**Workplace Sexual Harassment Definitions**

**Bystander:** A bystander is someone who witnesses or is aware of workplace sexual harassment even though they may not be the intended target of the harassment. If they feel safe doing so, a bystander may take a supportive role in helping to address the harassment: they may be able to intervene or defuse a harassment situation, they can note the time, place and nature of the incident so as to substantiate any future complaint, they can provide emotional support to the target of the harassment and they can make it clear to others that they object to harassment and will not take part in harassment. Depending upon the situation, there may be additional steps they can take to reduce the likelihood of harassment reoccurring.

**Consent**: The simplest definition of consent is that it is a giving of permission to someone to do something to the person giving their consent. To be actual consent, it must be given freely and not under threat or through coercion. As well, the person must be able to understand what it is that they are consenting to. So, when a person consents after being told that they will be physically harmed if they don’t consent, they have not actually consented. Similarly, if someone is intimidated into consenting or believes that there will be negative repercussions if they don’t consent, they have not actually consented. And it isn’t actually consent if the person has been rendered incapable by alcohol, substances, mental illness or cognitive injuries.

Consent is important in the context of sexual harassment and sexual assault because actions which might be perfectly welcome when consented to may constitute assault or sexual harassment without consent; it is their non-consensual nature that renders them offensive.

In fact, the Criminal Code of Canada set out the law around consent for the purpose of the sexual assault provisions as:

**273.1(1)** Subject to subsection (2) and subsection 265(3), **consent** means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

**(1.1)** Consent must be present at the time the sexual activity in question takes place.

**(1.2)** The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.

**(2)** For the purpose of subsection (1), no consent is obtained if

**(a)** the agreement is expressed by the words or conduct of a person other than the complainant;

**(a.1)** the complainant is unconscious;

**(b)** the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);

**(c)** the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

**(d)** the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

**(e)** the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

**(3)** Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

Further clarification of consent is given at s. 265(3) which states:

For the purposes of this section (s. 265 which deals with assault ), no consent is obtained where the complainant submits or does not resist by reason of

* **(a)** the application of force to the complainant or to a person other than the complainant;
* **(b)** threats or fear of the application of force to the complainant or to a person other than the complainant;
* **(c)** fraud; or
* **(d)** the exercise of authority.

Consent must be given in respect of a distinct incident and it must be given at the time of the incident. It can’t be given by one person on behalf of another and it cannot be the result of threat, intimidation, tricking someone or an abuse of power.

The same provisos that apply to consent in a sexual assault context also apply in a sexual harassment context. This is particularly important as harassment often refers to a series of offensive events. A person may consent to some of the incidents but can revoke that consent at any time. So, two people involved in a consensual relationship may permit incidents that would otherwise be harassment but if, at a certain point, one or both of them revokes their consent, future incidents are harassing.

Incidents which take place in public have the potential to harass a number of people and all of them must consent to the words or actions. For example, acts of intimacy between two consenting people may harass others who have to observe or hear and they have not consented.

It should be noted that, in considering whether an incident is sexual assault, consent can be given non-verbally although a failure to speak cannot be taken as consent. It is possible but perhaps less likely that non-verbal consent might be used as a defence to a complaint of workplace sexual harassment.

However, the standard of behaviour in the workplace is up to the employer as long as that standard is not discriminatory. That means that if an employer does not want to be put in a position where they are dealing with a complaint of sexual harassment which one party says was consented to and another says was not, the employer may simply institute a rule against words and actions which could be offensive, whether or not there is consent on the part of all parties.

**Gaslighting**: gaslighting is a form of manipulation in which the “gaslighter” causes the target to question the accuracy of their own observations and perceptions. Gaslighting often relabels a person’s perceptions and denies that an act that is objectively workplace sexual harassment is that, calling it instead, a “joke” or “letting off steam” or part of “workplace culture”. It is implied that if the complainant views it otherwise, there is something wrong with them: they “have no sense of humour”, are “overly sensitive” or “have some other problem and are taking it out on the innocent people they work with.”

