



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Shop Trading Hours Amendment Bill

21/01/2016

Submission on the Shop Trading Hours Amendment Bill

1 Introduction

- 1.1 The New Zealand Law Society (**Law Society**) welcomes the opportunity to comment on the Shop Trading Hours Amendment Bill (**Bill**). The Law Society's comments focus on:
- (a) the employer notification provisions;
 - (b) a potential discrepancy between Easter Sunday and other restricted trading days for employees working in shops covered by section 4 of the current Shop Trading Hours Act Repeal Act 1990 (**Principal Act**);
 - (c) the concept of adverse treatment;
 - (d) conflicts between the Bill and the Local Government Act 2002; and
 - (e) religious equality.

2 Employer Notification Provisions

- 2.1 Clause 15 of the Bill inserts new Part 2 into the Principal Act. Proposed section 5J provides that employers who want a shop worker to work on Easter Sunday must provide four weeks' notice of the employee's right to refuse to work on the relevant day.
- 2.2 There is no corresponding provision in the Bill for the employee to confirm to the employer whether he/she wishes to exercise the right to refuse to work on the relevant day. This is likely to result in difficulties between the employer and employee if the employee gives late notice that he/she wishes to exercise the right.

Recommendation:

- (a) Amend the Bill to provide that, in order to benefit from the protections set out in proposed sections 5K to 5L of the Principal Act, the employee must provide the employer with a minimum period of notice (say, two weeks) that he/she intends to exercise the right to refuse to work on Easter Sunday.

3 Potential discrepancy between Easter Sunday and other restricted trading days for certain employees

- 3.1 Section 4 of the Principal Act allows particular shops to remain open on restricted trading days. Currently, all restricted trading days (aside from Easter Sunday) are public holidays for the purposes of the Holidays Act 2003.
- 3.2 Section 47 of the Holidays Act 2003 provides that employees can be required to work on a public holiday if the holiday falls on a day that would otherwise be a working day and the employee is required to work on that day under the employee's employment agreement.
- 3.3 There is currently no legislation that enables employees to refuse to work on a particular day without giving a reason and to be protected from any adverse treatment as a result. Accordingly, a number of shop workers can currently be required to work on restricted trading days.
- 3.4 Proposed section 5I of the Principal Act (inserted by clause 15 of the Bill) proposes to give employees currently covered by section 4 of the Principal Act greater rights in respect of Easter Sunday if a bylaw is passed (i.e. the right to refuse to work without providing a reason), in comparison to other restricted trading days (Christmas Day, Good Friday and ANZAC Day morning),

where the employee may be compelled to work under the Holidays Act 2003. This consequence of the Bill has not been addressed in the Explanatory Note to the Bill or in the Regulatory Impact Statement.

Recommendations:

- (a) Consider whether it is intended that the Bill will have the effect (for those employees currently affected by section 4 of the Principal Act) of allowing greater employee rights in respect of Easter Sunday than are currently allowed in respect of Christmas Day, Good Friday and ANZAC Day;
- (b) Consider the potential confusion caused by different rights in respect of restricted trading days, as between shop workers covered by section 4 of the Principal Act, other workers not working in shops or performing public trading work, and garden centre workers.

4 Concept of adverse treatment

- 4.1 Proposed subsections 5L(2) and (3) of the Principal Act (inserted by clause 15 of the Bill) rely on the concept of “adverse treatment”. The same phrase was used to describe conduct in the Employment Standards Legislation Bill, and appears to be similar to the concept of “adverse conduct” introduced by the Health and Safety at Work Act 2015 (not yet in force). However, the phrase or concept is not currently contained in other employment-related legislation, such as the Employment Relations Act 2000 or the Human Rights Act 1993. Instead, the Employment Relations Act 2000 and the Human Rights Act 1993 include similar concepts of “less favourable treatment on grounds of” or “affected to the employee’s disadvantage”.
- 4.2 The use of multiple terms to describe similar conduct in a range of employment-related legislation may lead to a lack of clarity. It is unclear whether it is intended that “adverse treatment” will bear a different meaning to “less favourable treatment” (as compared with other employees who did not or would not have exercised the right to refuse to work) or an effect to the employee’s disadvantage, or whether it is intended that it will bear the same meaning as “adverse conduct” (which is defined in section 88 of the Health and Safety at Work Act 2015).

