

Prevention of Harassment and Violence in the Workplace - Legal Resources Manual



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Table of Contents

A. Legal Framework	2
i. Applicable Legislation	2
ii. Definitions.....	2
a. Harassment	2
b. Discriminatory Harassment	3
c. Sexual Harassment	5
d. Violence	5
e. Work Site, Worker, and Employer	6
iii. Employer and Worker Obligations.....	6
a. Employer Obligations.....	6
b. Supervisors and Manager.....	6
c. Worker Obligations	7
B. Workplace Violence and Harassment in Practice.....	8
i. How Harassment Manifests	8
ii. How Workplace Violence Manifests	9
iii. Management Decisions vs Workplace Harassment.....	10
iv. The Right to Refuse Unsafe Work	10
C. Workplace Violence and Harassment Policies and Procedures.....	11
i. The Harassment Policy	11
ii. The Workplace Violence Policy	13
iii. Addressing Violence and Harassment in the Workplace	15
a. Assessment of the Risks of Violence	15
b. Reporting Emergencies and Imminent Threats of Violence.....	15
c. Bringing a Violence or Harassment Complaint.....	15
d. Receiving a Complaint.....	16
e. Handling Complaints.....	16
f. Results from the Investigation	16
D. Practical Scenarios.....	18
E. Accommodation During an Investigation	20
F. Disclosure Protocol and Report & Referral Form.....	20

A. Legal Framework

Individuals have the statutory right to a workplace that is free from harassment. As a result, employers have a responsibility to put certain mechanisms in place to prevent, stop, and address harassment.

i. Applicable Legislation

Harassment in Nunavut is governed by various pieces of intersecting legislation. [The Nunavut Human Rights Act, SNU 2003 c.12](#), (the “HRA”) is applicable to all discriminatory harassment in Nunavut. The Nunavut [Safety Act, RSNWT \(Nu\) 1988 C s-1](#) (the “Safety Act”) and accompanying [Occupational Health and Safety Regulations, Nu Reg 003/2016](#) (the “OHSR”) have additional provisions pertaining to harassment that apply to the workplace (referenced as “work site” in the legislation).

Both the [Safety Act](#) and the [OHSR](#) were developed by the North West Territories in conjunction with Nunavut. The legislation is identical in both jurisdictions and the base [Safety Act](#) carries a North West Territories citation.

ii. Definitions

a. Harassment

The [OHSR](#) and the [HRA](#) define harassment as vexatious comments or conduct that is known, or ought to be known, to be unwelcome. As the [OHSR](#) is focused on safety in the workplace, it has the additional caveat that the conduct or comment at the work site must constitute a threat to the health or safety of a worker.

The test under both pieces of legislation is an objective one – whether the person knew or should reasonably have known that the conduct or comment was unwelcome or unsolicited.

For example:

The person knew the conduct or comment was unwelcome:

- When the worker responds or confronts the harasser immediately and negatively; or
- When the worker is visibly offended, humiliated, insulted or degraded by the conduct.

The person should reasonably have known the conduct or comment was unwelcome:

- When conduct is not in accordance with work site standards or policies; or
- When the harasser has previously engaged in similar conduct, for which the worker has indicated that it is unwelcome or unwanted.

It is important to note that while harassment at a work site generally involves repeated conduct, the [OHSR](#) does recognize that a single, serious incident of conduct may be considered harassment if such an incident causes lasting, harmful effect on the worker’s health and safety.

LEGISLATION

Human Rights Act, SNu 2003 c.12

1. “harass” means to engage in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome;

Occupational Health and Safety Regulations, Nu Reg 003/2016

Harassment

34. (1) In this section, “harassment” means, subject to subsections (2) and (3), a course of vexatious comment or conduct at a work site that

- (a) is known or ought reasonably to be known to be unwelcome; and
- (b) constitutes a threat at the work site to the health or safety of a worker. (*harcèlement*)

(2) To constitute harassment for the purposes of subsection (1), any one of the following must have occurred:

- (a) repeated conduct, comments, displays, actions or gestures; or
- (b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker’s health or safety.

(3) For the purpose of subsection (1), harassment does not include reasonable action taken by an employer or supervisor relating to the management and direction of the workers or of the work site.

b. Discriminatory Harassment

Discriminatory Harassment means any word, conduct or gesture that meets the general definition of Workplace Harassment but that refers to one of the personal characteristics that is protected by subsection 7(1) of the [HRA](#).

The enumerated grounds are:

- race;
- colour;
- ancestry;
- ethnic origin;
- citizenship;
- place of origin;
- creed;
- religion;
- age;
- disability;
- sex;
- sexual orientation;
- gender identity;
- gender expression;
- marital status;
- family status;
- pregnancy; or
- lawful source of income and a conviction for which a pardon has been granted.

Whether the person intended to discriminate on the basis of one of the enumerated grounds does not matter, all that matters is that discrimination occurred.

Further, subsection 7(6) of the [HRA](#) states that harassment based on a prohibited ground is not permitted in:

- the provision of goods, services, facilities or contracts;
- the provision of commercial premises or residential accommodation;
- in matters related to employment; or
- in matters related to membership in an employees' organization, trade union, trade association, occupational or professional association or society, employers' organization or co-operative association or organization.

If a worker is experiencing harassment on a prohibited ground, the employer is required to make sure there is protection in place for the employee, such as stopping the harassment and implementing the appropriate accommodation measures or corrective action. This obligation, although not codified, is based in the legislative requirement that an employer is responsible for ensuring the health and safety of their workers is not endangered.

LEGISLATION

[Human Rights Act, SNu 2003 c.12](#)

Prohibited grounds of discrimination

7. (1) For the purposes of this Act, the prohibited grounds of discrimination are race, colour, ancestry, ethnic origin, citizenship, place of origin, creed, religion, age, disability, sex, sexual orientation, gender identity, gender expression, marital status, family status, pregnancy, lawful source of income and a conviction for which a pardon has been granted.

Harassment

7. (6) No person shall, on the basis of a prohibited ground of discrimination, harass any individual or class of individuals

- (a) in the provision of goods, services, facilities or contracts;
- (b) in the provision of commercial premises or residential accommodation;
- (c) in matters related to employment; or
- (d) in matters related to membership in an employees' organization, trade union, trade association, occupational or professional association or society, employers' organization or co-operative association or organization.

Intent

8. Discrimination on the basis of one or more prohibited grounds is a contravention of this Act whether or not there is an intention to discriminate.

