



**PSA Submission on the Employment
Relations (Extended Time for
Personal Grievance for Sexual
Harassment) Amendment Bill**

To the education and workforce select
committee

July 2022

For a better working life

New Zealand Public Service Association
Te Pūkenga Here Tikanga Mahi

About the PSA

The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (the PSA) is the largest trade union in New Zealand with over 81,000 members. We are a democratic and bicultural organisation representing people working in the Public Service for departments, Crown agents, including the health entities, and other crown entities and state-owned enterprises; local authorities; tertiary education institutions; and non-governmental organisations working in the health, social services and community sectors.

For over 109 years, people have joined the PSA to negotiate their terms of employment collectively, to have a voice within their workplace and to have an independent public voice on the quality of public and community services and how they're delivered. Our purpose as a union is to build organisation to influence the political, economic, social and industrial environment in the interest of PSA members – creating a better working life for our members.

We are committed to advancing te Tiriti o Waitangi through our work. Te Rūnanga o Ngā Toa Āwhina is the Māori arm of the PSA membership. The PSA is affiliated to Te Kauae Kaimahi the New Zealand Council of Trade Unions, Public Services International and UniGlobal.

Summary of PSA Submissions

The PSA strongly supports the intent of the Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Bill and considers it a step forward to providing safer workplaces for all and an important part of the wider programme of work to prevent sexual violence. In this submission, we outline our reasons and evidence for supporting this bill and discuss and make recommendations on issues raised on first reading.

We make the following recommendations, to improve the bill:

- That the time be extended to at least two years.
- 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.
- That the committee add racial harassment to the bill.
- 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.

PSA Support for the Bill

The PSA has a long-standing interest in health and safety in the workplace. One of our strategic goals is to transform work and workplaces so that work is fulfilling, productive and satisfying. This includes to minimise violence, bullying and harassment to ensure healthy and safe workplaces.

Sexual Harassment

Sexual Harassment is a widespread problem in New Zealand workplaces. The recent #metoo movement drew attention to the widespread unreported sexual harassment around the world. In New Zealand, high profile cases of sexual harassers continuing in positions of power demonstrate the significance of the problem of sexual harassment.¹ Research from other jurisdictions provide figures on how widespread workplace sexual harassment is. The Australian Human Rights Commission has been undertaking high quality phone survey research on sexual harassment since 2004. Their 2018 research reported that 71% of those interviewed had experienced sexual harassment in their lifetime.²

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.³ Māori experience higher levels of sexual harassment, even in industries where sexual harassment is widespread.⁴ Young workers, rainbow workers, disabled workers, and those in insecure work all experience high rates of sexual harassment than the general population.⁵

Sexual Harassment Reporting

Most people who are sexually harassed never report the experience. Australian research, consistently showed that 20%, or less, of those who have experienced sexual harassment reported it.⁶ UK research showed similarly low rates.⁷

Victims of sexual harassment face barriers for reporting, both because of societal attitudes towards sexual violence and the power imbalances within the workplace. Victims of sexual harassment need

¹ Stuff, The #metoonz Project, <https://www.stuff.co.nz/national/me-too-nz>.

² Australian Human Rights Commission, 'Everyone's Business: Fourth survey on sexual harassment in Australian workplaces', 2018, p.18.

³ 'Everyone's Business', p.21

⁴ Jill Poulston, 'Metamorphosis in hospitality: A tradition of sexual harassment', *International Journal of Hospitality Management*, 27, no. 2, 2008, p.236.

⁵ 'Everyone's Business', 22-24; Poulston, p.236.

⁶ 'Everyone's Business', p.67; Australian Human Rights Commission, 'Working Without Fear: Results of the Sexual Harassment National Telephone Survey', 2012, p.40; Australian Human Rights Commission, 'Sexual harassment: Serious business', 2008, p.31.

⁷ TUC in association with everyday sexism project, 'Still just a bit of banter: Sexual harassment in the workplace in 2016', 2016, p.19.

time to process traumatic experiences and have to navigate a wider culture of blame, shame, stigma and disbelief in order to come forward.⁸ Young workers and workers in insecure jobs are less likely to know about avenues to seek redress and more likely to experience sexual harassment.

