

Regulatory Impact Statement

Protecting Migrant Workers from Exploitation

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment (the Ministry). It provides an analysis of options to protect migrant workers from exploitation.

The analysis includes non-regulatory (including the status quo) and regulatory options. The recommended approach is a package of regulatory and non-regulatory actions, as the exploitation of migrant workers is a complex issue that requires a comprehensive and prompt response. None of the non-regulatory options on their own meet all the desired objectives, as without sufficient legislative mechanisms to hold employers to account, employers who deliberately disregard employment standards are unlikely to be deterred.

The recommended option is a response targeted specifically at addressing the exploitation of migrant workers, as this provides more immediate action and sends a strong message that the exploitation of migrant workers is not tolerated. The Immigration Act is currently being amended and as such provides an opportunity to quickly address the exploitation of migrant workers through a legislative change. Changes to the employment relations framework have not been discounted, however this work would require a longer timeframe.

There is a lack of empirical evidence on the exploitation of migrant workers, due to both data limitations and the low propensity of migrant workers to complain or report the exploitation. Therefore it is difficult to accurately quantify the exploitation of migrant workers. However, the Ministry is of the opinion that change is needed to address the issue in an expedited fashion for the following reasons: the Labour Inspectorate has identified a number of cases suggesting more may exist, the costs on the individual workers in a single case can be significant, and the exploitative treatment of foreign nationals carries reputational risks to New Zealand.

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Status quo and problem

Migrant workers are particularly vulnerable to exploitation

1. Temporary migrant workers can be particularly vulnerable to exploitation. This is because temporary migrants cannot access social services and, in particular, income support and, if there are conditions on their visa, are often reluctant to approach authorities for fear of the consequences for their immigration status. In addition, many migrants are not familiar with New Zealand's institutions or their employment rights under New Zealand legislation.
2. Both international students with work rights and those on essential skills visa have employment conditions on their visas that, if breached, could make them liable for deportation or could potentially affect subsequent visa applications. This fear of immigration consequences can be exploited by unscrupulous employers. For example:
 - Students – for those students who are granted work rights, their visa conditions specify that they may only work for up to 20 hours in any given week and full-time over the Christmas/New Year holiday period. It has been reported that some students, possibly because they are underpaid by their employer, want to work longer hours, making them in breach of their visa conditions (with potential liability for deportation and/or impacts on subsequent visa applications). It has also been reported that some students without work rights nonetheless do work.
 - Essential skills visa holders – visa conditions stipulate the occupation that the worker must work in and the employer that the worker must work for. Because their visa is tied to a specific employer, if they leave their job, they can lose their visa and therefore become liable for deportation.
3. Unlike New Zealand citizens or permanent residents who have access to our welfare system, temporary migrant workers do not have a safety net and may be more reliant on their employer. In addition, the ability for migrant workers to stay in New Zealand may require the support of their employer, creating an even greater power imbalance between employer and employee. Therefore, migrant workers need additional protection over and above that of other workers.

Exploitative employers gain an unfair advantage

4. Exploitative employers seek to gain a commercial advantage by employing migrants on terms below minimum employment standards. For example, an employer who pays two workers \$5 an hour less than their entitlement for a 40 hour week is saving \$400 per week or \$20,000 per annum in overheads.
5. By avoiding the full costs of employing workers on a lawful basis, the commercial advantage gained by exploitative employers can potentially drive compliant businesses out of the market.

The extent of the problem

6. The Labour Inspectorate has only been collecting data on employees' migrant status since July 2012, so an understanding of the true scale of the problem is limited. Between July 2012 and May 2013 the Labour Inspectorate has completed investigations of approximately 180 complaints regarding alleged breaches of

employment standards involving migrants¹. Over 40 of these cases were found to involve breaches of the Minimum Wage Act 1983.

7. The Labour Inspectorate and Immigration New Zealand (INZ) report that it is common for employers who exploit migrant workers to themselves be former migrants.
8. There are certain sectors where exploitation of migrant workers is more prevalent, for example, lower skilled work in horticulture/viticulture, hospitality, retail and construction. Migrant exploitation is also prevalent where there is reliance on labour contracting as a business model.
9. Due to data limitations and low propensity to complain, it is difficult to gauge the exact extent of the problem in terms of both numbers and types of cases. However, anecdotal evidence from the Labour Inspectorate and INZ indicates that cases involving migrant workers are often the most severe in terms of exploitation. The following is an example provided by the INZ compliance team:

I currently have a case where this falls under exploitation in every sense other than the workers were legally employed (i.e. not unlawful). Both were employed as massage therapists under a contract submitted to INZ which meets minimum employment conditions. The reality was that they were asked to sign another contract which was vastly different to the one submitted to INZ. They effectively were required to live on premises working six – seven days per week from 0900 – 2100hrs or longer.