**Gender expression**: According to the Ontario Human Rights Commission gender identity is

. . . how a person publicly expresses or presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person’s chosen name and pronoun are also common ways of expressing gender. Others perceive a person’s gender through these attributes.

A person’s gender expression may be the same as their gender identity but it is entirely possible that they would instead choose to express an identity which they do not self-identify with but which would discourage violence against them or negative social interaction.

**Gender identity**: The Ontario Human Rights Commission defines gender identity as

. . each person’s internal and individual experience of gender. It is a person’s sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person’s gender identity may be the same as or different from their birth-assigned sex.

A person whose gender identity is the same as their birth-assigned sex is sometimes referred to as cis-gender. A person’s gender identity is not the same as their sexual orientation.

**Harassment**: In the Yukon, the Human Rights Act defines harassment as follows:

(1) No person shall:

(a) harass any individual or group by reference to a prohibited ground of discrimination

(b) retaliate or threaten to retaliate against an individual who objects to the harassment

(2) In subsection (1), “harass” means to engage in a course of vexatious conduct or to make a demand or a sexual solicitation or advance that one knows or ought reasonably to know is unwelcome.

Harassment that is focussed the prohibited grounds of discrimination of on sex, including pregnancy, sexual orientation, gender identity and gender orientation is described as sexual harassment.

While the Occupational Health and Safety Regulations to the Workers Health and Compensation Act state:

(2) In these Regulations, harassment of a worker by a person

(a) means bullying, objectionable conduct comment, by the person or any other or inappropriate comment, by the person

(i) that occurs in a workplace or is work-related,

(ii) that the person knows, or ought reasonably to know, is likely unwelcome, and

(iii) that adversely affects the worker’s physical or psychological well-being or constitutes a threat to the worker’s health and safety;

(b) includes bullying or comments to, or a course against the worker

(i) that occurs in a workplace or is work-related,

(ii) that the person knows, or ought reasonably to know, is likely to be unwelcome, and

(iii) that relates to, or is motivated by, the worker’s sex, sexual orientation, gender identity or gender expression; . . . .

These definitions are substantially similar to definitions found in human rights and employment standards legislation in Yukon and across Canada and in judicial decisions.

What these definitions mean is that harassment may be a series of smaller offensive incidents or it may be a single dramatic, larger scale incident. Generally, the more serious and the more offensive an incident is, the fewer incidents that are needed to constitute harassment.

Harassment is often identified as physical, verbal or written, and visual. These different types of harassment are defined below.

**Non-Disclosure Agreement**: In workplace sexual harassment matters, a Non-Disclosure Agreement, sometimes referred to as an “NDA” is an agreement, usually between a complainant and an employer where, in exchange for monetary or some other type of compensation, the complainant agrees not to talk about the harassment they suffered, the person who harassed them or, often, even the fact that there is an NDA. Most NDAs provide that if any mention is made of the subject matter of the NDA or even the fact there is an NDA, the complainant will have to repay any settlement they have received.

Some NDAs, negotiated more recently, allow the complainant to speak about some aspects of the matter including the nature of the harassment and where it occurred; some even allow the naming of the harasser. However, almost every Non-Disclosure Agreement will require that the amount of any monetary settlement cannot be disclosed.

**Physical harassment:** is harassment which involves either a touching or a threat to touch. The touch does not have to be intense or prolonged to constitute harassment but if it is an actual sexual advance only a single incident is needed rather than a series of offensive incidents.

