

Preventing sexual harassment in the workplace: Overview Webinar Participant Questions (December 2014)

1. Will the webinar be available to be used by employers for training?

The webinar is available on our website for your viewing at any time and can be used by employers for training purposes: www.ohrc.on.ca/en/preventing-sexual-harassment-work-overview

2. I am an employer and my employee – who has spoken to me about being sexual harassed – wants to remain anonymous.

Ontario employers have a legal duty to prevent and respond to sexual harassment. If someone comes to a manager to share an allegation of sexual harassment in confidence, there can be an expectation of confidentiality to a point. However, once you as the manager are aware that things are happening within the workplace, it could trigger your liability or your organizational responsibility to respond. If issues around harassment have been raised – whether or not a person wants to file a formal complaint (in which case, they will have to identify themselves as a complainant) – it becomes the manager's responsibility to ensure the work environment is safe and free from harassment.

3. Does an employer have to wait for a formal complaint to conduct an investigation?

Ontario employers have a legal duty to prevent and respond to sexual harassment. Employers must make sure they have poison-free environments that respect human rights. It is not acceptable to ignore sexual harassment, whether or not someone has formally made a complaint. An employer should conduct an investigation to try and collect as much information about the situation as he or she can.

4. Sexual harassment investigations usually involve “he said, she said” type of situations. How should I proceed in these investigations?

When complaints are filed and there are no witnesses, outcomes depend to a great extent on the credibility of the parties. If a complaint is heard by the Human Rights Tribunal of Ontario (HRTO), and there are no witnesses, credibility becomes a key factor. The individuals will give their testimony, and they are subject to examination and cross examination. Whoever is the most credible in their version of events can determine how these types of complaints are resolved. Where more than one person has experienced similar behaviour from the same individual, “similar fact evidence” could be introduced as evidence to substantiate the allegations.

Taking notes, if possible, that record what happened, when it happened, where it happened, what was said or done, who said or did it, and who, if anyone, saw it can help to substantiate a person's perception of what happened and can help them when filing a complaint.

5. Bob hugs Jane, and Jane does not feel harassed, but Sarah sees the hug and does not feel comfortable. She notifies the employer. Is this harassment?

A certain amount of common sense has to be used in the workplace. One of the requirements for sexual harassment is whether the behaviour is unwanted by the person on the receiving end. In this case, if Jane doesn't feel harassed, it wouldn't amount to sexual harassment. Having said that, other kinds of behaviour could take place in the workplace that could poison the environment for workers. If Sarah saw other types of behaviour – online sharing of sexual images, for example – she may not be directly involved in the exchange but could have her work environment poisoned nonetheless.

Once again, a hug – if it is between two people who are consenting to that interaction and that is the extent of it – would not amount to sexual harassment.

6. How does one “regularly monitor the workplace for sexual harassment”?

The OHRC does not stipulate how often employers should monitor their workplaces. Depending on the workplace, and the number of issues that come to the employer's attention, it may need to be reviewed regularly. The monitoring should be responsive to issues (specifically ones to do with poisoned environments or behaviour contravening the *Human Rights Code*, such as sexual harassment) as they arise, rather than simply in a formalized annual review.

7. Should organizations have a sexual harassment policy separate from the workplace harassment policy required under the *Occupational Health and Safety Act*?

The OHRC highly recommends that organizations develop and adopt in-house anti-sexual harassment policies separate from a general workplace harassment policy, to make sure that all responsible parties and staff are properly informed and educated about the nature, effects and cost of this type of behaviour. An effective policy will outline everyone's rights and responsibilities relating to sexual harassment.

Under the *Human Rights Code*, a person could be harassed because of any of the 17 grounds of discrimination included in the legislation. The ground of sex – which includes pregnancy and gender – is one such ground, and it is distinct from harassment that

happens based on other *Code* grounds. Section 7 of the *Code* deals specifically with sexual harassment.

8. Can I file a human rights complaint when there is a criminal trial underway (e.g. sexual assault)?

Yes, you can. The remedies available under human rights legislation and the *Criminal Code* are different.

