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Preventing Perpetrators of Sexual Misconduct from Circulation in the International Development and Humanitarian Assistance Sectors

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Preventing Perpetrators of Sexual Misconduct from Circulation in the International Development and Humanitarian Assistance Sectors

*Susan Keller Pascocello**

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I. INTRODUCTION

Following news of sexual misconduct¹ in international development and humanitarian assistance² organizations, including Oxfam Great Britain³ and Save the Children United Kingdom,⁴ aid organizations—including the U.S. Agency for International Development (USAID), multilaterals, foundations, and the private sector—began to refocus and reshape their efforts towards preventing sexual misconduct, including the problem of perpetrator circulation. Perpetrator circulation refers to the ability of serial perpetrators of sexual misconduct to move between various aid organizations and continue to commit abuse due to insufficient safeguards and accountability mechanisms, as well as concerns over potential legal liability, which disincentivize information sharing between organizations. Addressing the issue of perpetrator circulation is critical to tackling sexual misconduct in the sector.

Members of the international aid community recognize the existential threat to the community if the issue of perpetrator circulation is not adequately addressed. At the October 2018 International Safeguarding Summit, donor organizations representing twenty-two countries specifically addressed this issue by endorsing a set of commitments intended to strengthen the international aid community's response to sexual exploitation and abuse (SEA).⁵ Other examples of targeted actions taken include

1. "Sexual misconduct" is an umbrella term that encompasses any inappropriate behavior of a sexual nature or that is sex-based, including sexual abuse, sexual assault, sexual exploitation, sexual harassment, stalking, voyeurism, and any other such conduct that is nonconsensual or has the purpose or effect of threatening, intimidating, denigrating, or coercing a person. The misconduct need not rise to the level of civil or criminal illegality to warrant corrective or disciplinary action. U.S. AGENCY FOR INT'L DEV., POLICY ON PROTECTION FROM SEXUAL EXPLOITATION AND ABUSE (PSEA) 17 (2020) [hereinafter USAID PSEA POLICY].

2. The International Development and Humanitarian Assistance Sectors are collectively referred to herein as the "aid sector" and "aid community."

3. See Molly Anders, *Oxfam Sexual Abuse Scandal: Are the Aid Sector's HR Systems Failing?*, DEVEX (Feb. 14, 2018), <https://www.devex.com/news/oxfam-sexual-abuse-scandal-are-the-aid-sector-s-hr-systems-failing-92103>.

4. See Jessica Abrahams, *Save the Children Suspends DFID Bidding Amid Sexual Misconduct Scandal*, DEVEX (Apr. 27, 2018), <https://www.devex.com/news/save-the-children-suspends-dfid-bidding-amid-sexual-misconduct-scandal-92634>.

5. See DEP'T FOR INT'L DEV. & FOREIGN, COMMONWEALTH & DEV. OFF., COMMITMENTS MADE BY DONORS TO TACKLE SEXUAL EXPLOITATION AND ABUSE AND SEXUAL HARASSMENT

USAID's March 2018 launch of the Action Alliance for Preventing Sexual Misconduct,⁶ which has made significant progress working with its partners to tackle this problem by issuing the Agency's first-ever Protection from Sexual Exploitation and Abuse Policy⁷ and launching the Employment Accountability Community of Practice with the Dutch Ministry of Foreign Affairs in October 2020 to address perpetrator circulation.⁸ The United Kingdom's Foreign, Commonwealth & Development Office (FCDO, formerly known as the Department for International Development (DFID)) has led a technical working group of representatives from donor countries since early 2018 to coordinate donor efforts on this issue.⁹ Additionally, FCDO has been focused on safeguarding efforts,¹⁰ including, among other things, an Aid Worker Registration Scheme (also known as an "aid worker or humanitarian passport") that

IN THE INTERNATIONAL AID SECTOR 2 (Oct. 18, 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902420/donor-commitments2.pdf ("Review, and where necessary, renew efforts within and between aid agencies and across governments and the wider international system, to avoid the hiring and recirculation of perpetrators in the aid sector, and to hold them to account, including by helping to bring them to justice, when appropriate, all in line with due process and relevant legal obligations.").

6. See U.S. AGENCY FOR INT'L DEV., ADMINISTRATOR'S ACTION ALLIANCE FOR PREVENTING SEXUAL MISCONDUCT (AAPSM) (2020) [hereinafter AAPSM], <https://www.usaid.gov/PreventingSexualMisconduct>.

7. See USAID PSEA POLICY, *supra* note 1.

8. See Press Release, Pooja Jhunjhunwala, Acting Spokesperson, U.S. Agency for Int'l Dev., USAID Launches Community of Practice on Accountability for Sexual Exploitation, Abuse, and Harassment with the Dutch Ministry of Foreign Affairs (Oct. 6, 2020), <https://www.usaid.gov/news-information/press-releases/oct-6-2020-usaid-launches-community-practice-accountability-sexual-exploitation>.

9. DEP'T FOR INT'L DEV. & U.K. AGENCY FOR INT'L DEV., DFID PROGRESS ON DELIVERY OF THE DONOR COMMITMENTS FROM THE OCTOBER 2018 LONDON SAFEGUARDING SUMMIT 2 (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840066/DFID-progress-on-delivery-of-donor-commitments-Safeguarding.pdf.

10. *Safeguarding Against Sexual Exploitation and Abuse and Sexual Harassment (SEAH) in the Aid Sector*, GOV.UK (Aug. 20, 2020), <https://www.gov.uk/guidance/safeguarding-against-sexual-exploitation-and-abuse-and-sexual-harassment-seah-in-the-aid-sector>.

FCDO also has launched Project Soteria with the International Criminal Police Organization and the UK's ACRO Criminal Records Office to support organizations in the aid sector to stop perpetrators of sexual misconduct from working in the aid sector through more and better criminal records checks. See Description of Project Soteria, U.K. FOREIGN, COMMONWEALTH & DEV. OFF., <https://devtracker.fcdo.gov.uk/projects/GB-GOV-1-300784> (last visited Feb. 1, 2021).

aims to better track and vet an aid worker's history.¹¹ Oxfam Great Britain released a ten-step action plan focused on accountability, improved policies and culture, and changing screening processes.¹² Save the Children UK similarly released a set of proposals to combat sexual harassment and violence.¹³ These initiatives indicate a strong willingness to improve culture, standards, and policies relating to the prevention of sexual misconduct.

