements; and
- developing a website where training materials, guidelines, and best practices for sexual misconduct reporting and investigations are stored, which could be used as a resource Department-wide.

### ***B. Structure of the SMRU***

The SMRU would be led by a full-time career Director, who would consult with other Department stakeholders, including representatives from components' security, human resources, employee assistance, internal affairs or investigative offices, and general counsel offices; the Civil Rights Division's Criminal and Employment Litigation Sections; OVW; OVC; OIG; the Chief Diversity Officer; and DOJ employee affinity groups. The precise structure and staffing needs of the SMRU will depend on what decisions the Department makes concerning the scope of the SMRU's functions and responsibilities. The SMRU could begin with a modest staff and a limited scope of responsibility that would increase as the unit develops experience and staffing levels increased over time.

In terms of staffing the SMRU, the SHSC recommends that the SMRU be staffed by full-time career employees permanently assigned to the office. The staff would include, at a minimum, investigators who are trained in investigating sexual misconduct complaints by using a trauma-informed approach; SMRU advocates/navigators (*see* Recommendation No. 9); and administrative staff to organize and manage data and records on reporting, investigations, and

disciplinary actions. The number of staff would be determined by the SMRU Director, subject to available funding and resources.

In making this recommendation, the SHSC is mindful that the SMRU would be a new unit that would require appropriated funding and resources from the Department. Especially as it is stood up, the SMRU Director could seek to use contractors or employees on detail from other components who have completed the requisite training requirements to assist with investigations and other responsibilities assigned to the SMRU as needs arise. Likewise, trained employees in other components could be assigned to work with the SMRU as collateral duties, which likely would enable the SMRU to begin a greater scope of work more quickly. At the same time, the SHSC believes that the SMRU should operate independently from other components to the greatest extent possible, and that would happen most successfully if the SMRU was provided funding and resources to hire its own employees.

**3. The Department should ensure that all employees involved in the sexual misconduct process are trained on trauma-informed practices.**

To create an effective and reliable sexual misconduct response process, all employees involved in the process—e.g., those who receive complaints, provide support to complainants, and investigate complaints—must receive training on evidence-based, trauma-informed practices. Failing to ensure that those involved in the process are adequately trained can lead to distrust in the process, the outcome, and the Department.

Workplace trauma can result from a person experiencing or witnessing violence, bullying, harassment, discrimination, or sexual misconduct. Traumatic experiences often result in neurological changes that affect how a person remembers and can recount details of the experience. Trauma can also affect a person's behavior and emotional responses, and leave an individual susceptible to re-traumatization during an investigative process. It is critically important that Department personnel involved in the process do not re-traumatize victims because of their lack of training.

A trauma-informed process in response to a complaint of sexual misconduct requires all persons involved to recognize the signs of trauma in complainants, respondents, and witnesses; understand how, what, where and when to ask questions; and know the techniques and strategies for mitigating re-traumatization. Understanding the neurological changes caused by trauma means investigators are aware of the correct approach to obtain information necessary to make an accurate determination.

**4. The Department should enhance centralization of reporting.**

The SHSC recommends that the Department establish centralization of reporting of sexual misconduct allegations. Enhancing the centralization of reporting of sexual misconduct allegations at the Department will encourage managers and employees to report misconduct and help increase accountability, transparency, and efficiency in providing more comprehensive responses to complaints.

Department employees from any component should be able to report allegations of sexual misconduct directly to the SMRU (in addition to reporting to their component or the OIG), either through the helpline or online portal, both of which the SMRU would manage. The SMRU would then notify and advise components, the OIG, or other appropriate officials about the complaint for handling. Centralized reporting would address a common concern the SHSC heard—that having to report incidents to an employee’s own component often discourages individuals from coming forward. It would also help facilitate the handling of cross-component complaints (e.g., an employee harassed by another employee from a different Department component).

All components should immediately be directed to establish a central point of contact (e.g., an HR or Executive Officer) to receive internal complaints of sexual misconduct and to ensure that employees can easily access up-to-date information regarding the names and contact information for those individuals. Components should also be instructed to require managers and other employees working in a lead/quasi-supervisory capacity who receive a complaint or otherwise become aware of sexual misconduct or retaliation to promptly report that information to the central point of contact within their component. Component points of contact should be mandated to share all complaints with the SMRU, if and when it is created. Component points of contact—and SMRU, if established—shall ensure that all non-frivolous allegations are reported to the OIG as required by Department regulations.

**5. The Department should enhance training for investigations of sexual misconduct allegations, including a standardized manual outlining best practices.**

The SHSC recommends the creation of a DOJ-wide sexual misconduct investigation guide that will establish the basic parameters for all sexual misconduct investigations. This guide should include:

- the criteria for when investigations should be opened;
- the timing of investigations;
- interview guidance with sample questions;
- confidentiality statements; and
- discussion of when written reports are needed and what they should contain (e.g., “findings of facts,” as used by the OIG and some of the internal affairs units, as opposed to “summary of facts gathered,” as used in EEO administrative investigations).

