



The Me Too Collective

15 July 2022

Education and Workforce Select Committee
Parliament
Wellington

Tēnā koutou

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

1. I am a sole barrister and I advise clients who have experienced sexual harm in a range of contexts, including the workplace. I am in the process of establishing a charity called the Me Too Collective which will assist people who have experienced sexual harm and are considering reporting this (for more information see: www.metoocollective.com). I am also an Adjunct Professor of Legal Ethics at the University of Auckland.
2. In 2018, to raise awareness about the prevalence of sexual harm in the legal profession, I set up an online platform to enable people to share their experiences (for more information see: www.zoelawton.com/metoo-blog). Since then I have been lobbying for amendments to legislation that will increase access to justice for those who have experienced sexual harm, including the amendment that is the focus of this bill.
3. Several accounts from individuals posted to the above platform are referred to by the MP in charge of this bill, Dr Deborah Russell, in her first reading speech in Parliament. I wish to thank Dr Russell for drawing on these accounts to support the reasoning behind the bill and for her acknowledgement of my lobbying work on legislative reform more generally. It is fantastic to see a member's bill like this receive sufficient cross-party support to progress to the Education and Workforce Select Committee for consideration.

Extension of the statutory reporting timeframes

4. I fully support the amendment to s114 of the Employment Relations Act as it would increase access to justice for the many New Zealanders who have experienced sexual harm in the workplace. It would also bring the reporting timeframe in line with the 12-month reporting timeframe to report workplace sexual harm to the Human Rights Commission under s80 of the Human Rights Act.
5. However, I would like to invite the Committee to carefully consider if there is a sound policy rationale for having any timeframe to report sexual harm under the Employment Relations Act or the Human Rights Act.
6. There is a wide range of sexual harm that occurs in New Zealand workplaces including that which amounts to the following offences in the criminal jurisdiction:
 - indecent assault;
 - sexual connection with consent induced by threat; and
 - sexual violation (more commonly known as rape).
7. Under the s25 of the Criminal Procedure Act there is no timeframe for reporting these offences to Police and for charges to be filed.
8. Overall, at present we have a 90-day reporting timeframe in the employment jurisdiction (which could go up to 12 months if this bill is passed), a 12-month reporting timeframe in the human rights jurisdiction and no timeframe in the criminal jurisdiction.
9. In an ideal world, there would be no timeframes in any jurisdictions. It would then be up to the person reporting the sexual harm to choose the jurisdiction they wish to use based on the redress they wish to seek, which differs across jurisdictions. I believe consistency would be sound policy.
10. To put this into perspective I am currently advising a client who was raped by a manager during work hours and on work premises. She does not wish to use the criminal jurisdiction (for several reasons) and would rather use the employment or human rights jurisdictions. However, the statutory timeframes in both these jurisdictions have been exceeded. She is understandably frustrated about this and does not see the rationale for the inconsistency. She is also frustrated that she now has to attempt to get over the additional barrier of meeting the exceptional circumstances test under the Employment Relations Act (so that she can report outside the statutory timeframe) or the equivalent test under the Human Rights Act (again so that she can report outside the statutory timeframe).

11. I provide this example so that you can see how the reporting timeframes are viewed by someone who has lived experience of sexual harm.
12. I acknowledge that a change from a 90-day timeframe in the employment jurisdiction and a 12-month timeframe in the human rights jurisdiction to no timeframe at all could be regarded by the Committee as too much of a leap. However, the bill provides a very good opportunity to truly address the incredibly low reporting rates of sexual harm in New Zealand workplaces and consider whether the legislative barriers currently imposed by the Government are in fact valid.

An alternative option

13. If the Committee does consider that removing reporting timeframes in the employment and human rights jurisdictions is too far a leap, I strongly urge the Committee to consider amending the “exception circumstances” test in s 114 of the Employment Relations Act and the equivalent test in s 80 of the Human Rights Act. Both these tests allow reporting outside the statutory timeframes in a limited number of circumstances.
14. I am of the view the barriers created by these tests are too high and are too unclear to be easily understood by the public without the assistance of a lawyer. They also lack consistency.
15. At present the test under s114 of the Employment Relations Act provides that sexual harm can be reported outside the statutory timeframe where:
 - a. 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);
 - b. 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;
 - c. 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. the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

16. In contrast, at present the equivalent test under s80 of the Human Rights Act provides that sexual harm cannot be reported outside the statutory timeframe if:
- a. the subject matter of the complaint is trivial;
 - b. the complaint is frivolous or vexatious or is not made in good faith; or
 - c. having regard to all the circumstances of the case, it is unnecessary to take further action in relation to the complaint; or
 - d. there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition Parliament or to make a complaint to the Ombudsman, that it would be reasonable for the complainant or the person alleged to be aggrieved (if not the complainant) to exercise.
17. Attached is a New Zealand Law Journal article by my colleague at the University of Auckland Simon Schofield, which provides excellent in-depth commentary about the exceptional circumstances test in the Employment Relations Act and recent case law on its interpretation. I am not aware of any equivalent academic literature which analyses s 80 of the Human Rights Act.

The Me Too Collective

18. As mentioned above, I am in the process of establishing a legal charity called the Me Too Collective to support people who have experienced sexual harm in a range of contexts.
19. The reason why I set up the charity is because sexual harm is prevalent in New Zealand yet it is one of the most under reported forms of harm. With little accountability, many perpetrators develop a pattern of behaviour and sexually harm multiple people throughout their careers, in their communities or in their personal lives. A major contributing factor to low reporting rates is that coming forward as an individual can be very stressful, isolating and ultimately, overwhelming.
20. The aim of the charity is to enable New Zealanders to find strength in numbers and report in groups. The charity will provide a matching service to connect people who have been sexually harmed by the same perpetrator. Once matched, each group is then advised by a lawyer on the different reporting processes available to them. If the group decides to report, a lawyer will provide legal representation throughout their reporting process of choice to help get the outcome they want.

21. As I'm sure the Committee can appreciate, it takes time for people to come forward for a wide range of reasons, including the psychological toll. One person may register with the charity then wait a significant amount of time before another person feels able to come forward, which would then create a match. In order for the matching function to work effectively, and for the charity to ultimately increase reporting rates, there needs to be realistic statutory reporting timeframes for the charity to operate within.

Thank you for taking into account my views on this bill and once again my thanks to Dr Deborah Russell for putting it forward as a member's bill.

If the Committee is of the view that it would be of assistance, I would welcome the opportunity to make an oral submission to further expand on the views I have expressed in this written submission.

Ngā mihi

Zoë Lawton