# Section A: Proposals One to Four - Prevent migrant worker exploitation



As part of the Review, we are considering the risks of exploitation that can occur within certain business models. In particular, we are focussing on three business models - **subcontracting, franchising and labour hire** – because we have heard concerns about how they might be allowing exploitation to occur, and we want to find out if there are ways to **prevent** this from happening.

We also recognise, however, that each of these business models plays an important role in the New Zealand economy and labour market. The models are used by many employers who comply with minimum standards in good faith. We need *all* employers to obey the law, so that there is an even playing field in the business and labour markets.

We want to promote good business practices that encourage compliance with minimum employment standards across all businesses, while not adding costs to businesses with good employment practices. We want to provide a level playing field and fair competition for businesses, and help to build productive, sustainable and inclusive economic growth.

We have some high-level options that we are keen to test before we do more analysis on them.

**What are the business models we are looking at?**

We are focussing on three business models - **subcontracting, franchising and labour hire.** At this stage, we have defined those models in general terms, rather than too technically. Our working definitions are shown in the table below:

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| **Subcontracting** | Where a person is contracted to undertake part of a broader contract that has been awarded to a principal or contractor. |
| **Franchising** | A business arrangement where a person (the franchisee) trades and operates a business using the systems, conditions and intellectual property of another person (the franchisor). |
| **Labour hire** | Where a business’s activity involves arranging for the supply of labour (workers) to another person. |

Each business model is used in particular contexts:

* Subcontracting is a popular and effective model often used to access specialist skills and additional labour, and to reduce costs.
* Franchising is a common business model that can offer lower risk to both franchisors and franchisees. Over 124,000 people in New Zealand are employed in franchises.
* Labour hire firms support other businesses by providing a supply of labour to meet temporary demand, while also providing workers access to employment opportunities they may otherwise not have.

**When can these business models create risks of exploitation?**

The three business models we are considering are not necessarily problematic in themselves; rather, the ways in which they are designed or used can directly or indirectly help exploitation to happen. We give some examples of these features, and describe them in more detail under each of the options in the next section.

We would particularly like to invite submissions from stakeholders that operate, or work with operators of these business models. We want to hear of your experiences as they relate to temporary migrant worker exploitation.

Exploitation can result if businesses must reduce costs to be competitive (e.g. in a labour hire arrangement), or to meet the terms of a contract imposed by a more powerful company (i.e. in a sub-contracting arrangement). Businesses with strong market positions may leverage their positions to exert these kinds of pressures that drive prices down. Exploitation is also often observed in owner-employer businesses that broadly operate independently (such as small retail stores or restaurants).

In this way, exploitation is a particular risk where labour costs must be reduced in order to make the business commercially viable and sustainable, especially where wages make up most of a business’ costs. The three business models we are studying are susceptible to these pressures.

**What options are we exploring?**

We are exploring four options:

* Making people with significant control or influence over an employer legally responsible when that employer breaks the law
* Requiring certain subcontractors and franchisees to meet additional criteria under the Employer-Assisted visa gateway system
* Creating a labour hire licensing system, and
* Banning people who have been convicted of exploitation offences under the *Immigration Act* *2009* from directing or managing a company.

These ideas are not final proposals yet – we still have work to do on them. We want your opinion on whether these ideas would be viable, practical and effective. A case study in **Annex D** illustrates how three of these ideas could work in practice.

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

Employment obligations are generally the sole responsibility of the direct employer who is the party to an employment agreement with an employee[[1]](#footnote-2). However, in some cases this may not reflect the real nature of the relationship between an employer and an employee, because other people might have control or influence over the employer’s activities, and this can affect employment outcomes. However because the law generally puts responsibility on the employer, those other people can avoid liability.

There is a question about whether liability should apply to more situations in which people could affect employment outcomes. Accessory liability provisions introduced to the *Employment Relations Act 2000* in 2016 enable persons “involved in a breach” of certain minimum employment standards to be held liable for the breach, in addition to the employer. To date, these provisions have been used to hold to account individuals (primarily company directors) involved in exploitation.

