New Zealand Law Society
Te Kāhui Ture o Aotearoa

Worker Protection (Migrant and Other Employees) Bill

30/11/2022

Worker Protection (Migrant and Other Employees) Bill 2022

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Worker Protection (Migrant and Other Employees) Bill (**Bill**).

1.2 This Government Bill seeks to *"improve compliance and enforcement legislation to deter employers from exploiting migrant workers*,*"* and makes various amendments to the Employment Relations Act 2000, the Immigration Act 2009, and the Companies Act 1993.[1]

1.3 This submission has been prepared with input from the Law Society's Employment Law Committee, and Immigration and Refugee Law Committee,[2] and recommends various amendments to improve the Bill and ensure it better achieves its purpose.

1.4 The Law Society does not wish to be heard in relation to this submission. However, we would be happy to answer any questions or meet with the select committee to discuss this submission, if they wish to do so.

2 Proposed amendments to the Immigration Act

The breadth of the proposed information sharing provisions (clauses 4 and 5)

2.1 Clauses 4 and 5 amend the Immigration Act and empower immigration officers to request records which contain employees' personal information, and share these records with various "regulatory agencies" for the purposes of the Immigration Act, the Employment Relations Act, as well as various other enactments.

2.2 These are very broad information sharing powers which permit the sharing of information with a broad range of agencies for a broad range of purposes. The select committee should carefully consider whether such broad information-sharing powers are in fact needed to meet the underlying policy objectives.

2.3 If the committee considers the proposed powers to be necessary and appropriate, we recommend amending clauses 4 and 5 to indicate more clearly that employees' personal information can be shared with various other agencies, for a broad range of purposes. It would also be helpful to clearly set out the nexus between the Privacy Act, and the enactments listed in new section 294AAA(b), to assist employees' understanding of the use and disclosure of their personal information under this legislation.

2.4 These amendments will help ensure the legislation can be more easily understood, and is more accessible to vulnerable employees and migrant workers who speak English as a second language.

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1 Explanatory Note of the Bill.

2 See the Law Society's website for more information about these committees: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

Limits on using information provided by employers for the purposes of assessing visa applications (clause 4)

2.5 Clause 4 inserts new section 275A of the Immigration Act, and empowers immigration officers to require documents from supporting employers to determine whether the supporting employer is:

(a) employing a supported employee in accordance with the work-related conditions of the supported employee's visa; and

(b) complying with their obligations (including the obligation not to commit an offence) under that Act.

2.6 Immigration officers can exercise these powers to obtain documents which contain, for example, evidence of the employee working more than the maximum number of hours permitted under their visa because they were exploited by their employer. This could lead to concerns around immigration officers then relying on this information when assessing future visa applications, and concluding that the employee does not meet the relevant character requirements needed to obtain another visa (because they failed to comply with the conditions of their previous visa). Such concerns can deter migrant employees from reporting exploitation, leading to outcomes which are at odds with the policy objectives of the proposed legislative changes (i.e., to protect temporary migrant workers, and to enable them to leave exploitative employment).[3]

2.7 We acknowledge the Privacy Act 2020 may prevent immigration officers from using any information obtained under new section 275A for a different purpose (including for the purpose of assessing future visa applications).[4] However, vulnerable and exploited migrants are unlikely to understand that their information cannot be used for other purposes. More explicit constraints on the use of this information would better serve the protective purposes of the Bill and would reduce the risk of variable practice across immigration officers or changes to future practice, whether as a result of convenience or as compliance approaches change.

2.8 We therefore suggest amending clause 4 to explicitly provide that immigration officers cannot rely on any information obtained under new section 275A for the purpose of determining whether an employee has complied with the conditions of a current or previous visa.

Powers to interview employers and employees

2.9 The Employment Relations Act empowers Labour Inspectors to interview any employer or any employee for the purpose of performing their functions and duties under that Act.[5]

2.10 We suggest amending the Immigration Act so that immigration officers are granted similar powers to interview employers and employees for the purpose of determining whether a supporting employer has:

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[3] Regulatory Impact Statement, page 14.

[4] Privacy Act 2020, information privacy principle 10.

[5] Employment Relations Act, section 229(1)(b).

(a) employed a supported employee in accordance with the work-related conditions of the supported employee's visa; and

(b) complied with their obligations (including the obligation not to commit an offence) under that Act.

2.11 These powers could supplement the powers granted to immigration officers under clause 5 to request and examine employment documents, and will better equip immigration officers to investigate whether migrant exploitation has in fact occurred.

Infringement fees for employment infringement offences (clause 7)

2.12 Clause 7 of the Bill inserts new sections 359, 359A and 360 of the Immigration Act. These new sections seek to *"deter lower-level non-compliance by employers that is linked to, or increases the risk of, migrant exploitation"* by creating three new employment infringement offences.[6] A person who commits an employment infringement offence is liable to an infringement fee:[7]

(a) in the case of an employer who is an individual, $1,000 for each employee against whom the offence is committed; and

(b) in the case of an employer that is a body corporate or another entity, $3,000 for each employee.

