



# Preventing and Eliminating Sexual Harassment in New Jersey

Findings and Recommendations from Three Public Hearings



DIVISION ON  
**CIVIL RIGHTS**

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## Authors and Acknowledgments

This report is the result of three public hearings on sexual harassment held in September 2019 by the New Jersey Division on Civil Rights (DCR) in partnership with the New Jersey Coalition Against Sexual Assault (NJCASA). The report was prepared by DCR with substantial and valuable contributions from co-authors NJCASA and the Rutgers Law School International Human Rights Clinic.

### *About the New Jersey Division on Civil Rights (DCR)*

The New Jersey Division on Civil Rights (DCR) was created nearly 75 years ago to enforce the New Jersey Law Against Discrimination (LAD), which prohibits discrimination and harassment based on actual or perceived race, religion, national origin, gender, sexual orientation, gender identity or expression, disability, and other protected characteristics. The law applies in employment, housing, and places of public accommodation (generally, places open to the public, including businesses, restaurants, schools, summer camps, medical providers, etc.). In addition to enforcing the LAD and the New Jersey Family Leave Act, DCR works with stakeholders and members of the public to create a New Jersey free from discrimination and bias-based harassment, where all people are treated with equal dignity and respect and have access to equal opportunities.

Rachel Wainer Apter was appointed Director of DCR in October 2018. She has made combatting sexual harassment a priority, including by issuing this report, hosting the three public hearings that have informed the report's findings and recommendations, undertaking substantial enforcement actions, and working to ensure that individuals know their rights when it comes to sexual harassment. As one example, in September 2019, DCR ordered a company to pay nearly \$300,000 in damages, statutory penalties, and costs for subjecting an employee to egregious sexual harassment and ultimately firing her in retaliation for reporting the harassment.

Any person who has been subjected to sexual harassment in employment, housing, or places of public accommodation is encouraged to contact DCR by visiting [www.njcivilrights.gov](http://www.njcivilrights.gov) or by calling 973 648-2700.

### *About the New Jersey Coalition Against Sexual Assault (NJCASA)*

The New Jersey Coalition Against Sexual Assault (NJCASA) elevates the voices of sexual violence survivors and service-providers by advocating for survivor-centered legislation, training allied professionals, and supporting statewide prevention strategies. NJCASA was critical to the success of the three public hearings.

Staff: Patricia Teffenhart, Executive Director; Robert Baran, Assistant Director; Aaron Potenza, Program Manager; and Marissa Marzano, Communications Manager

### *About the Rutgers Law School International Human Rights Clinic*

The Rutgers International Human Rights Clinic is one of the first US-based legal programs to focus on using human rights law as a tool for positive social change. With the help of her

law students, Professor Penny Venetis, the Clinic's Director, has worked on a wide range of issues in New Jersey, the United States and throughout the world.

The International Human Rights Clinic also engages with the Newark community and with grassroots and governmental organizations in New Jersey on a diverse set of issues that include ending sexual harassment and abuse, fighting human trafficking, and strengthening voting rights. Professor Venetis also played a significant role in enacting cutting-edge federal anti-trafficking legislation, as well as state legislation throughout the country criminalizing "sextortion."

Director: Penny M. Venetis

Students: Rachel Newcomb, Kristen Krag, Kaylin Olsen, and Morgan McGoughran

This report is the result of the testimony of the experts, advocates, survivors of sexual harassment, and organizations who came forward at the hearings; the invaluable contributions of our panelists and fellow public servants who delivered opening remarks; and the tireless efforts of DCR's partners and staff. We offer our deep gratitude to all who provided oral or written testimony in connection with the hearings:

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The following individuals graciously served as hearing co-panelists with Director Wainer Apter and provided important opening remarks:

*Panelists:*

Sept. 11: Patricia Teffenhart, Executive Director, NJCASA; and Anna D. Martinez, Acting Director, New Jersey Department of Children and Families Division on Women

Sept. 24: Patricia Teffenhart, Executive Director, NJCASA; Patricia Perkins-Auguste and Clara C. Fernandez, Commissioners, New Jersey Civil Rights Commission

Sept. 25: Patricia Teffenhart, Executive Director, NJCASA; and Francis Blanco, Director, Women's Empowerment Initiatives, New Jersey Division on Women

*Opening Remarks:*

Sept. 11: Anna Maria Farias, Assistant Secretary, Federal Department of Housing and Urban Development

Sept. 24: Gurbir Grewal, Attorney General of New Jersey

Many members of DCR's team worked diligently to ensure that the hearings operated smoothly and contributed to this report, particularly:

Chief of Strategic Initiatives Aaron Scherzer and Legal Specialists Elise Olgin, Danielle Thorne, and Derek Fischer.

Finally, we offer our profound gratitude to Attorney General Gurbir Grewal for supporting the important work of addressing and eradicating sexual harassment in the State. We also offer sincere thanks to Commissioner Carmelyn Malalis and the New York City Commission on Human Rights, whose 2017 public hearing and report on sexual harassment in the workplace provided a model for our own hearings and report, and whose staff provided helpful advice and assistance.

## Introduction: A Message from Rachel Wainer Apter, Director of the New Jersey Division on Civil Rights

More than four decades after the phrase “sexual harassment” was first introduced to describe unwanted, hostile behavior based on gender, it remains a shockingly severe, pervasive, and unresolved problem. A recent survey found that 81 percent of women and 43 percent of men have experienced some form of sexual harassment during their lifetime.<sup>1</sup> That includes verbal, physical, and cyber harassment and sexual assault. Sixty-eight percent of women reported being sexually harassed in a public space, 38 percent at work, and 31 percent at their residence.<sup>2</sup>

Even as women make up nearly half of the work force, sexual harassment persists in every sector of the workforce, from male-dominated to female-dominated industries and from low-wage jobs to Hollywood. And it persists in housing and places of public accommodation as well.

Sexual harassment affects people regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin or immigration status. That has become all the more clear in recent years as more survivors have courageously come forward to say “me too.”<sup>3</sup> However, because it is fueled by power imbalances, marginalized communities, including women of color, immigrants, domestic workers, LGBTQ+ people and others, are often uniquely vulnerable to sexual harassment. Existing power disparities in the workplace, in housing, and in places of public accommodation increase the likelihood that vulnerable individuals will be sexually harassed, and then work to keep them from reporting. And the lack of reporting has meant that for far too long, sexual harassment has been ignored, overlooked, and normalized.

From the beginning of my tenure as Director of the Division on Civil Rights (DCR), we have recognized that the time has come for New Jersey to review its civil rights laws with a view towards better preventing sexual harassment in the workplace, in housing, and in places of public accommodation. So DCR, in partnership with the New Jersey Coalition

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<sup>1</sup> U.C. San Diego Center on Gender Equity and Health: Stop Street Harassment, *Measuring #MeToo: A National Study on Sexual Harassment and Assault* 10 (2019), <http://www.stopstreetharassment.org/wp-content/uploads/2012/08/2019-MeToo-National-Sexual-Harassment-and-Assault-Report.pdf> [hereinafter Stop Street Harassment, *Measuring #MeToo*].

<sup>2</sup> *Id.*

<sup>3</sup> Tarana Burke courageously began using the phrase “me too” in 2006 to support survivors of sexual violence, particularly Black women and girls. In doing so, she joined a storied history of Black women who have been “at the forefront of movements against sexual violence and rape” given the ways in which the intersection of race and gender have made women of color particularly vulnerable to sexual misconduct. See Stephanie Zacharek et al., “The Silence Breakers,” *Time* (2017) (interactive feature on Tarana Burke), <https://time.com/time-person-of-the-year-2017-silence-breakers/>; Me Too Movement, “About,” <https://metoomvmt.org/about/> (last visited Dec. 24, 2019); Danielle McGuire, “Recy Taylor, Oprah Winfrey and the Long History of Black Women Saying #MeToo,” *Washington Post* (Jan. 9, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/01/09/recy-taylor-oprah-winfrey-and-the-long-history-of-black-women-saying-metoo/>; Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 So. Cal. L. Rev. 1467 (1992).

Against Sexual Assault (NJCASA), hosted a series of hearings in September 2019 to hear from victims of sexual harassment and experts regarding how laws, policies, and culture should change.<sup>4</sup>

Our first goal was to uncover the depth and breadth of the problem. Because we can't fully address a problem that we don't understand. We also sought to raise up the human side of the staggering statistics: To learn from people's lived experiences as we collected recommendations for a way forward.

At hearings in Asbury Park on September 11, Hackensack on September 24, and Atlantic City on September 25, as well as in written comments, we heard from more than 40 survivors, advocates, and experts from all over the State. We heard from workers and advocates across a wide range of industries, from individual survivors, and from those who wanted to share their recommendations for how we forge a path forward. We owe a deep debt of gratitude to all who provided testimony: the advocates, experts, public servants, and, most importantly, the survivors of sexual harassment, who courageously shared their stories. This project would not have been possible without them.

It is our sincere hope that this report helps all New Jerseyans better understand the harm wrought by sexual harassment and sparks much-needed change. Reporting since we held our hearings has only confirmed that the time to act is now.<sup>5</sup>

This report includes several sections. Part I explains what sexual harassment is and identifies when it is unlawful in New Jersey. Part II identifies the key themes that arose from the public hearings and written testimony. Part III sets forth recommendations for how the Law Against Discrimination should be amended to provide broader and stronger protections against sexual harassment and other forms of bias-based harassment. Finally, Part IV offers employers, housing providers, and places of public accommodation best practices to combat sexual harassment.

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<sup>4</sup> DCR was created by the New Jersey Law Against Discrimination (LAD), the first state-level civil rights statute in the country. The law was enacted nearly 75 years ago and it tasks DCR with preventing and eliminating discrimination and bias-based harassment in the State. N.J.S.A. 10:5-1-3, 5-6. One of those forms of bias-based harassment is sexual harassment.

<sup>5</sup> See Susan K. Livio & Kelly Heyboer, *#MeToo Was Supposed to Fix Things. But Women in N.J. Politics Say They've Been Groped, Harassed – and Worse*, NJ.com (rev. Dec. 30, 2019), <https://www.nj.com/news/2019/12/metoo-was-supposed-to-fix-thing-but-women-in-nj-politics-say-theyve-been-groped-harassed-and-worse.html>.

## Part I. What is Sexual Harassment?

Sexual harassment is a form of discrimination based on sex. It can include unwelcome sexual advances, requests for sexual favors, verbal or physical harassment of a sexual nature, or offensive remarks about a person’s gender, or because of a person’s gender. It can be verbal, physical or visual, and can occur in person, over the phone or online.<sup>6</sup> Sexual harassment is often, but not always, “sexual” in nature.<sup>7</sup> A boss making sexual comments about how an employee dresses, or an employee inappropriately touching a coworker, is sexual harassment. But so too is any unwanted conduct that is “based on” gender, including sexual orientation and gender identity or expression.<sup>8</sup> That includes, for example, disrespectful or demeaning remarks about stereotypical gender roles, as well as homophobic or transphobic slurs.

Sexual harassment is an “everyday reality ... in every corner of the country.”<sup>9</sup> Women generally experience sexual harassment more often than men, but sexual harassment affects all genders and people of all sexual orientations and gender identities. Although data on the prevalence of sexual harassment varies, one survey reported that “81% of women and 43% of men reported experiencing some form of sexual harassment and/or assault in their lifetime.”<sup>10</sup>

However, the fear of retaliation or of not being believed leads many instances of sexual harassment to go unreported. Indeed, the Equal Employment Opportunity Commission (EEOC) has estimated that “approximately 90% of individuals who say they have experienced harassment [at work] never take formal action against the harassment, such as filing a charge or a complaint,” and that “[r]oughly three out of four individuals who

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<sup>6</sup> For definitions and examples of sexual harassment, see generally N.Y.C. Comm’n on Human Rights, *Combating Sexual Harassment in the Workplace: Trends and Recommendations Based on 2017 Public Hearing Testimony 2* (2018), [https://www1.nyc.gov/assets/cchr/downloads/pdf/SexHarass\\_Report.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/SexHarass_Report.pdf); U.S. Equal Employment Opportunity Comm’n, “Harassment,” <https://www.eeoc.gov/laws/types/harassment.cfm> (last visited Dec. 24, 2019) [hereinafter EEOC, “Harassment”]; Equal Rights Advocates, “Know Your Rights At School: Sexual Assault & Sexual Harassment,” <https://www.equalrights.org/issue/equality-in-schools-universities/sexual-harassment/> (last visited Dec. 24, 2019) [hereinafter ERA, “Schools”]; Equal Rights Advocates, “Know Your Rights At Work: Sexual Harassment,” <https://www.equalrights.org/issue/economic-workplace-equality/sexual-harassment/> (last visited Dec. 24, 2019); National Women’s Law Center, *Frequently Asked Questions About Sexual Harassment in the Workplace* 1-2 (Nov. 2016), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/11/Sexual-Harassment-FAQ.pdf> [hereinafter NWLC, *FAQ*].

