

Submission to the Education and Workforce Committee on the

Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Bill

Submitted by the New Zealand Council of Trade Unions Te Kauae Kaimahi, P.O Box 6645, Wellington
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1. Executive summary

- 1.1. This submission is made on behalf of the 28 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 300,000 members, the CTU is one of the largest democratic organisations in New Zealand.
- 1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.
- 1.3. The CTU welcomes the opportunity to submit before the Select Committee on the **Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Bill** (the Bill). This proposed legislation touches on some extremely important matters relating to the rights of working people, particularly their fundamental right to access justice. This Bill represents a positive step for workers in Aotearoa/ New Zealand and, it is our hope that discussion around this Bill will draw lawmakers and the public into deeper conversations about how the

‘personal grievance’ process can be improved as a tool for enabling working people to pursue their rights.

2. Introduction

2.1. The CTU strongly endorses the underlying principle of Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Bill.

2.2. The need for extending the timeframe for raising personal grievances in cases where sexual harassment is involved is accurately summed up in the General Policy Statement of the Amendment Bill where it states:

“Coming forward to report sexual harassment can be difficult, and it is common for victims of sexual harassment to wait a long time before coming forward, if at all.

For a person who has been the subject of sexual harassment, 90 days may not be enough as it can take people some time to consider what has occurred and feel safe to raise it with others. This deadline imposes an arbitrary deadline on victims of workplace sexual harassment and makes it less likely they can formally raise concerns about the behaviour of colleagues.”¹

2.3. We agree that the 90-day timeframe for raising personal grievances imposes an ‘arbitrary deadline’ for workers who seek to assert their employment rights. The restrictiveness of this deadline is acutely problematic for workers who face workplace sexual harassment and presents these workers with a serious obstacle to justice.

2.4. The passing of this Bill will improve the grievance experience for workers who experience workplace sexual harassment. It is a first step in recognising that an arbitrary and restrictive timeframe is not conducive to justice, especially where the nature of the grievance requires that the victim take more time to properly consider their situation before deciding to come forward.

2.5. While affirming the positive direction of the Bill, this submission makes several recommendations that will ensure that the Bill better fulfils its policy objective.

¹ Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Bill 2022 (87-1) (explanatory note) (pg. 1)

- 2.6. We also emphasise that there remain issues with the arbitrary nature of the 90-day timeframe that impact the ability of all workers to access justice.

3. Timeframe and sexual harassment

- 3.1. Victims of workplace sexual harassment are less likely to report their experiences and are less likely to pursue justice².
- 3.2. Yet, despite a lack of reportage, visibility and access to justice, sexual harassment is an entrenched feature of working life with a majority of workers experiencing sexual harassment in their lifetime.³
- 3.3. The prevalence of sexual harassment in society and the workplace highlights systemic inequality and deeper societal issues of discrimination.
- 3.4. The Select Committee submission of the Public Service Association Te Pūkenga Here Tikanga Mahi provides a comprehensive summary of how vulnerable communities of working people are disproportionately exposed to sexual harassment:
- “The less power a worker has, the more likely they are to be sexually harassed. Women are more likely to experience sexual harassment than men. 85% of women and 56% of men experience sexual harassment in their lifetime. Māori experience higher levels of sexual harassment, even in industries where sexual harassment is widespread. Young workers, rainbow workers, disabled workers, and those in insecure work all experience high rates of sexual harassment than the general population.”⁴
- 3.5. The widespread nature of workplace sexual harassment, its impact on vulnerable communities and the prevalent ‘culture of silence’⁵ around raising these issues

² Employment New Zealand, <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/sexual-harassment/>

³ Australian Human Rights Commission, ‘Everyone’s Business: Fourth survey on sexual harassment in Australian workplaces’, 2018, p.21.- **This source is produced by the Australian Human Rights Commission, based on comprehensive research carried out since 2004.**

⁴ Public Service Association Te Pūkenga Here Tikanga Mahi “Submission to the Education and Workforce Committee on the Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Bill 2022, at [2]”

⁵ Stuff, <https://www.stuff.co.nz/national/300585592/the-hidden-barrier-holding-metoo-back--and-the-women-who-are-challenging-it>.

means that the current tools afforded to victims to access justice are failing address the problem.

- 3.6. The 90-day time frame provided at s 114 (1) of the Employment Relations Act 2000 is arbitrary in that it provides the same prescriptive timeframe for raising a grievance in all situations.
- 3.7. It does not provide any flexibility for situations, such as instances where a worker is facing workplace sexual harassment, where more time may be needed for a worker to be safe and resourced enough to pursue a grievance claim.
- 3.8. We acknowledge that the Act does provide for the possibility of raising a grievance outside of the 90-day timeframe.
- 3.9. One pathway for raising an 'out of time' grievance that is provided in the Act is for the employer to consent for the grievance to be raised out of time⁶. However, for obvious reasons, this is practically impossible to attain, with few (if any) employers willing to expose themselves to liability by accepting a grievance that would otherwise be out of time.
- 3.10. Additionally, s 114 (4) allows a worker to apply directly to the Employment Relations Authority the leave to raise a personal grievance out of time. Leave may be granted if the Authority is satisfied that the delay in raising the grievance was occasioned by 'exceptional circumstances' and that granting the leave is 'just'⁷.

