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Inside

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Sexual harassment law change comes a STEP CLOSER

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EMPLOYMENT LAW

Why sexual harassment complainants need more time to raise personal grievances

From the outside, a sexual harassment victim looks like a once-performing employee who gradually loses confidence, starts to under-perform, begins taking excessive sick leave and makes careless mistakes

Jenni McManus

A bill sponsored by Labour backbencher Dr Deborah Russell to extend the deadline for filing personal grievances for sexual harassment has come a step closer to becoming law.

Parliament's Education and Workforce select committee has considered submissions from 43 parties, 39 of whom support Russell's draft legislation aimed at extending the timeframe for filing sexual harassment personal grievances from 90 days to a year.

Some submitters want the deadline pushed out to two years or more; others want the legislation to include bullying, racial discrimination and other forms of disadvantage.

Others are seeking some form of relaxation of the "exceptional circumstances" test which enables the Employment Relations Authority (ERA) to allow more time for filing sexual harassment claims. Many who made oral submissions before the select committee said the ERA was interpreting the test so narrowly that few – if any – claimants were succeeding.

However, Russell acknowledges that these issues might be outside the scope of her bill and more work might need to be done.

Among those appearing before the select committee last month to speak to their submissions were barrister Catherine Stewart, convenor of the ADLS Employment Law committee, David Fleming of Fleming Singleton (another member of the ADLS Employment Law committee), Lauren McGee on behalf of the Unite union and Russell herself.

The select committee is due to report back to Parliament on 18 November, after which the Employment Relations (Extended time for sexual harassment) Amendment Bill will receive its second reading. National and ACT have agreed to support the bill – at least, until the end of the select committee stage.

Speaking to her draft legislation, Russell told the select committee it was a simple bill, dealing with a complex and difficult matter. "The problem is with the nature of sexual harassment," she said. Victims were often slow to report it because of embarrassment, a lack of understanding of what had happened to them, the power dynamics in the workplace which make it too hard to speak out and "the cultural norms of shame".

This lack of reporting is evident in work commissioned by NZLS in 2018 to survey bullying and harassment in the legal profession. This revealed 31% of women and 5% of men said they had been sexually harassed. Of those, 39% of respondents said the behaviour had affected their emotional wellbeing and 32% said it had damaged their career prospects.

Despite these numbers, between 2015 and 2019 the ERA considered only 14 cases where sexual harassment was the main basis for a personal grievance, Russell said. The Employment Court considered none.

"People are badly affected by sexual harassment at work and yet the Employment Relations Authority hears very few cases," she said. "That suggests something is wrong in our settings."

Defying reality

In a paper attached to the ADLS submission on the bill,

Continued on page 04

Continued from page 03

Catherine Stewart

The truth is that the longer the law carries on in this unsatisfactory state, the longer that sexual harassment will continue to thrive in the shadows, the longer the perpetrators will avoid accountability on technical grounds and the longer the victims will be denied access to justice

Simon Schofield, who teaches employment law at the University of Auckland, says the 90-day deadline for filing personal grievances fails the victims of sexual harassment.

It does not reflect the way sexual harassment plays out in practice, says Schofield, a former member of the ADLS Employment Law committee. Victims deserve better and the law ignores the reality of sexual harassment.

"The truth is that the longer the law carries on in this unsatisfactory state, the longer that sexual harassment will continue to thrive in the shadows, the longer the perpetrators will avoid accountability on technical grounds and the longer the victims will be denied access to justice."

In Schofield's view, a major reason for the delayed reporting of complaints is the power imbalance in the employment relationship and the fear of retaliation. Complainants also fear generating ill-feeling among co-workers. Instead, they will avoid or try to appease their harasser and often suffer from self-blame and guilt. The idea of reliving the experience in a courtroom can be traumatising.

While the 90-day rule ensures employers can remedy personal grievances quickly, the argument isn't relevant in the context of sexual harassment, Schofield says.

Numb despair

Another submitter, Buckingham Employment Relations Ltd, says victims of sexual harassment often don't report their experiences immediately "and often do it reluctantly".

"Victims of sexual harassment in the workplace often find themselves numb, leave their employment early, usually without an alternative income or employment and sometimes in an overwhelming state of despair," Buckingham said.

Not surprisingly, the legal and technical aspects of raising and fighting a personal grievance "are not always at the forefront of their mind".

From the outside, Buckingham says, a sexual harassment victim looks like a once-performing employee who gradually loses confidence, starts to under-perform, begins taking excessive sick leave and makes careless mistakes.

"The nature and reality of the offending is that it takes many victims a prolonged period of time to come to terms with their experience and to have the confidence to come forward."

Ninety days is a "harsh limit", Buckingham says, where there has been a complex pattern of harassment or bullying that may not be apparent at first, even to the victim. "People who are being groomed or gaslighted are often not aware of what is going on until they are out of the situation."

The firm notes that sexual harassment claims can also be brought under the Human Rights Act 1993 where complaints have 12 months to lodge their claims and the commission has discretion to further extend that deadline.

Buckingham suggests sexual harassment claims brought under employment legislation should align with the provisions of the Human Rights Act, including its discretion. And it would like to see racial harassment claims treated in the same way as sexual harassment as they involved the same type of discrimination and cause equally severe harm.