<sup>7</sup> NWLC, *FAQ*, *supra*, at 1.

<sup>8</sup> *Id.* at 1-2.

<sup>9</sup> Diana Boesch et al., “Driving Change in States to Combat Sexual Harassment,” Center for American Progress (Jan. 15, 2019), <https://www.americanprogress.org/issues/women/reports/2019/01/15/465100/driving-change-states-combat-sexual-harassment/>.

<sup>10</sup> Stop Street Harassment, *Measuring #MeToo*, *supra*, at 10.

experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct.”<sup>11</sup>

Sexual harassment very often intersects with other types of discrimination or bias-based harassment, like discrimination or harassment based on race, national origin, sexual orientation, or gender identity or expression.<sup>12</sup> Individuals with intersecting vulnerabilities—including people of color, immigrants, LGBTQ+ individuals, individuals with disabilities, and low-wage workers—face unique challenges with respect to reporting sexual harassment. This makes sense: those who are most at risk of losing their job or their home are the most fearful of retaliation, and therefore the least able to report even the most egregious forms of sexual harassment.<sup>13</sup>

Sexual harassment has been associated with depression, anxiety, post-traumatic stress disorder (PTSD), and physical health issues like poor sleep and high blood pressure in both the short and long term. It can also reduce a person’s ability to perform their job or engage in daily life.<sup>14</sup> It also has been associated with loss of self-esteem, level of comfort, and sense of security.<sup>15</sup> Indeed, one study found that women who had been sexually harassed “had higher education yet more financial strain.”<sup>16</sup> And negative effects expand beyond the toll harassment takes on the survivor, reducing faith in our society’s ability to treat all people with dignity and reducing faith in our institutions’ ability to rectify wrongdoing.

New Jerseyans are protected from sexual harassment under the New Jersey Law Against Discrimination (LAD)<sup>17</sup> as well as Title VII of the federal Civil Rights Act of 1964,<sup>18</sup> the federal Fair Housing Act,<sup>19</sup> and Title IX of the federal Education Amendments of 1972.<sup>20</sup> When sexual harassment is unlawful, employers, housing providers, and places of public accommodation are required by law to take reasonable steps to prevent and address it. We now discuss the legal framework that currently applies to workplace sexual harassment and harassment in housing and places of public accommodation.

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<sup>11</sup> EEOC, “Harassment,” *supra*.

<sup>12</sup> Boesch et al., *supra*.

<sup>13</sup> *Id.*

<sup>14</sup> Rebecca C. Thurston et al., *Association of Sexual Harassment and Sexual Assault with Midlife Women’s Mental and Physical Health*, 179 JAMA Intern. Med. 48-53 (2019); Jason N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 2011 Soc. Mental Health 89-105, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3227029/pdf/nihms318538.pdf>.

<sup>15</sup> See, e.g., Houle et al., *supra*, at 10-11 (discussing self-doubt and loss of self-esteem, as well as economic strain, after sexual harassment).

<sup>16</sup> Thurston et al., *supra*.

<sup>17</sup> N.J.S.A. 10:5-12(a), (f)-(h).

<sup>18</sup> 42 U.S.C. § 2000e-2(a).

<sup>19</sup> *Id.* §§ 3604-05.

<sup>20</sup> 20 U.S.C. § 1681.

## Workplace Sexual Harassment

### *Background*

Sexual harassment in the workplace can take many forms, and can be perpetrated by many people, not just business owners and supervisors. It could include a supervisor threatening to fire a subordinate unless he performs sexual favors, a customer demanding a date with an employee, or a colleague making offensive gestures or hanging inappropriate pictures in the office.

Sexual harassment does not occur only in traditional “office” settings. It disproportionately occurs in industries with large numbers of low-wage workers and women, especially women of color, including hotels, healthcare or long-term care facilities, restaurants, private homes (domestic workers), and farms.<sup>21</sup> A recent study of sexual harassment charges filed with the EEOC over a ten-year period showed that workers in accommodation, food service, retail, trade, manufacturing, social assistance, and health care were responsible for over half of all sexual harassment charges filed.<sup>22</sup> And that likely underestimates the prevalence of sexual harassment in those industries because power imbalances, low pay, and job insecurity make low-wage workers, often in service industries, particularly fearful of reporting.<sup>23</sup>

### *Quid Pro Quo and Hostile Work Environment Harassment*

The LAD and federal law both prohibit two types of sexual harassment: quid pro quo and hostile work environment. “Quid pro quo” harassment is defined under state and federal law as attempting to make an employee’s submission to sexual advances a condition of their employment, or indicating that rejecting such advances would result in adverse employment consequences.<sup>24</sup> Under both state and federal law, quid pro quo harassment generally “involves an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotions, or suffer other adverse employment consequences.”<sup>25</sup>

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<sup>21</sup> Boesch et al., *supra*.

<sup>22</sup> Jocelyn Frye, “Not Just the Rich and Famous,” Center for American Progress (Nov. 20, 2017), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/>.

<sup>23</sup> *Id.* (“[W]omen—particularly women of color—are more likely to work lower-wage jobs, where power imbalances are often more pronounced and where fears of reprisals or losing their jobs can deter victims from coming forward.”)

<sup>24</sup> *Lehmann v. Toys ‘R’ Us, Inc.*, 132 N.J. 587, 601 (1993).

<sup>25</sup> *Id.* (describing New Jersey law). Under regulations promulgated by the EEOC, “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” amount to sexual harassment when “submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment” or “submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.” 29 C.F.R. § 1604.11(a); see *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1296 (3d Cir. 1997) (adopting EEOC’s formulation), *abrogated on other grounds by Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

Under the LAD, hostile work environment sexual harassment consists of “discriminatory conduct that a reasonable person of the same sex in the plaintiff’s position would consider sufficiently severe or pervasive to alter the conditions of employment and to create an intimidating, hostile, or offensive working environment.”<sup>26</sup> A broad range of offensive conduct can create or contribute to a hostile work environment. It may involve sexual comments, comments about the “abilities, capacities, or the ‘proper role’” of a particular gender, or inappropriate physical touching.<sup>27</sup> The harassment need not be “sex-based on its face,” as long as it “more likely than not ... occurred because of the plaintiff’s sex.”<sup>28</sup>

Under New Jersey law, harassment must be either severe or pervasive to create a hostile work environment. “[O]ne incident of harassing conduct” may be severe.<sup>29</sup> But so too multiple non-severe incidents may “considered together” be “sufficiently pervasive to make the work environment intimidating or hostile.”<sup>30</sup> Thus, in applying the severe or pervasive standard, courts are instructed to consider “the cumulative effect” of all incidents alleged.<sup>31</sup>

Title VII’s standard for analyzing whether conduct is sufficiently severe or pervasive to create a hostile work environment is similar, but federal courts’ articulation of the test is somewhat narrower. For example, the U.S. Supreme Court has said that a “merely offensive”<sup>32</sup> single utterance does not create a hostile work environment, while New Jersey’s Supreme Court has found a “single remark ... sufficiently severe to have produced a hostile work environment.”<sup>33</sup> In addition, federal courts declined to find a hostile work environment in cases where a male employee forced his hand under a female coworker’s shirt and fondled her breast,<sup>34</sup> and where a male employee repeatedly made sexual comments to a female coworker and suggested she be spanked.<sup>35</sup> By contrast, a New Jersey court found conduct to be sufficiently severe or pervasive to create a hostile work environment where a supervisor made sexual comments about an employee’s body, discussed a threesome, and touched her hand.<sup>36</sup>

That New Jersey courts have at times interpreted the LAD more broadly when it comes to hostile work environment claims can be traced to the New Jersey Supreme Court’s recognition that courts should not “hesitat[e] to depart” from federal law in interpreting the LAD “if a rigid application of [Title VII’s] standards is inappropriate under the circumstances.”<sup>37</sup> The Court also has “emphasize[d] that the LAD is *remedial* legislation,”

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<sup>26</sup> *Lehmann*, 132 N.J. at 592, 603-04.

<sup>27</sup> *Id.* at 605.

<sup>28</sup> *Id.*

<sup>29</sup> *Taylor v. Metzger*, 152 N.J. 490, 499-500 (1998).

<sup>30</sup> *Lehmann*, 132 N.J. at 607.

<sup>31</sup> *Id.*

<sup>32</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

<sup>33</sup> *Taylor*, 152 N.J. at 500-01.

<sup>34</sup> *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000).

<sup>35</sup> *Singleton v. Dep’t of Corr. Educ.*, 115 Fed. App’x 119 (4th Cir. 2004).

<sup>36</sup> *Velez v. Rocktenn Co.*, 2018 WL 3613393 (N.J. Super. Ct. App. Div. July 30, 2018).

<sup>37</sup> *Lehmann*, 132 N.J. at 601 (internal quotation marks omitted).

with the “very purpose” of *changing* “existing standards of conduct” for the better.<sup>38</sup> In addition, the New Jersey Supreme Court has urged New Jersey courts to recognize both evolving community standards and “the differences in the way sexual conduct on the job is perceived” by different genders when assessing whether conduct constitutes unlawful harassment.<sup>39</sup> In other words, New Jersey courts recognize that conduct that was considered not to be offensive a decade ago may be considered offensive now, and conduct that might be considered “harmless amusement” by one gender might be acutely felt as sexual harassment by another.<sup>40</sup>

### *Employer Liability and Remedies*

Whether an employer is legally responsible for unlawful sexual harassment in a particular case is similar under both the LAD and Title VII. Courts have interpreted both statutes to generally hold an employer responsible when the harasser is a supervisor, or, if the harasser is not a supervisor, when the employer “knows or should know of the harassment and fails to take effective measures to stop it.”<sup>41</sup> Whether an employer has sexual harassment policies in place is also relevant under current law; in New Jersey and under federal law, a court may consider an employer’s “failure to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training, and/or monitoring mechanisms” in evaluating whether the employer has taken reasonable steps to prevent harassment.<sup>42</sup> In addition, employers may shield themselves from liability by asserting that they “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>43</sup>

When an employer is liable for sexual harassment, remedies can range from monetary relief (like damages or backpay), to affirmative relief, including “hiring or reinstating the harassment victim, disciplining, transferring, or firing the harasser, ... or taking preventative and remedial measures at the workplace.”<sup>44</sup> In addition, DCR regularly requires employers to adopt or improve anti-sexual harassment policies and to train staff on sexual harassment and how to conduct internal investigations.<sup>45</sup>

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<sup>38</sup> *Id.* at 612.

<sup>39</sup> *Id.* at 612-14.

<sup>40</sup> *Id.* (internal quotation marks omitted) (quoting Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1203, 1206 (1989)).

<sup>41</sup> *Id.* at 623-24; see also 29 C.F.R. § 1604.11(d); EEOC “Harassment,” *supra*.

<sup>42</sup> *Lehmann*, 132 N.J. at 621; cf. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (“Title VII is designed to encourage the creation of antiharassment policies and effective grievances mechanisms.”).

<sup>43</sup> *Aguas v. State*, 220 N.J. 494, 499-500 (citing *Burlington*, 524 U.S. at 765, and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998)).

<sup>44</sup> *Lehmann*, 132 N.J. at 617.