2.13 These proposed infringement fees are, in our view, too low to deter non-compliance by employers. Employers can afford to write off a $1,000 or $3,000 fee as a business expense, or look to pay these infringement fees out of pocket, and then recoup those costs from their employees by:

(a) requiring employees to work additional hours for a lower pay, or no pay; or

(b) demanding that the employees (or their family members) reimburse the employer for the infringement fees,

in exchange for sponsoring the employee's visa application. Where employees refuse to work extras hours, or cover the infringement fee costs, employers could threaten to 'deport' the employer, or cancel their sponsorship.

2.14 Vulnerable migrant workers may therefore be worse off as a result of the proposed infringement offence regime, contrary to the policy objectives of the Bill to protect temporary migrant workers.[8] Higher infringement fees are therefore needed to ensure unscrupulous employers cannot afford to write off these costs, or look to recoup the costs from the employee. A higher infringement fee may also be more proportionate to the gravity of the offence, and the level of harm it causes to the employees. We recommend the Select Committee further consider the settings of this infringement regime, with these comments and the purpose of the Bill in mind.

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[6] Explanatory Note of the Bill.

[7] New section 359A(2) in clause 7.

[8] Regulatory Impact Statement, page 14.

3 Proposed amendments to the Employment Relations Act

3.1 Clause 17(1) inserts new section 229(2A) of the Employment Relations Act. This new section requires employers to comply with a requirement to provide any of the documents specified in section 229(1)(d) *"immediately after receiving [the requirement]", or, if that is not practicable, within 10 working days of the date on which the requirement is received"* (emphasis added).[9] New section 235A(c)[10] provides that an employer who fails to comply with the requirement in section 229(1)(d) within the timeframes prescribed in new section 229(2A) commits an infringement offence.

The use of the term "practicable" (clause 17)

3.2 The Bill does not define the term "practicable", which may define the timing within which an employer must furnish documents to a Labour Inspector. We acknowledge that it is not realistic to specifically define what is practicable, as that depends on the circumstances of each case. However, the use of this undefined term could lead to confusion and disputes where an employer's views of what might be "practicable" differs from the views of the Labour Inspector.

3.3 For example, an employer may consider that it is not practicable to provide documents "immediately after receiving [the requirement]" where:

(a) the employer has other urgent work to attend to in the business;

(b) the employer is overseas when the request is made; or

(c) employment records are held externally or across several systems and time is needed to locate the required documents.

In such circumstances, the Labour Inspector may issue an infringement notice if they consider it is in fact practicable to provide these documents immediately after the request is made, despite the employer holding a contrary view.

3.4 We therefore suggest amending new section 229(2A) as follows (amendments in red font):

> An employer must comply with a requirement under subsection (1)(d) ~~immediately after receiving it, or, if that is not practicable,~~ within 10 working days of the date on which the requirement is received.

3.5 This amendment clarifies that an infringement notice can only be issued after the 10-working day period has passed, and removes any doubt as to when an infringement notice might be issued. For similar reasons, and to improve the clarity of the Bill, we also recommend amending new section 229(2) as follows (amendments in red font):

> An employer must comply with a requirement under subsection (1)(c) ~~while the Labour Inspector is with the employer, or, if that is not practicable,~~ within 10 working days.

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9 The documents specified in section 229(1)(d) are copies of the wages and time record, or holiday and leave record, and the employment agreement of any employee.

10 Clause 19(3).

The 10-working day timeframe for providing documents (clause 17)

3.6 The 10-working day timeframe in new sections 229(2) and (2A) may not be a sufficient period for some employers to comply with a requirement to provide documents, particularly where:

(a) the employer is a relatively large business or organisation holding a large volume of records;

(b) the employer is a small business or organisation which does not hold the required documents in a format, or in a location, which can be easily accessed;

(c) the employer is facing resourcing issues (for example, due to labour shortages, staff illness or seasonal pressures);

(d) the employer is required to provide a large number of documents relating to multiple employees; or

(e) unforeseen circumstances arise, which impact the employer's ability to provide the required documents.

3.7 We therefore recommend inserting a clause which would allow the Labour Inspector to extend the timeframe for the employer to provide the required documents (for example, taking into account the employer's ability to locate and compile the documents, and the volume of information sought). This would provide for some flexibility in managing, for example, larger requests and dealing with unforeseen circumstances which may arise.

Requirement to notify employer of timeframes and consequences of non-compliance

3.8 The Bill and the Employment Relations Act do not presently require the Labour Inspector to inform the employer that they must provide the documents specified in sections 229(1)(c) and 229(1)(d) within a certain timeframe, or to advise the employer of the consequences of failing to comply with a requirement under those sections.

3.9 We recommend inserting a clause which requires the Labour Inspector to advise the employer of:

(a) the timeframe for providing the required documents (and the option to extend the timeframe, if our recommendation at paragraph 3.7 above is accepted); and

(b) the possibility of an infringement notice being issued if the employer fails to provide the required documents within the relevant timeframe; or

(c) the other consequences of failing to comply with the requirements under sections 229(1)(c) and 229(1)(d), which are set out in section 232 of the Employment Relations Act.