And yet, tragically, despite "zero tolerance" policies and focused efforts, sexual misconduct continues to occur in the aid sector and remains a major problem. This is evidenced by recent reporting regarding the 2018–2020 Ebola response in the Democratic Republic of Congo in which more than fifty women accused aid workers of sexual misconduct.¹⁴

While there is significant momentum on preventing sexual misconduct in the aid sector, and the community has united to take steps to address sexual misconduct, the issue of perpetrator circulation is particularly challenging from a legal perspective. Many aid organizations have complex legal structures and operate in countries where hiring practices and information—as well as cultural norms around this conduct—can vary widely. Therefore, the analysis of and steps taken to address a particular incident must take into account the laws of the jurisdiction where the incident occurred. In some cases, such laws may be in tension with the

11. *Impact Assessment: Aid Worker Registration Scheme Legal Review*, GOV.UK (June 23, 2020), <https://www.gov.uk/government/publications/aid-worker-registration-scheme-legal-review>.

12. See *Immediate Response Actions: Sexual Misconduct*, OXFAM INT'L [hereinafter OXFAM: *Immediate Response Actions*], https://www.oxfam.org/en/immediate-response-actions-sexual-misconduct?fbclid=IwAR2ck3Rm1ZsJU4pu7-SX1loq7Fm1_ImSUGI53Vd0d4ImEM3cObjbeGfWeAw (last visited Nov. 17, 2020); Press Release, Oxfam Int'l, Update to Oxfam Statement on the Independent Commission Report (June 28, 2019), https://oxfamapps.org/media/press_release/oxfam-welcomes-independent-commissions-recommendations-and-commits-to-deepen-culture-change-and-safeguarding-improvements/.

13. See Kevin Watkins, *Protecting Children Is the Most Important Thing We Do*, SAVE THE CHILDREN (Feb. 12, 2018), <https://blogs.savethechildren.org.uk/2018/02/protecting-children-important-thing/>.

14. Robert Flummerfelt & Nellie Payton, *Exclusive: More than Fifty Women Accuse Aid Workers of Sex Abuse in Congo Ebola Crisis*, NEW HUMANITARIAN (Sept. 29, 2020), <https://www.thenewhumanitarian.org/2020/09/29/exclusive-more-50-women-accuse-aid-workers-sex-abuse-congo-ebola-crisis>; see also Robert Flummerfelt & Nellie Payton, *Power, Poverty, and Aid: The Mix that Fueled Sex Abuse Claims in Congo*, NEW HUMANITARIAN (Sept. 29, 2020), <https://www.thenewhumanitarian.org/analysis/2020/09/29/Power-poverty-aid-sex-abuse-claims-Congo-Ebola-response>.

policies and procedures of the organization, which often are framed by the norms, practices, and laws of the country in which it is headquartered. This includes the issue of providing accurate and complete references to prospective employers of former staff who leave an organization while faced with a sexual misconduct allegation. Labor, employment, and privacy law, among others, all come into play.

Recognizing these legal complexities, this Article focuses on perpetrator circulation and the role that employers should play in eradicating the problem of circulation—and makes a business case for doing so. This Article supports the argument that aid organizations, which may be risk-averse, should take on potential, reasonable litigation risk if called upon to provide a reference for a former employee who was terminated for, or credibly alleged after investigation to have engaged in, sexual misconduct; this litigation risk is worthwhile in order to ensure the safety and continued effectiveness of the aid community overall. From a U.S. legal perspective, this Article addresses key issues in tackling this problem. Specifically, this Article will discuss how to best adhere to due process principles, including developing or strengthening organizational policies and completing investigations; address sexual assault claims; deal with past and non-workplace incidents; and ask for and provide accurate and complete references. These steps must be taken to ensure that sexual perpetrators cannot move from country to country or organization to organization undetected and undeterred.

II. THE BUSINESS CASE

International Development is based on the recognition of human dignity.¹⁵ Therefore, promoting and protecting human dignity is at the heart of international aid programs. As sexual misconduct strikes at the foundation of human dignity, aid practitioners have a responsibility to protect the people they are meant to be helping, as well as their colleagues, from any and all

15. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1 (Dec. 10, 1948) (“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”); see also *Development Is a Human Right*, U.N. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/EN/Issues/Development/Pages/SearchOfDignity.aspx> (last visited Nov. 17, 2020).

forms of sexual misconduct. Eradicating sexual misconduct should be central to each aid organization.

But eliminating perpetrator circulation is more than a moral or ethical imperative. Even from the most fundamental economic perspective, solving the perpetrator circulation problem is critical and makes good business sense. Failure to adequately address sexual misconduct can threaten or actually destroy an aid organization's existence, notwithstanding its many positive contributions, given its wide-ranging human and economic costs.¹⁶ Such ramifications include first and foremost the impact on the survivors of the sexual misconduct. Additionally, a failure to address perpetrator circulation can undermine a community's acceptance of and trust in the aid organization, impair its ability to execute programs within that community, present reputational risk and legal liability for the organization, impact the aid organization's donor(s) (government or private), and tarnish the perceptions of the aid community as a whole.¹⁷ In order to mitigate against this litany of risks, aid organizations should create respectful and safe environments and, when prevention fails, take a survivor-centered approach¹⁸ while also increasing accountability at both the individual and institutional levels.¹⁹

16. For example, Oxfam, following the sexual exploitation scandal in Haiti, lost 7,000 donors and saw an approximately 10% decrease in relevant income, resulting in the firing of staff and the cutting of programs. See Jessica Elgot & Karen McVeigh, *Oxfam Loses 7,000 Donors Since Sexual Exploitation Scandal*, GUARDIAN (Feb. 20, 2018, 1:40 PM), <https://www.theguardian.com/world/2018/feb/20/oxfam-boss-mark-goldring-apologises-over-abuse-of-haiti-quake-victims>; Nick Hopkins, *Oxfam to Axe Jobs and Aid Programmes in £16m Cuts After Scandal*, GUARDIAN (June 15, 2018, 8:02 AM), <https://www.theguardian.com/world/2018/jun/15/oxfam-warns-staff-urgent-savings-16m-haiti-scandal>.