The liability provisions require that the person was involved in a breach and so do not reflect circumstances where a party pressures the employer more broadly to adopt practices reliant on, or otherwise resulting in, exploitation. That party may profit from exploitation, whether directly or indirectly. However, that party has no legal obligation to address the issue (once it knows about it) and there is therefore no disincentive (other than reputational harm) to taking no action. These settings can encourage aggressive business practices that come at the expense of workers, particularly migrant workers.

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| **What do other countries do?****Australia** passed a law (the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*) which allows franchisors and holding companies to be held legally responsible for breaches of employment standards by their franchisees and subsidiaries respectively*[[2]](#footnote-3)*. This law applies where the franchisor has significant control or influence over the franchisee that has breached the standard, and also requires that the franchisor or holding company knew, or could be expected to have known, that the breach was likely to occur. Under the Australian approach, it is a defence if the person took reasonable steps to prevent a breach of the same or similar character. In determining this, a court may have regard to all relevant matters, including: the size and resources of the business; the extent to which the person had the ability to influence or control the employer’s conduct; any action taken to ensure the employer was aware of their obligations; the person’s arrangements for assessing the employer’s compliance; the person’s arrangements for receiving and addressing possible complaints; and the extent to which the person’s arrangements require the employer to comply with employment standards.Australia’s 2019 Migrant Workers’ Taskforce recommended extending these requirements to include all situations where businesses contract out services to persons. |

We are seeking views on the idea of making people who have significant control or influence over an employer, to be legally responsible (in some cases) when that employer exploits a worker. In other words, we would broaden the range of parties who are captured by liability provisions, in that it would create liability for persons that have a significant level of control or influence over an employer that breaches employment standards. We propose an approach modelled on the Australian law.

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?

Our development of these tests will be informed by this public consultation.

This proposal would make little or no difference to businesses and similar entities that already apply good practices, but would likely require many to review their operating practices. Businesses that have significant control or influence over employers, but take no steps to ensure they are complying with minimum employment standards, would need to take some form of action. A downside of using such tests is they are often not clear cut, and there can always be some uncertainty as to what they require, and their thresholds.

There would be some additional monitoring and other costs for businesses and similar entities with significant control or influence over employers. These costs could be passed on to those employers and consumers. However, the overall cost to business would depend on (a) requirements that are yet to be determined, as well as (b) the level of control or influence third party businesses have over employers. Businesses that already have good practices would likely experience no additional costs.

**Annex D** provides supplementary material on how this approach could work in practice.

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| **1A. Question:** **Do you agree that people with significant control or influence over an employer should be responsible for that employer’s breaches of minimum employment standards?** |
| [ ] Yes[ ] No [ ] Unsure |
| **1Ai. Supplementary question, if you answered YES:** **If people other than employers were responsible, how should we formulate the tests for this responsibility?** For example:* How should a threshold of “significant control or influence” be defined?
* What evidence should be considered in determining whether the person knew or should have known that a breach of employment standards occurred?
* What evidence or factors should be considered in determining whether the person took reasonable steps to prevent a breach?
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| **1Aii. Supplementary question, if you answered YES:** **Should this approach apply to all types of relationships or should it be limited (as is the case in Australia)? Please explain your response.** |
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| Click here to enter text.  |
| **1B. Question: What would be the advantages of making people with significant control or influence over an employer, responsible for that employer’s breaches of minimum employment standards? Please give your views below.** |
| Click here to enter text. |
| **1C. Question:** **What would be the disadvantages of making people with significant control or influence over an employer, responsible for that employer’s breaches of minimum employment standards? Please give your views below.** |
| Click here to enter text. |
| **1D. Question:** **What would be the costs of making people with significant control or influence over an employer, responsible for that employer’s breaches of minimum employment standards? Please give your views below.** |
| Click here to enter text. |
| **1E. Question: If you run a business, what steps does your business take to identify and mitigate the risk of exploitation occurring in your supply chain? (if you are not a business, please write ‘not applicable’).** |
| Click here to enter text. |
| **1F. Question: Do you have any other comments, suggestions or information on this issue?** |
| Click here to enter text. |

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

There can be multiple layers of companies (including subcontractors) in supply chains. The complexity and number of these layers can facilitate or hide exploitation:

