Departmental Disclosure Statement

Worker Protection (Migrant and Other Employees) Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material
- some of the key quality assurance products and processes used to develop and test the content of the Bill, and
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

15 September 2022.

Contents

Part One: General Policy Statement

Introduction

This is an omnibus Bill introduced under Standing Order 267(1)(a) (dealing with an interrelated topic that can be regarded as implementing a single broad policy).

The single broad policy and purpose of this Bill is to improve compliance and enforcement legislation to deter employers from exploiting migrant workers. The aim is to deter employer non-compliance with immigration and employment law. The related offence and penalty regimes are amended to ensure mirror enforcement regimes for work by both migrants and non-migrants.

This Bill provides a more proportionate and efficient enforcement toolkit for immigration officers and Labour Inspectors to deal with lower-level offending before it becomes more serious. The Bill aligns the powers of the Labour Inspectorate and Immigration New Zealand and supports greater collaboration between the 2 regulators to undertake compliance and enforcement activity.

To achieve that purpose, this Bill—

- amends the Immigration Act 2009 to empower immigration officers to request documents to verify that employers of migrant workers are complying with their obligations
- allows Labour Inspectors and immigration officers to issue an infringement notice when employers fail to provide requested information within a reasonable time frame
- establishes new infringement offences under the Immigration Act 2009 and the Employment Relations Act 2000
- amends the Immigration Act 2009 so that the chief executive of the Ministry of Business, Innovation, and Employment can publish the names of employers convicted of immigration offences (and details about the offending), and
- amends the Companies Act 1993 so that a person convicted of migrant exploitation and people-trafficking offences cannot be a director or manager of a company if the offending was enabled or otherwise related to the use of a company.

This Bill implements the legislative changes the Government announced as a result of the Temporary Migrant Worker Exploitation Review in 2020.

Creating document production power for immigration officers

Employers who support visa applications make commitments about the pay and conditions of the worker. To ensure that employers are meeting those commitments, immigration officers must be able to require relevant employment records.

Immigration officers have some powers of entry and inspection relating to records of employers under section 277 of the Immigration Act 2009. That power allows them to enter an employer's premises and inspect or copy records or documents under the employer's control, provided the immigration officer has reasonable grounds to believe there may be information in those records or documents that relates to noncompliance with the Immigration Act 2009 or the deportation liability of a worker.

The new document production power will differ from this entry and inspection power by allowing a desk-based immigration officer to require the production of documents and records to verify that an employer is employing a person in a role, or under conditions, that match those stated in the employer-supported visa application.

The kind of records and documents that immigration officers could request from employers include wages and time records, leave records, employment agreements, bank statements, and financial statements. Those records would allow immigration officers to assess, for example, whether a migrant worker is being paid the salary stated in the employer-supported visa application. The document production power relates only to documents that the employer is obliged to hold under relevant legislation or documents relating to the remuneration or employment conditions of a supported employee.

The information gathered using this power could, in some circumstances, indicate that an employer has breached employment standards or has committed a more serious criminal offence. In those circumstances, immigration officers will be permitted to share the information gathered with the relevant regulator if they consider it will be of assistance.

Allowing Labour Inspectors and immigration officers to issue infringement notices if employers fail to provide requested documents within a reasonable time frame

The Labour Inspectorate experiences delays to investigations when employers fail to provide statutory information within a reasonable period. Labour Inspectors currently have two production powers under section 229 of the Employment Relations Act 2000, but that section does not stipulate any time frame for compliance with requests for information.

The Bill will amend the Employment Relations Act 2000 to require an employer to comply with a document production request within ten working days. Labour Inspectors will be able to issue an infringement notice to employers who fail to comply with such a request within ten working days.

This infringement offence will be replicated in the Immigration Act 2009, to enable immigration officers to similarly issue infringement notices. Giving this power to both Labour Inspectors and immigration officers will help to ensure that employers comply with document requests.

Establishing new infringement offences under Immigration Act 2009

Currently, the Immigration Act 2009 allows employers to be prosecuted for serious migrant exploitation or other offending but does not provide a proportionate enforcement response for less serious or less intentional offences. Lower-level breaches of immigration law exacerbate migrant workers' vulnerability and may be the precursor to more serious exploitation.

The Bill will amend the Immigration Act 2009 to create three new immigration infringement offences to deter lower-level non-compliance by employers that is linked to, or increases the risk of, migrant exploitation. The offences are when an employer—

- allows a person who is not entitled under the Immigration Act 2009 to work in the employer's service:
- does not employ a person in accordance with a work-related condition of that person's visa:
- fails to provide documents requested by an immigration officer within a reasonable time frame (discussed in more detail above).

The Bill also provides a new ability for regulations to prescribe an offence as an employment infringement offence under the Immigration Act 2009.