They were required to sleep on the massage beds at night. They were earning approximately \$100 - \$200 per week. They received no holiday pay/sick leave etc.

This situation eventually compelled one of the workers to commence work as a sex worker for the same employer and the other to flee and commence work with another employer contrary to her visa conditions.

As it currently stands, this does not meet the criteria under the Immigration Act for exploitation.

Current legislation

10. There is currently a gap in New Zealand's legislation whereby employers who exploit unlawful workers can face heavy sanctions; however those who exploit lawful migrant workers face low risks of being held to account. Therefore, as it currently stands, there is an uneven legislative response to exploitation depending on the immigration status of the migrant.

Unlawful workers

11. Under section 351 of the Immigration Act 2009 (the Act), the exploitation of unlawful migrant workers is an offence. The Act provides for serious sanctions (up to seven years imprisonment and/or a fine of up to \$100,000) for employers who

¹ It is not clear whether the migrants are temporary or unlawful as the Labour Inspectorate does not collect his level of information.

seriously breach the Holidays Act 2003, the Minimum Wage Act 1983 or the Wages Protection Act 1983 while employing an unlawful migrant worker.

12. Under the Act, an unlawful worker, in relation to an employer, means a person who the employer knows is not entitled to work in the employer's service (because they do not have lawful work status or because the work involves a breach of their work conditions).
13. Under the Immigration Act 1987, residence class visa holders who exploited unlawful migrant workers were liable for deportation, if the offence was committed within the first 10 years of being granted a residence class visa. This provision was not carried over to the 2009 Act. Under the 2009 Act, temporary visa class holders may be deportable if they exploit migrant workers but residence class visa holders are not.
14. While unlawful workers are also protected by the general employment relations framework, they are unlikely to access it due to their unlawful status.

Lawful migrant workers

15. The Immigration Act currently offers no protection to workers who work in accordance with their visa status. No criminal action is able to be taken under any other legislation against employers who exploit lawful migrant workers. In addition, the civil sanctions available may not provide a sufficient deterrent.
16. The employment relations framework provides a system for resolving employment disputes within civil legislation. In cases of serious and wilful breaches of employment standards, the current legislative framework may not always provide for sanctions proportionate to the harm caused. Similarly, the current legislation may not always eliminate the gain achieved from non-compliance, or act as an adequate deterrent. Currently, the maximum penalties available under employment legislation are \$10,000 for an individual and \$20,000 for a company. Monies owing can also be awarded to the employee. Sanctions imposed are usually much less than the maximum. These sanctions can be lower than the gain achieved from non-compliance and may not act as an adequate deterrent.

Objective

17. The objective of the changes proposed is to ensure that employers are employing migrants on a lawful and fair basis by:
 - supporting employers to employ migrants on terms that meet minimum employment standards
 - creating sufficient deterrence measures, and
 - ensuring that those who exploit migrant workers are held to account.
18. In assessing the ability of each option to meet these objectives, a key criterion was the time it would take to implement each option because the Ministry considers that quick action is required to address migrant exploitation for the following reasons: the Labour Inspectorate has identified a number of cases suggesting more may exist, the costs on the individual workers in a single case can be

significant, and the exploitative treatment of foreign nationals carries reputational risks to New Zealand.

Options

19. A number of options have been analysed, including regulatory and non-regulatory options. The options demonstrate a range of possible solutions to address the issue of exploited migrant workers. Option Two and Option Three each present a package of actions to be taken to address the exploitation of migrant workers. The options are not mutually exclusive. Each option is described below.

Option One: The status quo

20. Under this option, no additional action would be taken to address the issue of exploitation of migrant workers. While the Labour Inspectorate or Immigration New Zealand compliance teams would continue to work to improve their ability to investigate cases of potential breaches of the employment framework, employers would have no added incentive to comply with minimum employment standards. As a result, there would be only limited improvements in protection for migrant workers.

Option Two: A specific response targeted to migrant workers

21. This option involves a series of non-regulatory and regulatory actions that have a specific focus on the protection of migrant workers, acknowledging that this is where the most serious breaches of minimum employment standards occur. The primary regulatory actions are via changes to the Immigration Act.