17. William Worley, *Save the Children UK 'Mismanaged' Sexual Misconduct Complaints*, DEVEX (Mar. 5, 2020), <https://www.devex.com/news/save-the-children-uk-mismanaged-sexual-misconduct-complaints-96698>; see Ben Parker, *Former Save the Children Staffers Speak Out on Abusive Culture Under Justin Forsyth*, NEW HUMANITARIAN (Feb. 22, 2018), <https://www.thenewhumanitarian.org/feature/2018/02/22/former-save-children-staffers-speak-out-abusive-culture-under-justin-forsyth>.

18. A survivor-centered approach is one in which "the survivor's dignity, experiences, considerations, needs, and resiliencies are placed at the center of the process." USAID PSEA POLICY, *supra* note 1, at 17; see also United Nations Protocol on Allegations of Sexual Exploitation and Abuse Involving Implementing Partners, ¶ 5 (Mar. 21, 2018) [hereinafter U.N. Protocol on Allegations of SEA], https://interagencystandingcommittee.org/system/files/un_protocol_on_sea_allegations_involving_implementing_partners_final.pdf.

19. USAID PSEA POLICY, *supra* note 1, at 5-7; see also U.N. Protocol on Allegations of SEA, *supra* note 18, at ¶ 22(a).

III. KEY ISSUES IN PERPETRATOR RECIRCULATION

Contributing to the issue of perpetrator circulation is the fact that aid organizations, like many employers, tend to view risks solely as they relate to their individual organization. This narrow view of risk has facilitated perpetrators' ability to escape accountability, as organizations are happy to simply be disassociated with the alleged perpetrator. Investigations appear to be a serious weakness—they often are not conducted at all or, if they do take place, they are insufficiently thorough or left incomplete because the accused resigns or a settlement is entered to secure the accused's departure from the position.²⁰ The problem is then compounded when the former employee provides his or her previous employer as a reference and the former employer may not provide a complete and accurate reference²¹ due to a perceived risk of legal liability, fears of litigation, or other concerns. Simply stating, as some organizations do, that the former employee is not eligible for "rehire" is generally not enough information upon which to base a negative hiring decision. These shortcomings have enabled perpetrators to circulate without accountability, allowing them to harm other colleagues or program beneficiaries. Fortunately, there are reasonable steps that employers can take to mitigate risks and protect themselves while also protecting the sector.

A. "Due Process" Issues

In the United States, due process refers generally to an individual's right to be treated fairly throughout a civil or criminal investigation, according to standard rules or principles that are

20. Each of these deficiencies point to weakness with an organization's investigative procedures. It should be noted that investigations into these matters are inherently challenging given: (i) the sensitivity of the topic and potential stigma and shame associated with it; and (ii) a possible fear of retaliation and consequences that a survivor may feel for disclosing the incident(s) and participating in an investigation. While these to a certain extent can be addressed with supporting skills training for investigators and other actions, there are larger cultural issues that these investigations raise, which are outside the scope of this Article, that are important to acknowledge.

21. A complete and accurate reference is factually accurate and does not omit information that would be relevant to a future employer. See Rebecca Knight, *The Right Way to Check Someone's References*, HARV. BUS. REV. (July 29, 2016), <https://hbr.org/2016/07/the-right-way-to-check-someones-references>.

applied to everyone.²² Though rights to due process differ from country to country, it is best practice to thoroughly document allegations, evidence, and the basis for employment decisions in order to safeguard due process and create a robust record of the alleged sexual misconduct.²³ In the event of a sexual misconduct allegation or incident, employers should follow organizational policies, which should provide for a well-documented and transparent process for addressing the allegation. Failure to establish and follow such a process undermines the defensibility of an employer's conclusion and actions.

Employer practices and employee rights will differ in varying work environments. Generally, U.S. government employees cannot be disciplined or terminated if they have not first been provided with due process, including the right to counsel, an explanation of the basis of the proposed discipline, and a right to be heard.²⁴ U.S. public sector employees thus may have constitutional²⁵ or statutory rights limiting an employer's ability to expeditiously hold them accountable for suspected sexual misconduct.

In the U.S. private sector, by contrast, most employment relationships are "at will" and employees have fewer rights than public sector employees. Therefore, private employers are generally able to discipline or fire an individual for any reason not

22. U.S. CONST. amends. V, XIV.

23. The International Covenant on Civil and Political Rights provides:

Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; [and] (c) To ensure that the competent authorities shall enforce such remedies when granted.

G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 2, ¶ 3 (Dec. 16, 1966).

24. Hanan M. Isaacs, *Do Employees Accused of Sexual Harassment Have the Right to Due Process?*, KINGSTON L. GRP. (Feb. 5, 2019), <https://kingstonlawgroup.com/sexual-harassment-due-process/>. Note that employees also have a right to appeal following discipline or termination.

25. See *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part) (holding that the legislature may not constitutionally authorize the deprivation of a property interest in federal employment, once conferred, without appropriate procedural safeguards).

prohibited by law.²⁶ However, even in the private sector, employers can and should implement established policies giving employees certain due process protections that provide those accused of sexual misconduct with an opportunity to “defend themselves or to present their side of the story.”²⁷

To be sure, employers can and should promote a survivor-centered approach. They also should maintain a commitment to treat both the survivor and the accused fairly in addressing the allegations.²⁸ A survivor-centered approach accounts for the perspective of someone who could have just experienced a profoundly traumatic experience:

[T]he survivor’s dignity, experiences, considerations, needs, and resiliencies are placed at the center of the process [T]he survivor should be informed, participate in the decision-making process, and provide consent on the possible use and disclosure of their information.²⁹ Those interacting with the survivor and/or handling information regarding the allegation must maintain confidentiality, ensure safety of the survivor, and apply survivor-centered principles without discrimination.³⁰

Importantly, if this approach is misapplied (e.g., not conducting as complete of an interview with the survivor as with the accused; reaching an insufficiently supported conclusion sustaining the allegations), it could compromise the validity of the investigation³¹ and any ultimate disciplinary action. Indeed, almost every state in the U.S., as well as many other countries, have laws that require an employer to “investigate and remedy harassment.”³²

26. *At-Will Employment – Overview*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 15, 2008), <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx>.

