

# How Could Central Government Better Respond to Sexual Harm in the Public Service?

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## Abstract

This article draws attention to the nature and impact of sexual harm in the New Zealand public service. It examines the scope and substance of official advice and tools available to public managers when responding to incidents of sexual harm, and builds a set of recommendations for central government. Recommendations include a central register of all complaints and reports of sexual harm to the public caused by public service workers.

**Keywords** central government, State Services Commission, central register, sexual harm, #MeToo

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Carrie Buckmaster works with project teams developing new technology-enabled public services. She holds a Bachelor of Computing and Mathematical Sciences degree from the University of Waikato and is scheduled to graduate in May 2019 from the Master of Public Management programme in the School of Government at Victoria University of Wellington.

The #MeToo movement has lifted a veil, exposed harmful sexual behaviours in the workplace, and demanded that we do better. Public entities, like all employers, have a legislative and moral responsibility to provide a safe working environment. Over and above that, the government is responsible for protecting the public from sexual harm caused by doctors, teachers, police officers and other public service workers. The New Zealand government's strategy for addressing workplace sexual harm has evolved during 2018. In July the Ministry of Business, Innovation and Employment (MBIE) established a central register of workplace sexual harassment complaints. This register was created to better understand the scale of the sexual harassment occurring across New Zealand workplaces (Duff, 2018; Nadkarni, 2018). However, there is no central register of complaints and reports of sexual harm to the public caused by public service workers. Using central registers to analyse

Figure 1: Focus of this article

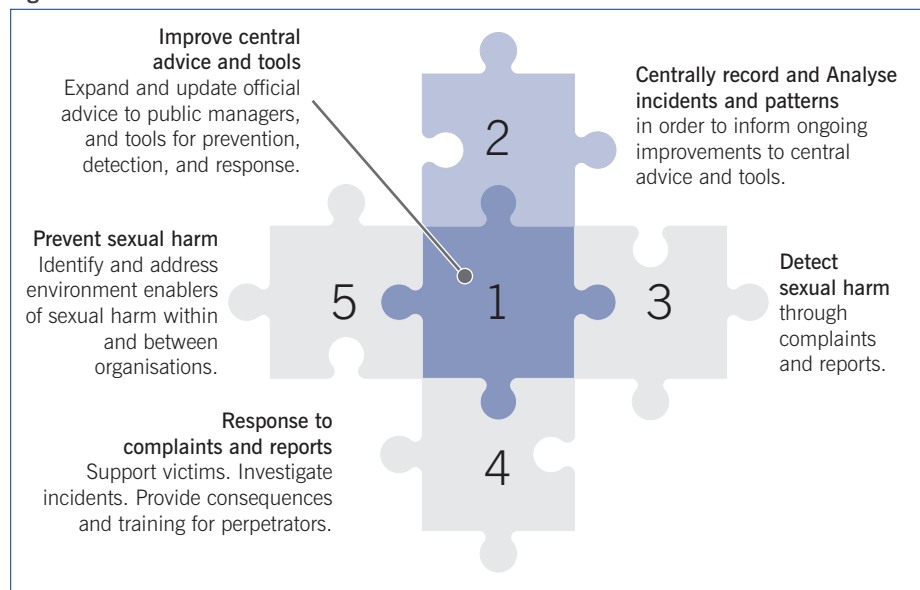


Table 1: Key international and domestic actions in 2018

Month	Jurisdiction	Action taken
February	United Kingdom	The Human Rights Commission calls for non-disclosure agreements about sexual harassment in the workplace to be banned (Mau, 2018).
May	New Zealand	The draft terms of reference for the Royal Commission of Inquiry into Historical Abuse in State Care is published. A component of the inquiry involves looking at the sexual abuse of children under state care from 1950 until 2000. A proposed deliverable of the inquiry is to report on lessons learned and changed practices, and also to identify areas where focus may be needed to make further improvements (Satyanand, 2018).
June	Australia	A year-long national inquiry into workplace sexual harassment is launched (Borys, 2018).
	New Zealand	Informal discussions begin to explore free counselling for victims of workplace sexual harassment via the Accident Compensation Corporation (Radio New Zealand, 2018).
July	New Zealand	MBIE launches a centralised register of allegations of workplace sexual misconduct (Nadkarni, 2018).
	United Kingdom	The House of Commons Women and Equalities Committee calls for new laws to protect workers from sexual harm. The committee chair, Maria Miller, states that government, regulators and employers have been 'dodging their responsibilities', and asks for the same amount of emphasis to be put on tackling sexual harassment as is put on protecting personal data and anti-money laundering measures (Topping, 2018).