Recommendation:

- (a) Consider whether it is intended that the concept of adverse treatment bears a different meaning from the comparable terms in the Employment Standards Legislation Bill, Employment Relations Act 2000, Human Rights Act 1993 or Health and Safety at Work Act 2015. If there is no intended difference in meaning, the Law Society recommends that, for clarity, one of the previously used terms ought to be adopted.

5 Conflicts with Local Government Act 2002

- 5.1 Proposed sections 5C to 5E of the Principal Act (inserted by clause 15 of the Bill) purport to create a process for the making and review of bylaws created under the Principal Act that is very similar to the Local Government Act 2002 (**LGA**) process under sections 87 and 157 to 160A.
- 5.2 Proposed section 5E of the Principal Act provides that the LGA applies to bylaws made under the Principal Act to the extent that the LGA applies to bylaws made under other enactments (i.e., enactments that are not the LGA). Despite this, the differences between the processes set out in proposed sections 5C to 5E are not significantly different from the LGA process, and there does not appear to be any reason why bylaws made under the Principal Act should be approached differently by local authorities. Accordingly, the effect of proposed section 5E seems unnecessarily complex and may well cause difficulty for territorial authorities trying to identify which provisions of the Principal Act and LGA need to apply to bylaws created.

- 5.3 Aside from undue complexity, there is one way in which the provisions conflict. Proposed section 5C(2) of the Principal Act provides for the contents of a statement of proposal for consultation purposes, and those contents are different to those required by section 87(3) of the LGA, which also applies to these bylaws by virtue of proposed section 5E of the Principal Act. Further, because of how proposed section 5E is phrased, it is not at all clear whether section 159 of the LGA (relating to further reviews of bylaws every ten years) will apply to bylaws made under the Principal Act. While this may have been deliberate in anticipation of a review of the Principal Act in the near future, there is no guarantee that the review will occur or what its outcome may be. It may be preferable to include a further review provision as a safeguard in case no further reform occurs.
- 5.4 A much simpler approach would be to make provision for the LGA provisions relating to bylaws to apply to bylaws made under the Principal Act in the same way as they do to bylaws made under other enactments. That would involve deleting all or parts of proposed sections 5B, 5C, 5D and 5E, and inserting a subsection into proposed section 5A to that effect. There may also need to be consequential amendments to the LGA to insert references to the Principal Act in the same way that LGA provisions refer to the Maritime Transport Act 1994. The Law Society is happy to work with officials to assist in that process.

Recommendations:

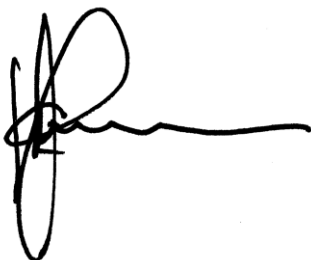
- (a) Consider applying the Local Government Act 2002's provisions relating to making, amending and reviewing bylaws, in their entirety.
- (b) Alternatively, if the current approach is preferred, insert a provision confirming that section 159 of the Local Government Act 2002 will apply to bylaws made under the Principal Act.

6 Religious equality

- 6.1 Because other submitters may raise the issue, it is worth confirming the Law Society's view that the Bill does not discriminate on the basis of religious belief. While the Bill may appear to differentiate between those of a Christian faith and other religions by enabling Christians to decline to work on a day of significance without adverse treatment, that simply provides specific recognition of a right available to all those whose religious beliefs may affect the times and days they are available for work: see for example *Meulenbroek v Vision Antenna Systems Limited* [2014] NZHRRT 51.

7 Conclusion

- 7.1 The Law Society does not wish to be heard further on this Bill, but is available to meet with the officials advising on the Bill if the Committee considers that this would be of assistance.



Chris Moore
President
21 January 2016