27. Caroline Reilly, *Losing Your Job for Sexual Harassment Is Not a Violation of Due Process*, REWIRE NEWS GRP. (Jan. 18, 2018), <https://rewire.news/article/2018/01/18/losing-job-sexual-harassment-not-violation-due-process/>.

28. *See id.*

29. Allowing the survivor to control the disclosure of their information could be at odds with conducting a thorough investigation.

30. USAID PSEA POLICY, *supra* note 1, at 17.

31. *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, PROMISING PRACTICES FOR PREVENTING HARASSMENT (Nov. 21, 2017), <https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment>.

32. Mark Brault, *How to Handle a Sexual Harassment Complaint*, HNI, <https://www.hni.com/blog/hr/how-to-handle-sexual-harassment-complaints> (last visited Nov. 10, 2020).

However, carefully and thoughtfully applying this approach is preferred as it both challenges a strict organizational liability mindset by centering the response on the survivor and aligns with concepts of protecting human dignity and “do[ing] no harm” that are central to the aid sector.

These fact-finding investigations should be completed whether or not the accused resigns prior to the investigation’s commencement or completion. Specifically, even if the accused resigns prior to the completion of the investigation, an employer should complete the investigation and seek a statement from the accused after resignation (if one was not obtained prior to the resignation). The accused’s perspective is important for several reasons. Most importantly, the accused is a critical witness, so offering them the opportunity to provide their perspective and recollection is crucial to obtaining a credible result. Failing to obtain the accused’s account at the time of the initial accusation opens up the possibility for memories to fade or for a bad actor to change their story after they hear subsequent accounts. There is also a fundamental benefit to getting as much information as possible in an immutable form (i.e., written statements) as part of the investigation. The closer to a contemporaneous accounting of events the better to ensure validity and reliability. Additionally, accused individuals in a workplace should be accorded some semblance of due process so that the accusation process is perceived as a fair system that is resistant to abuse or arbitrary judgments.

A completed investigation mitigates against future litigation risk in several ways. First, an investigation mitigates against future actions in tort by showing that the employer undertook steps to uncover any reasonable threats or issues that put employees at risk. This mitigates against future allegations (from survivors, their fellow employees, or others) that the employer acted negligently or failed to exercise reasonable care in preventing sexual misconduct. Second, documenting the situation protects against future tortious interference claims that could be brought by the accused. By documenting the facts of a situation and compiling evidence in a single file, the employer is in effect preparing its defense against future claims brought by the accused. Finally, in the harassment context, a completed investigation strengthens an employer’s defense under the *Faragher-Ellerth* doctrine, whereby employers are

not held liable for a hostile work environment if they exercised “reasonable care” to prevent and promptly correct harassing behavior of employees.³³

Moreover, employers should perform a risk assessment regarding the safety and security of the workforce. If an initial investigation reveals credible evidence indicating that the accused did engage in some form of sexual misconduct, or even without this level of evidence, then an employer should assess the organization’s safety and consider such measures as separating the accused from the complainant (transferring the accused to another department if possible)³⁴ until the investigation is finalized and the employer can take more formal action. Another intermediate step would be, if permitted legally, to suspend the accused employee with pay as the investigation continues.³⁵ If the investigation concludes with a finding that the alleged abuser did engage in misconduct, then the employer may consider terminating the employee where doing so is necessary to prevent harm to the organization.³⁶

At USAID, some best practices noted by the Agency’s employment lawyers are conducting timely investigations, having attorneys ensure legal sufficiency prior to closing an investigation,³⁷ and utilizing sworn statements. In addition, the literature identifies at least eleven best practices for conducting investigations: (1) “pick a qualified investigator” – someone who has experience in these situations and is a neutral and objective

33. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998).

34. *An Employee Filed a Harassment Complaint – Now What?*, ADP (May 16, 2016), <https://sbshrs.adpinfo.com/blog/an-employee-filed-a-harassment-complaint-now-what>. Transferring the accused or the complainant to another department/location could have the negative effect of limiting women’s opportunities by prohibiting them from certain activities or opportunities (e.g., women have complained about sexual misconduct when staying at the organization’s safe house, and the organization’s solution is to limit women’s opportunities to travel to that region).

35. *Id.*

36. Reilly, *supra* note 27.

37. Using attorneys to ensure the legal sufficiency of an investigation is a practice used by other organizations as well. For example, the U.S. Army has one judge advocate advise the investigator on how to best structure an investigation while having another judge advocate independently review the investigation. See U.S. DEP’T OF ARMY, REG 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS (Apr. 1, 2016).

third party;³⁸ (2) adhere to company policies—any deviation may raise suspicions or doubts whether the investigation was done in good faith;³⁹ (3) do not delay in initiating or following-up on the investigation;⁴⁰ (4) check past performance and complaints regarding the accused;⁴¹ (5) ensure confidentiality throughout the process;⁴² (6) regarding evidence and witnesses (i) document everything and organize accordingly,⁴³ (ii) do not include personal opinions and observations in documents, and do not intimidate witnesses,⁴⁴ and “(iii) evaluate the evidence objectively;”⁴⁵ (7) maintain status updates and keep the complaining party informed of all the steps being taken;⁴⁶ (8) consider credibility by assessing parties’ plausibility, demeanor, and motives to falsify and by assessing past records;⁴⁷ (9) “take appropriate remedial action;”⁴⁸ (10) “don’t add a retaliation claim” or do something that may be viewed as punitive by the complaining party;⁴⁹ and (11) continue follow-up to “ensure the harassment has not resumed and the victim has not suffered retaliation.”⁵⁰

Of course, conducting an investigation that results in terminating an employee is not without risk to the employer. When private sector employers take action to terminate employment, the accused often has the right to sue their employer under

38. See, e.g., Jeffrey D. Polsky, *Eight Steps to Avoid Getting Sued Over Your Investigation*, FOX ROTHSCHILD LLP (Mar. 26, 2018), <https://californiaemploymentlaw.foxrothschild.com/2018/03/articles/advice-counseling/eight-steps-to-avoid-getting-sued-over-your-investigation/>; Brault, *supra* note 32; Dori Meinert, *How to Investigate Sexual Harassment Allegations*, SOC’Y FOR HUM. RES. MGMT. (Jan. 8, 2018), <https://www.shrm.org/hr-today/news/hr-magazine/0218/pages/how-to-investigate-sexual-harassment-allegations.aspx>.