Among other topics, the guide also should cover:

- communications with the complainant (including avoiding re-traumatizing by making them repeat story multiple times) and the subject;
- what information can be shared with the complainant, including timeliness in providing that information;
- how to handle anonymous complaints;
- evidence preservation;

- waiver issues for employees accused of potentially criminal conduct;
- how to handle evidence of criminal conduct, including re-engaging with the OIG, as appropriate; and
- record-keeping requirements.

## **6. The Department should enhance centralization of investigations.**

The SHSC recommends that the Department adopt a structure in which all sexual misconduct investigations are conducted by neutral investigators who are well trained and have been given formal guidance on how to conduct fair and effective investigations. This could best be accomplished by centralizing sexual misconduct investigations in the SMRU, although the SHSC recognizes that there would be practical challenges to creating such a unit, and the Department would need to consider how best to develop a centralized unit over time.<sup>22</sup>

In devising a recommendation for how to best ensure sexual misconduct investigations are conducted by neutral, well-trained investigators, the SHSC considered a number of factors. Many employees from the law enforcement components, who already have centralized investigation units, related stories of sexual misconduct complaints being dismissed outright, retaliation for reporting, or bias in the investigation process. Many expressed distrust in their component's process and a preference for complaints to be handled outside their component. Similar complaints were made by employees from across the Department. There was general concern that when the investigation is handled by individuals in the component who are accountable to the component's management, bias affects how seriously a sexual misconduct allegation and any resulting investigation was taken. Prior reports by the OIG on the Department's handling of sexual misconduct and media reporting on particular cases support this concern. In addition, a number of employees reported frustration with how complaints on inter-component sexual misconduct (e.g., the employee of one component reports sexual misconduct against the employee of another component) are handled. In those cases, the complainant's component has no independent authority or practical ability to investigate or discipline the offender, and there was concern that the respondent's component often fails to respond to reports.

A single Department-wide unit that could handle sexual misconduct investigations not conducted by the OIG would address these concerns. The unit would be staffed with well-trained, trauma-informed investigators familiar with specific issues that arise in sexual misconduct investigations. Their expertise would allow them to handle these investigations thoroughly and efficiently, which would not only instill greater confidence in how the Department handles sexual misconduct investigations but provide greater assurance that those who are engaged in sexual misconduct are held accountable.

Creating a single unit capable of handling all the Department's sexual misconduct investigations, however, presents numerous challenges. To begin, no such unit capable of

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<sup>22</sup> Sexual misconduct involving criminal conduct would continue to be handled by the OIG and other law enforcement partners as appropriate.

undertaking these investigations currently exists in the Department, nor is there dedicated funding for the unit. Determining the needed size of such a unit also is not an easy task. As noted above, while the SHSC was able to gather some data on the number of sexual misconduct allegations and investigations Department-wide, the SHSC was unable to determine the resources these investigations require, in part because of the lack of record keeping and in part because we have concluded these investigations should be improved, which in turn may require more resources. Perhaps of most significance, sexual misconduct allegations are known to be substantially under-reported, and the SHSC anticipates its recommendations, if implemented, will result in more reporting of sexual misconduct (although if the SMRU improves the system of holding perpetrators accountable, sexual misconduct may eventually decrease). Sexual misconduct investigations may also involve other allegations of other wrongdoing, such as improper computer usage, and decisions would need to be made as to whether those other allegations should be handled by the SMRU or by other entities. These factors make it difficult to determine at the outset the staffing and resources that would be required of a fully centralized investigation unit.

While the OIG is an independent and neutral investigative component capable of handling sexual misconduct investigations (as well as other allegations of misconduct), it lacks the necessary resources to handle the bulk of the sexual misconduct allegations across the Department. As noted above, the overwhelming majority of sexual misconduct allegations are referred back from the OIG to components. As described above, the OIG would continue to take all sexual misconduct criminal investigations, as well as other specifically identified sexual misconduct allegations for investigation, as it does now. The OIG has indicated that it would welcome and benefit from additional specialized training in conducting sexual misconduct investigations, and that its recent budget requests have sought funds for victim services and support similar to that which the SHSC recommends be an integral part of the SMRU.<sup>23</sup>

Mindful of these factors, the SHSC concluded that the best practice would be for the SMRU to conduct sexual misconduct investigations for all DOJ components, with the exception of sexual misconduct investigations involving criminal conduct, which the OIG would continue to investigate, as well as other sexual misconduct cases OIG determines at its discretion that it should investigate. As previously noted, the matters investigated by the OIG are a relatively small percentage of overall administrative sexual misconduct cases. The structure proposed by the SHSC would enhance neutrality, consistency, and expertise in conducting sexual misconduct

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<sup>23</sup> To the extent the OIG receives additional funding and resources, it could accept more sexual misconduct investigations. The OIG recently requested and received from Congress funds for additional positions designed to create an interdisciplinary team to enhance oversight of the BOP. This team has a broad focus and includes funding for investigators, auditors, and other staff. While it is not focused specifically on sexual misconduct investigations, this team includes funding for a victim advocate, and could enhance the OIG's ability to handle sexual misconduct investigations. As the OIG explained to the SHSC, however, the funding is not sufficient to significantly increase the number of sexual misconduct investigations the OIG handles.

investigations. This structure also would directly address the concerns raised by employees and create greater confidence in the sexual misconduct investigation process.