the scope and patterns of sexual harm in the public service is one component of a potential future strategy to more comprehensively address the problem. Improving central advice and tools for public service managers is another. These two components (shown in Figure 1) are the focus of this article, which opens by first examining the nature and impact of sexual harm in the New Zealand public service. Second, it examines the scope

and substance of central guidance and tools. Third, it prepares a set of potential improvements.

**Blurred boundaries: sexual harassment, misconduct and assault**

Prior to Lin Farley coining the term in 1975, 'sexual harassment' was literally unspeakable (Swenson, 2017), but the lack of a shared term to describe the behaviour does not mean the behaviour was not

occurring (MacKinnon, 1979). Sexual harassment is unwelcome or offensive sexual behaviour that is repeated, or is serious enough to have a harmful effect (Human Rights Commission, 2009). The term 'sexual misconduct' is harder to define comprehensively, as public organisations, and professional standards authorities, can have their own definitions. Consensual sexual interaction can sometimes be determined to be misconduct. For instance, the New Zealand Medical Council takes a zero tolerance position on sexual relationships in the doctor-patient relationship (Medical Council of New Zealand, 2009). The term 'sexual assault' describes a range of sex crimes, including rape, indecent assault and indecent exposure (New Zealand Police, n.d.). This article uses the term 'sexual harm' to encompass all sexual harassment, misconduct and assault.

Stereotypical responses to sexual harm can blame victims for the behaviour, centring around myths that sexual harassment is a form of seduction, that women do not tell the truth and that they secretly want to be sexually harassed (Paludi and Barickman, 1991, p.28). In 2018, 125 years since New Zealand women gained the right to vote, it can be hard to understand why sexual harassment is still so prevalent. Why have we not solved this social problem yet? Fitzgerald theorises:

This stubborn and pernicious persistence rests largely on (1) a pervasive system of attitudes and beliefs, accruing over centuries and embedded in a variety of cultural institutions, that denies and rationalizes systemic abuse of women; and (2), the organizational and institutional actors that serve to maintain this system, a phenomenon that has come to be known as institutional betrayal. (Fitzgerald, 2017)

The international #MeToo movement, which spread virally in October 2017, placed workplace sexual harm and its persistence and prevalence in the headlines (Frye, 2018). There are signs that this increased awareness may result in the practical policy steps necessary to dismantle enablers of workplace sexual harm (see Table 1).

## The impacts of sexual harm

### On employees

Workplace sexual harm has the potential to devastate an employee's physical well-being, emotional health and vocational development (Paludi and Barickman, 1991). Sexual harassment affects victims' mental health, and is linked to anxiety, depression, insomnia, headaches, helplessness, debilitating stress, self-blame, shame, self-doubt, decreased motivation and loss of self-esteem (ibid.; State Services Commission, 2015a; Sugrue, 2018). Frequent sexual harassment early in one's career is associated with long-term depressive mental health effects (Houle et al., 2011). Organisational tolerance of sexual harassment (for example, where employees believe that complaints are not taken seriously, feel it is dangerous to complain and see there are few sanctions for offenders) contributes to psychological damage over and above the harm from the harassment itself (Fitzgerald, 2017; Fitzgerald et al., 1997). Research suggests an association between sexual harassment and suicides (Hangartner, 2015).

Sexual harassment in the workplace is linked with physical hardship, loss of income and isolation (Paludi and Barickman, 1991). The Australian federal minister for women, Kelly O'Dwyer, says sexual harassment can be financially disastrous for individuals: 'It might mean that she loses her job or it might mean that she decides to go for another job but can't get a reference from her former employer, it might mean she's being denied promotions' (Ford, 2018). Where public servants sexually harass each other, victims can take extended periods of sick leave, and abandon, or be forced from, their jobs. Colleagues are affected and workplace moral drops. An agency's productivity can decline, its reputation can be damaged, and employment disputes and litigation can result (State Services Commission, 2015a). Public organisations' legitimacy is challenged in different ways by sexual harassment between employees, and by sexual harm caused by public employees and contractors to members of the public.