Employment

9. (1) No person shall, on the basis of a prohibited ground of discrimination,

- (a) refuse to employ or refuse to continue to employ an individual or a class of individuals; or
- (b) discriminate against any individual or class of individuals in regard to employment or any term or condition of employment, whether the term or condition was prior to or is subsequent to the employment.

Duty to Accommodate

(5) When a practice referred to in subsection (1) results in discrimination, in order for it to be considered to be based on a justified occupational requirement, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on a person who would have to accommodate those needs.

c. Sexual Harassment

Sexual harassment is a type of harassment, which is conduct, comment or gesture that is of a sexual nature and is offensive, unsolicited or unwelcome.

There are two potential types of sexual harassment. "Quid pro quo", which is sexual solicitation or advances by someone in a position to confer employment-related benefit (or deliver reprisal if solicitation is refused), and "Poisoned atmosphere", which is inappropriate comments, gestures, materials, propositions being present in the workplace.

"Of a sexual nature" covers a broad range of actions and comments, such as:

- physical contact,
- gestures or actions with sexual content,
- verbal conduct,
- denigration or insults based on gender.

d. Violence

Violence at a work site is defined under the [OHSR](#) to mean any attempted, threatened or actual conduct of an individual that causes, or is likely to cause injury. This will include threatening statements or behaviour that gives a worker a reasonable belief that they are at risk of injury.

LEGISLATION

[Occupational Health and Safety Regulations, Nu Reg 003/2016](#)

Violence

35. (1) In this section, "violence" means attempted, threatened or actual conduct of an individual that causes or is likely to cause injury, such as a threatening statement or behaviour that gives a worker a reasonable believe that he or she is at risk of injury.



e. Work Site, Worker, and Employer

In order for the [OHSR](#) to apply, the place where the harassment is occurring must be considered a “work site” under the [Safety Act](#). The definition of “work site” is quite general in the legislation as it encompasses any location where a worker is actually or likely to be engaged in work, or near where a worker is likely to be or is engaged in work.

A “worker” is also defined to encompass a broad spectrum of realities. It is simply defined as someone who is engaged in work, regardless of remuneration, for an employer.

The general wording of these provisions is very broad, and was likely drafted to reflect the vast array of transactions that take place in Nunavut, some of which may not constitute a typical employer/employee relationship. However, these definitions have not received judicial consideration to date, and as such, they should be interpreted broadly until the courts make any findings that would apply any limits or parameters to them.

LEGISLATION

[Safety Act, RSNWT \(Nu\) 1988 C s-1](#)

Definitions

1. In this Act,

“employer” means every partnership, group of persons, corporation, owner, agent, principal contractor, sub-contractor, manager or other authorized person having charge of an establishment in which one or more workers are engaged in work;

“establishment” means any work, undertaking or business carried on in Nunavut;

“work site” means a location where a worker is, or is likely to be, engaged in work, or a thing at, on, in or near which a worker is, or is likely to be, engaged in work;

“worker” means a person engaged in work for an employer, whether working with or without remuneration.

iii. Employer and Worker Obligations

There are various obligations for both employers and workers under [Safety Act](#) and the [OHSR](#) to create and maintain safe workplaces on both workers and employers. It must truly be a team effort.

a. Employer Obligations

The employer must take all reasonable steps to prevent and stop violence and harassment that is connected to the work site or a worker’s employment. What may be connected to the work site or the worker’s employment is broad, and includes:

- Incidents that may arise at the work site and during work hours;
- Incidents that occur between workers and non-workers with whom the worker interacts with in the course of their employment (i.e. contractor, visitor, customer); and
- Incidents that take place outside of the work site and after work hours, but that are connected to the worker’s employment (i.e. holiday party or a conference).

It is important to note that where the incident involves a worker and a non-worker, it is possible that the worker be the complainant or the alleged offender. It is also possible that the non-worker involved is a spouse or family member of the worker, and that such an incident stems from a personal conflict, such as domestic violence.

The [OHSR](#) also requires all employers to develop and implement a written harassment policy, and in some instances, a written violence policy, both of which will be discussed in greater detail later in the Manual.

b. Supervisors and Manager

Supervisors and managers are often the employer’s eyes and ears at a work site. They are also often identified in harassment policies as individuals to whom a worker can report a complaint of harassment.

As they play a leadership role in most organizations, best practice encourages employers to ensure that managers and supervisors play an active role in the prevention of workplace harassment. Employers should ensure that supervisors and managers receive training to:

- Ensure that supervisors and managers know and follow the harassment policy, and set a positive example of a respectful workplace that is free from harassment;
- Know how to engage workers in discussion and training on following the harassment policy;
- Report any incident or alleged incident of harassment promptly to the employer (or individuals identified in the harassment policy to receive complaints);
- Facilitate the resolution of harassment complaints where appropriate;
- Assist the employer in ensuring that workers who have made complaints or participated in complaint investigations are protected from reprisal and retaliation;
- Assist in providing workers with accommodation, as may be required, as a result of a harassment complaint or investigation; and
- Contribute to the implementation of corrective action where appropriate.

c. Worker Obligations

While the legislation provides workers with the right to employment that is free from harassment, practically speaking this responsibility falls to everyone in the workplace.

This includes ensuring that workers understand what behaviour might constitute harassment, and that they be required to follow the requirements of the harassment policy. They should receive training on the policy and be encouraged to report any incidents of harassment to the employer so that they can be promptly addressed.

LEGISLATION

Safety Act, RSNWT (Nu) 1988 C s-1

Duty of employer

4. (1) Every employer shall

- (a) maintain his or her establishment in such a manner that the health and safety of persons in the establishment are not likely to be endangered;
- (b) take all reasonable precautions and adopt and carry out all reasonable techniques and procedures to ensure the health and safety of every person in his or her establishment; and
- (c) provide the first aid service requirements set out in the regulations pertaining to his or her class of establishment.

Coordination of employers

(2) If two or more employers have charge of an establishment, the principal contractor or, if there is no principal contractor, the owner of the establishment, shall coordinate the activities of the employers in the establishment to ensure compliance with subsection 4(1). S.Nu. 2003,c.25,s.4.

Duty of worker

5. Every worker employed on or in connection with an establishment shall, in the course of his or her employment,

- (a) take all reasonable precautions to ensure his or her own safety and the safety of other persons in the establishment; and
- (b) as the circumstances require, use devices and articles of clothing or equipment that are intended for his or her protection and provided to the worker by his or her employer, or required pursuant to the regulations to be used or worn by the worker.