In light of the practical considerations identified, and the complexities involved in creating a single investigative unit for sexual misconduct investigations, the SMRU could be designed so that it begins with a more limited set of investigations that increases over time as additional funding, staffing, and other resources become available. That would allow the SMRU Director to further assess challenges presented by creating this unit, including establishing policies and further recommendations for how to handle investigations involving both sexual misconduct and other types of misconduct. The SMRU Director could also assess staffing needs and make recommendations to the Department as to how best to expand the responsibilities and investigative capabilities of the SMRU.

In making this recommendation, the SHSC looked to other federal agencies who have likewise moved, or are moving, to centralize sexual misconduct investigations. The SHSC's recommendation is similar to the recommendations from the Independent Review Commission (IRC) on Sexual Assault in the Military. The IRC recommended, and DOD took action to implement, removing sexual misconduct investigations from the chain of command by creating a centralized unit. As noted above, NOAA created the WVPR unit to address sexual misconduct allegations and is moving toward a unit that can handle prevention, reporting, and investigations across the agency. Much as with the SHSC's recommendation for the SMRU, the WVPR began with more limited staff and investigative responsibilities, which were increased over time as it gained experience and additional staffing. More broadly, the Commerce Department, in which NOAA falls, itself has moved to enhance centralized sexual misconduct investigations, as have the State Department, the Peace Corps, and USAID.

Because time, and additional funding and resource, will be required to implement this best practice—or in the event this recommendation is not fully implemented—the SHSC offers the following additional recommendations that would enhance sexual misconduct investigations in the interim.

The law enforcement components together have approximately 94,000 employees and represent about 80% of DOJ's workforce. The vast majority of reported sexual misconduct complaints arise in the law enforcement components, which already have centralized internal affairs investigation units to investigate those complaints. BOP is an outlier in that most BOP investigations are assigned to local investigators in the correctional facilities, with the findings then reviewed by BOP's centralized internal affairs unit.<sup>24</sup> A short-term alternative to full centralization may be to assign to the SMRU, once created and sufficiently staffed, investigations of specific categories of allegations of sexual misconduct (namely those involving leadership and high-level management in components not accepted by the OIG for investigation, as well as matters involving inter-agency sexual misconduct with a victim and perpetrator in

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<sup>24</sup> BOP, however, is working to further centralize sexual misconduct investigations in its internal affairs unit, pursuant to recommendations from the BOP Working Group that the Deputy Attorney General directed BOP to implement.

separate components), while continuing to use the current functionalities and expertise of the internal affairs units already operating within the law enforcement components.<sup>25</sup> Under this approach, BOP would need to create a new structure in which sexual misconduct investigations are conducted by a centralized internal affairs unit, rather than at the correctional facility level. BOP already has begun this process based on recommendations from the BOP Working Group.

For other components, such as the Offices, Boards, and Divisions, creating centralized sexual misconduct investigation units within each component is likely not a practical solution given the low volume of complaints they receive each year and the typically smaller size of these components. The SMRU should accept for investigation all allegations from the OBDs that are not accepted by the OIG for investigation. However, to the extent the SMRU's staffing does not permit it to do so, a viable interim option would be to have trained investigators in the OBDs assigned to work with the SMRU as a collateral duty. Then, when an OBD has a sexual misconduct complaint, the SMRU could assign a trained investigator from another OBD to handle the investigation. At minimum, where the SMRU does not have the capacity to handle an investigation, enhanced neutrality can be achieved by having investigations of complaints by employees of OBD components handled by someone who is properly trained and outside of the accused employee's and the complainant's supervisory chain and their office(s), such as the Deputy Executive Officer, with guidance from component or JMD counsel.

For U.S. Attorney's Offices, given their size, the best short-term option for when the SMRU does not have capacity to handle an investigation may be to create a centralized unit within EOUSA's Executive Office that would handle investigations for sexual misconduct complaints from all 94 United States Attorneys' offices. Any complaints relating to an EOUSA employee would best be handled by the SMRU.

