

15 September 2022

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Worker Protection (Migrant and Other Employees) Bill**

### **Purpose**

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1. We have considered whether the Worker Protection (Migrant and Other Employees) Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 22582/6.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with section 14 (freedom of expression), section 21 (freedom from unreasonable search and seizure), and section 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

### **The Bill**

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4. The Bill is an omnibus bill that amends the Immigration Act 2009, the Employment Relations Act 2000 and the Companies Act 1993. It aims to improve compliance and enforcement tools to deter employers from exploiting migrant workers. The Bill:
  - a. creates a document production power for immigration officers to help them verify that employers of migrant workers are meeting their obligations
  - b. allows Labour Inspectors and immigration officers to issue infringement notices if employers fail to provide requested documents within a reasonable time frame
  - c. establishes new infringement offences to deter lower-level non-compliance by employers
  - d. enables publication of the names of employers convicted of immigration offences, and of details about the offending
  - e. disqualifies persons convicted of migrant exploitation or people-trafficking from managing or directing a company.

### **Consistency of the Bill with the Bill of Rights Act**

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#### **Section 14 – Freedom of expression**

5. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The

right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>1</sup>

6. The Bill allows immigration officers to require “supporting employers” to supply specified employment-related documents, namely wages and time records; leave records; and any other document relating to the pay or employment conditions of “supported employees” (new section 275A of the Immigration Act 2009). This provision limits the right to freedom of expression under the Bill of Rights Act because it provides a power requiring production of specified information and there is an associated infringement offence provision that may be used if an employer does not comply.

*Is the limitation justified and proportionate under section 5 of the Bill of Rights Act?*

7. Where a provision is found to limit any particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justifiable in terms of section 5 of that Act. The section 5 inquiry is approached as follows:<sup>2</sup>
  - a. Does the provision serve an objective sufficiently important to justify some limitation on the right or freedom?
  - b. If so, then:
    - i. is the limit rationally connected to the objective?
    - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. is the limit in due proportion to the importance of the objective?
8. We have concluded that the limits imposed by this requirement appear to be justified under section 5 of the Bill of Rights Act:
  - a. The requirement is rationally connected to the important objective of deterring employers from exploiting migrant workers. Being able to require employers who support visa applications to supply certain documents can be expected to encourage employers to comply with their commitments and will help immigration officers check that they are doing so.
  - b. The requirement also appears reasonable and proportionate to the objective:
    - i. The document production power applies only to specified employment-related documentation that we understand would already exist, and that it would appear reasonable for a supporting employer to provide. Employers have up to 10 working days to supply the documentation.
    - ii. The power can be exercised only for the limited purposes of determining whether a supporting employer is employing a supporting employee in accordance with the work-related conditions of the supported employee’s visa and determining whether a supporting employer is complying with their obligations under the Immigration Act 2009.

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<sup>1</sup> See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>2</sup> *Hansen v R* [2007] NZSC 7.

iii. While immigration officers may exercise this power without reasonable belief of non-compliance, this seems reasonable given that it is a relatively unintrusive power intended to enable auditing of employer compliance.

9. For completeness, we have also considered this document production power in terms of section 21 of the Bill of Rights Act, which protects against unreasonable search and seizure. For the reasons given above, we do not consider it amounts to an unreasonable search in terms of section 21 of the Bill of Rights Act.

### **Section 25(c) – Right to be presumed innocent until proven guilty**

10. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proven guilty according to the law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the State must bear the burden of proof.<sup>3</sup>
11. The Bill creates new strict liability infringement offences for:
- a. allowing a person who is not entitled under the Immigration Act 2009 to work in the employer's service to do that work (new section 359A(1)(a) of the Immigration Act 2009).<sup>4</sup>
  - b. employing a person in a manner that is inconsistent with a work-related condition of that person's visa (new section 359A(1)(b) of the Immigration Act 2009).
  - c. failing to supply employment documents as required by section 275A of the Immigration Act 2009 (new section 359A(1)(c) of the Immigration Act 2009).
  - d. failing to supply a Labour Inspector with specified employment documentation (as required by existing section 229(1)(d) of the Employment Relations Act 2000) within the required timeframe (added by new section 229(2A) of the Employment Relations Act 2000).
12. On the face of it, strict liability offences limit section 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by finding that certain facts occurred without proof of mens rea. The accused must prove a defence (on the balance of probabilities), or disprove a presumption, in order to avoid liability, whereas in other criminal proceedings an accused must merely raise a defence in an effort to create reasonable doubt. Although infringement offences do not result in a criminal conviction,<sup>5</sup> the Court of Appeal in *Henderson v Director, Land Transport New Zealand* held that the rights in sections 24 and 25 of the Bill of Rights Act apply to minor offences dealt with under the infringement notice regime.<sup>6</sup>
13. Strict liability offences may nevertheless be justifiable limits on rights under section 5 of the Bill of Rights Act. Strict liability offences have been found more likely to be justifiable where:

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<sup>3</sup> *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

<sup>4</sup> This offence currently exists at section 350(1)(b) of the Immigration Act 2009. Clause 6 of this Bill removes that offence from that Act. The amended section 350 will only penalise an employer who, knowing that a person is not entitled to work, allows or continues to allow them to work.

<sup>5</sup> Section 375(1)(a) of the Criminal Procedure Act 2011.

<sup>6</sup> [2006] NZAR 629 (CA).

- a. the offences are regulatory in nature and apply to persons participating in a highly regulated industry;
  - b. the defendant will be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
  - c. the penalty for the offence is proportionate to the importance of the Bill's objective.
14. We consider that the limit on section 25(c) of the Bill of Rights Act appears justifiable:
- a. The offences are rationally connected to the important objective of deterring employers from exploiting migrant workers.
  - b. The offences apply in a regulatory context, in which employers would be best placed to advise of any reason for their non-compliance. Although no statutory defences are provided for, the defence of total absence of fault would be available.
  - c. The penalties for the offences are relatively low and not disproportionate to the Bill's objective.
15. Accordingly, we consider that the offences in the Bill are proportionate and justifiable under section 5 of the Bill of Rights Act.

## **Conclusion**

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16. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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