NEW ZEALAND
LAW SOCIETY
NZLS EST 1869

149 Taranaki Street, Wellington
DX SP20202, Wellington
PO Box 5041, Wellington 6140, New Zealand

TEL 04 472 7837 · E inquiries@lawsociety.org.nz
www.lawsociety.org.nz

27 November 2019

International Labour Policy
Labour and Immigration Policy
Ministry of Business, Innovation & Employment
Wellington

By email: MigrantExploitationReview@mbie.govt.nz

Temporary Migrant Worker Exploitation Review

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the proposals in the consultation document: *Addressing Temporary Migrant Worker Exploitation* (Paper).

2. The Paper provides a summary of the findings of the Temporary Migrant Exploitation Review (Review) to date, along with ten proposals and options designed to reduce the exploitation of temporary migrant workers in New Zealand. The Paper notes the proposals and options aim to:[1]

   a) Prevent the occurrence of workplace (and other) conditions that might enable temporary migrant worker exploitation.

   b) Protect temporary migrant workers in New Zealand and enable them to leave exploitative employment.

   c) Enforce immigration and employment law to deter employer non-compliance through a fit for purpose offence and penalty regime.

3. The Law Society's Immigration and Refugee Law and Employment Law Committees have reviewed the Paper and the Law Society's comments on the proposals are set out below.

General comments

4. The Paper states that it is hard to say how many temporary migrant workers are being exploited, but that "Immigration New Zealand (INZ) received around 320 complaints of migrant exploitation between 2011 and 2018."[2] In light of this and the anecdotal reports of temporary migrant worker exploitation in New Zealand, the Law Society agrees it is an appropriate time to undertake a review.

5. However, the Paper has not set out sufficient evidence to clearly identify and assess the problem and identify solutions. For example, the Paper does not indicate how broad the exploitation of migrants is and how much of that is over and above exploitation of other

---

[1] *Addressing Temporary Migrant Worker Exploitation, consultation document*, at p 5.
[2] Ibid, at p 11.

vulnerable workers.3 Although the Paper indicates that relevant background information will be available, including independent research commissioned as part of the Review, we have not been able to locate that information and research on the Ministry's website.

6. The Law Society also questions whether there has been sufficient analysis of the existing regulatory tools – including the protections provided in the Employment Relations Act 2000 (the ER Act) and the Immigration Act 2009 (the Immigration Act) – available to address concerns about workplace exploitation, particularly of international students, and whether those existing tools are adequate.

Proposal One: Introduce liability for parties with significant control or influence over an employer that breaches employment standards.

7. Proposal One asks whether parties who have "significant control or influence" over an employer (for example franchisors) should be responsible for that employer's breaches of minimum employment standards. The Paper states:

   "We think that to determine whether a person would be legally responsible for an employer's breach of employment standards would require several tests, including:

   - Did the person have significant control or influence over the employer's affairs?
   - Did the person or a company officer know that the breach of employment standards would occur, or could reasonably have been expected to have known?
   - Did the person take reasonable steps to prevent a breach of employment standards occurring?

8. The Law Society considers the definition of "significant control or influence" should be left open, so that it can be determined on a case by case basis by the Employment Relations Authority (ERA) according to the relevant factors in each case.

9. We also do not consider it appropriate to prescribe what a person knew or could reasonably be expected to have known, or the reasonable steps a person could take to prevent a breach of employment standards. Again, this will be fact-specific, depending on factors such as the nature and size of the organisation or the way in which a franchise relationship operates in practice.

Proposal Two: Require certain subcontractors and franchisees to meet additional criteria under the employee-assisted visa gateway system

10. The Law Society considers this proposal will add a further layer of compliance to the changes coming in 2021, where employers will have to apply for accreditation before a specific employee's visa can be applied for. Proposing additional criteria suggests that the three levels of accreditation are not going to be sufficiently robust to prevent migrant exploitation. It would be preferable to ensure the primary accreditation processes are robust before creating an additional accreditation process for subcontractors and franchisees.