To effectively implement these interim strategies, consistent Department-wide guidelines would need to be established to ensure that all component investigative units were employing effective processes and investigative techniques. These guidelines would require that several modifications be made to the law enforcement components' existing investigation processes, including: prioritizing and expediting investigations of sexual misconduct complaints, which currently can take many months in some components; requiring training for investigators specific to conducting sexual misconduct investigations and interacting with trauma victims; and requiring adherence to written investigation guidance. The guidelines should contain reporting requirements that would allow the SMRU to monitor and report on investigations—and the outcomes of those investigations—handled by components other than the OIG, to exercise a degree of oversight, and to track the status of OIG investigations.

The Department also could require components other than the OIG to alert the SMRU when an investigation is initiated so that the SMRU could determine whether it should assume control. That is, there could be facts and circumstances surrounding an investigation such that the optimal investigating unit is the SMRU, if permitted by staffing and resources. This process

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<sup>25</sup> This, of course, would follow coordination with OIG to determine if it instead will investigate.



also would enable the Department to better assess necessary funding and resources needed to achieve full centralization of investigations within the SMRU.

**7. The Department should have more uniform and consistent discipline for sexual misconduct.**

The SHSC recommends that the Department take steps to ensure appropriate and consistent discipline, and to enhance neutrality in the discipline decision process. As with other aspects of handling sexual misconduct complaints, the Department should strive to ensure discipline decisions are timely. To achieve these goals, the SHSC recommends that the Department develop general guidance about the required discipline analysis and a penalty guidelines table in the sexual misconduct policy to be used when considering discipline for those who have engaged in sexual misconduct. The Department should also consider creating a centralized discipline unit to handle discipline for sexual misconduct.

***A. Ensuring Appropriate and Consistent Discipline***

To determine the appropriate discipline, all components are required to follow the existing federal sector disciplinary process set forth in 5 U.S.C. Chapter 75. Chapter 75 requires an individualized assessment based on the specific facts and consideration of the *Douglas* factors, including the nature and seriousness of the offense, supervisory status, consistency of the penalty with those imposed on other employees for the same or similar offenses, and consistency with the penalties set forth in a table of penalties, if one exists. However, as noted by OIG in its 2017 memo, some components do not conduct a complete *Douglas* factor analysis before making a disciplinary determination.<sup>26</sup>

The SHSC agrees that the Department must better ensure that components impose appropriate, proportionate, and consistent disciplinary action for sexual misconduct in a timely manner, and that components should be required to report all complaints to the SMRU for tracking and data analysis. It rarely, if ever, will be appropriate, for example, to merely move someone found to have engaged in sexual misconduct to another office or component as a function of discipline. And the level of discipline should fully account for aggravating factors that are applied evenly across the Department.

To enhance consistency and appropriate discipline for sexual misconduct, the SHSC recommends including general guidance about the required discipline analysis *and* a penalty guidelines table in the sexual misconduct policy and requiring that, to the extent there is not a centralized discipline unit (*see* below), all existing component tables be updated for consistency with the new policy. Currently, six components (ATF, FBI, DEA, BOP, USMS, and OIG) have tables of penalties covering all infractions common to that component; the remaining components do not. Penalty guidelines tables can promote consistency by establishing minimum

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<sup>26</sup> DOJ OIG, Management Advisory Memorandum, the Handling of Sexual Misconduct and Harassment Allegations by Department of Justice Components (May 2017), available at <https://www.oversight.gov/sites/default/files/oig-reports/1705-v2.pdf>. (Attached at Appendix 1).

penalties or ranges for certain types of misconduct and for repeat offenders, limit the decisionmaker's discretion, and minimize the impact of conscious or unconscious bias where, for instance, a supervisor imposing discipline has worked with the accused employee for years.

To better promote accountability and consistency in the DOJ-wide sexual misconduct policy, the Department should include guidance for proposing and deciding officials on applying the required *Douglas* factors; appropriate and legally defensible offense/charge labels; weighing prior precedents; and any aggravating factors that, if present, should result in the imposition of minimum levels of discipline.<sup>27</sup> The guidance also should set deadlines for each phase of the discipline process. If the Department does not create a centralized discipline unit (*see below*), it can further bolster accountability by requiring components to systematically track and report to the SMRU all disciplinary actions resulting from sexual misconduct complaints. Components also should be required to consult with component or JMD counsel on all sexual misconduct complaints, document their analysis of the *Douglas* factors, and follow the progressive discipline approach in which more severe discipline is imposed for repeat offenses or offenders.

Sexual misconduct can be varied and take many forms, which is why penalty guidance for proposing and deciding officials is imperative. While the fact-specific nature of the misconduct may present challenges in creating meaningful offense labels and ranges of penalties, proposing and deciding officials already face similar challenges and, without a penalty table, arrive at determinations that are perceived as insufficient and inconsistent.<sup>28</sup> For those components with employees represented by unions, creation of general guidelines and a penalties guidelines table may also require collective bargaining.