39. Polsky, *supra* note 38.

40. *Id.*

41. Meinert, *supra* note 38.

42. *Id.*

43. Polsky, *supra* note 38; Brault, *supra* note 32.

44. Brault, *supra* note 32.

45. Polsky, *supra* note 38.

46. *Id.*

47. U.S. EQUAL EMP. OPPORTUNITY COMM’N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (June 18, 1999), <https://www.eeoc.gov/policy/docs/harassment.html>.

48. Polsky, *supra* note 38.

49. *Id.*

50. Brault, *supra* note 32.

employment, labor, contract, or tort law.⁵¹ The accused could argue that the firing was based on a discriminatory accusation (based upon a protected class such as age, race, gender, religion and so forth) or that the firing did not accord with the terms of the contract (e.g., a clause permitting firing only “for just cause”).⁵² As noted, some accused employees may resign before a full investigation can be completed, which may lead to later complaints of a lack of due process should the employer provide a negative reference regarding the accused.⁵³ Having a well-defined process and following that process can help address and defend against any such legal claims.

B. Sexual Assault and Other Criminal Charges

Sexual assault, as opposed to sexual harassment, raises issues of its own. Much of the literature addresses “sexual harassment” as opposed to “sexual assault” in the workplace.⁵⁴ It is unclear why assault is addressed less often, though one explanation might be that it is a criminal charge (with specific requirements and definitions depending upon the jurisdiction). Regardless, there are additional survivor-centered approaches when dealing with sexual assault allegations or other criminal violations that a company can take both prior to any allegation and during an investigation. For example, employers may include information in organizational policies, procedures, and training to make clear that employees have a right, but are not required, to report to police if they believe that they have been sexually assaulted.⁵⁵ Further, employers may also provide information informing employees that they may

51. Jessica A. Clarke, *If You Fire Someone for Sexual Harassment, What Do You Say If You're Called for a Reference?*, HARV. BUS. REV. (Mar. 27, 2018), <https://hbr.org/2018/03/if-you-fire-someone-for-sexual-harassment-what-do-you-say-if-youre-called-for-a-reference>.

52. Isaacs, *supra* note 24.

53. Reilly, *supra* note 27.

54. See Paula McDonald & Sara Charlesworth, *Workplace Sexual Harassment at the Margins*, 30 WORK, EMP. & SOC'Y 118 (2015); see also Paula McDonald, *Workplace Sexual Harassment 30 Years On: A Review of the Literature*, 14 INT'L J. MGMT. REVS. 1 (2012).

55. Lindsay Tigar, *These Are Your Legal Rights in Cases of Workplace Sexual Harassment*, FAST CO. (Apr. 24, 2019), <https://www.fastcompany.com/90334325/these-are-your-legal-rights-in-cases-of-workplace-sexual-harassment>.

request a rape kit if sexually assaulted, but would not be required to report to police or press criminal charges by doing so.⁵⁶

During an investigation, if an employer has reason to believe that an assault or a crime was committed in the workplace, then the employer should inform the survivor of the potential criminal charges. Additionally, the employer should inform the survivor of the employer's willingness to cooperate with a police investigation if the survivor decides to pursue a criminal investigation.⁵⁷ This approach is in line with the survivor-centered approach discussed previously, as "it is the survivor who should generally decide what action(s), if any, to take after an incident of violence or abuse."⁵⁸

C. Past Incident(s) and Non-workplace Incidents

In addition to dealing with work-related incidents, employers may discover an incident that occurred in the past or outside of work. When employers become aware of an incident(s) that occurred a significant amount of time ago in the workplace, employers should nevertheless commence an investigation.⁵⁹ These types of corporate or administrative investigations are recommended because they enable employers to make decisions on more complete information. Moreover, unlike the criminal charges discussed in Section III.B, administrative infractions are not subject to a statute of limitations. An employer may decide to take action even when significant time has passed because an employee's

56. *Sexual Assault / Rape*, WOMENSLAW.ORG (Feb. 17, 2017), <https://www.womenslaw.org/about-abuse/forms-abuse/sexual-abuse-and-exploitation/sexual-assault-rape/steps-take-after-sexual>.

57. Steven Gerber & Laura Kirschstein, *No One-Size-Fits-All: Investigating and Addressing Complaints of Historical Sexual Harassment and Abuse*, SCHOEMAN LLP 31 (2017), <http://www.schoeman.com/wp-content/uploads/2017/04/S.Gerber-IDQ-Spring-2017-Article-on-Sexual-Harassment-and-Abuse-Complaints.pdf>; see also Charles H. Fleischer, *Employment Law 101: Employer Liability for Sexual Harassment*, SOC'Y FOR HUM. RES. MGMT. (Aug. 22, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/business-acumen/pages/employer-liability-for-sexual-harassment.aspx> ("If the complaint involves sexual assaults or other criminal conduct, [the employer should] suggest that the complaining party make a police report.").

58. USAID PSEA POLICY, *supra* note 1, at 8. There can be tensions with a survivor-centered approach where certain employers are required to report to the police. In the case of USAID, agency managers are required to report incidents of sexual misconduct, which could include informing the Agency's Inspector General and may involve the police. See AAPSM, *supra* note 6.

59. Gerber & Kirschstein, *supra* note 57, at 28.

egregious misconduct, while dated, may present a continuing significant risk to the current workforce. While commencing an investigation is recommended, finding supporting evidence in this situation may nevertheless be difficult and the employer may not be able to reasonably take a personnel action.