11. There is also a practical problem with identifying where contractors sit in a chain of existing relationships. They might sit in a different position depending on a particular contract, and subcontractors may have several contracts in place at any one time. The same minimum employment standards apply to all employees so, from a practical perspective, the same

[3] Further, the Paper cites no evidence of the rates of non-compliance with minimum employment standards when asserting that "temporary migrant workers often work in industries or sectors where employers have had higher rates of non-compliance with minimum employment standards."

accreditation criteria should equally apply.

12. Alternatively, an enhanced definition of "employer" in the Immigration Act might well assist with bringing these parties within the existing offence provisions in the Act.[4]

Proposal Three: Introduce a labour hire licensing scheme providing certain protections for workers

13. The Paper notes that "a licensing scheme would extend the accreditation principles proposed under the temporary worker visa reforms (which apply only to labour hire companies intending to sponsor temporary migrant workers) to all labour hire companies."[5] However, the Paper acknowledges that data on the extent of exploitation in labour hire companies is limited. It would be appropriate to undertake further research to ascertain the extent of the problem before assessing whether increased compliance requirements for all labour hire companies is justified.

14. The proposal also appears to create different rules for migrant workers and New Zealanders, even though the same minimum employment standards apply to both.

15. As noted in our response to proposal two, the pending accreditation system should be robust enough to address temporary migrant exploitation. Adding an additional licensing requirement for all labour hire companies seems redundant.

16. Finally, we note that from 2020, when "triangular relationship" amendments to the Employment Relations Act 2000 take effect, labour hire workers will more easily be able to claim against the 'end-user' as well as the labour hire company. We question how the proposed changes would sit alongside the existing ER Act provisions and invite the Ministry to explore this issue further.

Proposal Four: Prohibit persons convicted of exploitation under the Immigration Act 2009 from managing or directing a company

17. This proposal appears to be an extension of existing provisions under Part 9A of the ER Act where banning orders can be made preventing a person involved in a breach of minimum employment standards from entering employment agreements, being an officer of an employer, and being involved in the hiring or employment of employees (see section 142N). Presumably mirroring provisions would need to be inserted into the Companies Act 1993, and orders made by the ERA would apply in the same way.

18. However, the prohibition under the Companies Act 1993 may already cover exploitation under section 351(1) of the Immigration Act 2009. Section 382(1)(a) of the Companies Act says:

19. "a person has been convicted of an offence in connection with the promotion, formation, or management of a company (being an offence that is punishable by a term of imprisonment of not less than 3 months)."

20. Section 351(1) of the Immigration Act 2009 further provides, inter alia, for imprisonment for a term not exceeding 7 years and would appear to relate to "management" of a company. Consequently, it may not be necessary to specifically provide for the prohibition as proposed.

---

[4] For example, the definition of "employer" in the Immigration Act 2009 could be amended to include "directors, employees or agents attributed to body corporate or other principal."

[5] Above n 1, at p22.

Proposal Five: Establish an MBIE dedicated migrant exploitation 0800 phone line and online reporting AND establish an MBIE specialist migrant worker exploitation-focused reporting and triaging function

Questions 5A – 5F – 0800 line and online reporting

21. The Law Society notes that creating an alternative 0800 number will require considerable ongoing publicity and awareness to be effective. The barriers noted on page 30 of the Paper, particularly "face deportation or prosecution for breaching immigration laws" are real barriers in immigration practitioners' experience. The current system, as indicated on page 31, is "not widely known about or used". In any event, the conditions under which a migrant could apply for another visa are extremely limited.

22. The Paper also does not list limited English ability as one of the barriers faced by migrants in reporting exploitation. Practitioners have commented this is a significant barrier faced by many temporary migrant workers, particularly women on work visas based on partnership or migrant workers holding visas or jobs that do not require English language ability. Not only is it difficult for those with limited English to understand their employment rights, it also makes accessing support and reporting exploitation very challenging.