Furnishing a penalties guideline table, however, would offer significant benefits. It would provide guidelines for ranges of discipline for the most common types of sexual misconduct. The penalty guidelines also would provide expectations for how components weigh certain aggravating or mitigating circumstances when imposing discipline (such as heightened penalties for supervisors, multiple offenses, or multiple victims). This would improve accountability for offenders and vastly improve consistency in imposing discipline. Because the penalties guidelines table would provide more consistency and set standards for expected discipline, grievance or appellate officials also would be better positioned to assess the

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<sup>27</sup> The MSPB has also made clear that using offense labels such as “sexual harassment” – as the existing component tables do – will unnecessarily impose on the agency the much higher legal burden of proving a Title VII violation, including intent, thereby increasing the likelihood of disciplinary actions being reversed by the MSPB on appeal. Using such labels would also impose a much higher burden than that used by the OIG, which uses a preponderance of evidence standard (more likely than not) and could result in reversal of discipline despite an OIG finding of sexual misconduct. Accordingly, regardless of how the Department chooses to modify its discipline system, components that have tables of penalties already should be required to stop using offense labels of “sexual harassment,” “discrimination,” or other wording that would trigger higher burdens of proof.

<sup>28</sup> Another challenge would arise in circumstances in which misconduct was sustained for sexual misconduct and other offenses as well (such as lack of candor). But that problem already exists – the guidelines would need to be developed understanding this dynamic.

reasonableness of the discipline. This would lessen the likelihood discipline being reduced on appeal, which can undermine accountability and confidence in the discipline system.

### ***B. Enhancing Neutrality***

All the SHSC representatives agreed that a best practice for ensuring consistency of discipline for sexual misconduct would be to have a centralized unit that imposes discipline for sexual misconduct, much like the Professional Misconduct Review Unit (PMRU) and OARM do for attorney discipline and attorney professional misconduct. There was not consensus, however, regarding whether a fully centralized disciplinary unit is the best approach from an operational and resources perspective or whether neutrality and consistency can be achieved within components by making improvements to the existing disciplinary processes, including by issuing disciplinary guidance with penalty ranges for different types of sexual misconduct.

Creating a centralized disciplinary unit presents numerous challenges. Currently, no such unit capable of making discipline decisions over every type of DOJ employee exists in the Department, nor is there dedicated funding for such a unit.

As with the SMRU, determining the needed size of such a unit also is not easy because it is difficult to assess the number of substantiated misconduct investigations there may be in the future. Establishing a centralized unit would also require accounting for how the Department would handle grievances or appeals of discipline. Further complicating the effort is that different components currently have different discipline processes, and, for some, there may be a need to consult the component's table of penalties (such as when there is a finding of sexual misconduct combined with findings of lack of candor or misuse of government property). Furthermore, many components have employees represented by unions, and a change in the discipline process would require collective bargaining with the various unions under multiple collective bargaining agreements. The SHSC was not able to analyze the substantial structural steps necessary to transfer disciplinary decisions from components to a central office, and how to implement them. While the SHSC recognizes centralization as a best practice, it is also aware that creating such a centralized disciplinary structure in the agency may need to be an evolution, based on the experience of implementing other recommendations and the availability of necessary resources.

The benefits of enhancing consistency, neutrality, and an appropriate level of discipline, however, are worthwhile. A common complaint the SHSC heard from expert panels, and from its survey and focus groups, is that discipline for sexual misconduct is inconsistent and does not reflect the seriousness of the offense. Recent examples from BOP suggest that discipline for sexual misconduct is insufficient. And the OIG's 2018 report on the Civil Division found that both career and political officials administered lenient penalties to egregious offenders that were believed to be important contributors to the Division's work.

As we know from the Department's handling of attorney misconduct, including professional misconduct, there is great value and increased efficiency in having those involved in the discipline process knowledgeable about the subject matter of the discipline and the Department's policy goals in carrying out discipline. Discipline for sexual misconduct should be decided on an individualized basis, applying the *Douglas* factors and the relevant penalty

guidelines/tables, by proposing and deciding officials who are trained in issues common to sexual misconduct investigations. The work of OARM and the PMRU could provide models as to how best to establish a centralized discipline unit for sexual misconduct cases.

Time and additional funding and resources would be required to stand up a centralized discipline unit, or the Department may reject the recommendation entirely; therefore, the SHSC offers the following additional recommendations that would improve disciplinary procedures in sexual misconduct cases in the interim or the alternative.

The larger law enforcement components (except BOP), which account for a significant portion of DOJ's workforce, already have centralized disciplinary structures within their components that could be bolstered through DOJ-wide discipline guidance, penalty guideline tables, and formal reporting requirements to better ensure that adequate and consistent penalties are imposed. The SHSC believes that, at minimum, BOP should be required to create a centralized unit with neutral decisionmakers outside of the individual correctional facilities, in much the same way as other law enforcement components have centralized units.<sup>29</sup>

The OBDs have a partially centralized system for attorneys (with OARM) and do not have a volume of complaints that would warrant creating centralized disciplinary units within each component. They could nevertheless minimize bias by moving to a more centralized disciplinary process within the component, such as having disciplinary decisions relating to findings of sexual misconduct made by the Executive Officer, a career DAAG, or another career member of component leadership rather than an employee's first- or second-line supervisor in a particular section/unit.<sup>30</sup> Decisions regarding discipline in cases involving high-level employees (that would not already be made by OARM) could be made by the Executive Officer or the SMRU.