⁶ Employment Relations Act 2000, s 114 (1)- which stipulates that a worker may raise a personal grievance in 90 days "...unless the employer consents to the personal grievance being raised after the expiration of that period."

⁷ Ibid. s 114 (4)-

On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—

- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in [section 115](#)); and
- (b) considers it just to do so.

- 3.11. There are several problems with the mechanism provided by s 114(4) of the Act. While it is very arguable that granting leave to raise a grievance involving sexual harassment is 'just' it is not clear whether the delay caused in raising such a claim is 'exceptional'⁸.
- 3.12. Section 115 of the Act does provide an inexhaustive list of what constitutes 'exceptional circumstances' for the purposes of obtaining leave under s 114(4). That list does provide that an employee being too 'traumatised' to raise a personal grievance in time is an exceptional circumstance for the purpose of obtaining leave to raise a personal grievance out of time. Personal trauma is likely to be a feature of many if not most experiences of workplace sexual harassment. However, requiring a worker to be sufficiently traumatised so as not be able to raise a personal grievance in time places a high psychological threshold for the individual worker to meet.
- 3.13. Furthermore, in cases of workplace sexual harassment, other obstacles to raising a grievance may be more significant barriers to pursuing a personal grievance claim than personal trauma. These may include fear or recrimination, safety concerns, externally imposed stigma and the possibility of isolation and further disadvantage.
- 3.14. Thus, the 'exceptionality test' contained in section 114 (4) is not designed to accommodate these barriers to accessing justice. This is because delays in raising claims involving workplace sexual harassment are often 'unexceptional'.

⁸ Employment Relations Act 2000, s 115-

Further provision regarding exceptional circumstances under section 114

For the purposes of [section 114\(4\)\(a\)](#), exceptional circumstances include—

- (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in [section 114\(1\)](#); or
- (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or
- (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by [section 54](#) or [section 65](#), as the case may be; or
- (d) where the employer has failed to comply with the obligation under [section 120\(1\)](#) to provide a statement of reasons for dismissal.

- 3.15. Another problem with the mechanism in s 114(4) of the Act is that it requires a worker to initiate a public and formal process simply to determine whether their grievance can be heard.
- 3.16. Given the already existing pressure on victims of workplace sexual harassment not to raise personal grievances, the possibility of being subjected to scrutiny by employers, co-workers, and others, before the substantive matter can even be heard (and with no guarantee that it will be), is likely to present yet another barrier to being able to raise a personal grievance within a reasonable timeframe.
- 3.17. For this reason, none of the mechanisms for raising an 'out of time' grievance that currently exist in the Act are typically used by workers to pursue grievances that involve an element of sexual harassment.⁹
- 3.18. As outlined above, a fundamental problem with the 90-day timeframe provided by the Act is that its brief and arbitrary nature does not respond to the circumstances of workers who face workplace sexual harassment and does not give them a realistic or reasonable timeframe for raising their claim. The CTU agrees that this problem requires that the timeframe for raising personal grievances should be extended in cases where that grievance involves sexual harassment.
- 3.19. However, the extended timeframe itself should not be arbitrary.
- 3.20. It is our concern that a 12-month timeframe, while a vast improvement on the existing 90-day timeframe, may not sufficiently respond to the scope of the problem. Workers who experience workplace sexual harassment face deeply

⁹ *Creedy v Commissioner of Police* (2008) 5 NZELR 477 at [32] provides the most commonly caselaw definition of 'exceptional circumstances':

"We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered."

This case does not involve an element of sexual harassment and does not account for how delays in raising such grievances are not 'unusual, special or uncommon'. Accordingly, the test is not easily used for raising workplace sexual harassment claims out of time.

entrenched social, cultural, and economic barriers to speaking out (let alone pressing a legal claim) around sexual harassment.¹⁰

- 3.21. Determining a precise timeframe that sufficiently addresses this problem can be difficult. Once a version of this Amendment is passed, lawmakers ought to revisit the extended timeframe and provide further extension if the intended effects of the Bill have not been achieved.
- 3.22. Notwithstanding that difficulty, there is a strong public interest argument in ensuring that the timeframe for raising a grievance claim where sexual harassment is involved ought to at least mirror the timeframes that are normally provided for other civil claims. In this way, lawmakers will be sending a clear message that the systemic problems that this extension seeks to address are being taken seriously.
- 3.23. Accordingly, **the CTU submits that the timeframe for raising a personal grievance for claims that involve sexual harassment should be extended to at least 6 years.**
- 3.24. The 6-year timeframe requested in this submission reflects period that is typically for civil claims under the Limitation Act 2010.¹¹

