Regulatory Impact Statement

Strengthening the ability to hold employers to account for exploiting migrant workers

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment.

It provides an analysis of options to strengthen the ability to hold employers to account for the exploitation of migrant workers, to address an issue that was raised in relation to the migrant exploitation measures in the Immigration Amendment Bill (No 2).

The recommended option is to introduce a recklessness offence alongside the existing offence in clause 80 of the Bill. If agreed, any employer who exploits unlawful workers or temporary visa holders would commit an offence if:

a) they knew that the worker was unlawful or on a temporary visa (Bill status quo), or

b) they were reckless as to whether the worker was unlawful or on a temporary visa.

This Regulatory Impact Statement was prepared in a limited time in order to address an issue identified with the Immigration Amendment Bill (No 2) (the Bill) to progress within a Supplementary Order Paper to the Bill.

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11 February 2015

Executive summary

Clause 80 of the Immigration Amendment Bill (No 2) (the Bill) extends the existing offence of exploiting unlawful workers to also cover the exploitation of workers on temporary visas. The Bill has just completed its second reading.

As currently drafted the new section 351 will require employers to know that the migrant worker was either:

- not able to lawfully do the work, or
- on a temporary visa.

In their submission on the Bill, the Employers and Manufacturers Association expressed concerns that it may be difficult to prove an employer knew an employee was a temporary visa holder. In response, the Select Committee recommended the Bill was amended to provide that an employer is treated as knowing that an employee holds a temporary class visa if at any time in the preceding 12 months they had been informed of that fact by an immigration officer (which aligns with the current wording in the Act in relation to workers who are not entitled to work).

This change may provide more clarity in situations where an immigration officer has had previous interactions with an employer. The Ministry of Business, Innovation and Employment is concerned with the difficulties in being able to successfully bring proceedings under this section. They note that as the current legislation stands:

- there have only been two successful prosecutions since 2010
- in the past two years 110 complaints have been received alleging exploitation,
- resulting in approximately five investigations.

This is a reflection of the difficulty of putting together a case.

A number of options were considered that would strengthen the ability to hold employers to account for exploiting migrant workers. The recommended option is to introduce a recklessness offence alongside the existing offence in clause 80 of the Bill. If agreed, any employer who exploits unlawful workers or temporary visa holders would commit an offence if:

c) they knew that the worker was unlawful or on a temporary visa (Bill status quo), or

d) they were reckless as to whether the worker was unlawful or on a temporary visa.

Employers convicted under a) would be subject to the existing maximum penalty of seven years imprisonment, or $100,000, or both. Employers convicted under b) would be subject to a lesser maximum penalty of five years imprisonment, or $100,000, or both.

This change would provide more options for the Ministry when considering whether to bring a prosecution against employers who exploit migrant workers. The more serious knowledge offence would still be available and would be used where that level of knowledge can be proved. However, where knowledge cannot be proved, prosecutors would have an alternative option.

Status quo and problem definition

The Bill extends the existing employer offence of exploiting migrants (section 351) to also cover workers on temporary visas (clause 80). Section 351 currently only applies to the exploitation of workers who cannot lawfully work for that employer. This change was proposed in response to concerns over increasing evidence of exploitation of migrants and in particular vulnerable temporary workers (this issue was explored in a regulatory impact statement in May 2013 http://www.mbie.govt.nz/about-us/publications/ris/protecting-migrant-workers-from-exploitation.pdf).

Section 350 and section 351 of the Immigration Act provide for offences committed by employers. These offences are:

- Section 350(1)(b) – an employer employing an unlawful worker and not taking reasonable precautions to ascertain whether the person was entitled to do the work – penalty is a fine not exceeding $10,000
- Section 350(1)(a) – an employer who employs or continues to employ an unlawful worker knowing that they are unlawful – penalty is a fine not exceeding $50,000
- Section 351 – Exploitation (serious breaches of employment standards, coercion, withholding passports etc) of workers the employer knows are not entitled to work for them – penalty is imprisonment for a term not exceeding seven years, a fine not exceeding $100,000, or both.

As currently drafted, the new s.351 will require employers to know that the migrant worker was either:

- not able to lawfully do the work, or
- on a temporary visa.

It should be noted that the knowledge requirements of the new section 351 in relation to temporary visas will be the same as the existing section 351 requirements in relation to unlawful workers.