'Sad' findings

Appearing before the select committee on behalf of the Unite union, legal consultant and strategist Lauren McGee says those opposing the extension of the timeframe are "out of touch with reality to the way these situations are played out on the ground".

"In our experience, it's a very rare circumstance where we have a worker who has managed to overcome pressure from management and the employer, workplace culture, and has processed what has happened to them and the trauma of it and has then been able to muster the courage to speak out and come forward all within the space of 90 days," McGee says. "It's simply not been a reality that has worked out in practice."

McGee says Unite recently surveyed its members about sexual harassment. The survey revealed 13% of respondents reported they had been sexually harassed at work and another 26% said they had witnessed or been reliably informed about sexual harassment.

All those harassed were under 40 and 26% were under 20. Of the 13%, 17% reported that they hadn't processed their experience or understood what had happened. And 80% of those who had been harassed did not know what a personal grievance was at the time they were harassed. To this day, 45% still do not know, McGee said.

But "saddest of all" was that not a single survey respondent under the age of 20 indicated that they knew what a personal grievance was at the time they were harassed. And 58% of those under-20s still don't know.

"So, unsurprisingly, when talking about these workers, 93% of them have not lodged a personal grievance," McGee said. "The process is entirely in the hands of employers and perpetrators."

Most of the victims in her survey were younger female

Continued on page 05

Simon Schofield

David Fleming

People who are being groomed or gaslighted are often not aware of what is going on until they are out of the situation

Continued from page 04

workers. "We are talking about 16-year-olds here in their first McDonald's job."

Having specific timeframes "tucked away in case law" can be a huge barrier. McGee says one of these victims told her: "I was in that stage where I wanted to end my life. I was really depressed and had no idea what I should do. I had no money and my company kept on forcing me to work with my manager. And all I wanted to do at that point was to die."

In her view, personal grievances exist to provide an accessible avenue for workers to seek redress, McGee said. "And those workers most in need of protection are not currently using this avenue."

Inherent vulnerability

Barrister Catherine Stewart, representing the ADLS Employment Law committee, told the select committee that her members support the bill but also understand the importance of claims being raised as expeditiously as possible.

"So, we acknowledge and understand the need for the 90-day rule in most circumstances because dragging things on is not in either party's best interests in general," Stewart said. "Resolving them as close as possible to the point of origin is a really good aim that employers and employees benefit from."

But on a day-to-day basis, Stewart said, she and her fellow committee members could see the imbalance of power in sexual harassment situations. People complaining about sexual harassment are in a situation of "inherent vulnerability" because their livelihoods depend on them remaining at work.

"That is really the bottom line in terms of difficulties that we see employees face when raising these types of claims and these sexual harassment concerns," Stewart said. Victims of bullying are in a similar situation.

Stewart notes there is no provision for a bullying personal grievance in the Employment Relations Act and no harassment personal grievance, though there is provision for sexual and racial harassment personal grievances. Because of this significant gap in the legislation, bullying complainants often bring their claims under a disadvantage personal grievance, meaning the parties inevitably end up discussing definitions of bullying because no definition exists in current employment law.

Flexible limits

David Fleming, from Fleming Singleton Employment Law, told the select committee his firm has dealt with thousands of personal grievances and hundreds of sexual harassment complaints. The firm is also one of the biggest providers of legal aid for employment matters and sees a "significant portion of people who are relatively vulnerable in an employment situation".

Fleming says significant change is needed to the timeframes for raising sexual harassment personal grievances, including an ability to raise a grievance beyond any stipulated time limit.

His clients tend to be from a different cohort to those from Unite – they are older women but are also in vulnerable situations and feel disempowered. Typically, they are being harassed by senior managers or business owners.

In most cases he sees, Fleming says it takes at least two to three years after the sexual harassment begins before people get to the point where they feel able to sue their employer. It's important to remember that before the claim is filed, a lot of other strategies have been tried.

"The 90-day limit routinely operates to prevent people from being able to have their stories properly told, their claims heard and the issues dealt with on their merits," he says. The deadline also results in expensive and time-consuming arguments about whether personal grievances can be raised and, if so, their scope.

"Employers almost never consent to a personal grievance being raised out of time."

Fleming says the changes that Russell's draft legislation proposes are a "necessary step in the right direction" but don't go far enough. People often don't feel able to raise a claim because of the "major inequalities of power" and should be permitted to do so only when they feel it is safe. Nor should flexible deadlines be limited to sexual harassment grievances, he says.

Exceptional circumstances

The current legislation (s 115) allows personal grievances to be filed out of time in exceptional circumstances. Trouble is, the ERA interprets the law so narrowly that claims almost never succeed.

Telecom v Morgan is the case most often quoted, where the Employment Court determined that the reference to trauma in the legislation "connotes very substantial injury". Just how substantial is, of course, the issue. Psychological distress, the court said, didn't meet the threshold.

Stewart believes the onus should be put on the employer to explain why extra time cannot be given. Schofield says the legislation is poorly worded and sets a very high bar for legitimate claimants who have experienced psychological trauma to raise a claim. ■