## **8. The Department should improve timeliness for resolving sexual misconduct allegations and increase transparency.**

### ***A. Improve Timeliness***

As noted elsewhere in these recommendations, the lack of tracking and data across the Department makes it difficult to determine how long the Department currently takes to assess, investigate, and resolve sexual misconduct allegations. In focus groups, the online survey, and in expert panels assembled by the SHSC, however, a frequent complaint was the amount of time it takes to respond to sexual misconduct allegations. This includes the amount of time it takes the OIG to consider allegations referred to it, the time required to complete investigations by the OIG or components, and the time needed to impose discipline. As noted previously, these delays in investigating and resolving sexual misconduct complaints erodes trust in the Department's

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<sup>29</sup> BOP is conducting a comprehensive review of its discipline system at the direction of the Deputy Attorney General, following a recommendation from the BOP Working Group.

<sup>30</sup> For smaller components, this may not be feasible, and the component could confer with JMD General Counsel or the SMRU to determine how best to select proposing and deciding officials, which may come from outside of the component.

ability to effectively handle sexual misconduct complaints, which also leads to employees feeling less safe. And untimely handling of complaints also provides more opportunity for violators to resign or retire without facing accountability. Currently, there are no standards across the Department to address timeliness in handling sexual misconduct allegations.

Accordingly, the Department should develop guidelines to address timeliness in handling sexual misconduct allegations. In making this recommendation, the SHSC is mindful that many factors impact the amount of time required to assess, investigate, and resolve sexual misconduct allegations. Some allegations may lead to a criminal investigation, or may involve multiple subjects or victims, which have an impact on the length of time required to assess and investigate allegations. Some allegations may require numerous witness interviews and the collection of substantial evidence, which will increase the time required to complete an investigation.

At the same time, it should be possible to develop guidelines that would apply in the vast majority of cases. Setting time guidelines not only may help those investigating sexual misconduct allegations prioritize their work, but it would set reasonable expectations for both complainants and subjects of sexual misconduct investigations.

#### ***B. Modifications to OIG Referral and Investigation Process***

The SHSC recommends that, working with the OIG, the OIG referral and investigation process should be modified to address concerns about time delays and to enhance efficiency. Department regulations require that “nonfrivolous allegations of criminal wrongdoing or serious administrative misconduct” be reported to the OIG. Most components refer to the OIG only those sexual misconduct complaints that are non-frivolous allegations of criminal wrongdoing or serious administrative misconduct. Other components, including most law enforcement components (DEA, FBI, USMS, ATF), refer all sexual misconduct complaints to the OIG. Although the OIG reported that it makes every effort to assess complaints quickly and often responds to the components within days, components indicated that it often takes weeks or months for the OIG to determine whether it will investigate a complaint. The OIG further indicated that it refers 80 to 90% of the complaints it receives back to the component for handling. Where the OIG elects to conduct the investigation, it can take months to years to complete. Factors that affect the duration of the investigation when the allegations involve potentially criminal conduct include case development and analysis of evidence by prosecutors or local law enforcement partners.

As noted above, these delays significantly affect the complainant while the sexual misconduct investigation is ongoing. And too often, by the time the investigation is concluded and before discipline is imposed, the subject of the investigation resigns or retires, and evades full accountability. Improving the timeliness and efficiency of sexual misconduct investigations

is an important step to enhancing trust in the system and ensuring those who engage in sexual misconduct are held accountable.<sup>31</sup>

The SHSC recommends that the Director of the SMRU work with the OIG to establish a more efficient referral and investigation process. Options include: (1) narrowing the scope of complaints that must be referred to the OIG to those categories of complaints the OIG accepts for investigation currently: ones involving potentially criminal conduct, accused subjects who are GS-15 or higher-level employees, or pervasive issues that should be investigated by an independent oversight body; (2) fast-tracking decisions on whether the OIG will investigate sexual misconduct complaints or setting a timeframe within which the OIG must decide whether it will investigate; and/or (3) fast-tracking investigations of sexual misconduct allegations after the OIG accepts a matter. As part of the discussion, the OIG should also identify whether there are additional types of sexual misconduct allegations it would be willing to accept for investigation and explain the parameters for such acceptance (for example, when allegations concern the conduct of management officials below the GS-15 level, or when they relate to a complainant in one component but the alleged perpetrator is from another component).