<sup>45</sup> See, e.g., *T.S. and Director, Division on Civil Rights, v. Tyce Transportation*, OAL Dkt. No. CRT 05662-18, DCR Dkt. No. EG09WB-63409 (Aug. 12, 2019) (DCR final order requiring an employer “to adopt an anti-discrimination and anti-harassment policy that comports with the LAD” and to require

*Additional Key Distinctions Between the LAD and Title VII*

There are two additional ways in which the LAD more broadly protects against sexual harassment than Title VII:

- **Independent Contractor Protection:** Title VII protects only employees of a business from sexual harassment,<sup>46</sup> but the LAD provides protections for independent contractors in addition to employees, via its prohibition on gender-based discrimination in contracting.<sup>47</sup>
- **Employer Size:** Title VII only applies to employers with at least fifteen employees.<sup>48</sup> By contrast, nearly all employers in New Jersey, regardless of size, are covered by the LAD, although, as discussed in greater depth below,<sup>49</sup> the LAD excludes “any individual employed in the domestic service of any person” from coverage.<sup>50</sup>

**Sexual Harassment in Places of Public Accommodation and Housing***Background*

Sexual harassment extends beyond the workplace, and can also occur in places of public accommodation and housing. A place of public accommodation is a business, agency, organization or entity that is open to the public—like a school, government building, restaurant, bar, hotel, shopping mall, train, or bus. It does not include streets and sidewalks.<sup>51</sup> In Stop Street Harassment’s recent survey, public spaces were among the most frequently listed locations for sexual harassment.<sup>52</sup> Of the individuals surveyed, 68 percent of women and 23 percent of men “reported experiencing sexual harassment in a public space like a street, park[,] store,” restaurant, mall, library, movie theater, or gym; 25 percent of women and 10 percent of men experienced sexual harassment on mass transportation; and 37 percent of women and 12 percent of men experienced sexual harassment at a nightlife venue like a concert, bar, or club.<sup>53</sup>

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all “supervisors and managers ... to attend training on the employment discrimination and sexual harassment provisions of the LAD”). Federal courts may also order the adoption of anti-harassment policies and/or training. *E.g.*, *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1534 (M.D. Fla. 1991).

<sup>46</sup> U.S. Equal Employment Opportunity Comm’n, “Coverage,” <https://www.eeoc.gov/employers/coverage.cfm> (last visited Dec. 24, 2019) [hereinafter EEOC, “Coverage”].

<sup>47</sup> N.J.S.A. 10:5-12(l); see *J.T.’s Tire Service, Inc. v. United Rentals N. Am. Inc.*, 411 N.J. Super. 236, 241-43 (App. Div. 2010); *Rowan v. Hartford Plaza Ltd.*, 2013 WL 1350095, at \*10 (App. Div. Apr. 5, 2013); see also *Rubin v. Chilton*, 359 N.J. Super. 105, 111 (App. Div. 2003).

<sup>48</sup> 42 U.S.C. § 2000e(b).

<sup>49</sup> Parts II and III, *infra*.

<sup>50</sup> N.J.S.A. 10:5-5(f).

<sup>51</sup> N.J.S.A. 10:5-5(l).

<sup>52</sup> Stop Street Harassment, *Measuring #MeToo*, *supra*, at 25.

<sup>53</sup> *Id.* at 10, 25-26.

Sexual harassment at schools and universities, like a teacher making sexual advances or peers making offensive sexual remarks about a classmate, is also far too common.<sup>54</sup> A study by the American Association of University Women found that nearly half of “students in grades 7-12 experienced some form of sexual harassment at school during the 2010-11 school year.”<sup>55</sup> And in a recent survey commissioned by the Association of American Universities, 41.8 percent of students had experienced “at least one sexually harassing behavior since enrollment.”<sup>56</sup> Nearly half of those students “reported sexually harassing behavior that either interfered with their academic or professional performance, limited their ability to participate in an academic program or created an intimidating, hostile or offensive social, academic or work environment.”<sup>57</sup>

Sexual harassment is also prevalent in housing.<sup>58</sup> Indeed, “[e]very year, hundreds of state and federal civil lawsuits are filed against landlords, property owners, building superintendents and maintenance workers alleging persistent, pervasive sexual harassment and misconduct, covering everything from sexual remarks to rape.”<sup>59</sup> Examples of actions that constitute sexual harassment in housing include: a landlord, landlord’s employee, or housing inspector demanding sexual favors from a tenant or prospective tenant, a security guard at an apartment building making comments about a tenant’s body and clothes, or a maintenance worker repeatedly propositioning a tenant after being authorized by an apartment manager to enter the tenant’s home to conduct repairs.<sup>60</sup> A recent survey showed 31% of women and 15% of men reported being sexually harassed or assaulted in their own homes.<sup>61</sup>

### *Legal Framework*

The LAD prohibits gender-based discrimination and harassment in housing and places of public accommodation, and bans retaliation for reporting harassment in those

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<sup>54</sup> See, e.g., ERA, “Schools,” *supra*; Girls for Gender Equity, “What is Sexual Harassment,” <https://www.ggenyc.org/about/education/what-is-sexual-harassment/> (last visited Dec. 24, 2019).

<sup>55</sup> AAUW, *Crossing the Line: Sexual Harassment at School* 11 (2011),

<https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

<sup>56</sup> Westat, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, at xiii (2019), [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/FULL\\_2019\\_Campus\\_Climate\\_Survey.pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/FULL_2019_Campus_Climate_Survey.pdf) (internal quotation marks omitted).

<sup>57</sup> *Id.* (internal quotation marks omitted).

<sup>58</sup> Cf. U.S. Dep’t of Justice, “What is Sexual Harassment in Housing” (last updated Feb. 26, 2018), <https://www.justice.gov/crt/what-sexual-harassment-housing> [hereinafter DOJ, “What is Sexual Harassment in Housing?”]; U.S. Dep’t of Justice, “Sexual Harassment in Housing Initiative” (last updated Nov. 7, 2018), <https://www.justice.gov/crt/sexual-harassment-housing-initiative>.

<sup>59</sup> Jessica Lussenhop, “A Woman’s Choice – Sexual Favors or Lose Her Home,” BBC News (Jan. 11, 2018), <https://www.bbc.com/news/world-us-canada-42404270>.

<sup>60</sup> See, e.g., DOJ, “What is Sexual Harassment in Housing?,” *supra*; U.S. Dep’t of Housing and Urban Development, *Questions and Answers on Sexual Harassment under the Fair Housing Act* (Nov. 17, 2008), <https://www.hud.gov/sites/documents/QANDASEXUALHARASSMENT.PDF> [hereinafter HUD, Q&A].

<sup>61</sup> Stop Street Harassment, *Measuring #MeToo*, *supra*, at 25-26.

settings as well.<sup>62</sup> Like in employment, both quid pro quo harassment and hostile environment harassment are unlawful, with the analysis adapted to the relevant situation.

In the education context, for example, whether harassment based on a student's gender is "sufficiently severe or pervasive enough to create an intimidating, hostile, or offensive school environment" is viewed from the perspective of "a reasonable student of the same age, maturity level," and gender.<sup>63</sup> While a school is generally liable if the harasser is a teacher or other staff member (similar to supervisory liability in employment), whether a school is responsible for student-on-student harassment depends on whether the school "knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment."<sup>64</sup> A similar analysis applies to claims related to other places of public accommodation under the LAD.

By comparison, federal law does not generally prohibit sexual harassment in places of public accommodation. However, educational institutions receiving federal funding under Title IX may be liable in a sexual harassment lawsuit if they are deliberately indifferent to knowledge of severe or pervasive sexual harassment of a student by a school employee or peer.<sup>65</sup> Note that this standard is substantially narrower than the standard for liability under the LAD, in that under the LAD a plaintiff need only prove that the school or university knew or should have known about the harassment and failed to take reasonable action to stop it.<sup>66</sup>

In the housing context, the LAD's prohibitions on gender discrimination apply to a broad range of covered persons and entities, including owners and their agents and employees, as well as realtors and their agents and employees.<sup>67</sup> Because the LAD prohibits housing discrimination based on gender, it prohibits sexual harassment in housing.<sup>68</sup> In addition, housing providers must take reasonable action to stop sexual harassment on their

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<sup>62</sup> N.J.S.A. 10:5-12(f)-(h); see *L.W. v. Toms River Regional Schools Board of Education*, 189 N.J. 381, 400-03 (2007).

<sup>63</sup> *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 381, 402-03 (2007).

<sup>64</sup> *Id.* at 406-07.

<sup>65</sup> See Jared P. Cole and Christine J. Back, *Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations*, Congressional Research Service, at i (2019), <https://fas.org/sgp/crs/misc/R45685.pdf> (describing Supreme Court cases interpreting Title IX's prohibitions). Although the Department of Education had previously issued guidance that interpreted Title IX to impose liability in a broader set of circumstances, the Department in late 2018 proposed new regulations that would depart from these guidance documents and make it more difficult to hold education institutions liable for sexual harassment. *Id.* Among other things, the proposed regulations would "tether the administrative requirements for schools to the standard set by the Supreme Court, ... more narrowly define what conduct qualifies as sexual harassment under Title IX, and also impose new procedural requirements ... when schools investigate sexual harassment or assault allegations and make determinations of culpability." *Id.*

<sup>66</sup> *L.W.*, 189 N.J. at 404, 406-07.

<sup>67</sup> N.J.S.A. 10:5-12(g), (h).

<sup>68</sup> See *Godfrey v. Princeton Theological Seminary*, 196 N.J. 178, 195-96 (2008) ("Given that the LAD also protects against discrimination in other settings [aside from the workplace], this Court also has recognized that the LAD's promise of protection from discriminatory sexual harassment extends beyond the workplace to other settings.").

premises, whether by employees, agents, or other tenants, if they know or should have known about it,<sup>69</sup> and may not retaliate against anyone for reporting such harassment.<sup>70</sup>

In addition, the Federal Fair Housing Act<sup>71</sup> and other federal laws which also prohibit sex discrimination in housing have been interpreted to prohibit sexual harassment by housing providers.<sup>72</sup> As the Department of Housing and Urban Development has explained, the Fair Housing Act prohibits quid pro quo and hostile environment sexual harassment in housing.<sup>73</sup> The standards are similar to their equivalents under the LAD.<sup>74</sup> Quid pro quo sexual harassment occurs “when a housing provider, or his or her employee, agent or contractor conditions access to or retention of housing or housing-related services or transactions on a victim’s submission to sexual conduct.”<sup>75</sup> And hostile environment liability results when “a housing provider or his or her employee, agent or contractor, or in certain circumstances another tenant, engages in sexual behavior of such severity or pervasiveness that it alters the terms or conditions of tenancy and results in an environment that is intimidating, hostile, offensive, or otherwise significantly less desirable.”<sup>76</sup> As under the LAD, a property owner or manager not only has a “duty not to engage in sexual harassment,” but also must take action to stop harassment if the owner or manager knows or should have known that “an employee, agent, or contractor is sexually harassing applicants, tenants or residents.”<sup>77</sup> Some federal courts also “have held owners and managers, including condominium associations, liable in situations where they knew of tenant-on-tenant harassment and did not take remedial action.”<sup>78</sup>

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<sup>69</sup> See DOJ, “What is Sexual Harassment in Housing?,” *supra*; *L.W.*, 189 N.J. at 407; N.J. Div. on Civil Rights, *5 Things You Should Know About Protections from Sexual Harassment Under New Jersey Law* (Sept. 10, 2019), <https://www.nj.gov/oag/dcr/downloads/fact-SH.pdf>.

<sup>70</sup> N.J.S.A. 10:5-12(d).

<sup>71</sup> 42 U.S.C. § 3601 *et seq.*

<sup>72</sup> See, e.g., *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 861 (2018) (discussing 42 U.S.C. § 3604(b)).

<sup>73</sup> HUD, *Q&A, supra*, at 1.

<sup>74</sup> See U.S. Dep’t of Housing and Urban Development, *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 81 Fed. Reg. 63054-01 *et seq.* (Sept. 14, 2016) (codified at 24 C.F.R. pt. 100) (HUD final rule “defining ‘quid pro quo harassment’ and ‘hostile environment harassment’ as conduct prohibited under the Fair Housing Act,” “specifying the standards to be used to evaluate whether the particular conduct creates a quid pro quo or hostile environment in violation of the Act,” and clarifying “when housing providers and other entities or individuals covered by the Fair Housing Act may be held directly or vicariously liable”).

<sup>75</sup> HUD, *Q&A, supra*, at 1; see *Honce v. Vigil*, 1 F.3d 1085, 1089 (10th Cir. 1993) (recognizing quid pro quo liability in housing context); 24 C.F.R. § 100.600(a)(1) (codifying quid pro quo liability in housing context).

<sup>76</sup> HUD, *Q&A, supra*, at 1; see *Wetzel*, 901 F.3d at 861-62 (discussing elements of hostile housing environment liability); 24 C.F.R. § 100.600(a)(2) (codifying hostile housing environment liability).

<sup>77</sup> *Id.* at 2.

<sup>78</sup> *Id.* at 3.

## Part II. Themes Presented at the Public Hearings

More than 40 survivors, advocates, and experts spoke at the three public hearings we held around the State or submitted written comments. This section discusses the common themes presented in the oral and written comments submitted to DCR.