4. Racial harassment

- 4.1. Like sexual harassment, racial harassment is more likely to be under-reported.¹²
- 4.2. Sexual harassment disproportionately impacts on communities that are impacted by systemic racism.¹³ Both forms of harassment are supported by and promote a culture of silencing victims and protecting perpetrators.
- 4.3. Accordingly, the same rationale for extending personal grievance timeframes for sexual harassment applies to cases involving racial harassment.

¹⁰ Jill Poulston, 'Metamorphosis in hospitality: A tradition of sexual harassment', *International Journal of Hospitality Management*, 27, no. 2, 2008, p.236; 'Everyone's Business', 22-24.

¹¹ Limitation Act 2010.

¹² Harvard Business Review, 'Do your employees feel safe reporting abuse and discrimination' (2020) <https://hbr.org/2020/10/do-your-employees-feel-safe-reporting-abuse-and-discrimination>.

¹³ Poulston, p.236.

- 4.4. Both forms of harassment are viewed with equal seriousness under New Zealand law and, the victims of both forms of harassment deserve the same protection and access to justice.
- 4.5. **The CTU submits that the timeframe for raising personal grievances that involve racial harassment also be extended to a period of 6 years.**

5. Broader issues around the 90-day timeframe

- 5.1. While victims of workplace harassment face particular challenges in being able to use the 90-day timeframe to effectively pursue justice, the restrictiveness of the statutory timeframe restricts the rights of all working people in a way that is not justifiable.
- 5.2. The timeframe provided by the Employment Relations Act for workers to pursue personal grievances is extremely truncated.
- 5.3. Under the Limitations Act 2010, pecuniary civil claims that are not regulated by a statutory regime can be raised within a 6-year timeframe¹⁴. Typically, where statutory regimes do exist to set timeframes for raising civil claims, they afford a 2–3-year period¹⁵. The shortest timeframe for raising civil claims (outside of the Employment Relations Act’s 90-day timeframe) is 12 months.¹⁶
- 5.4. Outside of the Employment Relations Act, the opportunities provided for pursuing civil claims are not usually used by working people. They are instead usually used by businesses and corporate entities that are better resourced than most workers.
- 5.5. Having a restricted timeframe for workers to pursue their personal grievance claims is not consistent with the understanding that workers’ rights deserve protection and support in the face of an inherent imbalance of power¹⁷.

¹⁴ Limitation Act 2010, s 3.

¹⁵ Commerce Act 1986, s 83(5), s 86(6) (for contravening an information disclosure requirement); Dairy Industry Restructuring Act 2001, s 144(4); Financial Advisers Act 2008, s 137K (5); Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 79A (5).

¹⁶ Commerce Act 1986, s 85A (7).

¹⁷ Employment Relations Act 2000, 3 (a)(ii).

- 5.6. While the CTU acknowledges that this Amendment Bill rightly focuses on the needs of victims of workplace sexual harassment¹⁸, we also say that further reform is needed to extend the timeframe for raising all personal grievances.
- 5.7. Such an extension will affirm the importance of workers' rights in relation to other enforceable rights that exist in the civil jurisdiction.
- 5.8. **The CTU submits that the timeframe for raising all personal grievances be extended to at least 12 months.** Which would match the shortest of the statutory timeframes afforded for raising other civil claims.
- 5.9. In addition to the restrictive 90-day timeframe for raising personal grievances, the Employment Relations Act also provides that:
- 'No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.'¹⁹
- 5.10. While the Employment Relations Act does provide some mechanisms (however imperfect) for extending the 90-day timeframe, the 3-year time limit for commencing an action with respect to a personal grievance in the Authority or the court is inflexible.²⁰
- 5.11. The employment court has found that while aspects such as personal trauma experienced by a worker as a result of matter giving rise to a personal grievance may extend the 90-day timeframe at s 114(4) of the Act,²¹ such considerations cannot be used to extend the 3- year timeframe for bringing proceedings with respect to a personal grievance.
- 5.12. Thus, while a victim of sexual harassment may (at least theoretically) be able to rely on personal trauma as an exceptional ground for extending the 90-day timeframe

¹⁸ Notwithstanding the CTU's assertion that racial harassment should also be addressed in this Bill.

¹⁹ Employment Relations Act 2000, 114(6).

²⁰ *Blue Water Hotel Ltd v VBS* [2018] NZEmpC 128; (2018) 16 NZELR 407.