23. The Paper does not mention whether Ezispeak or any other interpreting services will be available to those reporting exploitations through the 0800 line. The ability to report exploitation in one's own language is essential for ensuring an accurate report is made. The Law Society suggests that interpreting services should be made available for both the 0800 line and the online reporting options. The Ministry should also produce plain English guides on reporting exploitation, translated into a range of languages.

24. Information on the 0800 line and other online reporting options would need to be made available at various points throughout and after the visa application process; all the options suggested at question 5B would be appropriate. However, using Facebook and other social media platforms for online reporting could be problematic due to concerns around privacy and confidentiality.

Questions 5J – 5OL: functions of the specialised team

25. Further clarity around the primary purpose of the proposed specialist team is required. The Paper seems to envisage that the duties of the team will include:

    a. Receiving and triaging reports of exploitation

    b. Providing support to exploited migrant workers throughout the investigation process

    c. Provision of information to exploited workers

    d. Follow-up action on false or inaccurate reports.

26. These duties may conflict with each other, particularly if the specialised team is reaching conclusions or taking action on false or inaccurate reports, as suggested in question 5N.

27. If it is intended the specialised team will triage reports, provide ongoing support and provide information, it is important that migrants can trust the service and feel safe in reporting exploitation. When a migrant worker reports exploitation to the specialised team it may be the first time they have disclosed the harm. Accordingly, the specialist team must be trained about the dynamics of migrant exploitation and the barriers migrants can face in extracting themselves from exploitative relationships as well as the inherent power imbalances between

employers and migrant employees. Frontline staff will require training on how to handle the disclosures made when reports of migrant worker exploitation are made.

28. Question 5H asks whether there are particular barriers women face in reporting workplace exploitation. Practitioners report that, in practice, sexual harassment is often a significant component of workplace exploitation experienced by women and they can face additional shame and fear in reporting their experiences, and that the connection between sexual harassment and workplace exploitation is often not well understood. Frontline staff will need to be trained and prepared to deal with disclosures of this nature and be able to respond with sensitivity.

29. Practitioners have commented that exploited migrant workers can face not only visa and financial uncertainty but also significant pressure from their community (reporting an exploitative employer may mean that people are shunned and excluded by their community). It may also mean they face retaliation including harassment or physical violence. These are very real risks for many people and care will need to be taken about how staff will advise people who may be facing safety concerns.

30. As noted above, migrant workers may feel their visa is in jeopardy if they report exploitation. It is essential the specialist team is able to provide comprehensive information on how to apply for a new visa if appropriate.

31. The Law Society suggests a model similar to the Weathertight Homes Resolution Service could apply to the specialist team in that claim advisers are able to provide support and information throughout the process of the investigation of a report of exploitation. It is essential this team is independent and not involved in investigating reports or making decisions on the validity of reports of abuse or exploitation. Maintaining independence is essential to developing a service that is trusted. It would not be appropriate for this team to be involved in decisions on visa applications, however the specialist team's role in relation to visa applications should include the provision of clear and comprehensive information on how to apply, as outlined above.

Proposal Six:

32. The option to develop a bridging-type visa for exploited migrant workers or to improve the current process will only work if INZ has the resources to deal urgently with such applications.

33. It may also be helpful to make existing processes easier for migrant workers to change visas to a new employer, even if only on a temporary basis, when they are experiencing exploitation. The link between the work visa and the employer appears to be the single biggest factor in migrant exploitation. The Paper mentions similar approaches in Canada and Australia (page 31) which may be worth further consideration.

Proposal 6A: Develop a bridging-type visa for exploited migrant workers

34. If implemented appropriately, proposal 6A appears to offer migrants the most certainty in reporting exploitation. As noted above and in the Paper,[6] visa uncertainty is arguably the most significant barrier to reporting exploitation. A bridging visa that allows a temporary migrant worker to maintain a valid visa status and look for a new job will remove one of the biggest barriers in reporting.