The survivors, advocates, and experts who testified at the hearings provided poignant accounts detailing the pernicious impact sexual harassment has on individuals in workplaces, housing, and public places throughout New Jersey. The hearings served as a clear call to action, challenging New Jersey to take immediate and meaningful steps to address a problem that has persisted for far too long. As Milly Silva, Executive Vice President of 1199 SEIU United Healthcare Workers East testified, “This turn-the-other-cheek mentality and culture when it comes to sexual harassment will ... continue to grow and fester if we allow it to do so.”<sup>79</sup>

### Sexual Harassers Often Take Advantage of Power Imbalances

Numerous witnesses testified that stark power disparities in workplaces, housing and places of public accommodation increase the likelihood that individuals will be sexually harassed.<sup>80</sup> Testimony highlighted how existing power structures work to further marginalize those who are already most vulnerable to sexual harassment, particularly those who work in isolated occupations.

#### *Individuals With Intersecting Vulnerabilities Face An Increased Risk of Sexual Harassment*

Andrea Johnson of the National Women’s Law Center summarized the testimony of many witnesses when she stated that “sexual harassment often occurs at the intersection of identities.”<sup>81</sup> Survivors are rarely harassed on the basis of gender alone.<sup>82</sup> For example, women of color are often harassed based on their race or national origin in addition to their gender.<sup>83</sup> As one person explained, “We know that sexual harassment is not about sex. It’s about power, it’s about dominance, it’s about control, and for the most part African

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<sup>79</sup> Hearing Transcript, 9/11/2019, at 25 (Testimony of Milly Silva, 1199 SEIU United Healthcare Workers East).

<sup>80</sup> *Id.* at 48-49 (Testimony of Sue Levine, 180 Turning Lives Around) (“There is a power imbalance between an employer or supervisor and a worker, and a landlord or property manager and a tenant. Survivors may not report sexual harassment, as not to risk exposing their immigration status and/or risk losing their job or housing. Employees and tenants need their jobs and homes for their safety and survival, and that of their families.”).

<sup>81</sup> Hearing Transcript, 9/25/19, at 35 (Testimony of Andrea Johnson, National Women’s Law Center).

<sup>82</sup> Hearing Transcript, 9/24/19, at 60 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey) (“[W]orkers with disabilities and LGBTQ [workers] face ... distinct harassment by virtue of their intersecting identities.”).

<sup>83</sup> Hearing Transcript, 9/25/2019, at 35 (Testimony of Andrea Johnson, National Women’s Law Center).

American women do not have the power to control, especially in the workplace, so their stories get ignored and they do not speak up.”<sup>84</sup>

Similarly, witnesses highlighted the unique vulnerabilities of LGBTQ+ individuals, explaining, “the prevalence of sexual assaults and harassment that are grounded in sexual orientation and gender identity is endemic in the United States.”<sup>85</sup> In addition, “[t]he LGBTQ community is ... targeted in the workplace and in housing with threats to ‘out’ them, which can includ[e] outing HIV-status.”<sup>86</sup>

Immigrants who lack legal status are often especially vulnerable because their harassers leverage the threat of deportation to silence them. One witness testified that “undocumented women in particular are vulnerable and suffer horrible abuse in the employment context.”<sup>87</sup> Several witnesses testified about undocumented workers whose employers targeted them because they were undocumented and subjected them to repeated sexual assaults.<sup>88</sup> One employer explicitly told a victim “that if he did not comply she would contact the authorities and deport him and his family.”<sup>89</sup> He was assaulted “every night for weeks.”<sup>90</sup> Another undocumented worker was assaulted by her supervisor for six months “until he hurt her in a way that required immediate medical attention.”<sup>91</sup>

#### *Individuals Who Are Isolated At Work Are Particularly Vulnerable*

Individuals who work in isolated environments are also at an increased risk of experiencing sexual harassment. According to Sue Levine, “[s]exual harassment occurs most often in isolation, without witnesses.”<sup>92</sup> Domestic workers, hotel housekeeping staff, and long-term care workers all work in environments where they are often alone with

<sup>84</sup> Hearing Transcript, 9/24/2019, at 71 (Testimony of Helen Archontou, YWCA of Northern New Jersey – healingSPACE).

<sup>85</sup> Written Testimony of Carlos Ball, Rutgers University.

<sup>86</sup> Hearing Transcript, 9/11/2019, at 51 (Testimony of Sue Levine, 180 Turning Lives Around).

<sup>87</sup> Hearing Transcript, 9/25/2019, at 20 (Testimony of Keith Talbot, Legal Services of New Jersey).

<sup>88</sup> See, e.g., Hearing Transcript, 9/24/2019, at 41 (Testimony of Christine Ferro-Saxon, Family Service League/SAVE of Essex County) (“In most cases survivors [of sexual assault] who are undocumented are even less likely to seek help out of fear of deportation.”); *id.* at 97-98 (Testimony of Jill Zinckgraf, Domestic Abuse and Sexual Assault Crisis Center of Warren County) (“Client A was a migrant, undocumented worker who worked for a couple of years as a laborer before she became the target of a new supervisor. In order for her to collect her money on payday ... she was told that she would have to perform oral sex. ... [T]his continued for approximately six months and the violence escalated before, during and after each sexual assault, until he hurt her in a way that required immediate medical attention.”); *id.* at 40 (Testimony of Christine Ferro-Saxon, Family Service League/SAVE of Essex County) (“Working in a local restaurant for about three months as a dish washer, one survivor found himself being sexually harassed by his supervisor. The harassment started [with] comments about his body and then escalated to unwanted touching and then sexual assault. He was told by his supervisor that if he did not comply she would contact the authorities and deport him and his family. He was sexually assaulted every night for weeks.”).

<sup>89</sup> *Id.* at 40-41 (Testimony of Christine Ferro-Saxon, Family Service League/SAVE of Essex County).

<sup>90</sup> *Id.* at 41.

<sup>91</sup> *Id.* at 97-98 (Testimony of Jull Zinckgraf, Domestic Abuse and Sexual Assault Crisis Center of Warren County).

<sup>92</sup> Hearing Transcript, 9/11/2019, at 50 (Testimony of Sue Levine, 180 Turning Lives Around).

potential harassers. In healthcare settings, such as nursing homes and other long-term care environments, this often means being left alone with patients who engage in sexual harassment. For example, one patient “bombarded [a nursing aid] with sexual comments and tried to touch her breasts as she washed him in the morning.”<sup>93</sup> Another patient “wanted [his caregiver] to touch his genitals in a sexual manner.”<sup>94</sup> Witnesses testified that, too often, managers fail to intervene and instead “excuse or turn a blind eye to harassment committed by patients, in order to keep the beds full and patients satisfied.”<sup>95</sup> Similarly, hotel housekeeping staff are often isolated with predatory patrons. One housekeeper testified that guests have asked her, “Can you do a little extra for me? I will pay you.”<sup>96</sup> Other housekeepers have been assaulted or raped by guests.<sup>97</sup>

Domestic workers also have been subject to egregious incidents of sexual harassment by their employers. Marrisa Senteno from the National Domestic Workers Alliance testified that domestic workers are “the nannies that take care of our children, they’re the housekeepers that bring sanity and order to our homes and they’re the home care workers that care for our parents and give independence to people with disabilities.”<sup>98</sup> One advocate shared the story of one worker who found her employer naked in the living room.<sup>99</sup> Another worker was required to bring her male employer a towel each time he showered, until one day he touched her sexually in front of his son.<sup>100</sup> A live-in domestic worker reported that her employer climbed into her bed.<sup>101</sup>

Domestic workers are currently not protected by either federal or state anti-discrimination laws.<sup>102</sup> And live-in domestic workers often feel particularly fearful of retaliation when their employers harass them because reporting the employer’s conduct puts them at risk of losing their job and their home simultaneously.<sup>103</sup> Existing law thus leaves domestic workers with no external recourse unless the harassment is severe enough to constitute a crime.

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<sup>93</sup> *Id.* at 23 (Testimony of Milly Silva, 1199 SEIU United Healthcare Workers East).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Hearing Transcript, 9/25/2019, at 24 (Testimony of Iris Sanchez, Unite Here Local 54).

<sup>97</sup> *Id.* at 24-25.

<sup>98</sup> Hearing Transcript, 9/24/2019, at 21 (Testimony of Marrisa Senteno, National Domestic Workers Alliance).

<sup>99</sup> Hearing Transcript, 9/11/2019, at 54 (Testimony of Lou Kimmel, New Labor).

<sup>100</sup> Hearing Transcript, 9/24/2019, at 36-37 (Testimony of Person Number 2, National Domestic Workers Alliance).

<sup>101</sup> Hearing Transcript, 9/25/2019, at 51-52 (Testimony of Namrata Pradhan, Adhikaar).

<sup>102</sup> N.J.S.A. 10:5-5(f) (excluding domestic workers from the definition of employee); 42 U.S.C. § 2000e(b) (defining “employer” to include only employers with 15 or more employees).

<sup>103</sup> Hearing Transcript, 9/11/2019, at 43-47 (Testimony of Person Number 5, CASA Freehold).

## Survivors Face Multiple Barriers to Reporting Harassment and to Securing a Just Outcome When They Do Report

### *Fear of Retaliation May Keep Survivors from Reporting*

Survivors of sexual harassment face numerous legal, societal, and cultural barriers that prevent them from reporting sexual harassment and that can also reduce the possibility of a just outcome when they do report. The most pervasive barrier to reporting raised at the hearings was a fear of retaliation. Advocates and community members alike testified that this fear serves as a highly effective deterrent to survivors' willingness to report sexual harassment.<sup>104</sup> As Michael Rojas of the Equal Employment Opportunity Commission testified, surveys show that as many as sixty percent of women have experienced sexual harassment in the workplace, yet the vast majority of them did not report the harassment either to their employers or to federal or state agencies.<sup>105</sup> When asked why they did not report, the most common answer was fear of retaliation.<sup>106</sup>

Retaliation against any person for reporting sexual harassment or any other violation of the LAD is illegal.<sup>107</sup> Even if what the person reports does not end up meeting the legal definition of sexual harassment, the person is still protected from retaliation based on the reporting.<sup>108</sup> But the majority of survivors still do not feel safe filing a complaint.

Despite existing legal protections that prohibit retaliation, “the fear of retaliation is well founded.”<sup>109</sup> A recent EEOC report found that “75% of employees who spoke out against workplace mistreatment faced some form of retaliation.”<sup>110</sup> Experts who testified at the hearing explained that retaliation can take many forms, including, but not limited to, termination.<sup>111</sup> Thus, if reforms are to make a meaningful impact, they should address the persistent and overwhelming fear of retaliation.

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<sup>104</sup> Hearing Transcript, 9/24/2019, at 31 (Debra Lancaster, Center for Women and Work, Rutgers University School of Management and Labor Relations) (“[T]here are few avenues for reporting harassment, and those who do have avenues to report seldom do for fear of retaliation ....”); *Id.* at 25-26 (Testimony of Marrisa Senteno, National Domestic Workers Alliance) (testifying that barriers to reporting include “fear of retaliation because of their immigration status, language barriers, fear of losing their job and not being able to support themselves and their families”).

<sup>105</sup> Hearing Transcript, 9/25/2019, at 15 (Testimony of Michael Rojas, United States Equal Employment Opportunity Commission).

<sup>106</sup> *Id.*

<sup>107</sup> N.J.S.A. 10:5-12(d).

<sup>108</sup> *Tartaglia v. UBS PaineWebber Inc.*, 197 N.J. 81, 126–27 (2008).

<sup>109</sup> Hearing Transcript, 9/11/2019, at 15 (Testimony of Michael Rojas).

<sup>110</sup> U.S. Equal Employment Opportunity Comm’n, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs (June 2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm); *see also* Hearing Transcript, 9/24/2019, at 60 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey).

<sup>111</sup> Hearing Transcript, 9/24/2019, at 60 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey).

*The Short Statute of Limitations May Keep Survivors from Reporting*

Survivors and advocates testified to an array of other barriers that prevent survivors from reporting and addressing sexual harassment. Many individuals are unaware of their rights,<sup>112</sup> and the short window in which legal claims must be filed at DCR serves as a barrier to those traumatized by harassment.<sup>113</sup> Research on the neurobiology of trauma suggests that “[t]rauma and fear cause specific short-term and long-term changes to the brain that will affect a victim’s behavior.”<sup>114</sup> Specifically, following a traumatic event, many survivors experience a number of symptoms that may cause a delay in processing the event and reporting it.<sup>115</sup> As one advocate explained, it is therefore incredibly challenging for survivors who are traumatized by harassment to act within the current six-month timeframe for filing a claim with DCR, especially when an individual does not know their rights. Individuals have to be able to acknowledge the harassment, decide to seek help, learn about their options, and overcome their fear of retaliation, all while continuing to shoulder their work and family responsibilities.<sup>116</sup>

*Lack of Clarity in an Employer’s Policies May Keep Survivors from Reporting*

These barriers are also compounded because many employers lack clear policies that define and prohibit harassment and provide instructions on how to report it. Employers, schools, universities, and others often either do not have sexual harassment policies at all or have policies that do not clearly address how to report harassment internally.<sup>117</sup> Even

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<sup>112</sup> Hearing Transcript, 9/24/2019, at 25 (Testimony of Marrisa Senteno, National Domestic Workers Alliance).