B. Workplace Violence and Harassment in Practice

i. How Harassment Manifests

Harassment can take many forms in the workplace, and is sometimes difficult to identify.

Harassment will generally include any inappropriate conduct or comment against a worker that is known, or ought reasonably to be known, to be unwelcome. Often, it occurs as a series of repeated incidents, but it is possible for one incident to be serious enough to constitute harassment. The comments or conduct at issue is generally personal in nature.

Examples of harassment may include, but are not limited to:

- Bullying;
- Jokes;
- Verbal or written threats or intimidation;
- Degrading or insulting comments, gestures or jokes;
- Isolation or sabotage of others;
- Destruction or interference with another's property; or
- Ridicule and gossip.

Harassment in the workplace will also include any form of retaliation or reprisal against an individual for having invoked a harassment policy, for having participated or co-operated in an investigation under a harassment policy, or for having associated with a person who invoked a harassment policy.

It is also very important to note that the conduct in question does not have to be intentional in order to constitute harassment.

Discriminatory Harassment generally means any conduct or comment that meets the definition of **Harassment**, but that refers to one of the prohibited grounds found in the [HRA](#):

...race, colour, ancestry, ethnic origin, citizenship, place of origin, creed, religion, age, disability, sex, sexual orientation, gender identity, gender expression, marital status, family status, pregnancy, lawful source of income and a conviction for which a pardon has been granted.

Many of the examples provided for Harassment, above, will be considered discriminatory harassment if they include a reference to one or more of these personal characteristics.

Sexual harassment means comments or conduct that meets the definition of Harassment, but that also includes elements of a sexual nature.

Examples may include, but are not limited to a direct or indirect invitation or request to engage in sexual acts or behaviour, displaying pictures or materials with sexual material, jokes of a sexual nature, unwelcome physical contact, or direct or implied threat of retaliation for refusing to engage with a sexual request.

It is also important to note that the conduct does not need to be directed at one particular person. Workers who make comments of an unwelcome sexual nature that are made openly at the worksite, or which are overheard by another person may also be considered sexual harassment.

ii. How Workplace Violence Manifests

Violence in the workplace generally manifests itself in three ways:

1. The exercise of physical force by a person against a worker, at a work site, that causes or could cause physical injury to the worker;
2. An attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to a worker; and
3. A statement or behaviour that is reasonably interpreted by a worker as a threat to exercise physical force against the worker, at a work site, that could cause physical injury to the worker.

Examples of behaviour, which could constitute violence at a work site include, but is not limited to:

- Physical or verbal assault or abuse which can include hitting, shoving, pushing, kicking or inappropriate physical closeness or contact;
- Threatening behaviour such as shaking fists, destroying property, throwing objects, derogatory or inappropriate jokes, verbal or written threats that can be insulting or taunting, swearing, condescending language or any expression of intent to inflict harm.

Violence in the workplace is not limited to actions or behaviour of a worker against another worker. Employers have a responsibility to take every reasonable precaution to ensure the health and safety of workers at a work site, including any risk of violence at a work site from a non-worker.

Workplace violence may also occur in the context of a personal or domestic dispute that finds its way to a work site.

Examples include:

- If an acquaintance of an employee attends the work site to claim money owing to them from a poker game over the weekend, and the acquaintance exercises physical force against the worker, the employer shall take every reasonable action to intervene (for example, call the police or security) and protect the worker.
- If an employer becomes aware of a situation of Domestic/Family Violence such that the employee is likely exposed to physical injury at the work site, the employer shall take every reasonable precaution to protect the worker.
- Domestic/Family Violence is widely understood to be a pattern of behaviour used by one person to gain power and control over another person with whom they have, or has had, a personal relationship.



iii. Management Decisions vs Workplace Harassment

Harassment, as defined under the [Safety Act](#) and the [OHSR](#), does not include any reasonable action taken by an employer or supervisor relating to the management and direction of the workers or of the work site.

Reasonable actions relating to the management of a work site generally consists of day-to-day management actions and decisions. These may include work assignments, job assessments or evaluations, offering constructive feedback, offering guidance or advice, workplace inspections, implementing or enforcing work site policies and procedures, and disciplinary action. Some of these managerial responsibilities may require sternness or objective criticism on the part of a manager or supervisor, particularly where disciplinary action is being imposed; however, they are not considered harassment.

Harassment arises in this context if there is an abusive or discriminatory element present. Examples include, but are not limited to the use of vulgar or degrading names when referring to workers, yelling, humiliating, berating, or deliberately making an employee feel insecure.

LEGISLATION

[Occupational Health and Safety Regulations, Nu Reg 003/2016](#)

Harassment

34. (3) For the purpose of subsection (1), harassment does not include reasonable action taken by an employer or supervisor relating to the management and direction of the workers or of the work site.

iv. The Right to Refuse Unsafe Work

Although the harassment provisions of the [Safety Act](#) and the [OHSR](#) have received no judicial consideration in Nunavut or the North West Territories, the Nunavut Court of Justice has determined the issue of whether harassment constitutes an unsafe working environment entitling workers to refuse unsafe work. Interestingly, the Court in Nunavut (Minister of the Environment) v ASCC¹ overturned the decision of a safety officer, who found that the harassment experienced by the worker constituted an unusual danger and as such, upheld the refusal to work. This decision happened before the implementation of the new [OHSR](#).

In overturning the safety officer's decision, the Court looked at whether harassment fell within the types of workplace dangers/health issues that the [Safety Act](#) contemplated as a basis for a work refusal.² The Court found that it did not. As such, the Court held that interpreting the legislation to include harassment as a justification for a refusal of work would not be appropriate given that work refusal is considered to be the most drastic of responses open to them under the legislation.³ The Court did not feel comfortable endorsing such an interpretation as it was not clear whether it was the intention of the legislature to include harassment as a workplace health and safety that would justify the refusal of work. The Court held that it is ultimately up to the legislature to decide whether to include harassment as a reason to refuse work, and further, it is best placed to determine how to do so. In making this determination, the Court placed a strong emphasis on jurisprudence from Ontario on this issue.

The Government of Nunavut has not explicitly included harassment as a reason to refuse work. The right to refuse unsafe work is outlined in subsection 13(2) of the [Safety Act](#) and it is mostly based on the presence of an unusual danger. Unusual danger is defined in subsection 13(1) as a danger that does not normally exist in that work, or a danger in which a person who is usually engaged in that work would not normally carry out the work.