Expanding the stand-down list

Under section 223AAA of the Employment Relations Act 2000, the Chief Executive of the Ministry of Business, Innovation, and Employment (MBIE) publishes comments about employers found in breach of minimum employment standards. This is what is known as the stand-down list. Employers who are named on the stand-down list are prohibited from supporting a visa application for both temporary and residence class visas for the duration of their stand-down period. Currently, the authorisation to publish names of employers and relevant offending details does not extend to employers convicted of offences under the Immigration Act 2009.

To improve compliance with the Immigration Act 2009 and to give migrants and their advisers access to better information about the compliance history of prospective employers, the Bill introduces a new provision into that Act to enable the Chief Executive of MBIE to publish the names and certain offending details of employers who are convicted of offences under the Immigration Act. The names and offending details could be included on the stand-down list.

Expanding the stand-down list to cover Immigration Act offences will help to prevent employers who breach employment or immigration requirements from supporting a visa application for both temporary entry and residence class visas. An expanded stand-down list will also reduce the need for immigration officers to assess an employer's compliance with their obligations at each application, and will clearly indicate to employers that they are ineligible to employ migrants under the accreditation process.

Disqualifying persons convicted of migrant exploitation or people trafficking from managing or directing company

Some company directors leverage corporate structures to avoid personal liability and avoid detection while exploiting migrant workers. This Bill will amend section 383 of the Companies Act 1993 so that persons convicted of exploitation under section 351 of the Immigration Act 2009 or people trafficking under section 98D of the Crimes Act 1961 cannot not be directors, promoters, or managers of any company when their offending was enabled by or otherwise related to the use of a company.

Enabling the court to make an order to disqualify persons convicted of migrant exploitation or people trafficking from being a director, promoter or manager of any company will help to reduce migrant exploitation. It will prevent people who have been convicted of serious exploitation that involved the use of a company from using company structures in the future. This measure will supplement existing protections, which currently allow persons to be banned from being employers for up to 10 years under the Employment Relations Act 2000.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	**YES**
Collins F & Stringer C. (2019) *Temporary Worker Exploitation in New Zealand*. MBIE. https://www.mbie.govt.nz/dmsdocument/7109-temporary-migrant-worker-exploitation-in-new-zealand Stringer C & Michailova S. (2019) *Understanding the Exploitation of Temporary Migrant Workers: A Comparison of Australia, Canada, New Zealand and the United Kingdom*. MBIE. https://www.mbie.govt.nz/dmsdocument/7110-understanding-the-exploitation-of-temporary-migrant-workers-a-comparison-of-australia-canada-new-zealand-and-the-united-kingdom Stringer C & Michailova S. (2019) *Addressing the Exploitation of Temporary Migrant Workers: Developments in Australia, Canada and the United Kingdom*. MBIE. https://www.mbie.govt.nz/dmsdocument/7111-addressing-the-exploitation-of-temporary-migrant-workers-developments-in-australia-canada-and-the-united-kingdom	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	**NO**

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	**YES**
Temporary Migrant Worker Exploitation Review Phase One Proposals. Ministry of Business, Innovation and Employment. 2020. https://www.mbie.govt.nz/dmsdocument/11806-impact-statement-temporary-migrant-worker-exploitation-review-phase-one-proposals-proactiverelease-pdf	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	**YES**
The RIS dated 4 March 2022 met the threshold for receiving an independent opinion on the quality of the RIS from the RIA Team based in the Treasury. Their opinion for Cabinet on that RIS is set out in full in Appendix One of this disclosure statement. The Regulatory Impact Analysis Review Panel that reviewed the Impact Statement was comprised of officials from MBIE and Treasury.	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	**NO**

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	**NO**

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
MBIE's International Labour Policy Team was consulted on consistency with New Zealand's international obligations and no issues were identified. Measures to better identify and sanction worker and migrant exploitation will contribute to the more effective implementation of the rights and freedoms contained in International Labour Conventions and human rights treaties to which New Zealand is a party. The mechanisms proposed would enable better enforcement of rights, more effectively implementing existing commitments Conventions New Zealand has ratified in the areas of labour inspection, employment policy and equal treatment for migrants.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?
No inconsistencies with the principles of the Treaty of Waitangi have been identified.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	**YES**
Advice provided to the Attorney-General by the Ministry of Justice is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights	

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	**YES**
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	**NO**

Clause 6 amends Section 350 of the Immigration Act 2009 to remove the strict liability offence of allowing a person who is not entitled under the Immigration Act to work in the employer's service to do that work. It also repeals sections 350(3) and (4), which provide defences to that offence.