These same standards and procedures could likewise be applied to sexual misconduct investigations handled by the SMRU or other components (i.e., prioritizing sexual misconduct investigations and setting guidelines for completion of those investigations in a timely manner).<sup>32</sup> Standards and procedures also should be developed so that components understand when and how to re-engage with the OIG when evidence of possible criminal conduct develops in an investigation being handled by the SMRU or a component. For those matters that are not completed consistent with timeliness guidelines, the SMRU should create a tracking report so that Department leadership will be aware of such cases and can consider further modifications to policies or processes as appropriate.

### ***C. Increase Transparency***

The Department should endeavor to provide updates to complainants and respondents on a regular, perhaps fixed basis. Transparency and regular check-ins can mitigate the fear and anxiety that sexual misconduct processes often cause the affected parties. The Privacy Act and

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<sup>31</sup> Subjects of investigations always will be able to resign or retire while an investigation is pending. But delays in an investigation make this problem worse. There is strong reason to complete an investigation even if an employee resigns or retires, and the SMRU and components should be encouraged to do so. For those who resign or retire while an investigation or discipline is pending, the Department can note in the employee's personnel file that the employee left the Department while discipline was pending, pursuant to 5 U.S.C. § 3322. See JMD Policy Memorandum 2020-01, *Implementing Guidance for Voluntary Separation Before Resolution of Personnel Investigation Under 5 U.S.C. § 3322* (Sept. 4, 2020).

<sup>32</sup> The SHSC recognizes that setting timeframes for completion of investigations is difficult, especially for those that are criminal in nature. Investigations must be conducted professionally and thoroughly, and information and other evidence may take time to develop and build. Nonetheless, the SHSC believes flexible guidelines could be developed to adjust for these concerns while at the same time setting reasonable expectations for the completion of investigations.

due process interests can prevent certain information from being disclosed, but the review and investigation process need not occur in the dark, as it too often does now. The Department should keep parties apprised of developments and progress to the extent permitted.

## **9. The Department should enhance victim services and support.**

To create a system that is truly victim-centered and trauma-informed, the Department must ensure that complainants and potential complainants have access to a range of support resources at every step of the process. Providing employees with access to effective services—from inside and outside the Department—is paramount to ensuring that those affected by sexual misconduct feel safe and supported, and are able to effectively navigate the processes available to them. It also helps to remove barriers to reporting and ensure that complainants remain engaged, which improves case outcomes.

The SHSC recommends that the Department develop the following mechanisms to support employees who have experienced or witnessed sexual misconduct:

### ***A. Maintain a Helpline***

The Department should offer a helpline to provide employees with crisis intervention, referrals, and emotional support. Employees would be able to use the helpline to receive live and confidential one-on-one assistance, even if an incident occurs outside of the workplace or is unrelated to work. Similar to the national 988 Suicide & Crisis Lifeline, the helpline should be staffed at all times throughout the year and accessible in numerous ways—including by phone, online chat, and text. The Department should determine whether the helpline would be better operated internally or by an outside organization such as the Rape, Abuse & Incest National Network, which currently operates helplines for other federal agencies, or another reliable vendor.

### ***B. Create a Team of SMRU Navigators***

Employees who experience or witness sexual misconduct often find the various policy frameworks and avenues for pursuing relief confusing and daunting. This creates a lack of trust in the system and can deter victims from filing complaints. Providing employees with access to a navigator who can help employees understand the numerous processes and shepherd them through any they choose to pursue can mitigate this problem by giving individuals the sense that they are treated fairly and with respect.

Navigators would not represent employees in any investigations or administrative proceedings. Instead, as appropriate to the circumstances, they would explain to an employee the different options for reporting (e.g., the SMRU, EEO the OIG, component supervisors); lay out the realities of retaliation and what to do if it occurs; provide updates about developments throughout and after the investigation; liaise with investigators and others involved in the process; accompany complainants prior to and after interviews or depositions (and during, if appropriate) for emotional support; ensure the employee has information about and access to a range of support resources; and answer questions along the way. Navigators, who would ideally hold the position on a permanent basis—either in a part- or full-time capacity, should be trained

in trauma-informed practices, and report to the director of the SMRU. Furthermore, the navigators could direct employees to resources so that they can learn about viable options for legal representation, especially if employees pursue an EEO complaint.<sup>33</sup>

***C. Provide Employees with Thorough Information about External Support Resources and Law Enforcement Options***

In addition to the abovementioned services, the Department should inform employees about and connect them to other government resources (including the Employee Assistance Program services), private and public sexual misconduct organizations, external mental-healthcare providers, and financial and housing assistance. These resources exist throughout the country, and the SMRU should maintain up-to-date lists so that employees in any location can avail themselves of them as needed. These resources should also be posted on the intranet site and elsewhere, and navigators should be trained on how to issue referrals.