In their submission on the Bill, the Employers and Manufacturers Association raised a concern that the requirement for an employer to know that a worker holds a temporary visa would be hard to prove and that employers could potentially avoid prosecution by remaining wilfully blind. In response to these concerns, the Select Committee recommended the Bill was amended to extend the application of section 351(7) to temporary visas. Section 351(7) currently provides that an employer is treated as knowing that an employee is not entitled to work for them if at any time in the preceding 12 months they had been informed of that fact by an immigration officer. The same will apply if the employer is advised that any workers are on a temporary visa.

This change may provide more clarity in situations where an immigration officer has had previous interactions with an employer. However, such situations are likely to be the minority. The Ministry of Business, Innovation and Employment is concerned about the difficulties in being able to successfully prosecute under this section. The offence has a number of elements to it, making investigations and prosecutions complex.

Even where employers do know what visa a worker holds, it is hard to prove that knowledge unless they admit it. There is a risk that employers choose to remain wilfully blind, potentially

accepting the lesser offence under s.350(1)(b), to avoid conviction. Proving an employer knew the temporary visa status of a worker under the proposed widening of the offence in future will be even more difficult, as employers could argue that they need to have a certain level of knowledge of the immigration system to understand the difference between different types of visas (i.e. residence and temporary).

Since section 351 came into force in 2010, two cases have led to prosecutions. These cases resulted in guilty pleas, so there has been no real challenge to the evidence or the law, meaning the section still remains untested. In the past two years 110 complaints have been received alleging exploitation, resulting in approximately five investigations. This is a reflection of the difficulty of putting together a case. The kinds of employers who typically engage in this type of behaviour are the ones least likely to ask or make inquiries as to the immigration status of the people they are underpaying and exploiting. Gathering enough evidence to show they "knew" that the person was an unlawful employee is in practice difficult.

Objectives

The objective of the overall amendments to address the exploitation of migrant workers to ensure that employers are employing migrants on a fair and lawful basis by:

1. Supporting employers to employ migrants on terms that meet minimum employment standards

2. Crating sufficient deterrence measures, and

3. Ensuring that those who exploit migrant workers are held to account.

The specific objective for the options analysed in this Regulatory Impact Statement fit within the third objective, in order to increase the number of successful prosecutions of employers who exploit migrant workers.

Options and impact analysis

A number of options have been analysed, and are described below.

The status quo

This option would leave the Bill drafted as it is. To secure a conviction under the current clause 80 of the Bill, the prosecution is required to prove that the employer knew that the person they exploited was not entitled to work for them. The penalty under section 351 is seven years imprisonment, or a $100,000 fine, or both. As currently drafted, the Bill states that an employer is treated as knowing that an employee is not entitled to work for that employer if the employer was told in writing of that fact in the preceding 12 months.

Under this option it would continue to be difficult to take prosecutions under section 351, as it does not deal with employers who remain wilfully blind as to the immigration status of their employees. The issue as to whether the current knowledge element under section 351 is a barrier to successful prosecution is yet to be tested. It would be possible to test this provision by awaiting the outcome of a case before the court. However, the Ministry of

Business, Innovation and Employment is concerned that it would be difficult to successfully bring proceedings under the current Clause 80 of the Bill.

This option will not increase the number of successful prosecutions of employers who exploit migrant workers.

Option One: replace the current knowledge element in the existing offence with recklessness

This option would replace the current 'knowledge' requirement in section 351 with a recklessness test (i.e., the employer was reckless as to whether the employee was lawful or held a current visa).

There are other examples of recklessness in New Zealand legislation (such as people smuggling in the Crimes Act and Aiding and Abetting in the Immigration Act).

'Recklessness' is a far lesser degree of fault that the prosecution must prove and the Ministry of Justice considered such a threshold would be inappropriate, given the significant consequences for defendants, if convicted. The Ministry of Justice stated that if the knowledge element was downgraded to recklessness the penalty would have to be downgraded also. However, the intention of having a heavy penalty is that it sends a strong message to employers – that the government takes the exploitation of migrant workers seriously, and downgrading the penalty would potentially dilute the message.

This option may increase the number of successful prosecutions, but would weaken the penalty and send the wrong message to employers.