Victims are very vulnerable to retaliation and other workplace consequences and often do not report sexual harassment until they are able to leave a job. In UK research, nearly 30% of women who had experienced sexual harassment and not reported it stated that they did not report sexual harassment because they were afraid it would impact on their workplace relationships.⁹

The impact of a 90-day limit on raising a Personal Grievance

The current 90-day limit on raising a personal grievance is a significant additional barrier for victims of sexual harassment. Given longer time limits, more victims of sexual harassment will be able to come forward. An Australian survey of sexual harassment cases before their Human Rights Commission showed that 20% had been raised more than three months after the incident.¹⁰

Government departments working on sexual harassment prevention policy have identified the 90-day limit to raise a personal grievance as a particular barrier. A recent literature review on best practice relating to sexual harassment by the Ministry of Women's Affairs stated: "Victims need to have sufficient time to report sexual harassment, given the trauma many have to deal with."¹¹ In 2021, the Ministry of Business, Innovation and Employment, undertook substantial consultation over Bullying and Harassment. In their issues paper they stated, "Where the behaviour was particularly traumatising (eg, sexual harassment), the employee may not feel ready to talk about their experience within 90 days."¹² They received 65 long-form submissions and a thousand responses to their online survey. The analysis of submissions to this consultation concluded that the short time-period for raising a personal grievance was inappropriate in cases of harassment and bullying.¹³

The 90-day limit on raising personal grievances was introduced as part of the Employment Contracts Act 1991. The justification for a new, severe, time limit on personal grievances was to encourage early resolution and to create certainty for employers.¹⁴ The widespread evidence of unreported sexual harassment demonstrates the limit does not encourage early resolution, and instead acts as an additional barrier. One of the key purposes of the Employment Relations Act 2000 is to acknowledge the inherent inequality of power in employment relationships and the 90-day limit on claims is contrary to this purpose.

⁸ 'Everyone's Business', 2018, p.81.

⁹ 'Still just a bit of banter'.

¹⁰ Australian Human Rights Commission, 'Sexual harassment: A Bad Business', 2002, p.26.

¹¹ Ministry of Women's Affairs, 'Literature Scan of international best practice about preventing and responding to workplace sexual harassment', 2019, p.2

¹² Ministry of Business, Innovation and Employment, 'Bullying and Harassment at Work Issues Paper: An In-depth look', 2021, p.76

¹³ FrankAdvice, 'Bullying and harassment at work: consultation submissions analysis', 2021, p.27.

¹⁴ Gordon Anderson, 's 114 Raising personal grievance', *Mazengarb's Employment Law (NZ)*.

The Bill would bring the time limits for victims of sexual harassment under the Employment Relations Act 2000 in line with those under the Human Rights Act 1993. Currently those who experience sexual harassment at work have the choice of two paths to seek the resolution, however the time limits are significantly different. Complaints made under the Human Rights Act 1993 do not have a strict time limit, but the Commission has the ability to decline to take action if the claim is raised more than 12 months after the harassment took place.¹⁵ This level of flexibility for accepting claims provides a permissive system that recognizes the barriers to raising complaints. The combination of a much lower time limit and less flexibility for raising a personal grievance undermines the ability of workers to make a choice between the two pathways. It is a restrictive system designed to bar legitimate claims if they are not raised in a very short timeframe.

A time limit of twelve months would still put considerable restrictions on the ability of those who have experienced sexual harassment at work to seek justice and resolve the situation. This submission has demonstrated the substantial evidence that trauma, lack of knowledge of pathways for redress, attitudes towards sexual harassment, and power imbalances in the workplace all contribute to the low rates of sexual harassment reporting. For some workers, 12 months will not be long enough. In 2020, the Australian Human Rights Commission undertook a national inquiry into sexual harassment at work and recommended that the time limit for sexual harassment cases be increased to two years.¹⁶ The Australian parliament acted on this recommendation.¹⁷ **The PSA recommends that the Bill be amended to increase the time limit to at least 24 months.**

Issues Raised at First Reading

Bullying and other forms of harassment

At the Bill's first reading, there was discussion of bullying and other forms of harassment. Dr Deborah Russell suggested the select committee could consider these matters.