9. What happens if a relationship was initially consensual and ongoing for some time, but then one employee claims sexual harassment?

Past consent does not amount to present consent. In situations where employees have been involved in a relationship and the relationship breaks down, the person who may have initiated the breakup can expect to not be harassed. Ongoing consent or assurance that the behaviour is not unwanted would need to be secured between the individuals – to avoid behaviour that could amount to harassment.

10. How do we deal with online harassment in the age of social media?

Social media is an area where harassment takes place. Some of the concerns for employers would be whether the media is being accessed at the workplace, whether it has ties to the workplace, and the implications for their workers. There are some jurisdictional issues around this that are not entirely clear in the law. However, we do know that the Human Rights Tribunal of Ontario (HRTO) has ruled on a few different sexual harassment complaints and interpreted what it means to be “in the workplace.”

The scope of behaviour that is seen to be linked to the workplace is expanding. For example, if events that take place outside of the workplace – office parties, company trips, etc. – have a link to the workplace, they will be seen to be “in the workplace.”

And there have been complaints that deal with behaviours that are taking place online or through social media. What we would say to employers is to try – where you can – to monitor behaviour happening in the workplace to ensure that people's environments are not being poisoned by content accessed through social media.

11. How is the strategy for dealing with sexual harassment different for housing providers from an office or factory setting?

The responsibilities for organizations would be very similar in the employment context or in the housing context.

Housing providers must take proactive steps to make sure that sexual harassment does not take place on their premises. If sexual harassment occurs, they must take immediate steps to intervene and respond appropriately.

A housing provider may be responsible for discrimination or harassment arising from the acts of its employees or agents, whether or not the service provider had any knowledge of, participation in, or control over these actions.

12. What types of situation would require calling the police?

In more extreme cases, sexual harassment is a criminal offence. It is a crime if the harassment involves attempted or actual physical assault, including sexual assault, or threats of an assault. Stalking is a crime called “criminal harassment.” You may contact your local police service in situations involving any of these things.

13. If employers have questions that require a legal answer, do they contact the Human Rights Legal Support Centre?

No, they should get or seek the counsel of a lawyer.

14. How do you identify an “offensive” or “unwelcome” comment? What if the perpetrator makes a sexually suggestive comment that he or she meant as a compliment?

The test for sexual harassment has a subjective and objective component. This means that anyone who is attempting to determine whether harassment has taken place would consider two things:

- 1) how the person on the receiving end of the harassment perceived the behaviour (a subjective assessment)
- 2) what would a reasonable person think about the behaviour in question (an objective assessment)

The two perspectives would be considered in assessing whether harassment took place. Our policy offers an extensive [list of conduct and behaviours](#) found by tribunals and courts to amount to sexual harassment.

15. What are the time requirements to file a Human Rights Tribunal of Ontario (HRTO) application?

The *Code* makes it clear that an application (the complaint) should be filed within one year of the last incident of sexual harassment. In some cases, the HRTO has the

discretion to be flexible. In general, however, it is safe to assume that a complaint with the HRTO should be filed within one year after the date of the last incident.

16. Should the employer reach out to the potential victim or respondent even when the complainant has not come forward? (SEE QUESTION #3)

The Ontario *Human Rights Code* requires employers to prevent and respond to sexual harassment and poisoned environments. It is not acceptable to ignore sexual harassment, whether or not someone has formally made a complaint.

Poisoned environments may affect all people in the workplace – whether or not they themselves are on the receiving end of harassment. An employer should conduct an investigation to try and collect as much information about the situation as he or she can. Employers and other organizations have a responsibility to take proactive steps to make sure that sexual harassment is not taking place in their environments. The OHRC's *Policy on preventing sexual and gender-based harassment* outlines concrete steps that organizations should take.

17. Is sexual harassment a gender-specific issue?

No, it's not. Men have been on the receiving end of sexual harassment, and can file a human rights complaint if they feel they have been sexually harassed.