35. The Law Society understands that some employers may be reluctant to employ people on short-term visas and a visa term of less than 12 months could be problematic for people in trying to

[6] Above n 1, at p 30.

secure a new role. A visa of approximately 12 months would offer prospective employers the certainty they require. The visa should be an open work visa for a minimum period of 12 months to allow the applicant time to find a new role, possibly one that offers them a visa pathway, or to make plans to return home.

36. Immigration practitioners have noted that in some cases, migrants who have experienced exploitation wish to return home but cannot afford to. A bridging visa will enable people in these situations to work and earn enough money to return home if they wish.

37. The Law Society also raises the following points:

    a. The Paper states that the bridging visa will be for temporary migrant workers who have reported exploitation, presumably to the Labour Inspectorate or through the 0800 number, *while* INZ assesses their report of exploitation. This implies that the process for granting of the visa will be separate to the assessment of the report of exploitation. It is important the two processes are not confused and that the Immigration Officers assessing the visa application are not drawn into investigating or making judgements on the validity of the complaint of exploitation. It is also important that the visa application is assessed as quickly as possible in order to allow the applicant to de-couple their visa from their employer quickly and to move to a new employer easily.

    b. Other sections of the paper refer to the Labour Inspectorate continuing to investigate claims of migrant exploitation and to the specialist team triaging reports of exploitation and referring them to either the Labour Inspectorate or INZ. The Law Society questions whether it is intended that INZ will also investigate such claims. The difference between 'assessing' and 'investigating' a claim of exploitation is not clear in the Paper. (What will happen after INZ has 'assessed' a report of exploitation under proposal 6A? Will it be referred to the Labour Inspectorate?) The Law Society suggests it would be preferable for the Labour Inspectorate to be appropriately resourced to assess the reports of exploitation in order to avoid any duplication of process with other MBIE teams.

Evidential requirements for the bridging visa

38. The instances of migrant worker exploitation likely to be reported will cover a broad range of circumstances. In some cases, a lack of documentation may be evidence of exploitation, for example in situations where migrant workers have not been given a contract or payslips. Accordingly, prescribing an exhaustive list of required evidence is problematic. Guidelines of a broad range of acceptable evidence would be preferable. A statutory declaration detailing the exploitation experienced could be a minimum requirement. Other acceptable evidence could include:

    - The Labour Inspectorate investigating a complaint
    - Documentation of efforts to resolve the matter with one's employer (this will be highly dependent on the type of exploitation experienced)
    - Letters and/or statutory declarations by people that the migrant worker has made disclosures to, including friends, family members, colleagues, CAB and/or Community Law employees, lawyers or advocates, health professionals such as GPs or counsellors

39. The Law Society considers it is appropriate for applications and accompanying evidence to be assessed by Immigration Officers with specialist training in worker exploitation. It is important that Immigration Officers understand the power imbalances that can exist in the relationship between employers and migrant workers and the barriers faced in leaving the employment

relationship, as noted in the Paper.

40. References are made throughout the Paper to 'collusion' and 'acceptance of their exploitation'. The Law Society is concerned about the assumptions underlying such statements. Some practitioners have noted that exploited migrant workers may feel trapped in their situation and not be willing to report exploitation or avail themselves of the options suggested under proposal 6A or 6B if they fear their visa applications will be declined on the grounds that they were complicit in their own exploitation.

Proposal 6B: improve the current Immigration New Zealand visa status consideration process.

41. Immigration practitioners have noted that a difficulty with the current visa process for reports of temporary migrant worker exploitation is that few people know about it. The information on the INZ website is very limited and not easily accessible. The visa process can be difficult to navigate for advocates and advisers, let alone migrant workers experiencing exploitation.

42. Practitioners also report that the Labour Inspectorate have a considerable backlog of cases, and investigations can take many months or they may decline to investigate due to a lack of resources. This has implications for those whose visa status becomes dependent on the Labour Inspectorate undertaking an investigation.