It is likely that a worker will remain unable to refuse work on the basis that of harassment unless the legislation is amended or the actions of the harasser amount to workplace violence.

¹ Nunavut (Minister of the Environment) v WSCC, 2013 NUCJ 11.

² Ibid, at para 50.

³ Ibid, at para 76.

LEGISLATION

Safety Act, RSNWT (Nu) 1988 C s-1

Definition of “unusual danger”

13. (1) In this section, “unusual danger” means, in relation to any work,

- (a) a danger that does not normally exist in that work; or
- (b) a danger under which a person engaged in that work would not normally carry out his or her work.

Right to refuse work

(2) A worker may refuse to do any work where the worker has reason to believe that

- (a) there exists an unusual danger to the health or safety of the worker;
- (b) the carrying out of the work is likely to cause to exist an unusual danger to the health or safety of the worker or of any other person; or
- (c) the operation of any tool, appliance, machine, device or thing is likely to cause to exist an unusual danger to the health or safety of the worker or of any other person.

C. Workplace Violence and Harassment Policies and Procedures

i. How Harassment Policy

Under the [OHSR](#), employers are required to develop and implement a harassment policy within the workplace. The policy must include:

- a definition of harassment that is consistent with the [OHSR](#);
- a statement that each worker is entitled to be free of harassment;
- a commitment from the employer that it will make every reasonable effort to ensure that workers are not subjected to harassment;
- a commitment that the employer will take corrective action with respect to any individual who subjects a worker to harassment;
- a commitment that the employer will make every reasonable effort to ensure that workers who bring forward harassment complaints, or who participate in the investigation of such complaints, will not be subject to retaliation or reprisal;
- an explanation of how harassment complaints will be brought to the attention of the employer;
- an outline of the procedure in place to address harassment complaints;
- a statement that the employer will not disclose the name of a complainant, or alleged harasser, or circumstances relating to the complaint to a person unless it is necessary for the purposes of investigating the complaint or required by law;
- a description of the procedure that the employer will follow to inform the complainant and alleged harasser of the results of an investigation; and
- a statement that the employer’s harassment policy is not intended to discourage or prevent a complainant from exercising other legal rights.

It is generally best practice to consult the employer's Joint Health and Safety Committee, if there is one at the work site, while developing the harassment policy in order to determine the appropriate procedures to prevent and address harassment are implemented at each work site.

It is also best practice for employers to look beyond the specific legal requirements outlined in the legislation to ensure that they are doing everything possible to create a healthy, safe, and respectful workplace.

LEGISLATION

Occupational Health and Safety Regulations, Nu Reg 003/2016

Harassment

- 34. (4)** An employer shall, in consultation with the Committee or representative, or, if no Committee or representative is available, the workers, develop and implement a written policy that includes
- (a)** a definition of harassment that is consistent with subsections (1), (2) and (3);
 - (b)** a statement that each worker is entitled to work free of harassment;
 - (c)** a commitment that the employer will make every reasonable effort to ensure that workers are not subjected to harassment;
 - (d)** a commitment that the employer will take corrective action respecting any individual who subjects any worker to harassment;
 - (e)** an explanation of how harassment complaints may be brought to the attention of the employer;
 - (f)** a statement that the employer will not disclose the name of a complainant or an alleged harasser or the circumstances relating to the complaint to a person unless disclosure is (i) necessary for the purposes of investigating the complaint or taking corrective action with respect to the complaint, or (ii) required by law;
 - (g)** a description of the procedure that the employer will follow to inform a complainant and alleged harasser of the results of an investigation; and
 - (h)** a statement that the employer's harassment policy is not intended to discourage or prevent a complainant from exercising other legal rights.
- (5)** An employer shall make readily available to workers a copy of the policy required under subsection (4).

ii. The Workplace Violence Policy

Under the [OHSR](#), the legislature has identified various types of work sites where violence may reasonably be expected to occur. These include work sites which provide health care services, pharmaceutical dispensing services, police services, security services, financial services, sell alcoholic beverages, taxi and transit services, among others.

At a work site where violence has occurred, or could reasonably be expected to occur, the [OHSR](#) requires employers to develop and implement a written policy to deal with potential violence at the worksite. The policy must include:

- a commitment that the employer will eliminate or reduce the risk of violence at the work site;
- the identification of the work site or work sites where violence has occurred or could reasonably be expected to occur;
- the identification of staff positions at the work site that were, or could reasonably be expected to be, exposed to violence;
- the procedure to be followed by the employer to inform workers of the nature and extent of risk from violence, including information in the employer's possession about the risk of violence from individuals who have a history of violent behaviour and whom workers are likely to encounter in the course of their work, unless the disclosure is prohibited by law;
- the actions the employer will take to eliminate or reduce the risk of violence, including the use of personal protective equipment, administrative arrangements and engineering controls;
- the procedures to be followed by a worker who is exposed to violence to report the incident to the employer;
- the procedure the employer will follow to document and investigate violence reported under paragraph (f);
- a recommendation that a worker who has been exposed to violence consult the worker's physician for treatment or referral for post-incident counselling;
- the employer's commitment to provide training programs for workers that include
 - the means to recognize potentially violent situations,
 - procedures, work practices, administrative arrangements and engineering controls to eliminate or reduce the risk of violence to workers,
 - the appropriate responses of workers to violence, including how to obtain assistance, and
 - procedures for reporting violence.



LEGISLATION

Occupational Health and Safety Regulations, Nu Reg 003/2016

Violence

35. (2) For the purposes of this section, work sites where violence may reasonably be expected to occur include work sites that provide the following services or activities:

- (a) services provided by health care facilities as defined in section 463;
- (b) pharmaceutical dispensing services;
- (c) educational services;
- (d) police services;
- (e) corrections services;
- (f) other law enforcement services;
- (g) security services;
- (h) crisis intervention and counselling services;
- (i) financial services;
- (j) the sale of alcoholic beverages or the provision of premises for the consumption of alcoholic beverages;
- (k) taxi services;
- (l) transit services.

(3) An employer shall, at a work site where violence has occurred or could reasonably be expected to occur, after consultation with the Committee or representative or, if no Committee or representative is available, the workers, develop and implement a written policy to deal with potential violence.