<sup>113</sup> *Id.*; see also *id.* at 61 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey).

<sup>114</sup> Deborah Smith, “What Judges Need to Know About the Neurobiology of Sexual Assault,” Nat’l Center for State Courts, <https://www.ncsc.org/microsites/trends/home/Monthly-Trends-Articles/2017/What-Judges-Need-to-Know-About-the-Neurobiology-of-Sexual-Assault.aspx> (last visited Feb. 13, 2020).

<sup>115</sup> Michael Henry, et al., *The 7 Deadly Sins of Title IX Investigations: The 2016 White Paper* 4 (2016), [https://cdn.atixa.org/website-media/atixa.org/wp-content/uploads/2016/02/12193411/7-Deadly-Sins\\_Short\\_with-Teaser\\_Reduced-Size.pdf](https://cdn.atixa.org/website-media/atixa.org/wp-content/uploads/2016/02/12193411/7-Deadly-Sins_Short_with-Teaser_Reduced-Size.pdf); Beverly Engel, *Stop Shaming Victims of Sexual Assault for Not Reporting*, Psychology Today (Sept. 23, 2018), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201809/stop-shaming-victims-sexual-assault-not-reporting>.

<sup>116</sup> *Id.* (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey (“The current 180 days for administering complaints is just too short and people seeking [redress] of their civil rights face many barriers [to] acting within six months, including not knowing their rights, fearing retaliation and then shouldering their work and family responsibilities ....”).

<sup>117</sup> *Id.* at 82-83 (Testimony of Penny Venetis, Rutgers Law School International Human Rights Clinic) (“In law school I was sexually harassed by a fellow student who was in a position of authority over me. I reported him immediately and went to file a complaint against him. It turns out that neither the law school nor the university had a sexual harassment policy. As a response to my complaint the University put together a working group of faculty and students and adopted the sexual harassment policy that our committee recommended, which was terrific, but the student who harassed me was never disciplined because there was no policy in place when I reported the abuse and the University enacted the policy after the student had graduated.”).

where policies exist, employers too often have not taken additional steps needed to ensure their employees have faith in the effectiveness or safety of the reporting systems.<sup>118</sup>

*Existing Legal Doctrines May Prevent Survivors from Securing a Just Outcome When They Do Report*

When survivors do attempt to file a legal claim, certain legal doctrines serve as perceived or actual barriers to obtaining a just result.<sup>119</sup> For example, numerous experts testified that New Jersey’s application of the “severe or pervasive” standard prevents survivors from reporting or successfully prosecuting claims, based on a belief that the harassment they suffered won’t constitute sexual harassment under the law.<sup>120</sup>

The severe or pervasive standard requires a complainant to allege “the complained of conduct (1) would not have occurred but for the employee’s [membership in a protected class]; and it was (2) severe or pervasive enough to make a (3) reasonable [person belonging to that protected class] believe that (4) the conditions of employment are altered and the working environment is hostile or abusive.”<sup>121</sup>

As noted above, under current law, harassment must be either severe or pervasive to create a hostile work environment; it need not be both. “[O]ne incident of harassing conduct” may be severe. And multiple non-severe incidents may “considered together” be “sufficiently pervasive to make the work environment intimidating or hostile.” Thus, in applying the severe or pervasive standard, courts are instructed to consider “the cumulative effect” of all incidents alleged.<sup>122</sup>

However, some state and federal cases in New Jersey have ignored these instructions and found that no reasonable jury could find “severe or pervasive” harassment even when the complainant had been grievously harmed by serious harassment.<sup>123</sup>

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<sup>118</sup> Hearing Transcript, 9/11/2019, at 22 (Testimony of Milly Silva, 1199 SEIU United Healthcare Workers East).

<sup>119</sup> Hearing Transcript, 9/25/2019, at 40-41 (Testimony of Ramya Sekaran, National Women’s Law Center).

<sup>120</sup> See, e.g., Written Testimony of Andrea Johnson and Ramya Sekaran, National Women’s Law Center (“[V]ictims may not step forward and make a complaint or seek help because they fear the harassment they are being subjected to would not be legally actionable.”); Hearing Transcript, 9/24/2019, at 55 (Testimony of Nancy Erika Smith, Smith Mullin, P.C.).

<sup>121</sup> *Lehmann v. Toys R Us, Inc.*, 132 N.J. 587, 603-04 (1993); *Taylor v. Metzger*, 152 N.J. 490, 498 (1998).

<sup>122</sup> *Lehmann v. Toys R Us, Inc.*, 132 N.J. 587, 606-07 (1993).

<sup>123</sup> See, e.g., *Clayton v. City of Atlantic City*, 538 Fed. Appx. 124, 129 (3d Cir. 2013) (holding that an incident in which a supervisor intentionally grabbed an employee’s buttocks did not rise to the level of severe or pervasive conduct); *Godfrey v. Princeton Theological Seminary*, 196 N.J. 178, 198 (2008) (describing the incidents “in sterile terms, stripped of the overlay of [plaintiffs’] subjective reactions to these interactions,” because, in the court’s view, those reactions were not relevant to “the determination of whether the conduct is severe or pervasive,” and holding that the alleged harasser’s “repeated and unwelcome behavior was one of the socially uncomfortable situations that many women encounter in the course of their lives when someone in whom they are not interested persists in trying to persuade them otherwise.”); *id.* at 201 (harassing conduct not directed at or witnessed by

Experts testified to similar problems with the *Aguas/Faragher-Ellerth* affirmative defense. As earlier noted, under both federal and New Jersey law, employers may raise as an affirmative defense to liability that they exercised reasonable care to prevent sexual harassment from occurring and that the plaintiff unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer or to otherwise avoid harm.<sup>124</sup>

In New Jersey, under *Aguas v. State*, five factors are relevant to the assessment of whether an employer exercised reasonable care: (1) whether there are formal policies prohibiting harassment in the workplace; (2) whether there are formal and informal complaint structures for employees to report violations of the policy; (3) whether the employer provides anti-harassment training to all employees, including mandatory training for supervisors and managers; (4) whether the employer has effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures; and (5) whether the employer has demonstrated “an unequivocal commitment from the highest levels of the employer that harassment [will] not be tolerated, and demonstration of that policy commitment by consistent practice.”<sup>125</sup>

*Aguas* is clear that merely having a policy or training in place is insufficient to establish the affirmative defense; rather, the assessment is focused on the efficacy of the employer’s remedial program.<sup>126</sup> Yet witnesses testified that courts have too often applied *Faragher-Ellerth* and *Aguas* in ways that enable employers to escape liability for harassment even where their policies or procedures were demonstrably ineffective or when the plaintiff attempted to take advantage of the procedures but was rebuffed by the

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plaintiff cannot factor into analysis of a hostile work environment claim); *Fernandez v. Pathmark Stores, Inc.*, 2006 WL 3093717 at \*1-5 (N.J. App. Div. Sept. 27, 2006) (finding no reasonable jury could find severe or pervasive sexual harassment where plaintiff and the alleged harasser had an intimate relationship for about one year and after she ended the relationship the alleged harasser, *inter alia*, (1) followed her to her car, tried to grab her keys, slapped her in the face, and “repeatedly called her a bitch”; (2) “accused her of having sex with” a coworker “and spilled a can of soda on her”; (3) followed her to the bathroom and grabbed her on the shoulder; (4) told her husband they were having an affair; (5) “stopped plaintiff in the parking lot” and told her he loved her; (6) found plaintiff in another department and grabbed her by her wrist; and (7) told other employees he was “crazy in love” with plaintiff, causing plaintiff to go out on disability leave for over a year because of depression and anxiety); *Anastasia v. Cushman Wakefield*, 455 Fed. Appx. 236, 237-240 (3d Cir. 2011) (finding no reasonable jury could find severe or pervasive harassment where (1) plaintiff’s superior informed her that “he was romantically attracted to her and had been for years,” and then, over that day and the following day, followed her to the parking lot and gently grabbed her arm, asked her for a photograph of her and her new boyfriend, “concocted a pretext to have [plaintiff] meet him alone in a break room”; (2) plaintiff immediately took a temporary leave of absence, while her superior continued to call and send emails and text messages to her, despite her repeated statements that his further contact was unwanted; and (3) plaintiff refused to return to work when her employer refused to create an arrangement under which she would not ultimately have to report to the alleged harasser).

<sup>124</sup> *Aguas*, 220 N.J. 494; see also *Burlington*, 524 U.S. 742; *Faragher*, 524 U.S. 775.

<sup>125</sup> *Aguas*, 220 N.J. at 513 (quoting *Gaines v. Bellino*, 173 N.J. 301, 313 (2002)).

<sup>126</sup> *Id.*

employer.<sup>127</sup> For example, witnesses noted that under *Aguas*, courts have sometimes found that a policy or training alone is sufficient, without engaging in the required assessment of efficacy.<sup>128</sup> Witnesses at the hearings thus spoke out strongly in favor of eliminating the *Aguas/Faragher-Ellerth* affirmative defense to liability<sup>129</sup> and instead allowing employers to present evidence of effective policies and procedures to mitigate damages.<sup>130</sup>

### Preventing Sexual Harassment Requires Proactive Work

Witnesses stressed that efforts to address sexual harassment once it has occurred are insufficient to change workplace culture in any meaningful way. Instead, witnesses detailed the need for proactive efforts designed to prevent sexual harassment from occurring by promoting a culture of prevention and institutional accountability.<sup>131</sup> Numerous witnesses called for increased anti-harassment education in schools and universities,<sup>132</sup> increased training in the workplace, with a focus on interactive live training,<sup>133</sup> and increased outreach to educate the public on their rights and inform employers, housing providers, and places of public accommodation of their responsibilities.<sup>134</sup> Multiple witnesses also testified to the need to hold institutions accountable by promoting transparency, including by requiring that employers report information about harassment complaints to DCR.<sup>135</sup>

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<sup>127</sup> Hearing Transcript, 9/25/2019, at 41.

<sup>128</sup> Hearing Transcript, 9/25/2019, at 41 (Testimony of Ramya Sekaran, National Women’s Law Center).

<sup>129</sup> *Aguas*, 220 N.J. 494.

<sup>130</sup> Hearing Transcript, 9/25/2019, at 41.

<sup>131</sup> *Id.*

<sup>132</sup> Hearing Transcript, 9/24/2019, at 62-63 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey); *id.* at 86 (Testimony of Penny Venetis, Rutgers Law School International Human Rights Clinic); Hearing Transcript, 9/11/2019, at 38-39 (Testimony of Jill Zinckgraf, Domestic Abuse and Sexual Assault Crisis Center of Warren County).

<sup>133</sup> Hearing Transcript, 9/11/2019, at 55 (Testimony of Lou Kimmel, New Labor); *id.* at 74 (Testimony of Sarah McMahon, Center on Violence Against Women & Children, Rutgers University School of Social Work); Hearing Transcript, 9/24/2019, at 34 (Testimony of Debra Lancaster, Center for Women and Work, Rutgers University School of Management and Labor Relations); *id.* at 49 (Testimony of Kirsten Scheurer Branigan, KSBranigan Law P.C.); *id.* at 62 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey); Hearing Transcript, 9/25/2019, at 43 (Testimony of Ramya Sekaran, National Women’s Law Center); *id.* at 29-32 (Testimony of Louis Chodoff, Ballard Spahr, LLP).

<sup>134</sup> *See, e.g.*, Hearing Transcript, 9/24/2019, at 86 (Testimony of Penny Venetis; Rutgers Law School International Human Rights Clinic); Hearing Transcript, 9/11/2019, at 52 (Testimony of Sue Levine, 180 Turning Lives Around).

<sup>135</sup> Hearing Transcript, 9/25/2019, at 42 (Testimony of Ramya Sekaran, National Women’s Law Center).