Workplace sexual harassment may limit the progression of women, and other affected groups, into certain roles in the public service. Having more women in

senior leadership positions, and in work environments which are currently predominantly staffed by men, may lead to better responses to sexual harm. An eight-year study of 60 urban areas in the United States found a positive association between the proportion of police officers who are women and the number of reports of, and arrests for, sexual assault. This study made the contribution to academic theory of establishing a case in which representation is likely to occur, even without a conscious effort on the part of the public employee, because of their shared experiences with members of the public (Meier and Nicholson-Crotty, 2006).

Members of the public can also harm public servants. For example, female medical professionals reported sexual harassment by patients as well as by staff in a recent *New Zealand Herald* investigation (Nichol, 2018). Across three years, the Canterbury District Health Board recorded 137 incidents of patients behaving in a sexually abusive manner towards staff (Scotcher, 2018).

### On members of the public

Public servants can sexually harm members of the public. To illustrate this, we will look at cases from the police, education and health sectors. In May, police sergeant Kimberlee Frederick Knight Vollme admitted in court to using a work computer to access confidential details of four women, two of whom he is accused of indecently assaulting (Shaskey, 2018). In February 2019 senior police officer Kevin Burke will go to trial on charges of indecent assault, sexual violation and unlawful sexual connection (Hurley, 2018; Owen, 2018).

Another example, from the education sector, and one on which Burke commented publicly prior to his arrest, is the sexual

violation of children by Northland teacher James Robertson Parker. In that case early allegations by children did not lead to Parker being removed from a teaching role. Parker went on to abuse children for another 16 years, before pleading guilty to 49 charges of indecent assault and unlawful sexual connection involving a dozen boys aged 11–13 (Radio New Zealand, 2012).

Finally, a 2016 *New Zealand Herald* investigation of sexual misconduct in the health sector found 90 cases of confirmed sexual misconduct from 2006 to 2016, with many practitioners returning to work after violating their oaths. The Health Practitioners Disciplinary Tribunal was

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found to have a convoluted four-pronged disciplinary system which critics say protects the health professional's reputation over public safety (Carville, 2016).

Sexual assault by police officers, teachers and medical professionals will often have acute and long-term mental health effects on victims. Children who experience sexual abuse suffer fear, helplessness, guilt, shame, responsibility, isolation, betrayal, anger and sadness. Long-term effects of childhood sexual abuse can include depression, low self-esteem, negative body image, dissociation from feeling, social isolation, relationship problems, self-destructive behaviour, sexual difficulties, parenting problems and flashbacks (South Eastern CASA, n.d.).

Employees of third parties contracted to deliver public services on behalf of the government can sexually harm members of the public. Members of the public can sexually harm others while under the care of the public service and third parties – for instance, in foster care situations, mental health care facilities and prisons. The extent of the use of non-disclosure agreements (NDAs) by organisations contracted to provide public services is

unknown. The use of NDAs in relation to sexual harm is arguably unethical, as a lack of information may act as an inhibitor to developing improvements to prevent or limit future sexual harm when delivering public services.

Sexual harm by public service workers, or by other public service users in the care of the state, has effects on the mental health, life paths and financial security of victims, their whānau and their communities. If victims and communities lose faith in the government and its agencies, they may feel

threat model has been used to explain how sexual harassment is employed as a tool to police the norms of gender, punishing men who are perceived to be 'too feminine' and women who challenge their subordinate position in the gender system (DeSouza and Solberg, 2004; McLaughlin, Uggen and Blackstone, 2012; Waldo, Berdahl and Fitzgerald, 1998).

Sexual harassment can be used as an equaliser against women in power, motivated more by control and domination than by sexual desire

non-native workers are more likely to be subjected to harassment (Eurofound, 2015).

### *Public service users*

International research provides clues as to who may be at most risk of sexual harm from the state: We know that people with intellectual disabilities are at a higher risk of experiencing sexual assault, and face additional barriers in addressing this abuse (Bretherton et al., 2016; Faccini and Saide, 2011; Opoku and Kleiner, 2005). A United States study of 771 sex-related arrest cases of 555 sworn officers across 2005–08 found that victims of sex-related police crime are typically younger than 18 (Stinson et al., 2015). In the United Kingdom, a 2016 inquiry by Her Majesty's Inspectorate of Constabulary found that 39% of police sexual misconduct allegations involved victims of domestic violence (Grierson, 2016). With 40% of police call-outs in New Zealand relating to family harm (Lawrence, 2018), protecting victims of domestic violence from further harm is of particular concern.