(4) The policy required by subsection (3) must be in writing and must include

- (a) a commitment that the employer will eliminate or reduce the risk of violence at the work site;
- (b) the identification of the work site or work sites where violence has occurred or could reasonably be expected to occur;
- (c) the identification of staff positions at the work site that were, or could reasonably be expected to be, exposed to violence;
- (d) the procedure to be followed by the employer to inform workers of the nature and extent of risk from violence, including information in the employer's possession about the risk of violence from individuals who have a history of violent behaviour and whom workers are likely to encounter in the course of their work, unless the disclosure is prohibited by law;
- (e) the actions the employer will take to eliminate or reduce the risk of violence, including the use of personal protective equipment, administrative arrangements and engineering controls;
- (f) the procedures to be followed by a worker who is exposed to violence to report the incident to the employer;
- (g) the procedure the employer will follow to document and investigate violence reported under paragraph (f);
- (h) a recommendation that a worker who has been exposed to violence consult the worker's physician for treatment or referral for post-incident counselling;
- (i) the employer's commitment to provide training programs for workers that include
 - (i) the means to recognize potentially violent situations,
 - (ii) procedures, work practices, administrative arrangements and engineering controls to eliminate or reduce the risk of violence to workers,
 - (iii) the appropriate responses of workers to violence, including how to obtain assistance, and
 - (iv) procedures for reporting violence.

iii. Addressing Violence and Harassment in the Workplace

It is not unusual for employers to develop one policy to address both harassment and violence in the workplace.

All allegations of violence and harassment must be addressed pursuant to the legislative requirements and the employer's policy. It is important that employers follow the policy and procedure that they have put in place, as this allows for all complaints to be addressed in a manner that is consistent, fair, and effective.

How a complaint is brought, how one is to be received, and how it is handled will be dictated by the formal policy in each particular work site, as required under the [OHSR](#). The policy should be reviewed regularly with all employees, and should be easy for them to locate.

a. Assessment of the Risks of Violence

Under the [OHSR](#), employers must assess the risks of workplace violence that may arise at a particular work site, and should conduct reassessments of these risks as often as necessary to ensure the ongoing safety of its workers.

Employers must also generally ensure that workers are informed of the nature and extent of risk from violence. The information provided to a worker may include personal information related to a risk of workplace violence from a person with a history of violent behaviour if the employee can be expected to encounter that person in the course of his or her work and the risk of workplace violence is likely to expose the employee to physical injury. The employer, however, will not disclose more personal information than is reasonably necessary to protect the employee from physical injury.

If an employer is aware that a situation of domestic/family violence is likely to expose a worker to physical injury, and there is a risk that such injury may occur at the work site, the employer's obligations under the [OHSR](#) remain to take every reasonable precaution to protect the employee.

b. Reporting Emergencies and Imminent Threats of Violence

As part of the policy on violence in the workplace, included should be the proper procedure for the reporting of emergencies and imminent threats of violence.

Workers should not ignore threatening or violent behaviour at a work site, whether on the part of a colleague or a non-worker (i.e. visitor, client, customer, contractor, etc.). Workers who experience or witness violence, or threats of violence, should immediately report the situation to a supervisor, security or someone in authority.

If it is an active situation, the worker should immediately call the RCMP.

c. Bringing a Violence or Harassment Complaint

Workers who feel they have been involved in a situation of workplace violence or harassment, and wish to bring forward a complaint, should be able to obtain clear information on how to do so in the employer's policy. The policy should clearly advise workers on how these complaints should be brought to the employer's attention.

Most often, employers are encouraged to bring a complaint to their direct supervisor or manager. If the direct supervisor or manager is the alleged offender, the policy should provide for clear alternatives. This might include any other supervisor or manager in the workplace, the human resources department, or in-house legal counsel.

It is important to note that in the event a worker brings forward a violence or harassment complaint, but then wishes to withdraw the complaint before it has been resolved or fully investigated, the employer may be obligated to continue investigating the complaint, depending on the circumstances. This goes to an employer's duty to ensure a safe and respectful work site for all workers.

d. Receiving a Complaint

The person who is receiving the complaint ought not to discourage the worker or prevent the worker from pursuing any of their legal rights. It is the responsibility of the individual receiving the complaint to ensure that it is taken seriously and escalated in accordance with the policy.

If the individual receiving the complaint is identified in the policy, they are required to carry out the duties that are assigned to them under the policy. If the person receiving the complaint is not a manager or supervisor, or is not identified under the policy, that individual – be it another worker at the work site – should be encouraged to report the complaint appropriately so as to ensure it is properly addressed.

Where the individual receiving the complaint is a manager or supervisor, it is important that they immediately report the complaint to the appropriate individuals under the policy. The failure to do so in some jurisdictions has resulted in penalties under occupational health and safety legislation for the employer.

e. Handling Complaints

The employer's policy should clearly outline the various options available to the employee and the employer to deal with the violence or harassment complaint. This will often include an informal procedure and a formal procedure.

The **informal procedure** often includes the provision of advice, and alternate dispute resolution. It may involve providing the complainant with advice and tips on how to address the issue with the alleged offender directly. It may also provide for informal meetings or mediation between the parties involved so that they may work together to come to a resolution such that the offensive behaviour ceases to continue.

In some instances, the informal procedure does not resolve the situation. In others, the complainant may request to make a **formal complaint**.

The employer's policy should outline what is required to make a **formal complaint**. Often, this will include putting the allegations in writing but this is not always required.

Upon a review of the allegations, if the employer is of the view that the allegations fall within the violence or harassment policy, the employer must first consider whether or not immediate action is required to protect the complainant or others while the investigation is conducted. This might be required where there are legitimate concerns of continued harassment or threats of violence, or where there is concern of reprisal. Examples might include a temporary reassignment of the complainant's duties if the alleged offender is their direct supervisor, or a paid leave of absence. This may also mean, where appropriate, a paid suspension of the alleged offender until the investigation has been concluded.

The policy and investigation process contained within the policy should also clearly address confidentiality throughout the investigation. This includes interviewing only those witnesses necessary to further the investigation, and clearly ensuring that those involved understand that the process and information discussed must be kept confidential.

f. Results from the Investigation

Most violence and harassment policies will require that an investigation report be produced. This report is generally confidential, and will include:

- an outline of the steps taken by the investigator throughout the investigation;
- a summary of the allegations;
- a summary of the alleged offender's response to the allegations;
- an overview of the information obtained from witness interviews; and
- any additional evidence gathered.

The investigation report will then make findings of fact and draw conclusions as to whether workplace violence or harassment is found to have occurred or not. The investigation report is generally provided to a designated person under the policy.