### Part III. Recommended Legislative Amendments and Outreach Efforts

The key concerns raised at the hearings support two categories of recommendations: recommended legislative amendments, and recommended best practices for employers, housing providers, and places of public accommodation.

The LAD was the first state-level civil rights statute when it went into effect nearly 75 years ago. But the hearing testimony identified numerous ways in which the law should now be amended to adequately prevent sexual harassment and other forms of discrimination and bias-based harassment.

This section discusses recommended legislative amendments, and the next section discusses recommended best practices.

#### Expand the LAD’s Protections to Additional Workers

The LAD explicitly exempts domestic workers from the definition of “employee,”<sup>136</sup> leaving domestic workers without legal protection from sexual harassment and other forms of bias-based harassment.<sup>137</sup>

As discussed in Part II, domestic workers and advocates highlighted at the hearings how the threat of sexual harassment in domestic work is profound and has a disproportionate impact on immigrant women and women of color.<sup>138</sup> The domestic workers who so courageously came forward to share their stories made one simple ask: “My ask is for you to include us. We always get excluded from every law out there. All I’m asking is ... when this moves forward, please include [domestic workers].”<sup>139</sup>

Witnesses at the hearing highlighted that domestic worker exemptions like those in the LAD “perpetuate racial and gender inequality.”<sup>140</sup> In fact, these exemptions have a troubling history. Domestic workers were excluded from the initial wave of labor protection laws passed as part of the New Deal because Southern Democrats refused to support the New Deal if it offered protections for domestic and agricultural workers, who were disproportionately Black.<sup>141</sup> Domestic work continues to be performed predominantly by

<sup>136</sup> N.J.S.A. 10:5-5(f).

<sup>137</sup> See e.g., Hearing Transcript, 9/24/2019, at 38 (Testimony of Person Number 2, National Domestic Workers Alliance); *id.* at 23 (Testimony of Marrisa Senteno, National Domestic Workers Alliance) (“Sexual violence in domestic work is prevalent. There’s no HR that domestic workers can report to, so there are no spotlights, no microphones in front of them to share their story. There’s few laws on the books that can actually protect domestic workers from harassment and exploitation.”).

<sup>138</sup> *Id.* at 21 (Testimony of Marrisa Senteno, National Domestic Workers Alliance) (“Domestic workers are mostly immigrant women of color and they’re some of the most at risk and invisible workers in the nation.”).

<sup>139</sup> *Id.* at 38 (Testimony of Person #2, National Domestic Workers Alliance).

<sup>140</sup> *Id.* at 26 (Testimony of Marrisa Senteno, National Domestic Workers Alliance) (testifying that domestic worker exclusions “perpetuate racial and gender inequality and ... have no place in the workplace” and that other states that have amended their statutes to address domestic worker exclusions “have decided to cut those ties ... to institutionalize[d] racism”).

<sup>141</sup> Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 Ohio St. L.J. 95, 100-17 (2011).

women of color and, increasingly, immigrant women,<sup>142</sup> and the continued exclusion of domestic workers from anti-discrimination and other labor laws therefore continues to disproportionately deprive women of color of protection for bias-based harassment in their workplace.

The LAD should be amended to clearly protect domestic workers from harassment and retaliation.<sup>143</sup>

Witnesses also highlighted that unpaid interns should be explicitly protected by the Law Against Discrimination.<sup>144</sup> DCR thus recommends amending the definition of “employee” in the LAD to include unpaid interns.

### **Promote Prevention and Increase Accountability**

Survivors, advocates, and experts at the hearings emphasized the importance of enacting measures designed to promote a culture of prevention and institutional accountability.<sup>145</sup> In the past few years, several States have passed legislation to require employers to take proactive measures to prevent sexual harassment, including requiring employers to maintain anti-harassment policies,<sup>146</sup> conduct anti-harassment training,<sup>147</sup> and notify employees of their right to be free from sexual harassment at work.<sup>148</sup> Numerous witnesses encouraged New Jersey to adopt similar legislation.<sup>149</sup> In addition, in light of the overwhelming testimony regarding the impact of intersecting identities, reforms intended to address sexual harassment should address all forms of bias-based harassment, including

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<sup>142</sup> See Hearing Transcript, 9/24/2019, at 21 (Testimony of Marrison Senteno, National Domestic Workers Alliance).

<sup>143</sup> Witnesses also urged New Jersey to follow the example of nine other states and at least one municipality that have passed a Domestic Workers Bill of Rights, which generally seeks to “includ[e] domestic workers in common workplace rights and protections [such as] paid overtime, safe and healthy working conditions, meal and rest breaks, earned sick time, and freedom from workplace harassment.” See National Domestic Workers Alliance, “National Domestic Workers Bill of Rights,” <https://www.domesticworkers.org/bill-rights> (last visited Dec. 24, 2019). Any such amendment is beyond the scope of this report.

<sup>144</sup> Hearing Transcript, 9/25/2019, at 36 (Testimony of Andrea Johnson, National Women’s Law Center; Hearing Transcript, 9/24/2019, at 62 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey) (“The law should be absolutely clear that employers are liable for harassment when experienced by any worker, regardless of their status on the payroll. We’re talking about interns, ... vendors, contractors, anyone in the workplace should be protected.”).

<sup>145</sup> See, e.g., Written Testimony of Andrea Johnson and Ramya Sekaran, National Women’s Law Center.

<sup>146</sup> See, e.g., Cal. Gov. Code § 12950; N.Y. Labor Code § 201-g(1); 19 Del. Code. Ann. § 711A(f); 26 Maine Rev. Stat. Ann. § 807; Mass. Gen. Law. Ann. ch. 151B § 3A(b).

<sup>147</sup> See, e.g., Cal. Gov. Code § 12950.1; Conn. Gen. Stat. Ann. § 46a-54(15)(C); 19 Del. Code. Ann. § 711A(g); N.Y. Labor Code § 201-g(2); 26 Maine Rev. Stat. Ann. § 807(3);

<sup>148</sup> See, e.g., Conn. Gen. Stat. Ann. § 46a-54(15)(A); Del. Code. Ann. 19 § 711A(f); 26 Maine Rev. Stat. Ann. § 807(1)-(2); N.Y. Labor Code § 201-g(2-a).

<sup>149</sup> See, e.g., Written Testimony of Andrea Johnson and Ramya Sekaran, National Women’s Law Center.

harassment based on race, sexual orientation, gender identity or expression, and disability, rather than focusing only on harassment based on gender.

### *Policies*

Consistent with this testimony, DCR recommends amending the LAD to require employers to maintain clear, written policies concerning unlawful discrimination and harassment that detail prohibited conduct and outline the consequences of engaging in such conduct.<sup>150</sup> The LAD should require that such policies:

- (1) Address discrimination, sexual harassment, and harassment on the basis of any other characteristic protected by the LAD;
- (2) Include an unequivocal statement from management that unlawful discrimination and harassment in the workplace will not be tolerated and are considered a form of employee misconduct, and that sanctions will be enforced against individuals engaging in unlawful discrimination or harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue;
- (3) Give clear definitions of prohibited conduct with examples;
- (4) Clearly describe potential consequences for those who violate the policy;
- (5) Detail the process for filing complaints;
- (6) Include a statement of the employer's commitment to conducting thorough and impartial investigations;
- (7) Provide information to allow survivors to seek redress, including information on how to contact DCR.<sup>151</sup>

The policies should be translated for employees whose primary language is not English and who have a limited ability to read, speak, write, or understand English. In addition, in order to facilitate employer compliance, DCR should be required to create model policies and make them available free of charge on their website.

### *Trainings*

Witnesses also stressed the importance of meaningful training for both employees and supervisory staff.<sup>152</sup> In recent years, at least five States have passed legislation requiring mandatory sexual harassment training.<sup>153</sup> The LAD should be amended to require such training, as follows:

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<sup>150</sup> Hearing Transcript, 9/25/2019, at 17-18 (Testimony of Michael Rojas, United States Equal Employment Opportunity Commission); *id.* at 27 (Testimony of Louis Chodoff, Ballard Spahr, LLP) (“[Sexual harassment policies] should describe what harassment is, what discrimination is, what retaliation is but not just words, they should include real life and easy to understand examples for employees.”); Hearing Transcript, 9/11/2019, at 79 (Sarah McMahon, Center on Violence Against Women & Children, Rutgers University School of Social Work).

<sup>151</sup> See Written Testimony of Andrea Johnson and Ramya Sekaran, National Women's Law Center.

<sup>152</sup> Hearing Transcript, 9/25/2019, at 29-32 (Testimony of Louis Chodoff, Ballard Spahr, LLP).

<sup>153</sup> Written Testimony of Andrea Johnson and Ramya Sekaran, National Women's Law Center; *see, e.g.*, Cal. Gov. Code § 12950.1; Conn. Gen. Stat. Ann. § 46a-54(15)(C); 19 Del. Code. Ann. § 711A(g); N.Y. Labor Code § 201-g(2); 26 Maine Rev. Stat. Ann. § 807(3).

- (1) To ensure protection for the most marginalized workers, training must
  - a. be required in all workplaces,
  - b. be accessible to those who do not speak English, and
  - c. address sexual harassment, discrimination, and harassment on the basis of other characteristics protected by the LAD.
- (2) In addition to training on all of the details of an employer's anti-discrimination and anti-harassment policy discussed above, the training must also address the appropriate responses to policy violations and include a segment on bystander intervention.
- (3) There must be a separate training for supervisors on how to proactively prevent and respond to harassment, discrimination, and retaliation.
- (4) Larger employers should be required to conduct live, in-person trainings, whereas smaller employers can rely on online training.

In order to facilitate employer compliance, DCR should be required to create model trainings, for both employees and supervisors, and make them available free of charge on its website.

#### *Clarify Applicability of the Aguas/Faragher-Ellerth Affirmative Defense*

As noted above, under both Title VII and the LAD, employers can currently raise as an affirmative defense to liability that they exercised reasonable care to prevent sexual harassment from occurring and that the plaintiff employee unreasonably failed to take advantage of preventative or corrective opportunities or to otherwise avoid harm.<sup>154</sup> Under *Aguas*, the five factors relevant to the assessment of whether an employer exercised reasonable care are: (1) whether there are formal policies prohibiting harassment in the workplace; (2) whether there are formal and informal complaint structures for employees to report violations of the policy; (3) whether the employer provides anti-harassment training to all employees, including mandatory training for supervisors and managers; (4) whether the employer has effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures; and (5) whether the employer has demonstrated “an unequivocal commitment from the highest levels of the employer that harassment [will] not be tolerated, and demonstration of that policy commitment by consistent practice.”<sup>155</sup>

However, if as recommended above, the LAD is amended to mandate that all employers (1) adopt formal anti-discrimination and anti-harassment policies in the workplace, including complaint structures for employees to report violations of the policy; and (2) provide anti-discrimination and anti-harassment training to all employees, including mandatory training for supervisors and managers, then permitting employers to use as a complete defense to liability their compliance with those statutory requirements to adopt formal policies and to provide training would mean that no New Jersey employer that complies with the mandatory policy and training requirements would ever be liable for sexual harassment in the future. The LAD amendments regarding mandatory policy and training requirements should therefore specify that an employer's compliance with those

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<sup>154</sup> *Aguas*, 220 N.J. 494; see also *Burlington*, 524 U.S. 742; *Faragher*, 524 U.S. 775.

<sup>155</sup> *Aguas*, 220 N.J. at 513 (quoting *Gaines v. Bellino*, 173 N.J. 301, 313 (2002)).

statutory requirements will not be sufficient to establish a defense to liability for harassment under the Act.

### *Mandatory Reporting*

Multiple witnesses identified benefits of promoting reporting around allegations of sexual harassment.<sup>156</sup> Increased reporting empowers survivors and “encourag[es] employers to invest in prevention.”<sup>157</sup> Moreover, given the significant barriers for survivors to file complaints regarding sexual harassment identified at the hearings,<sup>158</sup> it is clear that only a subset of harassment incidents are reflected in formal complaints filed with DCR. Accordingly, DCR recommends amending the LAD to:

- (1) Require larger employers to report to DCR the type, number, and ultimate resolution of internal discrimination, harassment, and retaliation complaints received;
- (2) Require these same employers to maintain records of their internal investigations for a sufficient period to enable further investigation by DCR when warranted.

### **Remove Barriers to Survivors Obtaining a Just Outcome**

#### *Extend the Statute of Limitations*

Currently, those who have suffered bias-based harassment have only 180 days to file a complaint with DCR and only two years to sue in court.<sup>159</sup> Many witnesses explained that the current filing deadlines are too short, especially for those who have suffered the trauma of sexual harassment,<sup>160</sup> and recommended that both deadlines be extended.<sup>161</sup>

DCR recommends extending the current statute of limitations for lawsuits in court from two years to three years and doubling the existing statute of limitations for filing claims with DCR from 180 days to one year.