Another difficult situation arises when an employer discovers a non-workplace incident in which an employee may have engaged in sexual misconduct with family members, friends, or nonemployees. Again, it is advised that employers should take allegations seriously, even if law enforcement is not investigating them.⁶⁰ In such cases, employers can ensure due diligence through liaising with law enforcement and requesting their results, reviewing publicly available court filings, and requesting court filings, among other actions.⁶¹ Public sector employers may face a challenge in these cases because they may have to show a sufficient nexus between the off-duty misconduct and the employee's job duties, such that non-work related incidents could still result in employment related actions such as suspension or reassignment (e.g., charges filed or arrests made).⁶²

To avoid either of these situations, many employers within the aid sector are taking important steps to improve job candidate screening and reference checking during the hiring process.⁶³ Some proactive examples are: (1) USAID requires that prior to joining the Agency, prospective employees self-certify regarding any potential history of engagement in abuse, assault, or exploitation with acceptance of the tentative offer letter; (2) the United Nations High Commissioner for Refugees and the United Nations Children's Fund utilize pre-screening questions as part of the application process;⁶⁴ (3) Oxfam uses a system of

60. *Report on Mercy Corps' Sexual Exploitation and Abuse Policies and Their Application to Issues Raised by Tania Culver Humphrey*, NICHOLS LIU LLP 14 (Jan. 29, 2020), https://www.mercycorps.org/sites/default/files/2020-02/NicholsLiuReport.EN_.pdf.

61. In the 1990s, the founder of MercyCorps was investigated for sexual assault allegations against his daughter. However, MercyCorps board members (one of whom co-founded the organization) conducted the investigation, creating a conflict of interest and compromising the integrity of the investigation. *Id.* at 13.

62. See 5 U.S.C. §§ 7503, 7513; *Doe v. Dep't of Just.*, 565 F.3d 1375, 1379 (Fed. Cir. 2009).

63. See, e.g., OXFAM: *Immediate Response Actions*, *supra* note 12.

64. In addition to the measures these United Nations entities have taken, the UN has instituted Clear Check to allow sharing of information regarding perpetrators of sexual harassment within the UN system of agencies, funds, and programs to prevent their rehire. *Launch of the Sexual Harassment Screening Database*, U.N. DEP'T OF MGMT. STRATEGY, POL'Y &

accredited referees;⁶⁵ and (4) the World Food Programme has an internal database⁶⁶ of disciplinary measures taken against staff perpetrators, including dismissals, to prevent rehiring them.⁶⁷

*D. References and Recommendations for Preventing
Perpetrator Circulation*

One of the most important mechanisms for preventing perpetrator circulation is providing potential employers accurate references, but this mechanism also presents litigation risk. Fortunately, however, there are appropriate steps that aid organizations can take to manage the potential litigation risks that could result from providing accurate and complete references in an effort to stop perpetrator circulation. For the former employer, the possible basis for litigation includes tortious interference with employment and defamation, which will be discussed in more depth in Section III.D.3.

Broadly speaking, an employer has four options when requested to give a reference about a former employee who was accused of sexual misconduct in the absence of a binding settlement or non-disclosure agreement. First, the employer could give a positive reference based on the employee's work history if the employee was good at their job.⁶⁸ Second, the employer could give a negative reference based on the incidents reported.⁶⁹ Third, the employer could give a reference that merely confirms an

COMPLIANCE, <https://www.un.org/management/news/launch-sexual-harassment-screening-database> (last visited Feb. 1, 2021).

65. See *Oxfam Training 119 Staff to Begin Investigations and Invests Over €2M as Part of Package to Strengthen Safeguarding Worldwide*, OXFAM INT'L (July 26, 2018), <https://www.oxfam.org/en/press-releases/oxfam-training-119-staff-become-investigators-and-invests-over-eu2m-part-package>.

66. Databases of this type can raise significant privacy law issues and concerns due to the sensitive nature of the information involved. Depending on the jurisdiction, there are privacy law issues and requirements that must be addressed prior to establishing this type of database. Limiting information contained within any database to the minimum necessary to achieve the purpose is always a good practice.

67. *Summary of IASC Good Practices: Preventing Sexual Exploitation and Abuse and Sexual Harassment and Abuse of Aid Workers*, INTER-AGENCY STANDING COMM. 1, 7 (2019), https://interagencystandingcommittee.org/system/files/iasc_summary_of_good_practices_on_psea_and_sha_2019.pdf.

68. See John Ashby, *Employment References: Should Employers Have an Affirmative Duty to Report Employee Misconduct to Inquiring Prospective Employers?*, 46 ARIZ. L. REV. 117, 118 (2004).

69. See *id.*

employee's dates of employment, rank and title,⁷⁰ which many employers do to avoid any litigation concerns.⁷¹ Finally, the employer could give no reference at all.⁷² As discussed in the next section, each of these options comes with various risks, but the second option both incurs risks that may be mitigated and helps serve the needs of the aid sector.

1. *Duty to disclose*

Strictly speaking, an employer does not have a general legal duty to disclose the reason for an employee's termination,⁷³ so employers could choose the first, third, or fourth options that decline to provide an explicitly negative reference. However, not making a comment or omitting information related to sexual misconduct creates a "negative societal effect" because the employer is not sharing important information about the prospective candidate who might then harm others.⁷⁴

2. *Negligent misrepresentation*

Depending on the jurisdiction, employers may be liable for negligent misrepresentation or other potential litigation risk if they choose the first option and give a positive reference.⁷⁵ For example, a duty of care/employer liability was found in a 1997 California Supreme Court case, *Randi W. v. Muroc Joint Unified School District*.⁷⁶

70. *See id.* at 119.

71. *See* Willam Newman, *They Were Accused of Sexual Harassment, but the City Hid It*, N.Y. TIMES (Mar. 19, 2019), <https://www.nytimes.com/2019/03/19/nyregion/sexual-harassment-neutral-reference.html?auth=login-email&login=email>. While neutral references may be provided to avoid litigation, employers doing so could receive negative publicity.

72. *See* Ashby, *supra* note 68, at 119.

73. *See* Clarke, *supra* note 51.

74. Ashby, *supra* note 68, at 119; Clarke, *supra* note 51. As a result, many employers have adopted the "name, rank, and serial number" approach to job references – they refuse to share any information about former employees other than confirming dates of employment and titles. Or they may refuse to say anything at all. While this may be the smartest legal strategy, it is morally questionable in cases in which an employee is likely to go on to commit sexual harassment, misconduct, or assault again.

75. *See* Clarke, *supra* note 51.