In principle, the PSA support increasing the time limit to raise a personal grievance for all forms of bullying and harassment. Many of the points raised in this submission also apply to other forms of harassment and bullying. In particular, time required to identify a pattern of behaviour, the lack of knowledge of access to legal recourse, difficulty processing trauma, and impact of workplace power imbalances are factors for victims of all forms of bullying and harassment. As the same principles apply, the main challenge to extending the provisions of the Bill to other forms of harassment is one

¹⁵ Human Rights Act 1993, s 80(2).

¹⁶ Australian Human Rights Commission, 'Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces', 2020, p.45.

¹⁷ Australian Sex Discrimination and Fair Work (Respect at Work) Amendment Act, 2021.

of drafting. Racial Harassment, like Sexual Harassment, is defined in legislation. **The PSA recommends the Bill be amended to include Racial Harassment.**

Other forms of harassment and bullying would require more policy work to be specifically included within this Bill. MBIE has reported on the submissions from their 2021 consultation into Bullying and Harassment, but have not indicated how they are going to advance that work programme. **The PSA recommends 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 prioritised.**

Time limits and ongoing events

Dr Russell also suggested the select to consider time limits and on-going patterns of behaviour. Asking: "Is it at the first instance of sexual harassment, or the second, or the last? What if there is a pattern of low-level events, how does that affect the time during which a personal grievance claim can be made?"

The current situation established in case law is that if a personal grievance is raised for multiple instances of harassment, the actions can be covered by one personal grievance claim provided they amount to one related and continuous cause of action.

The law could be codified, thereby making it clearer to the parties to an employment relationship, by stating that when behaviour is ongoing the time period runs from the last occurrence and covers every occurrence. This could be added to new s114(1A) and apply just to sexual harassment, but a wider approach would cover all forms of bullying and harassment. **The PSA recommend that s114(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.**

Concerns raised

The primary concern raised in the first reading of this bill was that it would create uncertainty for employers. To put this concern in context, in non-employment civil disputes and all other employment disputes that are not personal grievances, the limitation period is six years. Every employer regularly enters into, and is prepared for, a range of legal arrangements that could lead to a civil dispute. Employers who can manage the risk of a civil legal dispute being raised for six years, and who can manage any other employment disputes being raised for six years, can manage the risk of a personal grievance being raised for one year (or two if the PSA submission is accepted). As there is already a 12-month timeframe for raising claims through the Human Rights Commission, it could not create uncertainty to increase the time-limit for sexual and racial harassment personal grievances as employers must already make allowance for this timeframe. In addition, employers can take further steps to manage the risk of a personal grievance relating to sexual harassment, by following best employment practice to prevent sexual harassment.

Currently, most people experience sexual harassment in their working lives and 80% of cases of sexual harassment are unreported. From 2015-2019 the ERA considered just 12 cases of sexual harassment and the Employment Court considered none.¹⁸ There is a stark disparity between the level of sexual harassment in our society and the levels at which victims are accessing legal recourse. An increased period where people can raise personal grievances relating to sexual harassment would be an important and justifiable step towards addressing the inherent imbalance of a system that is demonstrably inaccessible to victims.

International Labour Organisation Violence and Harassment Convention (190)

New Zealand is yet to ratify the International Labour Organisation Violence and Harassment Convention, 2019 (190). The convention includes processes around sexual harassment as part of member states' obligations to adopt 'an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work'. Article 4, 2 (e) specifies "ensuring access to remedies and support for victims". The current 90-day time limit on raising a personal grievance puts unjustified restrictions on victims access to remedies and support, and increasing the time limit would mean New Zealand legislation was meeting international obligations.

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¹⁸ 'Bullying and Harassment at Work Issues Paper', p.78