MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Andrew Little	**Portfolio**	Workplace Relations and Safety
Minister	Hon Kris Faafoi	**Portfolio**	Immigration
Title of Cabinet paper	*Temporary migrant worker exploitation review – final proposals*	**Date to be published**	28 August

List of documents that have been proactively released		
Date	**Title**	**Author**
5 March 2020	Temporary migrant worker exploitation review – final proposals	*Office of the Minister for Workplace Relations and Safety* *Office of the Minister of Immigration*
11 March 2020	Cabinet Economic Development Committee (DEV) Minute of Decision [DEV-20-MIN-0034]	*MBIE*
4 March 2020	Impact Statement: Temporary Migrant Worker Exploitation Review Phase One Proposals	*MBIE*

Information redacted **NO**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Coversheet: Temporary Migrant Worker Exploitation Review Phase One Proposals

Advising agencies	Ministry of Business, Innovation and Employment
Decision sought	Agree to the proposed options
Proposing Ministers	Minister of Immigration; Minister for Workplace Relations and Safety

Summary: Problem and Proposed Approach

Problem Definition

What problem or opportunity does this proposal seek to address? Why is Government intervention required?

Temporary migrant worker exploitation is a serious problem in New Zealand. There are approximately 235,000 temporary migrant workers in New Zealand, and 64 per cent of the 599 investigations completed by the Labour Inspectorate in 2018/19 involved one or more migrants. The evidence suggests that market responses are insufficient to address the problem, and a wide-ranging approach involving Government intervention is required.

Summary of Preferred Options

This Regulatory Impact Statement (RIS) focuses on five proposals with regulatory impacts:[1]

Proposal	Legislation affected
Proposal One: Introduce a duty on third parties with significant control or influence over an employer to take reasonable steps to prevent a breach of employment standards occurring	*Employment Relations Act 2000*
Proposal Three: Disqualify people convicted of migrant exploitation under the *Immigration Act 2009* and trafficking in persons under the *Crimes Act 1961* from managing or directing a company	*Companies Act 1993*
Proposal Six: Establish three new immigration infringement offences targeting non-compliant employer behaviour, and a new power for immigration officers to compel employers to produce relevant documents	*Immigration Act 2009*
Proposal Seven: Allow Labour Inspectors to issue an infringement notice where employers fail to provide requested documents in a reasonable timeframe	*Employment Relations Act 2000; Employment Relations (Infringement Offences) Regulations 2019*
Proposal Eight: Expand the stand-down list to cover low to mid-level *Immigration Act* offences and, in future,	*Immigration Act 2009*

[1] These are part of a package of ten proposals tested in public consultation between October and November 2019. See: https://www.mbie.govt.nz/have-your-say/temporary-migrant-worker-exploitation-review/.

immigration infringement offences, and clarify that employers with serious convictions cannot support applications for migrant workers	

These proposals work as part of an end-to-end approach to reduce migrant exploitation. This approach includes other policy and operational changes proposed for Cabinet consideration outside of this RIS.

Section B: Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

Temporary migrant workers hold more than seven per cent of all jobs in New Zealand[2] and are the main expected beneficiaries of the proposals.

The proposals for change are expected to result in financial, social and health benefits to temporary migrant workers and their families. We also expect to see broader societal and economic benefits, including benefits to:

1. New Zealand businesses that comply with the law, who can expect to operate on a more level playing field where other businesses are not getting ahead by exploiting migrant workers.

2. New Zealand residents, particularly other groups that experience poorer employment outcomes such as Māori and young people, as migrant exploitation can contribute to wage suppression and job displacement in lower-paid industries.

3. New Zealand's international reputation as a safe place to work, live and study. This can affect our ability to attract and retain the migrant workers New Zealand wants and needs.

Where do the costs fall?

Costs primarily fall on Government and business. Compliance costs to business arise particularly in relation to Proposal One, although those businesses which already have good practices will be less affected. Costs associated with the remaining proposals largely fall on Government. Employers that comply with minimum employment and immigration standards will be largely unaffected by those proposals.

What are the likely risks and unintended impacts? How significant are they and how will they be minimised or mitigated?

Risks arise primarily in relation to Proposal One, for which there is uncertainty over costs as the nature and prevalence of private contracting arrangements is unknown. However, we anticipate the legislative design process will serve to inform detailed design matters and mitigate the risk of unintended consequences.