76. *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591 (1997). In this case, a student sued several school districts after officials from the school districts wrote positive letters of recommendation for an administrative employee who later sexually assaulted the student. The letters implied the employee was "fit to interact appropriately and safely with

In this case, the Court determined that a former employer and reference had “a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to third persons.”⁷⁷ Similarly, the Illinois Supreme Court held that the act of misstating employment history in a reference violated a duty of care when the former employer said that the teacher worked the whole year, but omitted disciplinary removal for sexual harassment, sexual grooming, and/or sexual assault.⁷⁸ A New Mexico appellate court further affirmed the *Randi W.* holding in a situation where a supervisor wrote a positive letter for a mental health technician who faced allegations of inappropriate sexual behavior and failed to mention those allegations.⁷⁹ However, other courts considering the issue have found no duty of care or employer liability.⁸⁰ Given that this is

female students,” despite the fact that the officials allegedly knew of the employee’s history of sexual misconduct. *Id.* at 585–86, 593.

77. *Id.* at 591.

78. *Jane Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Dirs.*, 973 N.E.2d 880, 885, 889 (Ill. 2012).

79. *Davis v. Bd. of Cty. Comm’rs of Dona Ana Cty.*, 987 P.2d 1172, 1175, 1177 (N.M. Ct. App. 1999).

80. For example, state courts have held there is no liability for nondisclosure if no “special relationship” existed between the writer of a letter/reference and the employee. *Randi W.*, 929 P.2d at 588; *see also* *Neptuno Treuhand-Und Verwaltungsgesellschaft Mbh v. Arbor*, 692 N.E.2d 812, 817 (Ill. App. Ct. 1998). The Michigan Supreme Court held that “while an employment relationship could form the basis for a ‘special relationship,’ former employment or supervision did not, and absent a ‘special relationship,’ the supervisor had no affirmative duty to inform the subsequent employer or department of the employee’s dangerous propensities.” Kiren Dosanjh, *Former Employer’s or Supervisor’s Tort Liability to Prospective Employer or Third Person for Misrepresentation or Nondisclosure in Employment Reference*, 68 A.L.R.5th 1, 5 (1999) (citing *Murdock v. Higgins*, 559 N.W.2d 639, 644 (Mich. 1997)). A New York appellate division held:

[A] school district owed no duty to disclose a former employee’s sexual misconduct in recommending him for another teaching position . . . [as] a mere recommendation does not form a basis for liability, noting the common law’s refusal to impose an affirmative duty to warn those endangered by the conduct of another absent a special relationship.

Id. at 6 (citing *Cohen v. Wales*, 518 N.Y.S.2d 633 (N.Y. App. Div. 1987)). A Michigan appellate court found there was “no duty to disclose an applicant’s dangerous propensities to prospective employers. In reaching its decision, the court weighed the competing policy considerations . . . placing great importance on the confidentiality of employment records.” *Id.* at 5 (citing *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 102 (Mich. Ct. App. 1990)). Additionally, a Washington appellate court declined to adopt the *Randi W.* definition when a school custodian’s current employer sued the custodian’s former employer for negligence (based on misrepresentation and nondisclosure) after discovering the custodian

another possibility for exposure to liability, which varies across jurisdictions, employers should look into this further to determine their risk.

3. *Exposure to liability for disclosure*

Despite the “negative societal effect” of not sharing information about the specific sexual misconduct allegation/investigation, many employers refrain from the second option out of a fear of being sued by the employee. Based on possible litigation concerns, including defamation and tortious interference with employment suits, many lawyers advise to not give bad references.⁸¹ Employers may also consider privacy laws and employee confidentiality in deciding whether or not to share such negative information about a former employee.

So how, then, do employers assess the actual litigation risk, and protect against the risk, if those employers choose to give an honest reference about a former employee’s sexual misconduct? While there is no clear legal answer to this question,⁸² there is growing support for providing an accurate reference regardless of those risks.⁸³ In assessing litigation risk, employers should equally consider the broader harm associated with a failure to disclose. For example, charitable organizations have seen significant reductions in donations after their leadership was seen to mishandle

resigned in exchange for dismissing the child molestation counts, a fact which the former employer had failed to mention in the recommendation. *Richland Sch. Dist. v. Mabton Sch. Dist.*, 45 P.3d 580, 587 (Wash. Ct. App. 2002). In this case, the molestation counts were not confirmed by police investigation, and the allegations “changed during the course of the investigation, were disputed among family members, appeared to be tied to divorce proceedings, and were treated by Mabton officials as a ‘family squabble.’” *Id.* at 584, 587.

81. *See Clarke, supra* note 51.

82. *See id.*

83. The Steering Committee for Humanitarian Response launched the Inter-Agency Misconduct Disclosure Scheme in 2019, in which those organizations signed on to the Disclosure Scheme commit to providing more transparent references between them. *The Inter-Agency Misconduct Disclosure Scheme*, STEERING COMM. FOR HUMANITARIAN RESPONSE, <https://www.schr.info/the-misconduct-disclosure-scheme> (last visited Oct. 20, 2020). The Disclosure Scheme had forty-six organizations signed on as of August 2020. *See* Mark Califano & Sarah Morgenthau, “Safeguarding” Aid Workers: The Importance of Rooting Out Bad Actors, NARDELLO & CO. (Jul. 2018), <https://www.nardelloandco.com/insights/safeguarding-aid-workers-the-importance-of-rooting-out-bad-actors/>; *see also* Molly Anders, *Oxfam Sexual Abuse Scandal: Are the Aid Sector’s HR Systems Failing?*, DEVEX (Feb. 14, 2018), <https://www.devex.com/news/oxfam-sexual-abuse-scandal-are-the-aid-sector-s-hr-systems-failing-92103>.

allegations; the allegations also resulted in the firing of responsible staff, loss of disaffected staff, and potential loss of additional partnerships/opportunities.⁸⁴ An organization cannot simply price liability risks without factoring in the counterfactual costs if the organization chooses to remain silent about a former employee's misconduct and the former employee causes additional harm at a new organization. Further, there also could be related costs to other organizations in the sector, as one organization's misdeeds may affect others' ability to operate in challenging overseas locations and could reduce overall support for the aid sector. Therefore, to have a complete picture of risk exposure, organizations should balance tort liability against revenue/expertise loss in deciding in favor of disclosure.