That being said, women are disproportionately affected by sexual harassment – international human rights conventions and Canadian legal decisions have recognized sexual harassment as an abuse of power that can reinforce a woman's historic lower status compared to men.

Sexual harassment can happen in all social and economic classes, ethnic groups, jobs and places in the community. A person may be more vulnerable to sexual harassment if they identify by other *Code* grounds such as race, sexual orientation, disability, etc.

18. How do we deal with same-sex harassment?

Sexual harassment can happen between people who are of the same sex. That does not affect whether or not a person can complain about sexual harassment, or the ways that the OHRC suggests that a person deals with it.

Employers, housing providers, educators and other responsible parties operating in Ontario have a legal duty to take steps to prevent and respond to sexual harassment – of all forms and between members of different gender identities and expressions.

Additionally, gender-based harassment is recognized as a form or subset of sexual harassment. Gender-based harassment is often used as a “gender policing” tool to try to enforce conformity with traditional sex-role stereotypes, or as a bullying tactic – often between members of the same sex.

19. Why is “sexual harassment” not simply called “harassment”?

Under the *Human Rights Code*, a person could be harassed because of any of the 17 grounds included in human rights legislation. The ground of sex is one of these grounds. Among the provisions in the *Code*, section 7 deals specifically with sexual harassment. It is distinct from harassment based on other *Code* grounds.

20. Should employers have their sexual harassment policy approved by the OHRC?

No, the OHRC does not approve policies. Having said that, the OHRC’s *Policy on preventing sexual and gender-based harassment* includes detailed guidance on what organizations should include in their anti-sexual harassment policies.

21. What happens when the harasser is from a third-party organization (e.g. contracted workers)?

Employers are responsible for the behaviour of third parties (including contracted workers and customers) within their environments, and may be held liable for their sexually harassing behaviour. For example, if external people coming in to do maintenance work are engaging in sexual harassment, the employer is responsible as part of their general obligation to maintain a harassment-and-discrimination-free work environment, and must address the behaviour immediately.

Employers, housing providers, educators and other responsible parties need procedures for dealing with sexual harassment by third parties. These procedures should show how people are expected to respond to the harassment, make sure that serious and/or ongoing problems are brought to the attention of those in charge, and that the people in charge take appropriate steps to assess the situation and take remedial action.

22. Why do some people wait so long before they complain?

There are many different reasons why some people don't report sexual harassment or it may take them some time to decide to report it.

Studies show that some of the reasons that people either don't report sexual harassment immediately or not at all are:

- they feel like they won't be believed, knowing it would be their word against the other person's word
- they feel that they would not be able to prove their case (e.g. no witnesses)
- they feel traumatized and don't want to relive the experience
- they worry it could jeopardize their career.

23. I think I am being sexually harassed. Who should I contact?

If you believe that you have experienced sexual or gender-based harassment, try, where possible, to resolve the problem through any internal policies or resolutions mechanisms your organization may have. If you are in a union, you may wish to contact your union for assistance. Using an internal mechanism does not always replace your right to file a human rights claim, or to proceed in other ways.

If you are being harassed (including sexual harassment) where you work, you may be able to have action taken under the *Occupational Health and Safety Act*. Contact Ontario's Ministry of Labour for more information.

In more extreme cases, sexual harassment is a criminal offence. It is a crime if the harassment involves attempted or actual physical assault, including sexual assault, or threats of an assault. Stalking is a crime called "criminal harassment." Where sexual harassment includes any of these things, you can contact your local police service.

If you think you have been a victim of sexual or gender-based harassment, you can make a complaint (called filing an application) with the Human Rights Tribunal of Ontario (HRTO). You will need to file this within one year of the last incident of sexual harassment. The Human Rights Legal Support Centre may help you file this application.

Many communities offer free services, support resources and helplines to women of all ages who have experienced, live with, or are in fear of violence. More information is available here: www.women.gov.on.ca/owd/english/ending-violence/help.shtml