2 Data from the Integrated Data Infrastructure (IDI), using tax records and Immigration NZ data.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty
There are significant methodological challenges in attempting to accurately measure the extent of migrant worker exploitation. The hidden nature of this illegal activity and the difficulties of accessing migrant workers willing to participate in research make data collection difficult. The Ministry of Business, Innovation and Employment (MBIE) has used data from administrative sources (including information from Immigration New Zealand (INZ) and Labour Inspectorate case and investigation files, and Statistics New Zealand's Integrated Data Infrastructure), surveys and qualitative interviews to understand the extent and nature of exploitation. However, there are limitations on each of these data sources. They are all further constrained by language barriers and migrant workers' reluctance to come forward due to the fear that reporting exploitation could, for example, impact their immigration status or their family's well-being. The challenges in measuring migrant exploitation create flow-on uncertainties in developing and targeting interventions. These limitations constrain our ability to monetise the costs and benefits of each proposal. While there is uncertainty across all relevant measures of exploitation, we consider that the inferences which can be made from the combination of known data are sufficient to warrant and guide the interventions proposed.

To be completed by quality assurers:

Quality Assurance Reviewing Agency:
Ministry of Business, Innovation and Employment
Quality Assurance Assessment:
The Regulatory Impact Statement meets requirements.
Reviewer Comments and Recommendations:
MBIE's Regulatory Impact Analysis Review Panel considers that the information and analysis summarised in the Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Impact Statement: Temporary Migrant Worker Exploitation Review Phase One Proposals

Section 1: General information

1.1 Purpose

The Ministry of Business, Innovation and Employment (MBIE) is solely responsible for the analysis and advice set out in this Regulatory Impact Statement (RIS), except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing key (or in-principle) policy decisions to be taken by Cabinet.

1.2 Key Limitations or Constraints on Analysis

The scope of the Temporary Migrant Worker Exploitation Review

The scope of the Temporary Migrant Worker Exploitation Review ('the Review') was agreed by Cabinet as being to address migrant worker exploitation "within an employment context, and that the priority will be the assessment of the regulatory systems of employment standards and employment relations, health and safety at work, immigration (including visa policy settings), and international education settings; [and] other related areas may be raised in conjunction with issues in these regulatory systems" [DEV-18-MIN-0179 refers].

At the most serious end of the spectrum, exploitation includes forced labour and trafficking in persons. However, those offences were not the focus of this Review as the Government has existing regulatory responses to them as well as other work underway, including the development of a new plan of action to prevent people trafficking and forced labour.

Our definition of migrant worker exploitation

For the purpose of the Review, we have broadly defined exploitation as referring to breaches of minimum employment standards (as set in legislation), and conduct under the *Immigration Act 2009*,[3] where the outcome of the offending behaviour causes or increases the risk of harm to the economic, social and physical well-being of the migrant worker. It also includes situations where migrant workers are deceived or coerced into paying above market rates for goods and services, such as food and accommodation, or are forced to live in substandard accommodation.

Evidence of the problem and quality of data

Information relating to the current state and problems seen is included in sections 2.1 and 2.3 respectively below. However, there are significant methodological challenges in attempting to accurately measure the extent of migrant worker exploitation. The hidden nature of this illegal activity and the difficulties of accessing migrants willing to participate in research make data collection difficult. These issues, along with language barriers, mean that accurately measuring the extent of exploitation is extremely challenging.

Both within New Zealand and internationally, experts in exploitation research have

[3] Note that exploitation is also defined under section 351 of the *Immigration Act* for the purpose of that section, and relates to serious failures. It uses a narrower definition than that which we have used for the purpose of the Review.

recommended mixed-method approaches using both quantitative and qualitative research. MBIE has used data from administrative sources (including information from INZ and the Labour Inspectorate's case and investigation files and Statistics New Zealand's Integrated Data Infrastructure), surveys and qualitative interviews to understand the extent and nature of exploitation. The survey and qualitative interview data we have considered in relation to the options under this RIS include:

- Independent primary research commissioned as part of the Review: 'Temporary Migrant Worker Exploitation in New Zealand'[4]
- Migrant Survey 2018
- Household Labour Force Survey, including the Survey of Working Life 2018[5]

These data sources have informed research and reports undertaken outside of the Review, which have also been considered as part of the Review.

Our knowledge has been supplemented by information and feedback from an external Consultation Group, established as part of the Review, representing migrants, businesses, unions and international students. Public consultation on ten proposals for regulatory, policy and operational change (including all those noted in this RIS) undertaken between October and November 2019 was also intended to help build our knowledge base and understanding of how migrant exploitation manifests in New Zealand.