* The more layers there are in a supply chain, the higher the pressure is to keep costs down. Increasing numbers of layers can increase cost pressures, with each contractor in a layer taking a cut of the payment. Workers at the end of a chain (that is, in the bottom layers) may be left in a position where their employer fails to meet minimum employment standards because otherwise the employer will not make a profit.
* In addition, multiple layers allow exploitation to be hidden within complex and opaque structures, which can make it more difficult to find.
* Monitoring employment in a supply chain becomes more challenging where there are many layers to look through, and because of that it can be difficult to identify those responsible for exploitation, or those who directly influence it.

Subcontracting and franchising business models operate with multiple contracting layers. These models can create a particular risk that cost pressures flow down to workers. This risk can increase with a higher number of layers of subcontracting, or depending on the nature of the relationship between the franchisor and the franchisee.

If we increase the requirements for employers operating with these business models, it might help to mitigate the risk that temporary migrant workers are exploited.

Additional criteria for some employers form part of the new employer-assisted visa gateway system. This includes an employer gateway where employers will need to be accredited in order to participate in the employer-assisted temporary work visa system. The employer gateway includes the following three accreditation groups:

* Standard accreditation – setting minimum standards for all employers
* High-volume accreditation – setting higher standards for employers that recruit six or more employer-assisted workers over a 12 month period
* Labour hire accreditation – setting higher standards for labour hire companies

We are considering whether the labour hire accreditation approach should be extended to other business models, including subcontracting and franchising, and if so then what standards (criteria) should apply.

We are particularly concerned with the risk of exploitation occurring in longer subcontracting chains. We therefore consider there could be grounds for limiting additional accreditation criteria to subcontractors at the third or subsequent layer of contracting.

We do not hold comprehensive data on subcontracting and the extent of exploitation in businesses that subcontract, because of challenges in sourcing this information. This option also does not address the issue of cost and other pressures directly; instead it attempts to mitigate risk of those pressures transferring to temporary migrant workers through accrediting employers. We seek your views regarding the risks associated with subcontracting, franchising and other business models, and the impacts of requiring employers with those models to meet higher accreditation standards.

This may add compliance costs to subcontractor, franchisee or other businesses that are reliant on sponsored visa holders, if they need to make changes to meet new standards. In a subcontracting context, if changes are needed, the flow-on effect might be delays and/or cost increases in recruiting and employing migrants for projects (though there would be no restriction or cost for businesses which do not rely on sponsored visa holders, or that meet the new criteria). There will also be additional administrative costs for government from having additional criteria to assess.

We would like your views on this idea, and what accreditation standards should apply. We are particularly keen to hear from principals, contractors and subcontractors involved in any kind of subcontracting arrangement, as well as franchisors and franchisees. We would like to know what you think are the pros and cons of this approach, and the costs on businesses, employers and migrant workers.

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| **2A. Question:** **Do you think subcontractors and franchisees should be required to meet additional criteria under the new employer-assisted visa gateway system?** |
| [ ] Yes[ ] No [ ] Unsure |
| **2Ai. Supplementary question, if you answered YES:** **What additional criteria should they have to meet?** |
|  |
| Click here to enter text.  |
| **2Aii. Supplementary question, if you answered YES:** **If subcontractors were required to meet certain criteria, who do you think they should apply to? Please choose one answer**. |
| [ ] all subcontractors[ ] only to subcontractors that contract beyond a particular tier of a subcontracting chain – please specify which layers you think it should apply to: Click here to enter text. |
| **2B. Question: What would be the advantages of requiring subcontractors and franchisees to meet additional criteria under the new employer-assisted visa gateway system? Please give your views below.** |
| Click here to enter text. |
| **2C. Question: What would be the disadvantages of requiring subcontractors and franchisees to meet additional criteria under the new employer-assisted visa gateway system? Please give your views below.** |
| Click here to enter text. |
| **2D. Question: What would be the costs of requiring subcontractors and franchisees to meet additional criteria under the new employer-assisted visa gateway system? Please give your views below.** |
| Click here to enter text. |
| **2E. Question: Do you have any other comments, suggestions or information on this issue?** |
| Click here to enter text. |

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

Exploitation has also been observed in labour hire companies in New Zealand, although data on the extent of exploitation is limited.

