NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Regulatory Systems (Workforce) Amendment Bill (No 2)

25/03/2019

Submission on the Regulatory Systems (Workforce) Amendment Bill (No 2)

1 Introduction

1.1 The New Zealand Law Society welcomes the opportunity to comment on the Regulatory Systems (Workforce) Amendment Bill (No 2) (the Bill).

1.2 The Bill is an omnibus bill containing "smaller regulatory fixes" to various Acts.[1]

1.3 The Law Society suggests some minor technical amendments to the Bill for clarity. The Law Society also notes that the proposed changes that expand the powers of Labour Inspectors could be considered substantive and more than merely a 'regulatory fix'; consideration should be given to limiting the scope of these changes to ensure they remain minor and fitting with the purpose of a Regulatory Systems Bill.[2]

1.4 The Law Society does not seek to be heard.

2 Employment Relations Act 2000 – Remuneration

2.1 Clause 4 of the Bill will amend section 171(3) of the Employment Relations Act 2000 (ER Act) to allow for the remuneration of any member of the Authority delegated as Chief (from time to time under section 166B) to be paid a higher amount. The proposed change to the ER Act achieves that.

2.2 The change also requires a consequential amendment to Schedule 4 of the Remuneration Authority Act 1977. Wording from the current provision in Schedule 4 has been omitted (presumably accidentally) from the clause 10(2) rewording. The current drafting no longer refers to section 166 of the ER Act which defines the Authority as consisting of a minimum number of Members including the Chief.[3]

2.3 For completeness, we recommend that in addition to the clause 10(2) changes (<u>underlined</u> below) to Schedule 4 of the Remuneration Authority Act 1977, the current Schedule 4 wording (indicated in **bold**) be reinserted:

> The Chief of the Employment Relations Authority, <u>members of the Employment Relations Authority to whom a delegation has been made under section 166B of the Employment Relations Act 2000</u>, and other members of the Employment Relations Authority **(being the members who hold office under section 166 of the Employment Relations Act 2000)**

3 Labour Inspector powers

3.1 Clause 5 proposes to amend the powers of Labour Inspectors to enable them to investigate the question of whether a person is an "*employee*." Proposed new section 229A also empowers a Labour Inspector to investigate whether any place is a "*workplace*," and whether any person for whom work is being performed is an "*employer*."

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1 Explanatory note to the Bill, p1.

2 Noted in paragraph 3 of the *Regulatory Impact Statement: Clarifying labour inspectors' ability to investigate whether workers are employees*

3 Section 5 of the ER Act currently defines a Member of the Authority as someone who holds office under section 166(1) of the ER Act and includes a temporary member appointed under section 172 of the Act.

3.2 The core function of a Labour Inspector is to determine, ensure, monitor and enforce compliance with relevant Acts and employment standards.[4] These functions require a Labour Inspector to investigate the question of whether someone is an employee. The Law Society agrees that expanding the powers of a Labour Inspector to expressly include investigating whether any person performing work is an employee will clarify current uncertainty. This change will better support a Labour Inspector's core functions, particularly around whether an Inspector may investigate in the absence of a complaint or other reasonable grounds to reasonably believe an individual is an employee.

3.3 However, the Law Society considers that it is a substantial change for a Labour Inspector to also proactively investigate whether any place is a workplace, and the purpose of the change is unclear.

3.4 A Labour Inspector investigating whether a place is a "*workplace*" could go beyond their current core functions and scope of employment-related legislation outlined in section 223(1) of the ER Act. The functions of a Labour Inspector derive from a person's status as an employee. If it were solely contractors and volunteers who were performing work in a place, a Labour Inspector would not need to investigate whether the place was a "*workplace*."[5]

3.5 In a similar vein, the clause 7 changes to entry warrants (proposed new section 231(1)(a) and (b) of the ER Act) potentially extend in a substantial way the ability of a Labour Inspector to enter a dwellinghouse or apply for a warrant to enter a dwellinghouse. This may occur where a place is somewhere that, upon reasonable grounds, a Labour Inspector considers a person performs work there, or it is the only practical means through which a place may be entered.

3.6 Section 5 of the ER Act defines a workplace as meaning a place where an employee works from time to time; it includes a place where an employee goes to do work. The Labour Inspector is already able to enter a workplace that is a dwellinghouse with an entry warrant if a judge is satisfied reasonable grounds exist for believing it is a place where someone is employed or it is the only practicable means through which to enter such a place. Giving extended scope to enter a dwellinghouse to investigate whether "*any person performs work*," whether as an employee, contractor or volunteer, appears to the Law Society to be significant and more than minor. Again, it appears to go beyond the scope of the core functions of a Labour Inspector, and the relevant Acts listed in section 223(1) that, aside from the Volunteers Employment Protection Act 1977, relate solely to the rights of employees, as opposed to the rights of volunteers and contractors.

3.7 We recommend reducing the scope of proposed new sections 229A(1) (by deleting paragraph (a), investigating whether any place is a workplace) and 231(1)(a) and (b), if they are to remain in a Regulatory Systems Bill.

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4 Section 223A of the ER Act. Section 223 outlines relevant acts as including the ER Act and Holidays Act.

5 The Law Society acknowledges that the concepts of "*worker*" and "*workplace*" are also significant for the Health and Safety at Work Act 2015; however, that Act has its own definitions of the concepts, and its own inspection regime carried out by inspectors appointed under that Act.

4 Parental Leave

4.1 The Law Society recommends two drafting changes to the provisions amending the Parental Leave and Employment Protection Act 1987.

"Reasonable period"

4.2 The Bill amends a number of sections in that Act (sections 10, 30B, 31, 71I and 71K), and refers to actions being taken within a "*reasonable period*". The Law Society appreciates the need for flexibility. However, without definition, what is considered to be a reasonable period will be open to debate.

4.3 The Law Society recommends that the period within which actions must be taken is defined (such as, for example, one month) but allowing flexibility by adding the words "*or within such period as the employer and employee agree*".

Applications for payment

4.4 The Bill also amends section 71I, Applications for Payment. An employee who succeeds to parental leave under proposed new section 7(1)(b)(iii) must apply for a parental leave payment "within a reasonable period" after the employee becomes the primary carer (clause 21: proposed new section 71I(2A)).

4.5 This is less permissive than for other primary carers who under section 71I must apply in accordance with section 71I(2), which states:

> (2) The application must:
>
> (a) be made by the employee or self-employed person before the earliest of the following:
>
> (i) The date on which the person returns to work;
>
> (ii) The date on which the child attains the ages of 12 months (in the case of a child born to the person or to the person's spouse or partner);
>
> (iii) The date that is the first anniversary of the first date on which either the person or the person's spouse or partner became the primary carer in respect of the child (in any other case)

4.6 The reason for the more stringent requirement for those who come within proposed new section 7(1)(b)(iii) is not apparent. The Law Society recommends that proposed new section 71I(2A) be deleted from the Bill, so that the existing provisions of section 71I will apply to applicants who are primary carers under section 7(1)(b)(iii), consistent with any other applicant for parental leave payments.

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25 March 2019