43. These issues along with the lack of accessible information may act as a strong disincentive to migrant workers considering reporting workplace exploitation. Some feel, or may be advised, that their situation is not of sufficient gravity to warrant complaining to a government agency. Of those who feel able to proactively address the exploitation, most choose to pursue remedies under employment law such as raising a personal grievance and attending meditation. The difficulty with proposal 6B is that a visa would not be available to those who choose to resolve their situation in this manner.

Proposal Seven: Establish new immigration offences for employer behaviour that contributes to exploitation and vulnerability

44. The proposal to better align the current employment and immigration enforcement toolkit has merit. If new immigration offences are to be introduced, it is unclear whether they would be included in the Employment Relations Act or the Immigration Act and which body would have the power to make orders. Given that these offences relate to minimum employment standards, we suggest they are included in the Employment Relations Act, with the ERA and Employment Court given the statutory power to make orders or declarations. (Otherwise there is the risk of a two-tier system – one for New Zealanders and one for migrant workers, even though both are concerned with minimum employment standards.) The enforcement responses should be consistent with the existing provisions in Part 9A (enforcement of employment standards) and Part 11 (infringement offences) of the Employment Relations Act.

45. Question 7A includes giving INZ an option to issue an infringement offence "when an employer does not comply with immigration law and policy" (emphasis added). This appears to go beyond infringement of the Immigration Act and opens the door to offences being created, for example, through amendments to Immigration Instructions. If the proposed infringement offences are deemed an appropriate solution, they should be introduced through legislative change to allow appropriate Parliamentary scrutiny, and not be made through subordinate (tertiary) instruments such as Immigration Instructions.

46. In respect of the possible infringement offences suggested, we recommend the following:

    a. Failing to provide information to an Immigration Officer should also include failure to

provide information to a Labour Inspector.

b. The suggested offence of employing workers who are not entitled to work in New Zealand or who are in breach of their conditions should not be strict liability. The offence should require some element of knowledge, as there are situations, such as workers on a working holiday visa, where an employer has no way of checking whether an employee has complied with the terms of their visa, for example in relation to their previous employment.

c. Similarly, the offence of paying less than the salary documented should be applicable to deliberate underpayment, not where it is simply a clerical mistake. For instance, periods of (for example) unpaid sick leave would reduce the employee's annual pay below their documented salary, such as where the employee falls sick in the first 6 months of employment and is not yet entitled to paid sick leave under the Holidays Act.

47. The proposed infringement regime should follow the procedural requirements set out in section 235D of the ER Act and include, as in section 235D(3)(f), that the person notified has the right to request a hearing. The form of the infringement notices should be consistent with the Employment Relations (Infringement and Reminder Notices) Regulations 2016.

Proposal Eight: Allow the Labour Inspectorate to issue an infringement notice to employers who do not provide documents requested within a reasonable timeframe

48. As noted above, we consider it would be appropriate to have Labour Inspectors rather than immigration officials enforcing employment standards, although there may be scope for individuals to hold a dual warrant (as with WorkSafe and Maritime Safety warrants).

Proposal Nine: Expand the stand-down list to include existing immigration offences and, in future, immigration infringement offices for employer non-compliance

49. The Law Society considers this proposal would provide consistency between immigration standards and minimum employment standards.

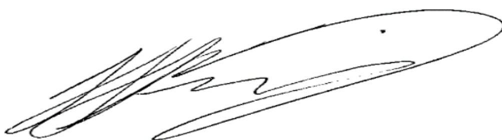
Proposal Ten: Notify employees on employer-assisted visas who work for an employer who is stood down

50. This proposal seems practical. Thought will need to be given to how employees will be notified. Practitioners note that migrant workers often give their employer's address as the point of contact, but mail sent to that address may be intercepted by the employer. Other options for notifying employees, such as email, should be considered. The notice will also need to be in the employees' language.

Conclusion

51. We hope these comments are helpful to the Ministry and would be happy to discuss further if needed. If so, contact can be made in the first instance through the Law Society's Law Reform Manager, Vicky Stanbridge (Vicky.stanbridge@lawsociety.org.nz).

Yours faithfully



Herman Visagie
Vice President