#### *Clarify Legal Standards for Sexual Harassment Claims*

As discussed above, witnesses at the hearings expressed significant concern over unduly narrow interpretations of the “severe or pervasive” standard.<sup>162</sup> And some state and

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<sup>156</sup> See, e.g., *id.* at 42.

<sup>157</sup> *Id.*

<sup>158</sup> See Part II, *supra*.

<sup>159</sup> N.J.S.A. 10:5-12.11; *id.* 10:5-18.

<sup>160</sup> Hearing Transcript, 9/24/2019, at 61 (Testimony of Jeanne LoCicero, American Civil Liberties Union of New Jersey) (“The current 180 days for administering complaints is just too short and people seeking [redress] of their civil rights face many barriers [to] acting within six months, including not knowing their rights, fearing retaliation and then shouldering their work and family responsibilities ....”).

<sup>161</sup> See, e.g., *id.*; Written Testimony of Andrea Johnson and Ramya Sekaran, National Women’s Law Center.

<sup>162</sup> See Part II, *supra*; see also Written Testimony of Andrea Johnson and Ramya Sekaran, National Women’s Law Center (“[V]ictims may not step forward and make a complaint or seek help because they fear the harassment they are being subjected to would not be legally actionable.”).

federal cases in New Jersey have misapplied the “severe or pervasive” standard to find that no reasonable jury could find “severe or pervasive” harassment even when the complainant had been grievously harmed by serious harassment.<sup>163</sup> Several witnesses urged the Legislature to take action,<sup>164</sup> noting that California recently enacted comprehensive legislation clarifying how courts should apply the severe and pervasive standard,<sup>165</sup> while New York recently eliminated the standard altogether.<sup>166</sup>

Because creating a completely new legal standard could cause confusion and lead to unintended consequences, DCR recommends amending the LAD to clarify how the “severe or pervasive” standard should apply. Specifically, DCR recommends that the Legislature clarify that:

- The standard for assessing unlawful harassment claims is that laid out in *Lehmann v. Toys R Us, Inc.*<sup>167</sup> and *Taylor v. Metzger*.<sup>168</sup>
- The existence of a hostile work environment depends upon the totality of the circumstances. When evaluating the severity or pervasiveness of harassing conduct, the cumulative effect of all incidents must be considered as a whole. Individual incidents must not be considered in isolation. While petty slights or trivial inconveniences are not actionable under the LAD, a court may not ignore or filter out abusive or offensive language, jokes, teasing, offensive comments, or isolated incidents when evaluating the totality of the circumstances.
- A single incident of harassing conduct may be sufficiently severe to create a triable issue of fact regarding the existence of a hostile work environment.
- Although the reasonable person standard outlined in *Lehmann* is an objective standard judged from the perspective of a reasonable person belonging to the same protected class as the complainant, the facts should not be assessed in sterile terms, stripped of the overlay of complainant’s reactions. Instead, a complainant’s subjective responses to the allegedly harassing conduct are part of the totality of the circumstances that are relevant to whether a reasonable person belonging to the same protected class would consider the conduct to be sufficiently severe or pervasive to alter the conditions of employment. In addition, the complainant’s knowledge of harassment directed to others may be relevant to evaluating whether a hostile work environment exists, whether or not the complainant witnessed the harassing conduct.
- Harassment need not involve physical touching to qualify as severe or pervasive.

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<sup>163</sup> See note 123, *supra*.

<sup>164</sup> *E.g.*, Hearing Transcript, 9/24/2019, at 55 (Testimony of Nancy Erika Smith, Smith Mullin, P.C.); Written Testimony of Andrea Johnson and Ramya Sekaran, National Women’s Law Center.

<sup>165</sup> See Cal. Gov. Code § 12923; *id.* § 12940(j); Hearing Transcript, 9/25/2019, at 40 (Testimony of Ramya Sekaran, National Women’s Law Center).

<sup>166</sup> N.Y. Exec. L. § 296(h); Hearing Transcript, 9/25/2019, at 40 (Ramya Sekaran, National Women’s Law Center).

<sup>167</sup> 132 N.J. 587.

<sup>168</sup> 152 N.J. 490.

- Loss of tangible job benefits shall not be necessary in order to establish a hostile work environment. In addition, the complainant need not prove that his or her tangible productivity declined as a result of the harassment.

This legislation would disapprove of cases that have found or implied otherwise.<sup>169</sup>

### **Expand DCR’s Outreach Efforts**

Existing legal protections are of little use to survivors who do not know their rights, whether because they do not understand what fits the legal definition of harassment or because they do not know that the law exists at all. And existing legal protections also will not change the behavior of employers, housing providers, or places of public accommodation if those entities are unaware of their legal obligations.

Witnesses at the hearing echoed this theme,<sup>170</sup> and made clear how little New Jersey residents understand about the LAD and what it requires.<sup>171</sup> For example, several witnesses testified to the importance of ensuring that civil rights laws cover employees at small employers, but the LAD already covers all employers, regardless of size. Similarly, witnesses testified that independent contractors should be covered, but as discussed above in Part II, the LAD already provides sexual harassment protections for independent contractors. The testimony underscored the need for DCR to engage in a public outreach campaign to:

- (1) Ensure that employers, landlords, and places of public accommodation understand their obligations under the LAD, both with respect to not engaging in unlawful harassment, discrimination, and retaliation, and with respect to how to respond when it occurs.<sup>172</sup>
- (2) Prioritize marginalized communities with limited access to information, including domestic workers and others working in isolated professions; immigrant communities; and tenants in public and other subsidized housing.<sup>173</sup>
- (3) Publicize and emphasize the LAD’s protections against retaliation for reporting harassment and discrimination.<sup>174</sup>

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<sup>169</sup> See note 123, *supra*.

<sup>170</sup> Hearing Transcript, 9/11/2019, at 61-62 (Testimony of Michael Campion, United States Attorney’s Office for the District of New Jersey) (“[A]lmost everyone will know that it is wrong when their landlord, property manager or someone else sexually harasses them, but they may not know it’s illegal.”); Hearing Transcript, 9/24/2019, at 71 (Testimony of Helen Archontou, YWCA of Northern New Jersey – healingSPACE) (“When you’re a young woman in a corporate environment things happen and you’re not sure what to do about it.”).

<sup>171</sup> Hearing Transcript, 9/24/2019, at 86 (Testimony of Penny Venetis, Rutgers Law School International Human Rights Clinic).

<sup>172</sup> See, e.g., Hearing Transcript, 9/24/2019, at 52 (Testimony of Namrata Pradhan, Adhikaar).

<sup>173</sup> See Part II, *supra*; Hearing Transcript, 9/25/2019, at 22.

<sup>174</sup> See Part II, *supra*.

- (4) Evaluate and implement effective programs directed at students in both secondary and post-secondary schools.<sup>175</sup>
- (5) Promote public awareness of the ways in which New Jersey law is more protective than federal law<sup>176</sup> including, but not limited to, the following:
  - a. The LAD covers all employers, regardless of size, even though Title VII only covers employers with at least 15 employees.<sup>177</sup>
  - b. The LAD protects individuals who work as independent contractors rather than employees, even though Title VII protects only “employees” and not independent contractors.<sup>178</sup>

DCR has already created a set of fact sheets to publicize the law, and will engage in a sustained outreach campaign over the next several months.

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<sup>175</sup> See, e.g., Hearing Transcript, 9/24/2019, at 72 (Testimony of Helen Archontou, YWCA of Northern New Jersey – healingSPACE); *id.* at 86 (Testimony of Penny Venetis, Rutgers Law School International Human Rights Clinic) (“If a student abuses [during] his college years, that student is likely to be an abusive worker. Today’s college students are tomorrow’s managers.”).

<sup>176</sup> See Part II, *supra*.

<sup>177</sup> Compare N.J.S.A. 10:5-5(a), 10:5-5(e), with 42 U.S.C. § 2000e(b).

<sup>178</sup> EEOC, “Coverage,” *supra*; Written Testimony of Andrea Johnson and Ramya Sekaran, National Women’s Law Center (“Legal protections against harassment extend only to ‘employees’ in most states and under federal law, leaving many people unprotected. ... No worker should be left without legal recourse when harassment or discrimination occurs.”).

## Part IV. Best Practices

Survivors, advocates, and experts who testified at the hearings correctly explained that government alone cannot affect the cultural change required to stop the pervasive problem of sexual harassment. Instead, employers, housing providers, schools, and other places of public accommodation should each take responsibility for creating and maintaining a culture in which harassment and other forms of discrimination and bias-based harassment are not tolerated and are swiftly addressed. Witnesses at the hearing provided extensive testimony on best practices that employers and other entities can adopt in order to achieve that goal, and NJCASA is already working with the New Jersey Chamber of Commerce to offer seminars for New Jersey senior level business executives on how they can foster safer working environments. Although this section primarily focuses on best practices for employers, many can also be helpful for housing providers and places of public accommodation, including schools.

### Implement Strong Policies and Effective Training

It is important that employers, housing providers, and places of public accommodation (including schools) adopt clear and comprehensive written policies addressing sexual harassment, discrimination, and other forms of bias-based harassment.<sup>179</sup> Strong policies set expectations by sending a top-down message that leadership is engaged in and committed to creating a culture in which unlawful harassment and discrimination do not occur.<sup>180</sup> As testimony at the hearings made clear, policies that are implemented merely to satisfy legal mandates are not nearly as effective in preventing harassment as policies that are developed with participation from impacted parties and that reflect a true commitment from an entity's leadership.<sup>181</sup>

To that end, witnesses offered clear guidance at the hearings regarding elements of the most effective policies (in addition to the proposals set out in Part III above, which would set a minimum floor for employer policies). Employers and other entities who have a code of conduct or other handbook governing behavior should incorporate an anti-harassment policy into its code of conduct.<sup>182</sup> If the entity has multiple policies addressing related topics, they should ensure that the anti-harassment policy is integrated with other relevant policies. For example, a policy addressing internet usage, email, or social media should

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<sup>179</sup> Hearing Transcript, 9/24/2019, at 92-93 (Testimony of Rayba Watson, United States Equal Employment Opportunity Commission); Hearing Transcript, 9/25/2019, at 27-28 (Testimony of Louis Chodoff, Ballard Spahr, LLP) (“First and foremost ... employers must have an appropriate policy in place to deal with sexual harassment and harassment of all kinds.”).

<sup>180</sup> Hearing Transcript, 9/11/2019, at 73 (Testimony of Sarah McMahon, Center on Violence Against Women & Children, Rutgers University School of Social Work) (“There must not only be a clear message from the top about behavioral expectations, but that message must be reflected in action.”); *id.* at 38 (Testimony of Jill Zinckgraf, Domestic Abuse and Sexual Assault Crisis Center of Warren County).

<sup>181</sup> *Id.* at 38 (Testimony of Jill Zinckgraf, Domestic Abuse and Sexual Assault Crisis Center of Warren County) (“Develop codes of conduct that are not generic or check an insurance’s liability box, but rather developed and written by the people that have been impacted and disenfranchised.”).

<sup>182</sup> Hearing Transcript, 9/25/2019, at 27 (Testimony of Louis Chodoff, Ballard Spahr, LLP).

make clear that harassment is prohibited over email or online, and a policy addressing fraternization should address prohibited harassment as well.<sup>183</sup> In addition, the most comprehensive policies seek to “prevent things that may not rise to the level of illegal harassment but are unprofessional and unwelcome conduct in the workplace.”<sup>184</sup> For example, an isolated “joke” that demeans women or people of color may not rise to the level of illegal harassment (although it may, depending on the circumstances), but it is always unprofessional and unwelcome.

Witnesses also stressed the need for entities to reinforce their policies with effective training. Ultimately, the goal of effective training is to build a culture in which all employees, tenants, students, and patrons feel safe.<sup>185</sup> First, training should be conducted live whenever possible.<sup>186</sup> Live training is not only a more effective format for adult learning, but also allows those in positions of leadership to signal that they take the issue seriously. For this reason, leaders should make a point to attend training alongside those they supervise.<sup>187</sup> Second, as described above in Part III, training should empower participants to intervene appropriately when they witness harassment. This means not only training participants on the requirements of the policy prohibiting harassment and discrimination, but also training participants on tools for response, such as bystander intervention techniques.<sup>188</sup> Bystander intervention training “views everyone as a potential ally in preventing and combating sexual harassment and gives [all employees] the tools and skills to address harassment.”<sup>189</sup> And it means emphasizing the negative impacts of harassment and discrimination on productivity, workplace culture, and on the business as a whole and encouraging those who witness either to report it.<sup>190</sup>

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<sup>183</sup> *Id.* at 28-29 (“The policies should also be integrated with other related policies .... Employees need to know that if they’re on the internet, if they’re sending emails all of that is subject to the harassment policy as well.”).