Amendments to the Immigration Act 2009

22. The Immigration Act potentially provides an effective legislative vehicle to address the exploitation of migrant workers in particular. The Immigration Act already allows for criminal, financial, and administrative penalties, including the ability to halt individual employers' access to migrant labour through the immigration system.

Include the exploitation of lawful temporary migrant workers as an offence

23. Currently, the Immigration Act applies sanctions only to the exploitation of unlawful migrant workers, so offers no protection to workers who work in accordance with the conditions of their visa status. This option would amend the Immigration Act to include the exploitation of migrants on temporary visas with work conditions as an offence against the Act in order that they may be protected in the same way as unlawful migrants. This would provide greater protection to temporary migrants with legitimate work visas, and international students. It would also send a strong message that the exploitation of temporary migrants and abuse of the immigration system will not be tolerated by the New Zealand Government. It could also benefit New Zealand's reputation (particularly as a safe place to send students to).
24. This would extend the existing immigration enforcement frameworks without changing their fundamental nature. It also enables further immigration consequences (for example, disqualification of sponsorship of migrant workers or possible deportation) to be directly linked to immigration offending.

25. The drawback of this legislative change is that it could be perceived to offer better employment protection to migrant workers than to New Zealand workers. However, it reflects the greater level of vulnerability of migrants and targets enforcement to the area where the most serious breaches of employment standards occur.
26. This change could result in an increase in the number of complaints and investigations undertaken by the Labour Inspectorate and/or INZ. However, this increase could be met through existing resources.

To make employers liable for deportation if they exploit migrant workers or knowingly employ migrant workers without work rights

27. In many cases, those who exploit migrant employees are themselves migrants. This option would render residence class visa holders who breached certain sections of the Immigration Act (including exploiting migrant workers) liable for deportation if the offence was committed within the first 10 years of being granted a visa.
28. This legislative change would act as a further deterrent to employers exploiting migrant workers, particularly where employers are themselves migrants. This proposal was a provision in the Immigration Act 1987 and was not carried over when the Act was amended in 2009.
29. This legislative change would likely result in increased time and resources required to investigate and progress the increased number of cases. However, this could be met through existing resources.

Improved information provision to employees and employers

30. This provision focuses on improving the information provided to employees and employers on employment rights and obligations and better targeting and disseminating the information to migrant employees and employers.
31. The Ministry has a range of information resources targeted to migrant employees and employers, available in a number of languages. INZ also provides basic information on employment rights to new recipients of work visas in a range of languages. More targeted information about working in New Zealand is also specifically provided to migrants identified as 'at risk workers', or who are employed in sectors reliant on migrant workers.
32. The Ministry has also recently developed communications for potential victims of exploitation, setting out indicators of exploitation and actions that migrants can take to prevent exploitation.
33. While information provision is important, on its own it would only go part of the way to protecting migrant workers, as in most cases employers are aware of their responsibilities but choose to disregard them. There are also incentives on workers to not complain because they do not have access to any other source of income, or require their current employer to support their future visa application. Without stronger legislative mechanisms to hold unscrupulous employers to account, they are unlikely to be deterred.

Improved intelligence gathering and analysis

34. With only 35 inspectors nationally, the Labour Inspectorate needs to target its resources carefully, aimed at addressing the greatest harms. The Labour Inspectorate's ability to most effectively target its resources is limited by the absence of an intelligence gathering and analysis function. The absence of this capability means that the Labour Inspectorate is largely reliant on reacting to complaints.
35. Given that the most vulnerable workers, particularly temporary migrants, are unlikely to approach authorities, the greatest harms may not be identified through complaints. Greater investment in an intelligence function would help improve the Labour Inspectorate's ability to identify the workplaces where migrants are most at risk and to address this accordingly.
36. The Labour Inspectorate is currently assessing its operating model and identifying the associated capability needed for the Labour Inspectorate to be more effective in taking a more proactive approach to addressing migrant exploitation. This will help to identify exploitation, but without adequate legislative sanctions will, on its own, have limited effect in protecting migrants from exploitation.