Additionally, violence and harassment policies will provide for a mechanism by which the results of an investigation will be communicated to the complainant and the alleged offender. In order to ensure confidentiality, the investigation report is generally not provided to the complainant or alleged offender. Rather, a summary of the findings are provided.

If the investigation determines that there has been violence or harassment at the work site, the employer will then need to determine what actions are required to ensure that the behaviour ceases and that it does not reoccur. This might include corrective action and/or disciplinary action, including but not limited to:

- A formal apology to the person who was affected;
- Counselling/Training for the employee at fault;
- Written warning in the employee's file;
- A change in reporting structure;
- Referral to an assistance program;
- Suspension or termination of employment;
- Reassignment or relocation; or
- Any other measure deemed appropriate by the employer.

If the investigation determines that there has been no violence or harassment, there should be no consequence to the complainant so long as the complaint was made in good faith. Complaints that are found to be spiteful, or where it is found that the complainant knowingly lied when bringing forward a complaint, may lead to discipline or corrective action for the complainant.



D. Practical Scenarios

Harassment is not always easy to identify. We invite you to review and discuss the following scenarios. Might they constitute harassment? Why or why not? If they do constitute harassment, what might the worker do?

The performance review

Mario gives Sylvia a negative performance rating. He expressed himself firmly but respectfully. He objectively lists everything Sylvia needs to improve to stay with the organization. Sylvia cries the rest of the day and is afraid to see Mario.

Is this harassment? **Likely No**

This is likely not harassment as it is the exercise of management rights carried out in a non-abusive fashion.

The monitoring of a colleague

Olivia monitors all of her colleague Julie's e-mails. She constantly surprises her in her office to watch what she does and times her lunch hours. She tells everyone what Julie ate for lunch and laughs at her culinary choices.

Is this harassment? **It is possible.**

Olivia's monitoring of Julia's activities is likely exaggerated and unfounded.

The spontaneous massage

Sabrina previously studied massage therapy. She loves using her talents on her colleague, Francis. She gives him several neck massages a day, without asking him for permission. According to her, he is simply too shy to ask her, but as he does not reject her, it is clear that he enjoys it.

Is this harassment? **It is possible.**

It is possible that this amounts to harassment. Just because Francis does not say anything to Sabrina does not mean it is not harassment. Massaging colleagues is not normal workplace behaviour, and Francis may feel deeply uncomfortable.

The chronically late employee

Matt is always late. He is disciplined for this behaviour. He apologizes and indicates that he does not intend to be late. Disciplinary measures are imposed nevertheless.

Is this harassment? **No**

The disciplinary measures do not amount to harassment. Even if Matt disagrees with the discipline imposed, it is not considered harassment as the employer is exercising their management rights.

Personality Conflict

David and Kim do not get along. They constantly argue about everything, and since they work in the same department, they are in frequent contact. Each exchange ends in a verbal fight, and the two are very clear to the effect that they are unable to work together.

Is this harassment? **No**

This would likely not be considered harassment as personality conflicts or disagreements between two colleagues does not constitute harassment.

Office Crush

Ben likes Laura. He often compliments her, invites her out for dinner, and tells her that they would make a great couple. He even bought her flowers on Valentine's Day. He is determined to make Laura his girlfriend.

Is this harassment? **It is possible.**

If Ben's advances make Laura uncomfortable, if she asks him to stop, or if he is too intrusive or too persistent, it may constitute harassment. However, it is also possible that Laura is happy with Ben's advances and gladly accepts his invitation.

The Office Clique

Antoine is a new employee. Justine, who knew him from before as they have friends in common, does not like him at all. She warns all her colleagues not to be friends with him, not to invite him to any socials, and she turns her back on him or ignores him when he tries to intervene in conversations. She simply does not like his personality and wants her colleagues to be loyal to her.

Is this harassment? **It is possible.**

Justine is isolating, discrediting, excluding and sullyng Antoine's reputation. This behaviour, particularly if repeated, can constitute harassment.

The Office Email

Damian sends an email to several colleagues, which contains inappropriate racist and sexist jokes. Shirley finds them to be offensive.

Is this harassment? **It is possible.**

While Damian likely means no harm or offence in circulating these jokes, we know that at least one of his colleagues, Shirley, has found them to be offensive. Damian must take care to ensure that his conduct – the circulating of these jokes – is not offensive to others. They could well constitute harassment.

Text Messages between Colleagues

Cindy and Bobby work together. Cindy gave Bobby her personal cell number because he came to her house on the weekend to pick up a couch he had bought from her. Since giving him her number, Bobby sends Cindy text messages commenting on how she looks every day and that he would like to go out with her. Cindy sometimes receives these text messages at work, but they mostly occur in the evenings and on the weekends. They make Cindy uncomfortable.

Is this harassment? **It is possible.**

Even if Bobby is unaware that his text messages to Cindy are unwelcome, Cindy finds them to be offensive. Even though the majority of the text messages are sent outside of work hours, and on personal phones, Cindy and Bobby are coworkers and Cindy is now uncomfortable around Bobby in the workplace.

Threatening Phone Calls at Work

Jill shares an office with Bernadette. Several times during the day Bernadette receives threatening phone calls from her boyfriend. Bernadette shared a voicemail with Jill where her boyfriend threatened to come to the office if she didn't return home that evening. Bernadette says she is embarrassed and doesn't want anyone to know about the calls. Jill is concerned about what might happen if Bernadette's boyfriend shows up.

What should Jill do?

Even though Bernadette's boyfriend is not an employee, his threatening phone calls may put Bernadette (or other employees) at risk in the event that he does show up. It is evident that both Jill and Bernadette are concerned. This situation would likely constitute a threat of violence such that it should be reported to the employer in accordance with the workplace violence policy.

E. Accommodation During an Investigation

When a workplace violence or harassment complaint is made, employers should immediately consider whether any accommodation is necessary while the investigation is ongoing.

Generally, at the outset of an investigation, consideration should be given to whether any accommodation measures are required for the complainant, particularly if they normally work closely with, or report to, the alleged offender.

Examples of accommodation measures might include:

- A temporary transfer of the complainant to another work site or department;
- Leave with pay if the complainant is unable to attend the work site (i.e. for medical reasons associated with the allegations);
- Temporary suspension with pay of the alleged offender so as to remove them from the work site;
- Temporary change in work schedules or shifts such that the complainant and respondent do not work at the same time;

Depending on the circumstances, it may also be necessary for the employer to consider accommodation measures at the conclusion of a workplace investigation.