Clause 7 inserts section 359A into the Immigration Act to introduce three infringement offences for:

- allowing a person who is not entitled under the Immigration Act to work in the employer's service, with an infringement fee of $1,000 in the case of an employer who is an individual or $3,000 in the case of employer that is a body corporate, or a fine imposed by a court not exceeding double the amount of the total infringement fees payable
- employs a person in a manner that is inconsistent with a work-related condition of that person's visa, with an infringement fee of $1,000 in the case of an employer who is an individual or $3,000 in the case of employer that is a body corporate , or a fine imposed by a court not exceeding double the amount of the total infringement fees payable
- fails to comply with a requirement made under section 275A within the time period required by that section and with an infringement fee of $1,000 or a fine imposed by a court not exceeding $2,000.

Clause 7 also amends sections 359 and 360 of the Immigration Act to reflect the introduction of the infringement offences under section 359A.

Clause 17 amends section 235A of the Employment Relations Act to introduce an offence for a failure by an employer to comply with a requirement made under section 229(1)(d) within the time period required by section 229(2A).

3.4.1. Was the Ministry of Justice consulted about these provisions?	**YES**

The Ministry of Justice (MOJ) were consulted during policy development of the immigration infringement offences and the document production power. The Offence and Penalty Team were consulted via email. Feedback focussed on clarifying technical and legal questions, such as which jurisdiction infringement offences fall under, as well as how the infringement regime and document production power would fit with existing offences and powers in the Immigration Act and wider legal system. MOJ also recommended amending section 350 of the Immigration Act to remove the strict liability offence under that provision, to avoid duplication of offences with the introduction of new infringement offences.

MBIE adjusted the policy design of the proposals to account for MOJ's feedback to ensure the proposals were appropriately framed and consistent with existing legislation.

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	**YES**

Refer to Appendix Two

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
Refer to Appendix Two.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
MBIE undertook public consultation on the proposed changes which will come into force through the legislation. MBIE received 167 submissions from a range of submitters, including migrant workers, unions, migrant organisations, employers and industry organisations and non-governmental organisations. Submitters were overall supportive of the proposed changes and there was widespread recognition that migrant workers are valued and make an important contribution to the economy and to a diverse society. There was high-level support for action to address temporary migrant worker exploitation and high-level support for individual proposals.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	**NO**

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	**NO**

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	**NO**

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	**YES**
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	**NO**
Refer to Appendix Three.	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	**NO**

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	**NO**

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	**NO**

4.8. Does this Bill create or amend any other powers to make delegated legislation?	**YES**
The Bill provides for new regulation making powers under the Immigration Act 2009, to support the new infringement offence regime to be established in the Act. Schedule 2 sets out section 400(ga) consequential amendments to the Immigration Act, which provides for regulations to be made by the Governor-General by Order in Council to prescribe infringement offences against the Immigration Act in the case of employers. The amendment will support the new infringement offence regime. Regulations made under Section 400 are secondary legislation, and subject to Legislation Act 2019 (LA19) requirements. PCO must publish regulations on the legislation website and notify it in the *Gazette* under LA19 s 69(1)(c), the Minister must present it to the House of Representative under LA19 s114, Sch 1 cl 32(1)(a), and a regulation may be disallowed by the House of Representatives as per LA19 ss 115, 116.	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	**NO**

Appendix One: Further Information Relating to Part Two

Regulatory Impact Analysis on the Regulatory Impact Statement – question 2.3

Attached as separate document

Appendix Two: Further Information Relating to Part Three

Provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information – question 3.5

Information sharing between regulators

The Bill establishes a document production power for immigration officers to compel a supporting employer to supply a document to the immigration officer that is a wage, time or leave record kept in accordance with the provisions of any Act, or any other document relating to the remuneration or employment conditions of a support employee.

The Bill also establishes a framework for information sharing between immigration officers/MBIE and other specified agencies for regulatory purposes. The relevant provisions make it clear that this information sharing is only for information acquired obtained under the new section 275A and must be done within the framework provided by the Privacy Act 2020.

To achieve this, clauses 4 and 5 inserts sections 275A, 294AAA and 294AAB into the Immigration Act 2009.

Section 275A establishes the power for immigration officers to access employment documents. Section 275A specifies that information in these documents may only be used for the purposes relating to verifying whether an employer is meeting their obligations under the Immigration Act 2009.

Section 294AAA places a bar on immigration officers sharing information they obtain under section 275A unless the disclosure is in accordance with section 294AAB and for the purpose of specified legislation.

Section 294AAB provides that immigration officers and defined regulatory agencies may share information with each other under certain circumstances. Specifically, this information sharing:

- must comply with the Privacy Act 2020
- will be overridden by any other legislation imposing information sharing constraints or requirements
- may be subject to any conditions that any party chooses to impose (eg in relation to the provision of, and storage, use, access to, copying, returning and disposing of any information).

Expanding the stand-down list

The Bill inserts a provision allowing the Chief Executive of MBIE to publish names and information of employers in respect of immigration offences. The Chief Executive will be able to publish names and information of employers who are either convicted of an offence against the Immigration Act.