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they have nowhere to turn to legitimately seek justice. Where the victim is a child, and/or a person with physical or mental challenges or limitations, the public outrage at learning of sexual misconduct can be great. Where a government department or agency is seen to have responded inappropriately to complaints or reports of sexual harm a legitimacy crisis can result.

### **Who do we harm and why?**

#### *Public service workers*

Although there are many explanations for the drivers of workplace sexual harm, key theoretical frameworks include: 1) the organisational model, and 2) the sociocultural model, which is supported by 3) the power-threat model. The organisational model focuses on formal role-based power, seeing sexual harassment as the result of an unequal and exploitative power relationship within the workforce (Guttek, 1985). The sociocultural model is based on the socialisation of men and women to create and maintain unequal positions of power in society based on gender (Rospenda, Richman and Nawyn, 1998). The power-

(McLaughlin, Uggen and Blackstone, 2012). Research on the Australian public service by Dutch researcher Jan Wynen uncovered patterns of 'contrapower harassment'. Wynen surveyed 102,219 Australian public servants and found evidence that women in public management positions between the ages of 30 and 44 are more likely to be sexually harassed than female public servants without supervisory authority. Their harassers are often men who occupy less powerful formal positions. Women occupying supervisory positions can lay claim to some organisational power, but do not necessarily embody the informal power required to prevent sexual harassment. Wynen recommends that victims of contrapower harassment be enabled, through policy and culture, to come forward without undermining their own authority (Ford, 2018; Wynen, 2016).

Financially vulnerable men and women are more likely to experience sexual harassment, and women are the most frequent targets of unwanted touching and invasion of personal space (Uggen and Blackstone, 2004). European research shows that in many countries

### **What is the state of play?**

#### *Legislation*

The Crimes Act 1961 enables prosecution for multiple different sexual crimes, including forcing sexual activity on a person without their consent, misusing an imbalance of power gained through one's employment position to threaten vulnerable people into engaging in sexual activity, and sexual exploitation of a person with significant impairment (Crimes Act 1961, ss127–44). In practice, many reported alleged sexual crimes do not result in successful prosecution. It is difficult to prove the absence of consent. The section of the act covering inducing consent through (explicit or implicit) threats related to a perpetrator's position of authority (ss129A (5)(c)(i)) is very rarely applied.

Employees are protected from sexual harassment by the Employment Relations Act 2000 and the Human Rights Act 1993. However, as acknowledged by Jan Logie, the parliamentary under-secretary to the minister of justice (domestic and sexual violence issues), these legal protections do

not appear to be working in practice (Long, 2018).