For example, the complainant may require a gradual and supported return to work, with the assistance of counselling or other supports. It is also possible that the complainant remain in another department or at another work site long term, particularly if the alleged offender was their supervisor at the time the complaint was brought forward.

F. Disclosure Protocol and Report & Referral Form

Protocol – Referrals & Information Management

Purpose:

- To establish a procedure to ensure that workshop participants and facilitators understand the importance of open sharing and respect while being explicit about the public nature of the workshops and limited confidentiality that applies in a public workshop setting;
- To confirm that, in the context of the summary legal advice sessions a solicitor-client relationship exists, and to review the rules and obligations that arise in the context of this relationship;
- To highlight the duty to report information that a child is in need of protection to family services⁴;
- To establish a referral procedure to connect workshop participants/clients with legal and health supports and services; and
- To affirm the need for careful record keeping and information management.

This protocol is not intended to teach workshop facilitators or lawyers how to intervene in sexual harassment/violence or mental health situations, nor how to do assessments or write incident reports.

Community Workshops:

Interactive community workshops will be conducted with one or more community partners. Lawyers acting as facilitators will disseminate information about healthy workplaces, the rights of workers, and obligations of employers and workers when it comes to sexual harassment and other forms of harassment in the workplace. The workshops are intended to be interactive. Collaborative learning will be encouraged, and participants included at various stages of learning. Participants will be encouraged to share knowledge and learn from lived experiences. Participants may reveal information that generates a referral to services or raises reporting obligations on the part of the workshop facilitators.

⁴ See Section 8 of the *Consolidation of the Child and Family Services Act*, S.N.W.T. 1997, c. 13.

To create a safe space for sharing it will be important for facilitators to lead a discussion with the group at the beginning of the session. The discussion should set 'rules' the group agrees to follow and should be guided by the following considerations:

- Facilitators are encouraged to 'close' the group to new joiners once the workshop has begun. This avoids disruption and repetition.
- The workshops are not confidential in the legal sense. Nonetheless, facilitators should encourage the group to agree that the information shared during the workshops will not be talked about by participants outside the workshop. What is said in the group stays with the group.
- Facilitator should explain that the only exception to this rule is the duty to report to family services if the information shared during the workshop reveals a situation where a child is in need of protection.
- Facilitators should be careful to also affirm that this agreement is not legally binding. If someone in the group breaks the group's trust by sharing information heard during the workshop with others outside the group, the Law Society of Nunavut will not step-in to take action against this person.
- Facilitators should also explain that in addition to the community workshops, individual legal advice sessions will be available to discuss issues of harassment and other workplace issues. Those free legal advice sessions are private and confidential.
- If a concern cannot be addressed within the scope of the workshop, facilitators will provide referrals and information about other available legal and health supports.

Duty to Report that a Child is in Need of Protection

- Everyone has a duty to report that a child is in need of protection. This duty is set out in the *Child and Family Services Act (CFSA)* section 8(1):

A person who has information of the need of protection of a child shall, without delay, report the matter (a) to a Child Protection Worker; or (b) if a Child Protection Worker is not available, to a peace officer or an authorized person.
- A Child is any person who appears to be under the age of 16 years.
- Section 7(3) of the CFSA details the many circumstances that define a child in need of protection. Lawyers are encouraged to review the section and be familiar with it. The circumstances listed therein include physical, psychological, emotional or sexual harm (or the substantial risk thereof) inflicted by a parent or caused by a parent's inability or unwillingness to adequately provide for or protect or supervise the child. If the concern relates to the actions of a third party (i.e. an employer) – the child may be in need of protection because of the parent's inaction.
- This protocol affirms the duty to report but it is important to be mindful that it is not the facilitator's job to investigate. It is important that the investigation be done by a trained professional. The obligation is to report to a Child Protection Worker or RCMP officer and to document the report.
- There are no legislative requirements detailing what should be included in the report. The following basic information is likely to assist the Child Protection Worker or Peace Officer in conducting their investigation:
 - The child's name and location;
 - Whether there are any immediate concerns about the child's or youth's safety;
 - Why you believe the child or youth is at risk;
 - Any statements or disclosures made to you.
- The fact of the report and information conveyed must be documented on the LSN Report and Referral Form.

Referrals under the Mental Health Act

- Facilitators should also be aware of the provisions of the *Mental Health Act*.⁵ While there is no duty or obligation to report, the Act does authorize a peace officer (section 11), or a private person if a peace officer is not available and it would be unreasonable to delay (section 12), to take a person into custody and then without delay to a medical practitioner or hospital for the purpose of undergoing a psychiatric assessment where there are reasonable and probable cause to believe that the person:
 - Has threatened or attempted or is threatening or attempting to cause bodily harm to him/herself
 - Has behaved or is behaving violently toward another person or has caused or is causing another person to fear bodily harm from him/her
 - Has show or is showing lack of competence to care for him/herself.
- While the legislation does not explicitly set out a temporal test for “has” there is arguably an implied immediacy given that these provisions provide for immediate apprehension and an involuntary assessment.
- A referral under the MHA involves a deprivation of liberty. It should be used as an option of last resort.

Summary Legal Advice:

Lawyers will be retained by the LSN to provide summary legal advice when in communities. It is during these sessions that community members may seek and obtain free legal advice. As such all rights, responsibilities, and obligations that arise in the solicitor-client context apply.

- Lawyers retained to provide advice must maintain adequate professional liability insurance throughout their involvement with the project and for a period of at least 12 months after the completion of their mandate. Lawyers should consult with the LSN if there is any question about the required liability insurance relating to this project.
- Communications with your client for the purpose of giving legal advice are covered by solicitor-client privilege.
- The duty of confidentiality applies to the summary legal advice sessions offered in this project. There are very limited and rare exceptions to this rule. This ethical rule is wider than the evidentiary rule of solicitor and client privilege.⁶
- You should explain both solicitor-client privilege and a lawyer’s duties of confidentiality and loyalty to your client.

Duty of Confidentiality:

Rule: The ethical duty of confidentiality extends to all information you learn working for and with a client. It is a duty owed by lawyers to clients. It arises because of the professional relationship. The duty is enshrined in the *LSN’s Code of Professional Conduct* (section 3.3 Rules and Commentary)⁷.

Not only is a lawyer obligated not to divulge confidential information but must protect it from inadvertent disclosure. The duty extends to the secure storage of confidential information.