We note that there are limitations on each of these data sources. INZ and Labour Inspectorate investigations data is biased by proactive operations which are targeted based on risk, while reactive investigations data may be affected by migrants' reluctance to report exploitation and the particular circumstances in which they do come forward. Survey data is limited by the languages the survey is offered in, participants' knowledge of their minimum employment rights, and in some cases through self-selection – migrant workers may be reluctant to participate in research where they are being exploited, are in breach of their visa conditions, or do not hold a valid visa.

The challenges in measuring migrant exploitation create flow-on uncertainties in developing and targeting interventions. These limitations also constrain our ability to monetise the costs and benefits of each proposal.

However, while there is uncertainty across all relevant measures of exploitation, we consider that the inferences which can be made from the combination of known data are sufficient to warrant and guide the interventions proposed. We consider that further consultations will be required to better inform our understanding of impact, particularly in relation to Proposal One, and to accordingly inform future design and implementation work. However, we do not consider this to be a barrier to progressing the proposals through the legislative process at this stage.

The criteria we have used to assess the options in this RIS

We have considered options under each proposal against the following criteria:

1. **Effectiveness at reducing migrant exploitation** – This includes consideration of the extent to which the option is likely to address the problems in regulatory and

4 Available at: https://www.mbie.govt.nz/dmsdocument/7109-temporary-migrant-worker-exploitation-in-new-zealand

5 Available at https://www.stats.govt.nz/topics/labour-market and https://www.stats.govt.nz/information-releases/labour-market-statistics-working-life-december-2018-quarter

policy settings we have identified as contributing to exploitation.

2. **Impact on businesses** – This includes consideration of the time, effort and costs required for businesses to be compliant with the proposal. We have assumed that businesses with good practices should be less affected.

3. **Impact on regulators** – This includes consideration of the time required and ease of implementation for regulators, as well as the impact on their ability to effectively and efficiently carry out their functions and duties. It also includes consideration of the potential fiscal impact of a proposal, including whether the cost of implementing and delivering it can be met from baselines or would require additional funding.

Our underpinning assumptions

We have considered and proposed interventions based on what we know from the available administrative and research data, including independent research commissioned as part of the Review, on the basis that this is likely to reflect practices generally (while noting the challenges identified above). This has been supported by consideration of international approaches to addressing exploitation.

The effectiveness of this package of proposals, including their monitoring and evaluation, is subject to resourcing. Tools to improve enforcement, for example, will only be effective to the extent that the regulators are resourced to leverage those tools. This should be understood in the wider context of the Review, which includes non-regulatory proposals that we anticipate will lead to increased reporting of temporary migrant worker exploitation. We have assumed that funding will be available to at least the minimum level required to give effect to the proposals.

The limitations on consultation and testing

A key limitation on consultation and testing relates to Proposal One, which was tested in public consultation as a high-level idea which required further development. Some submitters noted that they were unable to comment substantively on this proposal given the lack of detail in the consultation document. This in turn limits our ability to estimate the proposal's impacts. However, we consider that the views expressed through submissions are sufficient to take the proposal forward. We consider that further public consultation as part of the standard legislative process will enable effective testing of a more detailed version of this proposal.

1.3 Responsible Manager (signature and date):

Nita Zodgekar

International Labour Policy

Labour and Immigration Policy branch

Ministry of Business, Innovation and Employment

4 March 2020

Section 2: Problem definition and objectives

2.1 What is the current state within which action is proposed?

There are approximately 235,000 temporary migrant workers currently in New Zealand. The use of migrant labour has been steadily increasing in New Zealand in recent years. In November 2018, more than seven per cent of all jobs were held by temporary visa holders (up from around three per cent in 2005).[6]

Migrant workers are entitled to the same employment protections as New Zealand employees, including the minimum entitlements provided in the *Employment Relations Act 2000*, *Holidays Act 2003*, and *Minimum Wage Act 1983*. The Labour Inspectorate is responsible for enforcing minimum employment standards, and generally does so through a civil penalty regime. INZ is responsible for enforcing the *Immigration Act 2009*, including through criminal prosecutions, under which there are sanctions for employers who:

- employ migrants who are not entitled to work
- are responsible for serious failures under the *Holidays Act 2003*, *Minimum Wage Act 1983* or *Wages Protection Act 1983*, and
- are responsible for coercion or control behaviours, such as preventing employees from leaving the job, or holding their passports.