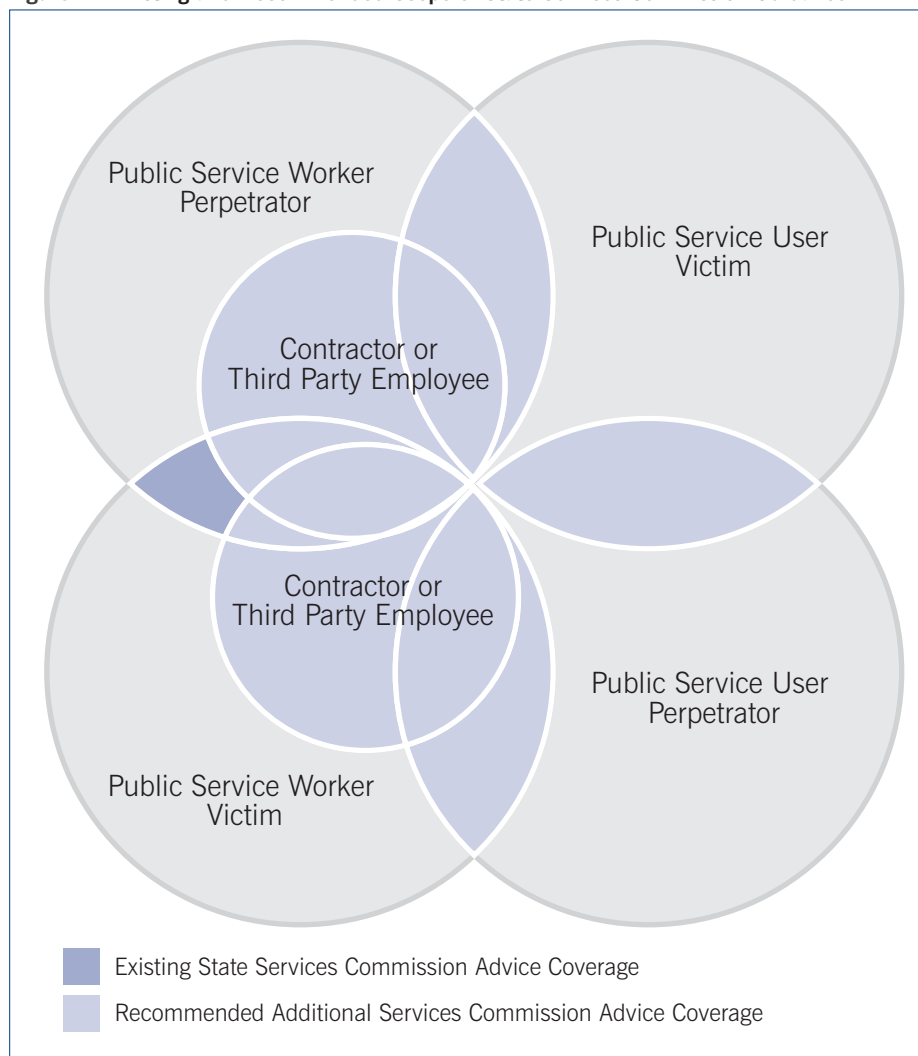
*Specific to children and young people*

The Crimes Act 1961 has specific legislation for the protection of youth, including the crimes of sexual contact with a child under 12 years old, sexual contact with a young person under 16 years old, and meeting a young person under 16 following sexual grooming (Crimes Act, ss131–4; Rape Prevention Education, 2011). The Vulnerable Children Act 2014 requires any organisation which receives public funds and has a duty of care for children to ensure that criminal history checks occur prior to employment of workers with regular or overnight access to children, and then at least once every three years. The act also requires these organisations to have a child protection policy, which must contain a provision on identification and reporting of child abuse and neglect in accordance with section 15 of the Oranga Tamariki Act 1989. Section 15 of the Oranga Tamariki Act states that anyone with concerns about child sexual abuse may report the matter to the chief executive or a constable.

*Central complaints handling*

There is no central agency handling all complaints of sexual harm by public service workers. The Independent Police Conduct Authority (IPCA) handles complaints of sexual misconduct by police officers. However, the IPCA is not subject to Official Information Act requests. Increased transparency may drive improvements, by enabling researchers and reporters to analyse patterns in sexual harm and complaint outcomes, and an informed public to hold the New Zealand Police and the IPCA to account when public expectations are unmet. Both the Human Rights Commission and MBIE handle sexual harassment complaints. The Human Rights Commission lost significant credibility when a ministerial review in May found that the organisation failed to deal appropriately with an internal complaint relating to sexual harassment of an intern by a senior manager. In the past three and a half years the Human Rights Commission has received 215

**Figure 2: Existing and Recommended Scope of State Services Commission Guidance**



complaints of sexual harassment. MBIE receives around 70 calls reporting sexual harassment a year. Equal employment opportunities commissioner Jackie Blue states: ‘We know many are going unreported because they fear retaliation or feel saying something might hurt affecting their reputation or a promotion. No one wins in that situation’ (Nadkarni, 2018).

From the first week of July this year MBIE began to log all complaints of sexual harassment they and their mediation services receive in a central register. This register was set up under the direction of the minister for women, Julie Anne Genter, to provide more useful quantitative data on workplace sexual harm (Duff, 2018; Nadkarni, 2018). As a minor, isolated step, it is difficult to see how this register will make a significant difference. Blue has applauded the register as a move in the right direction, but has called for more public education on what

workplace sexual harassment is, and how to report it. Blue recommends that a group such as WorkSafe New Zealand records the name of the perpetrator and employer in order to track people who leave an organisation but continue misconduct (Nadkarni, 2018).