Option Two: introduce a recklessness offence alongside the existing offence in section 351

This option would introduce a recklessness offence alongside the existing offence in clause 80 of the Bill, to make it easier to successfully prosecute employers who exploit migrants. Under this option an employer who exploits workers who are not able to lawfully do the work, or temporary visa holders would commit an offence if:

a) they knew that the worker was not able to lawfully do the work or on a temporary visa (Bill status quo), or

b) they were reckless as to whether the worker was lawfully able to do the work or was on a temporary visa.

Employers convicted under a) would be subject to the existing maximum penalty of seven years imprisonment or $100,000 or both. Employers convicted under b) would be subject to a lesser maximum penalty of five years imprisonment or $100,000 or both. Introducing a recklessness offence would enable employers who exploited migrants to be convicted if they were aware that there was a real risk that the worker was not lawfully able to do the work, or was on a temporary visa and the employer made a conscious decision not to inquire further.

This proposal would provide more options for the Ministry when considering whether to bring a prosecution against employers who exploit migrant workers. The more serious knowledge offence would still be available and would be used where that level of knowledge can be

proved. However, where knowledge cannot be proved prosecutors would have an alternative option.

The five year sentence is not inconsistent with other similar offences. Section 343(1)(b)(ii) of the Immigration Act provides a penalty of up to seven years or $100,000 or both for a person who assists someone to enter New Zealand unlawfully and knows or is reckless as to whether the person's entry is or would be unlawful. People smuggling (Crimes Act 1962 section 98C) provides a maximum 20 year or $500,000 or both penalty if a person arranges, for material gain, an unauthorised migrant to enter New Zealand and is reckless as to whether the person is an unauthorised migrant.

This option is likely to increase the number of successful prosecutions of employers.

Option Three: Introduce higher penalties in the employment relations framework in line with the offences in the Immigration Act

This option would introduce higher penalties for serious breaches of minimum employment standards to bring them in line with the offences in the Immigration Act. Under this option employers would face similar penalties regardless of whether the employee they exploit is a migrant or not.

New Zealand's employment standards system imposes minimum obligations on employers and provides minimum entitlements for workers. It includes such standards as the requirements to pay at least the minimum wage and to provide four weeks annual holidays.

The current employment standards system does not currently provide such a strong deterrent as that in the Immigration Act. Cabinet is due to consider changes to the Employment Standards framework that increase civil penalties for serious breaches of employment legislation. However, as the employment standards framework is a civil system, the penalties are not likely to be as high as the criminal penalties within the Immigration Act. This is appropriate as migrant workers are particularly vulnerable to exploitation and need additional protections over and above that of other workers.

Preferred option: introduce a recklessness offence alongside the existing offence in section 351

The recommended option is option two, which introduces a recklessness offence alongside the existing offence in clause 80 of the Bill. Under this option, any employer who exploits unlawful workers or temporary visa holders would commit an offence if:

a) they knew that the worker was unlawful or on a temporary visa (Bill status quo), or

b) they were reckless as to whether the worker was unlawful or on a temporary visa.

Employers convicted under a) would be subject to the existing maximum penalty of seven years or $100,000 or both. Employers convicted under b) would be subject to a lesser maximum penalty of five years or $100,000 or both.

The sentence of five years imprisonment is proposed because in general people who are convicted under a lower mental standard (recklessness) should be subject to a lower penalty. However, exploiting migrants while being reckless as to their visa status is still a serious

offence and therefore a five year maximum sentence is an appropriate penalty. The five year sentence is not inconsistent with other similar offences.

In situations where recklessness cannot be proved or where workers are lawfully able to undertake the work or are not temporary migrants, employers may still be subject to penalties imposed under employment legislation.

Consultation

Consultation was undertaken on the Bill prior to, and during the Select Committee stage. In their submission on the Bill the Employers and Manufacturers association raised a concern that the requirement that an employer knows that a worker holds a temporary visa may be hard to prove and that employers could potentially avoid prosecution by remaining wilfully blind.

The Ministry of Justice has been consulted on the amendment in the SOP.

Implementation plan

The changes will be included in a Supplementary Order Paper to the Immigration Amendment Bill (No 2). The Bill has completed its second reading. The amendment would come into force the day after Royal Assent. There are no specific implementation requirements.