3.10 In the absence of such a provision, employers may be unaware of the requirement to provide documents within a certain timeframe, and of the consequences for failing to do so. We believe the proposed amendment will address these concerns, provide a fairer process for employers, and encourage employers to promptly collate and provide any required documents within the prescribed timeframe.

<u>The use of plain language (clause 17)</u>

3.11 The Bill seeks to replace some of the more archaic terms in the Employment Relations Act (such as "forthwith", or "on examination or enquiry") with plain English,[11] and impose requirements that are more easily able to be understood. We support the inclusion of these amendments, which improve the clarity and accessibility of the legislation. This is particularly important in the context of migrant worker exploitation, where both workers and employers may speak English as a second language.

<u>Clarifying the provisions relating to infringement notices (clauses 19-21)</u>

3.12 Section 229(1)(d) of the Employment Relations Act empowers the Labour Inspector to require the supply of documents relating to *any employee*. A requirement to provide documents can therefore cover multiple documents relating to multiple employees.

3.13 As noted above, the Bill empowers the Labour Inspector to issue an infringement notice if the employer fails to comply with such a requirement within the prescribed timeframe. As currently drafted, it is unclear whether the Bill contemplates multiple infringement offences being committed where an employer fails to comply with a requirement which covers multiple documents or multiple employees.

3.14 The Regulatory Impact Statement recognises that there can be "*uncertainties around whether an employer who partially complies with a request to produce documents could be issued with an infringement notice under this proposal, for example, by providing some but not all of the documents requested" and notes that "[t]his risk will be addressed in the detailed legislative design process"*.[12] However, the legislative design and drafting do not presently address these uncertainties.

3.15 It would therefore be helpful to amend the Bill, and to clarify:

(a) whether the employer commits a separate infringement offence in relation each document they fail to provide, or in relation to each employee covered by the requirement (i.e., the employer can commit multiple infringement offences where they partially comply with a requirement); or

(b) whether the employer commits an infringement offence in relation to each requirement to provide documents (i.e., the employer only commits one infringement offence where they partially comply with a requirement).

3.16 In our view, option (a) may result in unduly harsh and disproportionate penalties being imposed on employers. Option (b) sets a more appropriate and proportionate penalty for partial compliance. For example, where an employer fails to provide 30 documents out of 300 documents covered by a requirement, the employer would be liable to pay $30,000 in infringement fees under option (a), and $1,000 under option (b). The penalty under option (a) would be disproportionate to the employer's conduct, and the objective of these provisions to simply reduce delays in the investigation process.[13]

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11 See clause 17(1) which replaces section 229(2), and clause 17 (3) which replaces section 229(5).

12 Regulatory Impact Statement, page 44.

13 Explanatory Note of the Bill.

Penalties for failing to comply with section 229(1)(c)

3.17 Labour Inspectors have the power to require the production of documents under sections 229(1)(c) and (d) of the Employment Relations Act. New sections 229(2) and (2A) set timeframes for complying with a requirement to produce documents.

3.18 New section 235A(c) provides that an employer who fails to comply with section 229(1)(d), within the timeframe specified in new section 229(2A), commits an infringement offence. However, the failure to comply with section 229(1)(c), within the timeframe specified in new section 229(2), does not attract a similar penalty.

3.19 We query whether this is a drafting error, and invite the select committee to consider whether section 229(1)(c) should also be added to new section 235A(c), so employers who fail to produce documents under section 229(1)(c) within the specified timeframe also commit an infringement offence. This would be consistent with the objectives of the Bill to provide an "enforcement toolkit" for Labour Inspectors, and to address delays experienced by the Labour Inspectorate when employers fail to provide statutory information within a reasonable period.[14]

4 Other suggestions to improve the Bill

4.1 In addition to the above, the following amendments are suggested to improve the Bill and to ensure it meets its policy objectives:

(a) The Bill should contain a clause which clarifies that migrant exploitation has occurred where an employer has committed an employment infringement offence under new section 359A of the Immigration Act. A finding of migrant exploitation will:

(i) assist exploited migrants who wish to leave their employment and apply for a different visa; and

(ii) signal to immigration officers who assess future visa applications that an exploited migrant may have 'breached' their previous visa conditions only because they were forced to do so by their employer.

(b) The Bill should contain a clause which amends the Legal Services Act 2011 and ensures legal aid is available to exploited migrants who require assistance with reporting migrant exploitation, dealing with employment issues arising from exploitation, and applying for Migrant Exploitation Protection Work Visas.

4.2 We also note that Immigration New Zealand and the Labour Inspectorate will need to be adequately resourced to ensure immigration officers and Labour Inspectors are able to carry out the additional functions and duties under this legislation.

[14] Explanatory Note of the Bill, and Regulatory Impact Statement, pages 40-44.

4.3 We understand Community Law Centres o Aotearoa has submitted on these points in a similar vein, and we agree with the points raised in that submission.

David Campbell
Vice-President