Labour hire arrangements can be confusing for workers, and particularly migrant workers. This can present difficulties when those workers seek redress for breaches of employment standards. A licensing scheme could address some risks associated with the labour hire model, and **prevent** exploitation.

A licensing scheme would extend the accreditation principles proposed under the temporary worker visa reforms[[3]](#footnote-4) (which apply only to labour hire companies intending to sponsor temporary migrant workers) to all labour hire companies. This approach would in turn introduce criteria that are applicable to all labour hire workers, including migrant workers who are not on Employer-Assisted temporary work visas – such as working holiday visa holders and partners of temporary work visa holders. The licensing requirements and employer accreditation would need to be aligned so that any employers, who are sourcing migrant workers through both schemes, do not have to duplicate their efforts and incur costs.

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| **What do other countries do?**A number of states in **Australia** have passed or introduced laws requiring agencies that offer ‘on-hire workers’ (that is, labour hire providers) to be licensed. The Australian Government has also agreed in principle to establish a mandatory National Labour Hire Registration Scheme (as recommended by the Migrant Workers’ Taskforce). This Scheme would aim to drive out unscrupulous labour hire operators and give assurance to employers who rely on labour hire.In 2010 the **United Kingdom** passed the Agency Workers Regulation to implement the European Union Agency Workers Directive. The UK also regulates labour hire agencies that provide workers in the agricultural, horticultural, shellfish collecting, and food processing industries through the *Gangmasters (Licensing) Act 2004*. In **Canada**, legislation introduced in 2009 in Ontario regulates temporary agency work (similar to New Zealand’s labour hire arrangements) in a number of ways, including requiring agencies to provide information to workers on wage rates and who they will be working for, not allowing fees to be charged for registration or placement into a job, and protections from reprisals. |

If a labour hire licensing scheme was introduced in New Zealand, it could include criteria such as: a fit and proper person test; the provision of information to workers; regulations on the timeliness and/or amount of pay; and the provision of formal mechanisms to facilitate disputes.

The employer-assisted labour hire accreditation requirements will have an impact on labour hire companies that employ temporary migrant workers. However, it is unknown how many labour hire companies employ migrants on open work visas, and how many of those also sponsor employer-assisted visas (and will therefore need to meet accreditation criteria). A licensing scheme could be effective in managing risks across the labour hire model more broadly. It would also extend protections to a wider range of workers, including migrant workers who are not on employer-assisted temporary visas (such as working holiday visa holders and partners of temporary work visa holders).

There might be expensive to administer the scheme, and costs would likely need to be borne by government, or business (through e.g. fees), or both. To provide an indication, the Australian State of Victoria currently sets an application fee of between $1,600 and $7,900 and an annual fee of between $1,100 and $5,450 (varying based on annual turnover); and Queensland sets an annual licensing fee of between $1,000 and $5,100 (varying based on total wages paid). Costs for a New Zealand labour hire licensing scheme would depend on a range of design features.

We are seeking your views on whether you think a licensing scheme should be introduced (and with what criteria), and the benefits and the costs.

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| **3A. Question:** **Do you think we should introduce a licensing scheme in New Zealand for labour hire companies, to provide certain protections to labour hire workers?** |
| [ ] Yes[ ] No [ ] Unsure |

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| **3Ai. Supplementary question, if you answered YES: What criteria should a licensing scheme include?** |
| Click here to enter text. |
| **3Aii. Supplementary question, if you answered NO or UNSURE:** **Please explain your answer. You might wish to outline what you see as the costs and disadvantages of a licensing scheme**. |
| Click here to enter text. |
| **3B. Question: What would be the advantages of a licensing scheme? Please explain your answer.** |
| Click here to enter text. |
| **3C. Question: What would be the disadvantages of a licensing scheme? Please explain your answer.** |
| Click here to enter text. |
| **3D. Question: What would be the costs of a licensing scheme (to employers or others)? Please explain your answer.** |
| Click here to enter text. |
| **3E. Question: Do you have any other comments, suggestions or information on this issue?** |
| Click here to enter text. |

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

‘Limited liability’ and separate ‘legal personality’ are features of companies, under New Zealand law. These features protect the shareholders and officers of a company from being personally responsible for a company’s obligations. They are important features of the corporate governance system (both within New Zealand and internationally). They encourage people to open new businesses, and they encourage innovation.