Physical harassment includes but is not limited to:

* + Casual touches
  + Hugs
  + Shoulder rubs
  + grabbing someone
  + preventing someone from leaving a room
  + a kiss

Physical sexual harassment may also constitute a sexual assault under the Criminal Code of Canada, defined below. More information about the difference between sexual harassment and sexual assault is also set out at XXXXX

**Power Imbalance**: When talking about workplace sexual harassment, power imbalance refers to the differing levels of power that a harasser and their target may have in the workplace. Harassment, in general is an exercise in power; someone with greater power says or shows or does something unwelcome and offensive to another person in the belief that the other person does not have the power to get the offensive behaviour to stop.

One of the earliest Canadian cases on workplace Sexual Harassment, Jansen v. Platy [1989] 1 SCR 1252, the Supreme Court of Canada quotes, with approval, the statement of a Canadian law professor, Arjun Aggarwal, in his book *Sexual Harassment in the Workplace* (1987),

Whether it is from supervisors, co-workers, or customers, sexual harassment is an attempt to assert power over another person.

Harassers often use their superior power to diminish another’s power in the workplace by making them look weak or making them the butt of a joke.

Power does not have to be formally given by an employer. A person may have power – or clout – through a number of sources: their tenure with the employer, their role in the community at large, their physical stature or their comparative wealth. What is important is that they are willing to assert that power over others.

**Reasonable person**: the reasonable person is a made-up person of average age, intelligence and experience and their response to actions and words is used to gauge whether those words or actions are appropriate in their context. In judging whether a person should know that their acts or words would be unwelcome or undesired, the reasonable person test is often used.

**Retaliation**: In the workplace sexual harassment context, retaliation is harming someone because they have complained about or objected to workplace sexual harassment. It is an offence under the Yukon and the Canadian Human Rights Acts.

Occupational health and safety regulations under the Workers Safety and Compensation Act also make retaliation, which it terms “reprisal” an offence.

**Sex:** in human rights law is a reference to a person’s biological sex

**Sexual Assault:** Sexual Assault is an offence under s. 271 of the *Criminal Code of Canada* which states:

s. 271 Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Further information about what constitutes sexual assault and how it overlaps with and differs from sexual harassment is set out at

**Sexual Orientation**: Sexual orientation is a person’s sexual identity or self-identification in respect of the genders that they are or are not attracted to. LGBTQ2S+ is an acronym (standing for Lesbian, Gay, Bisexual, Transgender, Queer, Two Spirited, plus others) that speaks to sexual orientation.

**Unwelcome**: something that is unwelcome is the opposite of something that is welcome. It is something that is uninvited, unrequested and unappreciated.

**Verbal harassment** : this is harassment which is either spoken or written and can be delivered personally or electronically. It may include but is not limited to:

* Using sexually charged language, including joking about sex, sexual orientation, gender identity or gender expression
* Using sex-specific derogatory language
* Telling a person things about their body or about having sex with them
* Refusing to call a person by their preferred pronouns or purposely mis-gendering them including by deadnaming them

**Visual harassment** : Visual harassment occurs when a person is subject to offensive and unwelcome sexually charged images in their workplace such as posters, calendars and videos showing exualized acts.

**Workplace**: A workplace includes the place where a person carries out their employment, e.g. an office, a factory, a restaurant, but it also includes other places where work may not be taking place but the workplace relationship is still engaged.

Courts across Canada have found that sexual harassment that takes place between colleagues who are travelling together for work, attending training or conferences related to their work, workplace retreats, work social events and parties, even athletic teams sponsored by the workplace may be workplace sexual harassment. The important thing is that there is a workplace relationship between the harasser and the target of harassment and that the target is aware that their response to the harassment might have an effect upon them in the workplace.

And when the offensive behaviour is from a supervisor to someone that they have control over in the workplace, it will almost always be found to be workplace sexual harassment even if the two people are not physically in the same place. If, for example, one evening a supervisor, from their own home, sends an unwelcome sexual text message to one of their reports who is also in their own home, that is workplace sexual harassment; the workplace relationship between a supervisor and those whose employment the supervisor has control over is not interrupted by the fact that the supervisor is not in the same physical place as the target.