Confidential information may be divulged where expressly or impliedly authorized by the client. Generally, disclosure or use of confidential information is impliedly authorized where patently necessary to fulfill the lawyer’s mandate. That being said, express authorization should be obtained where disclosure may bring adverse consequences.

Exceptions: Among the limited exceptions to this rule the Future Harm/Public Safety Exception could arise. Such situations will be rare. This exception is recognized in the *LSN’s Code of Professional Conduct*: “A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.”

⁵ *Mental Health Act*, RSNWT (Nu) 1988, c M-10. A new MHA is currently before the Nunavut Legislature (Bill 36). The provisions of the Bill do not impose a Duty to Report but do provide for an expanded role for non-peace officers in the assessment process.

⁶ The legal principles and exceptions summarised in this protocol are those that are relevant to, and could possibly arise, in the context of this project.

As members of the LSN and the legal profession the lawyers retained for this project are presumed to know and understand all their ethical and legal obligations.

⁷ <https://www.lawsociety.nu.ca/en/society-rules-and-policies>

The SCC in *Smith v. Jones*⁸ noted that serious bodily harm includes psychological harm. Disclosure should be limited to the information which indicates that the preconditions for disclosure exist. The rule is permissive not mandatory. If a lawyer believes that disclosure may be warranted it is recommended that ethical advice be sought from the Law Society or if practicable a judicial order sought.

Solicitor-Client Privilege:

Rule: Solicitor-client privilege is an evidentiary rule of law and a protected right. It attaches to communications between a lawyer and a client. It provides a legal right to withhold otherwise relevant information from the court or an opposing party. All communications between a lawyer and client are confidential but not all are privileged.

The SCC in *Pritchard v Ontario (HRC)*⁹ has said that for solicitor and client privilege to apply, the party asserting the privilege must establish the communication meets the following criteria: (a) the communication was between a solicitor and client; (b) it must entail the seeking of legal advice; and, (c) the advice sought must be intended to be confidential by the parties. There is no requirement that the communication be related to litigation: it covers any consultation for legal advice.

Exceptions & Exclusions: To apply a lawyer must be providing legal advice or otherwise acting as a lawyer. Lawyers hired by LSN to conduct the workshops are providing legal information to the participants but are not providing legal advice. The workshop participants are not clients and no professional relationship is created.

Beyond the technical limits of the privilege, there are also limited circumstances where solicitor-client privilege will not apply.

Child in Need of Protection:

- Information disclosed in the context of a legal advice session is not subject to a mandatory disclosure obligation (s. 8(4) CFSA) as the information is cloaked with solicitor-client privilege.

Disclosure of Notes and Records:

- Lawyers retained to provide legal services in the context of this project are required to maintain files. All information and documents must be stored in a secure manner and retained for at least six (6) years following completion of the work for which the lawyer was retained.¹⁰
- If a client is later involved in a court case the lawyer's records (notes, recordings, etc.) could be subpoenaed and may be ordered disclosed by the Court. Disclosure is unlikely as records/notes made during a legal advice session are very likely protected by solicitor/client privilege. The Lawyer should advise the LSN as soon as practicable if an Application for records is initiated.
- Any decision regarding the disclosure of information and waiver belongs to your client and not to you as the lawyer or to any family members.
- Your client may choose to share information with family and may authorize you to do so, but this must clearly be the client's choice and only after you are satisfied that your client understands your duties. It is good practice to make a careful note of any authorization to disclose and if possible, obtain written instructions.
- When further assistance is provided in the form of a referral to support or other services the attached LSN Report and Referral Form must be completed and included in the file.

⁸ *Smith v. Jones*, [1999] 1 S.C.R. 455.

⁹ *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809.

¹⁰ Section 80.7 Rules of the Law Society of Nunavut.

Documentation

Reporting & Disclosure Guidelines:

During the workshops it is possible that a participant will disclose that they have experienced or witnessed violence, harassment, or abuse. If this information is shared the following protocol applies:

- Avoid giving advice but be prepared to listen and provide support.
- Find a time away from other participants to have a conversation.
- Ask questions but only get the essential facts. Your job is not to investigate but to get enough information to understand the issues to determine if there is a legal duty to report or if a referral is appropriate.
- When obtaining information ask open questions. These are who, when, what, and how questions.
- Make a support and referral plan. Remind them that you are not the expert but offer to put them in touch with resources that can help.
- Discuss what you think will happen next and who will be involved.
- Make notes. As soon as possible after the disclosure, write down as much as you can of what the participant told you. This will help ensure accuracy when reporting to the appropriate authority. Use the Report and Referral Form attached to this protocol.
- If in any doubt a referral or report consult the LSN and project managers.

Resources

Prior to arriving in the community workshop facilitators and lawyers should familiarise themselves with the available supports in the community and/or region including after-hours and emergency contacts. The Community Workshop Program provides a list of resources. In addition, available resources include

- Community Justice Outreach Worker
- Community Social Services Worker
- Community Health Services (including Mental Health Workers)
- Family Services Office
- Victim Services Office
- RCMP Detachment

Nunavut operates family violence shelters in only some communities. If there is no Family Violence Shelter in the community, the Community Social Services Worker or Community Justice Outreach Worker can assist in identifying the nearest place of safety.

Up to date information should confirmed prior to the workshop/legal advice sessions:

<https://www.gov.nu.ca/justice/information/community-justice-outreach-workers>

<https://www.gov.nu.ca/family-services/information/family-violence>

<https://www.gov.nu.ca/health/information/health-centres> <https://gov.nu.ca/sites/default/files/Social-Services-Offices.pdf>

Facilitators should also be familiar with helplines and crisis counsellors:

<https://www.gov.nu.ca/health/information/mental-health-0>

Kamatsiaqtut Help Line:

1-867-979-3333
Toll-free at 1-800-265-3333
<http://nunavuthelpline.ca/>

Kids Help Phone:

1-800-668-6868 (24 hours)
Text "TALK" to 686868 to reach
a counsellor

NWT Crisis Line:

1-800-661-0844 (9 p.m. -1 a.m. ET)

Referral To Services :

Agency: _____

Contact Name: _____

Contact Information: _____

Referral To Services :

Agency: _____

Contact Name: _____

Contact Information: _____

Referral To Services :

Agency: _____

Contact Name: _____

Contact Information: _____

Referral To Services :

Agency: _____

Contact Name: _____

Contact Information: _____

Referral To Services :

Agency: _____

Contact Name: _____

Contact Information: _____



Access to Justice
Prevention of Harassment