The Department should also guide employees to the appropriate law-enforcement entities when the conduct in question may qualify as a criminal offense. The Department should provide employees information about how they can: (1) obtain a protective order in any jurisdiction; and (2) report incidents for criminal investigation such as to local law enforcement agencies, the FBI, OIG, or CRT's Criminal Section. Knowing when the involvement of law enforcement may be warranted can be a complicated determination, and the Department should make clear to employees when and how they can reach out to the appropriate authorities.

**10. The Department should monitor and track sexual misconduct allegations, investigations and discipline, and a semi-annual report should be prepared for the Deputy Attorney General so that further changes to policies and procedures can be recommended and implemented.**

Because of the decentralized manner in which sexual misconduct allegations are currently reported, investigated, and resolved, it is challenging to fully understand the scope of sexual misconduct and how effective the Department's response to it is. While the SHSC did gather some data on sexual misconduct in the Department, it was not possible to determine how long investigations lasted on average, whether discipline was imposed in a timely fashion, or whether discipline was imposed consistently across components. Nor was it possible to fully assess the extent to which discipline complied with already existing policies intended to ensure sexual misconduct was deterred and that those responsible were held fully accountable. As a result, it was challenging to assess whether certain policies were effective or where gaps might exist.

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<sup>33</sup> Making these resources available would not be an endorsement of any attorney or organization, it merely would identify available resources. The SHSC understands that employment attorneys are often reluctant to represent federal employees due to statutory caps on compensatory damages and the unavailability of punitive damages. Lists of individual attorneys or organizations willing to represent federal employees in these matters therefore would be especially useful.



To properly assess whether the Department has in place the policies and practices necessary to effectively prevent sexual misconduct, and respond to it when it does occur, the Department should more comprehensively track sexual misconduct allegations, investigations, and discipline. As noted above, the SHSC recommends that the SMRU be tasked with this tracking and monitoring function, and report to the Deputy Attorney General on a semi-annual basis. That will enable the Deputy Attorney General and other Department leaders in the future to evaluate the effectiveness of the Department's policies and make any necessary modifications.

**11. The Department should issue a regular climate survey to gather employee perspectives on the Department's handling of sexual misconduct allegations.**

The Department should conduct a prevention-oriented, anonymous, and confidential climate survey that explores workplace culture and equity. It should administer a survey that elicits information about employees' knowledge of Department policies, their perception of the Department's response to misconduct, and their feelings about safety and trust in the workplace. The survey should include questions that obtain demographic data (e.g., gender, race, sexual orientation, type of position, component assignment, etc.), as well as employees' understanding of sexual misconduct, their awareness of how and where to report misconduct, their individual accounts of experiencing or witnessing sexual misconduct, and their experience with the reporting process. The survey should ask questions about negative outcomes of workplace sexual misconduct on employees' work.<sup>34</sup>

To encourage employees to provide the most complete and accurate information, the survey should be anonymous and confidential. As other agencies have done, and given the size and scope of such a survey, the SHSC believes this will likely require hiring an outside vendor that can conduct an evidence-based, methodologically sound survey, and provide a report on anonymously aggregated data and responses.<sup>35</sup>

The results of the climate survey will allow the Department to assess the effectiveness of its trainings on sexual misconduct, identify gaps in employees' knowledge of what constitutes sexual misconduct and the reporting process, and detect risks and trends towards which the Department should focus attention and resources. Climate surveys have the additional benefit of

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<sup>34</sup> In 2019, NIH conducted a sexual harassment [workplace survey](#), in which 50% of respondents reported experiencing sexual harassment. Fifty-two percent of respondents who experienced sexual harassment reported no longer feeling a part of their work unit.

<sup>35</sup> Other federal agencies have hired outside vendors. A 2017 Department of Interior [workplace survey](#) revealed that in a 12-month period, 35% of employees had experienced some form of harassment or assault, much of which was gender-based or sexual in nature. Nearly 30% of those who reported the behavior were punished for doing so and nearly 40% were encouraged to drop the issue. In 2020, FEMA asked the Homeland Security Operational Analysis Center, operated by Rand Corporation, to conduct a [survey](#) to assess gender- and race-based discrimination at the agency. The survey determined that gender-based or sexist behavior was more common than sexual harassment; and that one in five employees experienced racial/ethnic harassment or discrimination in the preceding year.

letting employees know that the Department cares about their safety and well-being, which can further engender trust in the sexual misconduct response process.

### **III. Conclusion**

The Deputy Attorney General tasked the SHSC with making recommendations as to whether changes should be made to existing Department sexual misconduct policies and procedures to ensure that the Department is proactive and effective in preventing and responding to sexual misconduct in the workplace. Based on its work, the SHSC identified deficiencies in the Department's approach to handling sexual misconduct allegations and has offered 11 recommendations to enhance and improve the Department's prevention of and response to sexual misconduct. By implementing these recommendations, the Department will be taking meaningful steps to better ensure a safe workplace and advance gender equality.