²¹ Employment Relations Act 2000, s 115.

for raising a personal grievance, no such accommodation will extend the timeframe for issuing proceedings in the Authority or the court is provided.

- 5.13. Like the 90-day timeframe, the 3-year time limit on lodging personal grievance related proceedings in the Authority or the court is an arbitrary restriction on the ability of workers to pursue justice.
- 5.14. It is particularly arbitrary when it is considered that the Employment Relations Act itself provides a 6-year time limit for lodging any non-personal grievance related proceedings in the Authority or the court (as provided by s 142 of the Act).²²
- 5.15. **The CTU submits that the 3-year time limit outlined at s 114(6) be extended to at least 6 years for general personal grievances and to 15 years for personal grievances involving racial or sexual harassment.**
- 5.16. Any extension to the 90-day timeframe would require a commensurate extension to the 3-year time limit.
- 5.17. Such a consequential amendment would ensure that those relying on the extended grievance raising timeframe do not inadvertently suffer from an effectively reduced timeframe for lodging proceedings once the grievance is validly raised.

6. Summary of submissions

- 6.1. That the timeframe for raising a personal grievance for claims that involve sexual harassment should be extended to 6 years.
- 6.2. That the timeframe for raising personal grievances that involve racial harassment also be extended to a period of 6 years.
- 6.3. That the timeframe for raising all personal grievances be extended to at least 12 months.

²² Employment Relations Act 2000, s 142.

- 6.4. That the 3-year time limit outlined at s 114(6) be extended to at least 6 years for general personal grievances and to 15 years for personal grievances involving racial or sexual harassment.
- 6.5. We support the submission of the PSA: 'That section 114(1) be amended to state that when the cause of the grievance is ongoing the time period runs from the last occurrence and covers every occurrence. '
- 6.6. We support the submission of the PSA: 'That the committee note the difficulty of including all forms of bullying and harassment in this bill and recommend that MBIE's work on Bullying and Harassment be prioritized.'

7. Conclusion

- 7.1. A personal grievance is very important concept in the employment law of Aotearoa/ New Zealand.
- 7.2. Raising a personal grievance is more than merely raising a complaint²³. It is a formal step, demanding a legal remedy from an employer for an alleged breach of duty.
- 7.3. It is unique from other kinds of civil claims as it designed to be easily accessible to workers. Workers can raise personal grievances in any form, with or without a lawyer or advocate²⁴. The ability to raise a personal grievance gives workers, who might not be able to afford the expenses of formal litigation a means of raising a serious legal claim through simple and direct means.
- 7.4. However, the way in which the timeframes around personal grievances are constructed seem counterintuitive to the advantages that personal grievances otherwise present. Instead of simplifying the process and giving workers adequate

²³ *Creedy v Commissioner of Police [2006] 1 ERNZ 517* - provides that an employee may raise a grievance orally or in writing, however, must give sufficient detail for the employer to be able to address the problem. It is not sufficient to merely advise the employee that the employee has a grievance (in other words it is not enough to merely make a complaint).

²⁴ *THOMSON v M J D HAULAGE LTD BC201064224* - "To raise a grievance, no formalities are required [to raise a grievance] and the test is whether to an objective observer the communication was sufficient to elicit a response and for the employer to remedy the alleged grievance or the party to settle it in discussions" [10].

time to properly raise their grievance, the timeframe adds pressure and complexity to exercise.

- 7.5. The impact of these arbitrary timeframes is particularly adverse for workers are trying to raise complaints that involve sexual or racial harassment. With a great proportion of complaints involving these forms of harassment being silenced due to various pressures.
- 7.6. The CTU strongly endorses the initiative of this Amendment Bill to provide victims of workplace sexual harassment sufficient tools to assert their rights.
- 7.7. We agree with the view expressed in the policy statement attached to this Amendment Bill, that providing a sufficient timeframe for raising grievances involving sexual harassment is a significant step towards providing these tools.
- 7.8. We strongly argue that workplace racial harassment warrants the same treatment.
- 7.9. Workers who face racial harassment also face tremendous systemic barriers to pursuing personal grievances that relate to their experiences.
- 7.10. In fact, there is a demonstrable intersection between the forms of discrimination that underly both racial and sexual harassment²⁵. For example, in Aotearoa the data indicates that Māori workers are more likely to experience sexual harassment, even in areas of work where sexual harassment is widespread.²⁶
- 7.11. Racial harassment is just as serious a problem as sexual harassment. Both issues need to be addressed together as both relate to each other on a systemic basis.
- 7.12. Looking forward, the CTU hopes that the discussion of the Select Committee can be drawn into a deeper discussion about workability and effectiveness of personal grievance timeframes.

²⁵ TUC in association with everyday sexism project, 'Still just a bit of banter: Sexual harassment in the workplace in 2016', 2016, p.9.

²⁶ Poulston, p.236.

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