Processes to ensure that migrants reporting exploitative practices are not disadvantaged

37. The Ministry has recently developed a formal approach to encourage victims of exploitation to come forward and to assure migrant victims of exploitation that they will not be disadvantaged by making a complaint against an employer.
38. Proposed changes to immigration instructions will allow immigration officers to disregard any previous breach of the work-related conditions of an applicant's current visa if he or she has cooperated with INZ and/or the Labour Inspectorate by providing evidence of workplace exploitation against him or herself. They will not however, offer better visa outcomes that the applicant would have been entitled to if he or she had not been exploited.
39. This will encourage exploited workers to come forward to report exploitative practices and help to identify exploitative employers. It will not incentivise malicious complaints aimed at providing unearned benefit to the applicant.

Option Three: Wider changes to the employment relations framework

Higher penalties for serious breaches under employment relations legislation

40. The employment relations framework provides a system for resolving employment disputes within civil legislation. In cases of serious and wilful breaches of minimum employment standards, the current legislative framework may not (as noted above) always provide for sanctions proportionate to the harm caused. Similarly, the current legislation may not always eliminate the gain achieved from serious non-compliance, or act as an adequate deterrent. Currently, the maximum penalties available under employment legislation are \$10,000 for an individual and \$20,000 for a company. Monies owing can also be awarded to the employee.
41. This legislative change could introduce higher penalties for serious breaches of minimum employment standards and potentially also more serious criminal sanctions.

42. The introduction of more serious sanctions for serious breaches of employment standards would send a clear message that the Government will not tolerate such breaches of legislated employment standards, especially with respect to migrants.
43. [

*withheld under section 9(2)(g)(i)
of the Official Information Act 1982*

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44. [*withheld under section 9(2)(g)(i)
of the Official Information Act 1982*]

Increased compliance resourcing

45. This provision would see INZ and the Labour Inspectorate increasing resources in order to increase the volume of investigations of exploitation claims and to work proactively with employers to attain compliance in employing migrants on a lawful and fair basis.
46. INZ is currently exploring reprioritisation of its services and policy options are being considered to enable this to occur in the compliance space.
47. [*withheld under section 9(2)(g)(i)
of the Official Information Act 1982*]
48. Increasing compliance resourcing would improve the capability needed to investigate instances of exploitation and may have a deterrent effect if employers are more likely to have their practices investigated. However, without adequate legislative sanctions, it would have a limited effect in protecting migrants from exploitation.

Summary of options

49. Table one summarises the costs and benefits of each option and assesses the extent to which they meet the desired objectives.

Option	Extent to which option meets objectives			Comment	Costs	Benefits
	Supporting employers to employ migrants on terms that meet minimum employment standards	Creating sufficient deterrence measures	Ensuring that those who exploit migrant workers are held to account			
Option One: The status quo	No	No	No		No additional costs.	No benefits.
Option Two: A specific response targeted to migrant workers. Package includes:	Yes	Yes	Yes	Provides a package of regulatory and non-regulatory actions to protect migrant workers from exploitation. Actions are targeted specifically at the exploitation of migrant workers.	Can be met within existing resources.	This option is relatively quick to implement. It would send a more immediate message that exploitation of migrant workers is not tolerated. It could benefit New Zealand's reputation (particularly as a safe place to send students to).
1. An amendment to the Immigration Act 2009 to include the exploitation of lawful temporary migrant workers as an offence against the Act	Yes – but not on its own	Yes	Yes		Could require increased resources to deal with the higher number of complaints, investigations and prosecutions. This would be met within existing baselines.	Would send a strong, more immediate message that the exploitation of migrant workers will not be tolerated and would act as a strong deterrent. Could benefit New Zealand's reputation (particularly as a safe place to send students to).
2. An amendment to the Immigration Act to render people liable for deportation if they exploit migrant workers or knowingly employ migrant workers without work rights	Yes – but not on its own	Yes	Yes		May result in increased resources required to progress the higher number of complaints, investigations, prosecutions and deportations. This would be met within existing baselines.	Would act as a direct deterrent to employers who exploit migrant workers.