<sup>184</sup> *Id.* at 28.

<sup>185</sup> Hearing Transcript, 9/11/2019, at 55 (Testimony of Lou Kimmel, New Labor). The best practices recommended here would be in addition to the proposals set out in Part III above, which would set a minimum floor for employer trainings.

<sup>186</sup> Hearing Transcript, 9/24/2019, at 49 (Testimony of Kirsten Scheurer Branigan, KS Branigan Law P.C.) (“I strongly believe, like many others who have testified, that interactive live training is the key to preventing sexual harassment ....”); Hearing Transcript, 9/25/2019, at 31 (Testimony of Louis Chodoff, Ballard Spahr, LLP) (“We like to recommend periodic in-person training because we found that the interactive process of the in-person training can be more effective and more engaging; we think people learn more with face to face in person training.”).

<sup>187</sup> Hearing Transcript, 9/25/2019, at 29 (Testimony of Louis Chodoff, Ballard Spahr, LLP).

<sup>188</sup> Hearing Transcript, 9/11/2019, at 74 (Testimony of Sarah McMahon, Center on Violence Against Women & Children, Rutgers University School of Social Work) (“There is also evidence that many instances of harassment are witnessed by co-workers and peers, but they do not know how to intervene safely and effectively. We have good models for providing training on bystander intervention in schools and on campuses for sexual assault and I would argue that we need this for workplaces as well.”).

<sup>189</sup> Hearing Transcript, 9/24/2019, at 34-35 (Testimony of Debra Lancaster, Center for Women and Work, Rutgers University School of Management and Labor Relations).

<sup>190</sup> Hearing Transcript, 9/25/2019, at 28 (Testimony of Louis Chodoff, Ballard Spahr, LLP).

Third, in addition to the supervisory training discussed above in Part III, supervisors should be held accountable for effectively monitoring and implementing anti-harassment policies.<sup>191</sup> As one expert testified, “It’s not good enough for the supervisors just to enforce the policies; they need to act appropriately as well because the rank and file look to them. They set the tone for the organization.”<sup>192</sup> Accordingly, the employer should make clear to supervisors that enforcing anti-harassment policies and setting the proper example is part of their job description and part of the evaluation of their job performance.<sup>193</sup>

### Actively Encourage Reporting

As noted above, witnesses at the hearing repeatedly testified about survivors’ well-founded fear of retaliation for reporting sexual harassment and other forms of bias-based harassment and discrimination. Therefore, it is particularly important that employers, housing providers, and places of public accommodation make a concerted effort to ensure that employees, tenants, students, and patrons feel comfortable using established reporting mechanisms.<sup>194</sup> Experts at the hearing provided guidance on what steps an entity can take to build faith in its reporting systems. First, as described in Part III, an entity’s policy should clearly spell out its complaint procedure.<sup>195</sup> Second, it is equally important that an entity’s procedure identify multiple avenues through which a survivor can report sexual harassment. For example, in employment, it is insufficient if an employee’s only avenue for reporting is to file a report with their supervisor. That leaves many employees without meaningful options to report sexual harassment if their supervisor is the harasser.<sup>196</sup> Third, reporting policies and procedures should actively encourage those who witness harassment to report it.<sup>197</sup> To encourage such reporting, policies should explain that complaints generally will be treated confidentially and emphasize the prohibitions on retaliation,<sup>198</sup> and those to whom complaints may be made should actively welcome complaints.<sup>199</sup> Finally, when complaints are filed, it is essential that they are promptly investigated, that all reporting procedures are enforced, and that consequences follow when violations are found.

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<sup>191</sup> *Id.* at 31.

<sup>192</sup> *Id.* at 30-31.

<sup>193</sup> *Id.* at 31 (“When you sit down and evaluate a supervisor one of the things that they should be evaluated on is how effectively they implement and monitor the policies, including the harassment policy and if they aren’t doing a good job implementing and monitoring the policies it should reflect in their evaluations.”).

<sup>194</sup> Hearing Transcript, 9/11/2019, at 22 (Testimony of Milly Silva, 1199 SEIU United Healthcare Workers East) (“It is very vastly underreported due partly through lack of adequate reporting policies, lack of faith in the reporting system, and fear of retaliation.”); *id.* at 78-79 (Testimony of Rayba Watson, United States Equal Employment Opportunity Commission) (“Policies must be implemented, clearly articulated and enforced. Regardless of the industry type and size, employers must create a culture in which employees trust that their complaints will be heard and acted on.”).

<sup>195</sup> Hearing Transcript, 9/25/2019, at 27 (Testimony of Louis Chodoff, Ballard Spahr, LLP).

<sup>196</sup> *Id.* at 27-28.

<sup>197</sup> Hearing Transcript, 9/24/2019, at 92 (Testimony of Rayba Watson, United States Equal Employment Opportunity Commission).

<sup>198</sup> Written Testimony of Kirsten Scheurer Branigan, KS Branigan Law, P.C.

<sup>199</sup> Kirsten Scheurer Branigan, et al., *Conducting Effective Independent Workplace Investigations in a Post-#MeToo Era*, 74 Dispute Resolution J. 85, 89 (2019).

As one expert testified, “employers must create a culture in which employees trust that their complaints will be heard and acted upon.”<sup>200</sup> It is incumbent upon an entity’s leadership to not only receive and investigate complaints, but ensure that they hold offenders accountable.<sup>201</sup>

### **Conduct Prompt, Thorough, and Impartial Investigations**

Witnesses explained that when complaints are filed, it is essential that entities conduct prompt and thorough investigations.<sup>202</sup> These witnesses set out best practices for effective investigations, particularly by employers.

First, employers should allocate sufficient resources and authority to those responsible for investigating complaints to ensure a prompt and thorough investigation.<sup>203</sup> Employers should also ensure that those conducting investigations are impartial, objective, and well-trained.<sup>204</sup> This may include engaging experienced third parties trained in conducting impartial, independent investigations.<sup>205</sup>

Second, procedures for all stages of an investigation should be clear, and those procedures should be spelled out in the employer’s policy. For example, employers should have clearly defined protocols for what triggers an investigation, how the investigation will be conducted, and how to conduct witness interviews.<sup>206</sup> They should also have clear rules governing how to appropriately conclude an investigation. Those rules should address the issuance of a final report, the retention of notes and other evidence from the investigation, protocols for communicating the results of the investigation to impacted parties, and appropriate post-investigation monitoring mechanisms.<sup>207</sup>

Third, employers should ensure that those participating in the investigations process have faith in the system. Therefore, employers should consistently enforce prohibitions on retaliation throughout the investigations process and maintain the confidentiality of the complainant to the fullest extent possible to prevent retaliation.<sup>208</sup> Moreover, those conducting investigations should treat all parties involved, including complainants, witnesses, and alleged harassers, with respect and compassion.<sup>209</sup>

Finally, employers should empower their investigators to reach meaningful conclusions and follow those conclusions up with corrective action. The employer should

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<sup>200</sup> Hearing Transcript, 9/11/2019, at 78-79 (Testimony of Rayba Watson, United States Equal Employment Opportunity Commission).

<sup>201</sup> *Id.*; Hearing Transcript, 9/24/2019, at 92 (Testimony of Rayba Watson, United States Equal Employment Opportunity Commission).

<sup>202</sup> Written Testimony of Kirsten Scheurer Branigan, KS Branigan Law, P.C.

<sup>203</sup> Hearing Transcript, 9/24/2019, at 48 (Kirsten Scheurer Branigan, KS Branigan Law P.C.).

<sup>204</sup> *Id.*; Written Testimony of Louis L. Chodoff, Ballard Spahr, LLP.

<sup>205</sup> Branigan, et al., *supra*, at 90; Written Testimony of Louis L. Chodoff, Ballard Spahr, LLP.

<sup>206</sup> Hearing Transcript, 9/24/2019, at 48 (Testimony of Kirsten Scheurer Branigan, KS Branigan Law P.C.).

<sup>207</sup> *Id.* at 49.

<sup>208</sup> *Id.* at 48; Written Testimony of Louis L. Chodoff, Ballard Spahr, LLP, at 4.

<sup>209</sup> Branigan, et al., *supra*, at 89.

provide guidance to those conducting investigations on how to appropriately assess credibility, weigh evidence, make findings, and reach a conclusion.<sup>210</sup> Internal investigations should be substantiated if the investigator finds that it is more likely than not that harassment, discrimination, or retaliation occurred,<sup>211</sup> and employers should ensure that it is clear to investigators and all parties involved that complaints will be substantiated if they meet that threshold. Perhaps most critically, when investigations are substantiated, employers should impose appropriate consequences,<sup>212</sup> up to and including termination.<sup>213</sup>

### Monitor for Compliance

Witnesses also testified about the importance of ensuring that employers' policies and procedures are actually working as intended to prevent sexual harassment from occurring. And given the pervasive fear of retaliation and the frequency with which supervisors themselves engage in sexual harassment, formal complaints do not always capture the full scope of the problem. As one witness testified, "Employers must understand that the absence of complaints does not mean that there are no offenses."<sup>214</sup> Rather, it may be a sign that employees are too afraid to report.<sup>215</sup>

Accordingly, employers should engage in proactive efforts to ensure compliance within their workplaces. Anonymous climate surveys are a particularly useful mechanism for monitoring the efficacy of an employer's anti-harassment and anti-discrimination prevention efforts. Climate surveys are "tool[s] used to assess an organization's culture by soliciting employee knowledge, perceptions, and attitudes on various issues."<sup>216</sup> These surveys can help employers get a more accurate measure of the nature and scope of harassment within their workplaces.<sup>217</sup> The information gleaned from climate surveys can help employers identify and address problems before they escalate, and can also better position employers to tailor training programs to the specific needs of their employees.<sup>218</sup>

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<sup>210</sup> Hearing Transcript, 9/24/2019, at 48-49 (Testimony of Kirsten Scheurer Branigan, KS Branigan Law P.C.).

<sup>211</sup> *Id.* at 47.

<sup>212</sup> Branigan, et al., *supra*, at 89; Written Testimony of Louis L. Chodoff, Ballard Spahr, LLP ("Remedial action must be taken based on the investigation. ... The remedial action should be measured to the facts of the situation.").

<sup>213</sup> Hearing Transcript, 9/25/2019, at 32 (Testimony of Louis Chodoff, Ballard Spahr, LLP).

<sup>214</sup> Hearing Transcript, 9/11/2019, at 79 (Testimony of Rayba Watson, United States Equal Employment Opportunity Commission).

<sup>215</sup> *Id.*

<sup>216</sup> Written Testimony of Andrea Johnson and Ramya Sekaran, National Women's Law Center.

<sup>217</sup> Hearing Transcript, 9/25/2019, at 43-44 (Testimony of Ramya Sekaran, National Women's Law Center).

<sup>218</sup> *Id.*

## Conclusion

This Report highlights only some of the testimony survivors, advocates, and experts shared at the hearings. The overwhelming and relentless nature of sexual harassment reflected in witnesses' statements underscores that the time to act is now. The Report and the testimony received at the hearings provide support for legislative and policy changes to address the pervasiveness of sexual harassment. They will also inform DCR's efforts to engage in public education and outreach, both to ensure that members of the public know their rights and to ensure that employers, housing providers, and places of public accommodation understand their responsibilities to prevent sexual and other unlawful harassment and to promptly remedy it when it occurs.

Because combatting sexual harassment requires ongoing engagement by all who seek to end it, DCR welcomes further discussion of the issues and additional recommendations to improve the agency's public outreach and policy responses. Continued dialogue will be increasingly helpful as DCR begins creating resources and tools to guide compliance by employers, housing providers, and places of public accommodation.

Any New Jersey resident or employee who has experienced sexual or other unlawful harassment may file a complaint with DCR. New Jersey's LAD includes strong, anti-retaliation provisions designed to protect any person who comes forward. You may file a complaint by calling 973-648-2700, and you can find out more information about DCR on our website at [NJCivilRights.gov](http://NJCivilRights.gov).

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Findings and Recommendations  
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