**Official guidance and tools**

In 2015, after the resignation of CERA chief executive Roger Sutton following sexual harassment claims, the State Services Commission (SSC) published a sexual harassment policy guideline, reporting framework, checklist and a role card (Anthony, 2018; State Services Commission, 2015a, 2015b, 2015c, 2015d). These documents provide useful guidance on preventing and responding to sexual harassment between employees. However, they do not provide any practical guidance to public managers on how to:

- handle situations involving the sexual harm of members of the public;

- categorise sexual harm complaints and reports, and identify where criminal sexual assault may have occurred;
- understand the power balance between individuals and its effect on the nature of situations;
- avoid the use of NDAs, which may prevent victims from speaking about sexual harassment, assault and misconduct;
- evaluate and address environmental risk factors; and
- understand the limit of internal roles, and the benefits of bringing in external help.

In addition to responding to the six gaps explored below, a regular review of official advice on sexual harm prevention and response frameworks, such as those

worker's position of trust or information (see Figure 2).

### *Categorising sexual harm reports and complaints*

Where managers do not have adequate tools to help them objectively understand and categorise the types of sexual harm occurring in their organisation they may be more likely to overlook or dismiss potential criminal offences. Some managers harbour subconscious bias and may be affected by an unhealthy team culture. Some managers may not approach sexual harm as seriously as others.

Although developing a catalogue of different types of sexual harm complaints and reports may initially seem a difficult

categories may help managers better understand the nature of the incident or incidents, and will provide a richer data set for analysis at both an organisation level and across the whole of the public service.

### *Understanding the impact of power dynamics*

The SSC provides no guidance to managers on how to consider the power balance between the parties when understanding the nature of incidents, and how to respond. A drunken kiss at a staff Christmas party between the head of finance and an intern may need to be viewed more seriously than a drunken kiss between two interns. The impact of power dynamics after an unwelcome or harmful workplace sexual act or situation should be considered: for example, have any follow-up actions caused anyone to feel humiliated, threatened, unfairly treated or silenced? The possibility of contrapower harassment should be considered when planning for a safer workplace.

### *The use of non-disclosure agreements (NDAs)*

The SSC provides no guidance on the use of NDAs by public organisations or third parties delivering public services. Secrecy and corporate complicity enable sexual harassment to persist in the workplace (Levine, Lesser and Dudley, 2018). Preventing the use of NDAs where sexual harm has occurred within the public service may lead to more informed discussions of workplace risks, which may in turn lead to better preventative measures.

### *Identifying and addressing environmental risk factors*

Sexual harassment can be viewed not solely as an issue between individuals, but also as a systemic workplace problem in need of a structural solution (Frye, 2018). As well as providing advice on how to address specific allegations, the SCC should provide tips on how to explore and adjust the workplace environment where the unwelcome or harmful sexual behaviour occurred. Interventions organisations can make to make workplaces safer from unwelcome and harmful sexual behaviours include providing bystander intervention training,

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provided by McDonald, Charlesworth and Graham (2015), is recommended. The SSC already encourages organisations to take a proactive prevention approach and hold regular information sessions for employees on how to recognise sexual harassment, report concerns and use the complaint process (State Services Commission, 2015a).

### *Expanding the scope of guidance*

While the SSC provides guidance on sexual behaviour between employees, there is insufficient guidance on how public managers should deal with situations where there is unwelcome sexual behaviour involving members of the public and employees of third parties contracted by government to deliver public services. It is recommended that the SSC expand the scope of its advice to cover all instances and situations of harm that occur during public service work, or that are enabled by a public service

and subjective task, the work to develop a helpful sexual harm categorisation guide can be successfully completed quite quickly. This is demonstrated by the New York Civilian Complaints Review Board's categorisation of police sexual misconduct, which it completed in February 2018. Some examples of non-criminal misconduct complaint categories relevant to the New York Police Department include 'verbal sexual harassment' and 'taking unwarranted photographs or videos'. Examples of potentially criminal complaint categories include 'over-the-clothing groping during frisks' and 'forcible rape' (Civilian Complaints Review Board, 2018).

Organisations that have kept detailed records of sexual harm complaints and reports should be able to analyse their records to develop types of common complaints and reports with examples. Each organisation's categorisation scheme should categorise acts into non-criminal and potentially criminal groups. These

and working to create equal opportunities in the workplace, particularly for women (Sugrue, 2018). Many people may wish to avoid the actual and perceived diminished career prospects, and loss of status and power, which can occur when labelled with the terms ‘victim’ and ‘survivor’. Victims, particularly of contrapower harassment, should be enabled, through good culture and policy, to come forward without undermining their own authority (Wynen, 2016).