Employers should also consider actual litigation risk, rather than adopt a blanket aversion to any litigation at all. In providing an accurate reference, employers may fear defamation suits by the respective employee; however, there are defenses available to employers in these cases. First, truth is a defense. Generally, if an employer can "prove that the statements given are substantially true, the employer will not be liable for defamation."⁸⁵ But since the facts in a specific situation are not always clear, this defense may not work in cases where the factual evidence is not strong.⁸⁶ Second, if a prospective employee signs a waiver of liability against a former employer being asked to provide a reference, then the employee may be limited in bringing a subsequent defamation suit.⁸⁷ Third, if an employer gives an opinion, as opposed to a statement of fact, this could be a defense.⁸⁸ Finally, there is also a common law/statutory privilege that protects employers'

84. See Elgot & McVeigh, *supra* note 16; Hopkins, *supra* note 16; see also *Portland Nonprofit Mercy Corps' CEO Resigns Under Pressure*, OPB (Oct. 10, 2019, 5:13 PM), <https://www.opb.org/news/article/mercy-corps-sexual-abuse-ceo-resign/> (reporting the resignation of three senior Mercy Corps officials following the sexual abuse scandal relating to one of its founders).

85. Ashby, *supra* note 68, at 124.

86. *See id.*

87. *See id.*

88. If an employer is careful to give a negative reference in the context of their negative opinion of the trustworthiness or reliability of the former employee, this subjectivity could insulate the employer from defamation claims. *See id.* (citing *Karp v. Hill & Knowlton, Inc.*, 631 F. Supp. 360 (S.D.N.Y. 1986)). However, note that *Karp* was not about sexual misconduct, but about an employer giving an opinion that the former employee defrauded the company. Thus, it is unclear if this would similarly apply to sexual misconduct situations.

statements, though this is limited to statements that affect an employee's work.⁸⁹ Depending on the circumstances, this may or may not be a defense in situations regarding a former employee's sexual misconduct.

Employers may also fear suits for tortious interference with employment. Tortious interference with future employment is a type of tortious interference with a prospective "economic advantage" that requires the employee to show that the employer knew that the employee had a reasonable expectation of prospective employment and would have been hired but for the employer's intentional and wrongful interference.⁹⁰ As with defamation suits, however, there are defenses that are available to the employer in claims of tortious interference. First, the employer can claim that they were upholding their professional responsibility by acting to serve the company or organization without improper motives or purposes.⁹¹ Second, an employer may argue that they were providing the truth as well as honest advice to an employee's prospective employer.⁹² For some courts, the truth is an absolute defense even if the employer acted maliciously.⁹³ However, many courts implement a "good faith" requirement when determining the overall honesty of a response.⁹⁴

4. Statutory protections implemented by states

In addition to common law defenses, U.S. states are enacting protections for prospective and former employers who do reference checks and provide accurate though negative references. For prospective employers, states can impose liability for negligent hiring if a prospective employer does not engage in proper due diligence in looking into an applicant's background during the hiring process,⁹⁵ which could result in monetary damages awarded

89. *See id.* at 125.

90. *See* Zachary G. Newman & Anthony P. Ellis, *Navigating the Nuances of Tortious Interference Claims*, 18 *BUS. TORTS J.* 1, 1 (2011); Joseph A. Hennessey, *Checking Misconduct in Competition Through Tortious Interference with Contract Causes of Action*, 10 *BUS. TORTS J.* 1, 2 (2002).

91. *See* Newman & Ellis, *supra* note 90, at 20.

92. *See* Alex B. Long, *Tortious Interference with Business Relations: The Other White Meat of Employment Law*, 84 *MINN. L. REV.* 863, 902 (2000).

93. *See id.* at 905.

94. *See id.* at 903.

95. *See* Clarke, *supra* note 51.

by a jury. Moreover, former employers find protection from defamation and tortious interference claims in some states, including California, that implement a special privilege for employers “if they advise a prospective employer that the applicant was the subject of a sexual harassment investigation based on credible evidence.”⁹⁶ Much of the legal uncertainty and financial risk employers face in providing accurate but negative references could be addressed if more states adopt these types of statutory protections for employers and employees, both current and future, to ensure that sexual predators cannot circulate among employers.

IV. CONCLUSION

Ensuring that perpetrators of sexual misconduct are prevented from circulating from aid organization to aid organization undetected is critical to the success of preventing sexual misconduct in the sector and to the overall ability of these organizations to succeed in their broader goals. Leaders and staff must take a hard look at their organizations and organizational cultures and take the necessary steps to create respectful, safe, and inclusive work environments where everyone, including the senior-most leaders, is held accountable.⁹⁷ To tackle this issue, it is critical that organizational leaders continually model and demonstrate active support for the concept of zero tolerance for inaction when sexual misconduct situations arise, and that clear and transparent organizational policies are in place so that when incidents occur they are thoroughly and completely investigated and that employers properly take action against found perpetrators. If an employee accused of or disciplined for sexual misconduct leaves the organization and is seeking work, key to the success of preventing sexual misconduct is for typically risk-averse aid organizations to take on potential, reasonable litigation risk if

96. Megan Kokontis, *Job References in the #MeToo Era: Employers in Some States Now Have Privilege to Say #HimToo*, JD SUPRA (Aug. 29, 2018), <https://www.jdsupra.com/legalnews/job-references-in-the-metoo-era-15714/>; see also *Job Reference Shield Laws by State*, CRIMCHECK, <https://crimcheck.net/resources/job-reference-shield-laws/> (last visited Oct. 20, 2020); Charles L. Thompson, *New California Law Protects Victims, Witnesses, and Employers from Damages to Alleged Sexual Harassers' Reputations*, NAT'L L. REV. (Jul. 18, 2018), <https://www.natlawreview.com/article/new-california-law-protects-victims-witnesses-and-employers-damages-to-alleged>.

97. See USAID PSEA POLICY, *supra* note 1.

called upon to provide a reference for the former employee. Doing so eliminates other risks for the organization and ensures the safety of the aid community overall. Those steps must be taken to ensure perpetrators cannot move from country to country or organization to organization undetected and undeterred. After all, aid organizations have a moral and ethical imperative to protect their workforces and those whom they aim to assist. Further, as sexual misconduct is part of a broader culture that one sector alone cannot solve, other sectors should consider this approach to ensure perpetrators cannot circulate from sector to sector.