Option	Extent to which option meets objectives			Comment	Costs	Benefits
	Supporting employers to employ migrants on terms that meet minimum employment standards	Creating sufficient deterrence measures	Ensuring that those who exploit migrant workers are held to account			
3. Improved information provision to employees and employers	Limited – likely to only address less serious breaches of minimum employment standards, which would not meet the threshold for exploitation (as defined in section 351 of the Immigration Act).	No	No	This provision would only go part of the way to protecting migrant workers, as in most cases employers are aware of their responsibilities but choose to disregard them.	Could be met within existing resources.	Greater awareness of rights and responsibilities through improved information provision. Sectors and employers who employ high numbers of migrant workers would be targeted.
4. Improved intelligence gathering and analysis by Labour Inspectorate and INZ compliance staff	Yes - but only in the long-term (through identifying risk areas and better targeting of resources in future).	Limited – as better targeting occurs, it could deter employers in the future.	Limited – as will help to identify bad employers or industries.	On its own, this would have limited effect in protecting migrants from exploitation as it does not strongly sanction delinquent employers.	Could be met within current resources.	Would improve the Labour Inspectorate's ability to identify the workplaces where migrants are most at risk.
5. Processes to ensure that migrants reporting exploitative practices are not disadvantaged	Yes – but not on its own	No	No		Can be met within current resources.	Would encourage exploited migrant workers to come forward to report exploitative practices and help to identify exploitative employers.
Option Three: Wider changes to the employment relations framework. Package includes:	Yes	Yes	Yes		To be determined	see below
1. Increased compliance resourcing	Yes	Limited – employers may be deterred if they are more likely to be investigated.	Limited – as bad employers would be more able to be identified.		<i>withheld under section 9(2)(g)(i) of the Official</i>	Would enable INZ and the Labour Inspectorate to take a more proactive approach to identify delinquent employers

Option	Extent to which option meets objectives			Comment	Costs	Benefits
	Supporting employers to employ migrants on terms that meet minimum employment standards	Creating sufficient deterrence measures	Ensuring that those who exploit migrant workers are held to account			
					<i>Information Act 1982</i>	and work with them to ensure compliance.
2. Introduction of higher penalties for serious breaches of employment standards	Yes – but not on its own	Yes	Yes	<i>withheld under section 9(2)(g)(i) of the Official Information Act 1982</i>		Sends a strong message to employers that serious breaches of employment standards will not be tolerated. Would act as a deterrent to employers exploiting all workers. Could benefit New Zealand's reputation (as a safe place to send students to).

Preferred option

50. None of the non-regulatory actions on their own meet all the desired objectives, as without sufficient legislative mechanisms to hold employers to account, employers who deliberately disregard employment standards are unlikely to be deterred. In addition, given the serious impacts of migrant exploitation, timeliness of implementation was a factor in selecting the option to address it.
51. Therefore, the recommended option is Option Two, which includes a package of regulatory and non-regulatory actions, including:
- improve information provision, to ensure employers and employees are aware of their obligations and rights
 - improve intelligence gathering and analysis capability, so that the Labour Inspectorate can focus its resources on workplaces where migrants are most at risk
 - implement processes to ensure that migrants reporting exploitative practices are not disadvantaged
 - amend the Immigration Act to include exploitation of lawful migrant workers as an offence, in order to provide a serious deterrence measure, and
 - amend the Immigration Act to enable the deportation of migrant employers who exploit migrant workers or knowingly employ migrant workers.
52. This package will work to support employers to employ migrants on a lawful basis while introducing heavy sanctions to deter delinquent employers and sufficient legislative mechanisms to hold those employers who wilfully disregard employment standards to account.
53. This option also has the advantage of being able to be implemented quickly, as the Immigration Act is currently being amended and this proposal could be added to the Immigration Amendment Bill before it is introduced in July 2013.

54. [

*withheld under section 9(2)(g)(i)
of the Official Information Act 1982*

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Implementation and review

55. [

*withheld under section 9(2)(f)(iv)
of the Official Information Act 1982*]

56. The Ministry is currently assessing the Labour Inspectorate operating model and identifying the associated capability needed for it to be more effective in taking a more proactive approach to addressing migrant exploitation. Any additional capability as identified in this review is expected to be in place by the end of 2013.

57. Information from the Labour Inspectorate and INZ will be reviewed regularly to monitor the effect of the legislative changes.

58. [

*Withheld under section 9(2)(g)(i)
of the Official Information Act 1982*]

Consultation

59. Both employer and employee representatives, such as the Council of Trade Unions (CTU) and the Employers and Manufacturers Association (EMA), have recently expressed concerns to the Minister of Labour and the Ministry about the exploitation of migrant workers. Concerns expressed include:
- migrant workers are vulnerable, not aware of their rights and are being taken advantage of, and
 - certain employers in New Zealand are seeking to gain a competitive commercial advantage from employing migrants on terms that are below minimum employment standards or outside the employees' visa conditions. This threatens the viability of legitimate employers.
60. The CTU and EMA have recommended changing legislation to explicitly deal with the exploitation of migrant workers, although they have not been consulted with directly on the options presented in this paper.