#### *Bringing in outside help*

The SSC could provide advice to managers on how to understand the limitations of their role in resolving sexual harm complaints, and the benefits of bringing in external help. When someone discloses sexual harm it is important, for that person’s mental health and recovery, that they feel believed. However, in cases of employee–employee sexual harm a manager may be in a position where they are unable to honestly give this assurance to the complainant. A third party, from, for example, the Employee Assistance Programme or the Sexual Abuse Prevention Network, could assist by providing emotional support. Unions, such as the Public Service Association, can support employees and raise awareness. When sexual harm to the public may be the fault of an organisation, having an independent third party managing or overseeing the complaints process can increase accountability and trust. Where a manager believes there may have been a crime committed, it would be helpful for the SSC to provide advice on how to proceed, and when and how to contact the police. Care must be taken to respect the wishes and autonomy of victims, as additional loss of control may cause additional mental harm and impair recovery.

#### **Conclusion**

Power dynamics influence sexual harm. Employees in subordinate positions, and women in supervisory roles between the ages of 30 and 44, may be at higher risk, as are women in general, migrants and the financially vulnerable. Youth, victims of

family harm and people with intellectual disabilities are at increased risk of sexual harm from the state. Sexual harm can have acute and long-term effects on victims, and poor responses to complaints can cause further harm. These effects extend beyond just victims, reaching work colleagues, whānau and communities. When public organisations respond ineffectively or inappropriately to complaints or reports of sexual harm a legitimacy crisis can result. This is demonstrated by the public response this year to the mishandling of the sexual harassment of an intern who worked at the Human Rights Commission.

There is significant and increasing public demand for better responses to sexual harm. There is the opportunity, and the imperative, for central government to act to improve management of sexual harm from, and of, public service workers and public service users. There is a good case for the following actions: 1) providing public service managers with comprehensive guidance material on how to better prevent, record and respond to sexual harm; 2) empowering a central body to maintain and analyse a central register of complaints and reports of sexual harm within and from the public service; 3) committing to a continual improvement process. Lessons learned and insights gained from analysis of central register records can inform updates to central guidance material, and prompt new actions to better prevent, detect and respond to sexual harm.

More comprehensive guidance material from the SSC could assist public service managers to:

- take responsibility for all situations involving sexual harm, including where members of the public are harmed, and where third parties contracted to deliver public services are involved; record and handle these situations in the same transparent and accountable manner as incidents of sexual harm involving only employees;
- categorise sexual harm complaints and reports, and identify where criminal sexual assault may have occurred;

- recognise the power balance between individuals and understand its effect on the nature of situations; factor that power balance into training materials, and take it into account when deciding on appropriate disciplinary action;
- stop the use of NDAs which prevent victims from speaking about sexual harm; ensure that contracts with third party providers explicitly disallow the use of NDAs in relation to complaints, reports and incidents of sexual harm;
- conduct thorough risk assessments, and identify and address environmental risk factors;
- stop relying too heavily on internal mechanisms, and bring in external help to meet training, risk assessment, response and remediation needs.<sup>1</sup>

A central register of public service sexual harm would provide policy analysts, researchers, reporters and the general public with access to de-identified information, including the number of known sexual harm incidents per public organisation, the incident categories and the follow-up actions taken. This transparency and accountability could assure the public that sexual misconduct is well managed, and drive improvement where needed. Public safety and transparency must take priority over public organisations’ reputations. There is opportunity and the imperative for central government to take action to meet the increasing public demand for better management of sexual harm within, and from, the state.

Ka tika a muri, ka tika a mua, ka rere pai ngā āhuatanga katoa; if all is in order in the front and the back, all will go well.

<sup>1</sup> For instance, lawyers can ensure sexual misconduct is clearly defined in the code of conduct, and help develop the sexual misconduct categorisation guide; sexual harm prevention organisations can perform risk assessments, provide staff training, and respond professionally to situations of harm and assist with remediation measures; councillors and representatives from employee unions and advocacy groups can support and assist victims; the New Zealand Police can provide advice and take appropriate action where a crime may have been committed.

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