However, individuals who exploit migrant workers can also avoid any liability and penalties (such as being put on a stand-down list) by liquidating a business but then reopening a very similar one.

Changes to the *Employment Relations Act* in 2016 enable persons other than the employer to be held responsible for breaches of minimum employment standards if they have been involved in the breach (these other people can include company directors, senior managers and legal or business advisors). These changes limit the risk of directors liquidating their business to avoid liability, because they allow those directors to be held personally responsible. The Labour Inspectorate is increasingly using these new changes.

However, these changes might not go far enough to prevent or deter some directors from liquidating a company to avoid legal responsibility and penalties where their company has been caught exploiting workers. We are seeking views on whether you think people who have been convicted of exploitation under section 351 of the *Immigration Act 2009* should be prevented from managing or directing a company, and for what reasons or under what circumstances.

Consistent with the definition of “director” in the *Companies Act 1993*, this change would not just apply to individuals who are formally appointed as directors of a company; it would also apply to certain other individuals including “a person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act” – sometimes referred to as shadow directors.

If we could prevent an offender from directing a company, this would mitigate the risk of them re-engaging in exploitation, as it would prohibit them using the limited liability structure under which exploitation can be carried out. We consider this sort of prohibition would also likely have a deterrent effect on potential offenders.

A management prohibition would prevent someone from managing or directing a company, regardless of whether they employ or intend to employ another person. This could potentially have an economic impact. However, this would also likely apply to a very small number of people and they could still either operate as sole traders (under which they would be personally liable for any debts incurred) or work for another employer as an employee.

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| **4A. Question:** **Do you agree with the idea of not allowing persons to manage or direct a company if they have been convicted of exploitation under the *Immigration Act 2009*?** |
| [ ] Yes – please provide reasons Click here to enter text.[ ] No – please provide reasons Click here to enter text. [ ] Unsure |
|  |
| **4B. Question:** **Would you suggest any other reasons that people should be not allowed to manage or direct a company; or are there alternative options you would suggest? You might wish to consider:*** **whether other serious employment-related offences should be included, and**
* **whether this should only apply in a more limited set of circumstances, such as where a person breaches a banning order?**
 |
| Click here to enter text. |

**Other options you might suggest**

We are interested to hear if you have any other ideas on how to **prevent** the risks of exploitation that these business models and practices can have, without hindering legitimate business operations. Your ideas do not necessarily need to focus on what government can do. You might want to consider what others, such as industry or unions, can do.

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| **Section A, Final Question:** **Do you have any other thoughts on how the risk of exploitation could be reduced through business models and practices, and who might be best to do this?** |
| Click here to enter text. |

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# Submitter Questionnaire - Tell Us About Yourself

**If you are writing a submission on multiple sections of the discussion document, please only fill this questionnaire out once, and send all sections in one email or envelope.**

In order to make sure that the views of different groups, sectors, and regions are properly

shown in any analysis, please provide some preliminary information about your submission.

**Questions that are marked \*** **are mandatory**. The other questions are optional.

**\* AA. What sector(s) are relevant to your work or business, or other interest?** You can tick more than one.

|  |  |
| --- | --- |
| [ ] General submission - no specific sector[ ] Aged Care[ ] Construction[ ] Finance[ ] Education[ ] Energy[ ] Forestry[ ] Healthcare (other than aged care)[ ] ICT | [ ] Labour hire[ ] Manufacturing[ ] Natural resources[ ] Petroleum and minerals[ ] Retail[ ] Tourism and hospitality[ ] Transport and freight[ ] Viticulture and horticulture[ ] Other (please specify) Choose an item. |