To achieve this, clause 10 inserts section 383A into the Immigration Act, which provides the Chief Executive the authority to publish this information. Clause 10 applies to employers who have been convicted of an offence under the Immigration Act. Information about individuals who are convicted of an offence is typically already publicly available through court or tribunal decisions.

The new provision does not propose to publish new or otherwise not publicly available information about these employers, and clause 10 clearly specifies the information that can be published about employers who breach their obligations under the Immigration Act 2009.

Consultation with the Privacy Commissioner – question 3.5.1

The Office of the Privacy Commissioner (the Office) was consulted on the information sharing and publication of names provisions to be inserted into the Immigration Act 2009. The Office raised a concern about sections 294AAA and 294AAB in clause 5, which enable regulatory agencies to share information with each other, and also raised concerns about clause 10, which inserts new section 383A allowing for the publication of names and information of employers in respect of immigration offences.

Information sharing provisions

The Privacy Commissioner supports the intent to address migrant worker exploitation and to enable officials to get access to personal information to address and identify offending against migrant workers. However, the Commissioner recommends the proposed proposals should carefully consider whether Privacy Act override provisions in the Immigration Act are necessary. The existing Privacy Act framework facilitates the disclosure of personal information for law enforcement and investigative purposes, and it is unclear if the proposed override provisions in the Immigration Act have limited applicability.

Following consultation with the Office of the Privacy Commissioner, the legislation was amended to include section 294AAB(3)(a) and (b). These subsections allow an immigration officer, the department, or a regulatory agency who provides information or a copy of a document under the section to impose conditions relating to the provision of the information.

Publishing names and information of employers

The Privacy Commissioner supports the proposal of a stand down list intended at amplifying publicly available information on employers convicted of an Immigration Act offence. The Commissioner recommends that MBIE's officials consider the form in which the stand down list is published and if a public register would be a privacy enhancing mechanism of sharing the relevant public information.

Appendix Three: Further Information Relating to Part Four

Strict liability offences – question 4.4

Clause 6 amends section 350 to remove the strict liability offence under section 350(1)(b), to avoid duplication with the new infringement offences.

Clause 7 inserts section 359A into the Immigration Act to introduce three infringement offences for:

- allowing a person who is not entitled under the Immigration Act to work in the employer's service, with an infringement fee of $1,000 in the case of employer who is an individual or $3,000 in the case of employer that is a body corporate, or a fine imposed by a court not exceeding double the amount of the total infringement fees payable
- employs a person in a manner that is inconsistent with a work-related condition of that person's visa, with an infringement fee of $1,000 in the case of employer who is an individual or $3,000 in the case of employer that is a body corporate , or a fine imposed by a court not exceeding double the amount of the total infringement fees payable
- fails to comply with a requirement made under section 275A within the time period required by that section and with an infringement fee of $1,000 or a fine imposed by a court not exceeding $2,000.

Outside of criminal prosecution before a court, the Immigration Act does not provide an enforcement mechanism to address low-level non-compliant employer behaviour. This is a time-consuming, expensive and inefficient response to low-level offending which undermines the effectiveness of immigration and employment law and places migrant workers at risk of more serious exploitation. The three new infringement offences target lower-level non-compliant behaviour that is linked to, or increases the risk of, migrant exploitation.

Employers who choose to hire migrant workers and support visa applications do so voluntarily and have an obligation to comply with all relevant employment and immigration laws. Accredited employers are also made aware of the consequences of breaching their obligations and are advised of the risks they face if they breach their obligations under the Immigration Act.

An immigration officer issuing an infringement notice to a person must believe on reasonable grounds that the person is committing or has committed an infringement offence. Employers issued with an infringement notice will have the ability to challenge it in a defended hearing before the District Court. If the Court finds an employer liable in a defended hearing, it will have discretion to require an employer to pay an infringement fine, the maximum of which would be double the amount of the infringement fee.

Clause 17 amends section 235A of the Employment Relations Act to introduce an offence for a failure by an employer to comply with a requirement made under section 229(1)(d) within the time period required by section 229(2A).

Under section 229(1)(d) of the Employment Relations Act 2009, labour inspectors can require employers to supply them with copies of records. Labour inspectors cannot, however, require records be provided within a particular timeframe and so experience delays to investigations when employers stall in providing information they are legislatively required to hold and produce to a labour inspector. The amendment to section 235A creates an infringement offence where employers fail to comply with a requirement within 10 working days. This will help ensure employers produce employment documents within a reasonable timeframe.

The fee for employers who are issued an infringement offence for failure to comply with a request for copies of records within the required time period will be $1,000. Employers who are issued an infringement notice can challenge it in a defended hearing before the District Court.