**\* BB. Which region(s) do your responses most closely relate to?** You can tick more than one.

|  |  |
| --- | --- |
| [ ] All regions[ ] Auckland[ ] Bay of Plenty[ ] Canterbury[ ] Gisborne[ ] Hawke’s Bay[ ] Manawatu-Whanganui[ ] Marlborough[ ] Northland | [ ] Nelson[ ] Otago (Other than Queenstown lakes)[ ] Queenstown lakes[ ] Southland[ ] Taranaki[ ] Tasman[ ] Waikato[ ] Wellington[ ] West Coast |

**\* CC. Which of the following most closely describes you?** Please tick one.

[ ] Employer - \***Please tell us the size of business by total number of employees.**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| [ ] 1-10 | [ ] 10-19 | [ ] 20-49 | [ ] 50-99 | [ ] 100-499 | [ ] 500+ |

[ ] Employee - New Zealander citizen or resident

[ ] Employee - Temporary work visa holder - **What type of visa do you hold?**

[ ] *Essential skills*

[ ] *Post-study work visa*

[ ] *Partner of a visa holder*

[ ] *Special purpose*

[ ] *Talent*

[ ] *Other (please specify)* Click here to enter text.

[ ] Employee - Study visa holder

[ ] Employee - Visitor visa holder

[ ] Employee – Other (please specify) Click here to enter text.

[ ] Industry organisation

[ ] Economic development agency

[ ] Licenced immigration advisor

[ ] Union

[ ] Non-Governmental Organisation (NGO)/Social services provider

[ ] Local Government

[ ] Other (please specify) Click here to enter text.

**\* DD. *FOR EMPLOYERS ONLY* - Is your business primarily any of the following? (tick as many as apply)**

[ ] Franchisor

[ ] Franchisee

[ ] Primary contractor or other contractor that engages subcontractors

[ ] Subcontractor

[ ] Labour hire provider

[ ] If none of the above, please briefly describe your business Click here to enter text.

[ ] Don’t know or would rather not say.

**\* EE. *FOR EMPLOYERS AND EMPLOYEES ONLY* - Are you currently living in New Zealand?**

[ ] Yes

[ ] No

**\*FF. *FOR EMPLOYERS AND EMPLOYEES ONLY* - Did you come to New Zealand as a migrant?**

[ ] Yes

[ ] No

**\* GG . *FOR EMPLOYERS AND EMPLOYEES ONLY IF ANSWERED YES FOR FF -*  Where did you come from?**

Choose an item.

**\* II. If you are submitting on behalf of an organisation, what is the name of that organisation?**

Click here to enter text.

**\* JJ Would you prefer your submission, either in part or in full, be withheld from public release? (Personal information such as your name and contact details would not be released).**

[ ] No, the contents of my submission are able to be publicly released in full.

[ ] Yes, please withhold my entire submission from any public release of submissions.

[ ] Yes, please withhold private or confidential information as indicated in my submission within square brackets. I do not need to be consulted further regarding public release of submissions.

[ ] Yes, private or confidential information has been indicated in my submission within square brackets. Please consult me before releasing my submission as part of a public release.

**The following questions are optional so you don’t have to answer them. We are asking them to help with analysing the submissions and how different groups in the communities might view the proposals.**

**KK. If you are making a submission as an individual, what is your gender?**

[ ] Male

[ ] Female

[ ] Other – please specify: Click here to enter text.

**LL. If you are making a submission as an individual, what is your age group?**

[ ] Under 19 years

[ ] 20–29 Years

[ ] 30–39 Years

[ ] 40–49 Years

[ ] 50–59 Years

[ ] 60–69 Years

[ ] Over 70 years

**The following questions are optional. We are asking them in case we want to contact you to ask for some clarification on your answers, or if your submission is requested under an Official Information Act request.**

**What is the name of the person completing this submission?**

Click here to enter text.

**What are your contact details?**

Email (preferred) Click here to enter text.

Phone Click here to enter text.

Alternative contact Click here to enter text.

1. There are some exceptions, when other persons are involved in a breach of employment standards. [↑](#footnote-ref-2)
2. See <https://www.legislation.gov.au/Details/C2017A00101> [↑](#footnote-ref-3)
3. Refer Proposal Two in text above. [↑](#footnote-ref-4)