64 per cent (384) of the 599 investigations completed by the Labour Inspectorate in 2018/19 involved one or more migrant workers, and nearly half (177) of those cases involved calculated conduct with a serious departure from legislated minimum standards.

By comparison, in 2018/19, INZ opened 100 case files as a result of allegations of exploitation (as defined for the purpose of section 351 of the *Immigration Act 2009*), involving 218 individuals and 172 businesses. This does not include allegations of the most serious exploitative offences, for example, slavery or human trafficking.

Qualitative and quantitative research has identified that three particular groups of temporary workers are more vulnerable to exploitation than others:

- International Students
- Essential Skills visa holders
- Working Holiday Makers.

Within these groups temporary workers are more likely to be vulnerable to exploitation if they are a low-skilled worker, from a low-income source country, or if they have significant debt. Debt may cause temporary workers to accept exploitative conditions out of necessity. Vulnerability to exploitation will be enhanced if the migrant has a low level of English language proficiency and/or a limited knowledge of New Zealand law.

Independent research commissioned as part of the Review found exploitation was seen to occur most frequently with student visas and employer-assisted visas, including both essential skills and post-study work visas (prior to the November 2018 changes which replaced the employer-assisted post-study work visa with post-study open work visas).[7]

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6 Data from the Integrated Data Infrastructure (IDI), using tax records and Immigration NZ data.

7 See https://www.mbie.govt.nz/dmsdocument/7109-temporary-migrant-worker-exploitation-in-new-zealand. Note that only two interview participants were working holiday visa holders, limiting our understanding of the experiences of people in this group.

The independent research suggested that for those on student visas, exploitation can begin in their home country where they are encouraged to come to New Zealand with promises of jobs leading to permanent residence. In practice, many then find it difficult to obtain a job and become vulnerable to exploitation. This may be exacerbated by the need to repay debts they have incurred to travel to and study in New Zealand. Those on employer-assisted visas are vulnerable due to their dependency on their employer, and this dependency is explicitly leveraged by some employers.

Data drawn from the Integrated Data Infrastructure suggests that 'low payment rates'[8] for Essential Skills Visa holders (the largest group of employer-assisted visa holders) have decreased considerably, from 7.4 to 3.7 per cent between 2008 and 2018. However, it also found that some groups of workers were particularly likely to experience low pay. Those groups included women, young workers, migrants from Samoa or Tonga, workers in caring occupations (especially from the Philippines, Fiji and India), and hospitality workers (especially chefs from Thailand, India, China, Korea, and Japan).

Both the independent research and Migrant Survey 2018 found that exploited migrants are often reluctant to take formal or informal action, due to concerns that no action will be taken and that their visa status may be affected.

2.2 What regulatory system(s) are already in place?

As noted above, for the purpose of the Review we have broadly defined exploitation as referring to breaches of minimum employment standards (as set in legislation), and conduct under the *Immigration Act 2009*, where the outcome of the offending behaviour causes or increases the risk of harm to the economic, social and physical well-being of the worker. It also includes situations where migrants are deceived or coerced into paying above market rates for goods and services, such as food and accommodation, or are forced to live in substandard accommodation.

The regulatory systems directly affected by the proposals in this RIS are as follows:

Regulatory system	Objectives

Employment Relations and Standards (Proposals 1, 7)	The objectives underpinning employment relations and standards activity are:
	• Employment rights and standards that:
	  ○ provide minimum requirements and obligations in employment relationships. These minimum requirements satisfy expectations New Zealanders have about the conduct of employment relationships
	  ○ ensure employment relationships are structured in ways that meet labour market outcomes while still enabling other societal benefits, such as cohesion, stability, and well-being.
	• Labour market flexibility, enabling employers and workers to enter and leave employment relationships and to

8 Defined as having a weekly pay rate that is less than the sum of the hourly minimum wage multiplied by 40 (comprising a standard full-time working week), for the purpose of the report prepared for MBIE.

	agree the terms and conditions to apply in these relationships (subject to minimum requirements). • Efficient markets, by addressing market failures such as power and information asymmetries in employment relationships which can lead to the exploitation of workers.
Immigration (Proposals 6, 8)	The objective of the *Immigration Act 2009* is to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals.
Corporate Governance (Proposal 3)	The purpose of this regulatory system is to promote accountable, transparent and high-performing businesses and other types of entities by setting rules and incentives for how these entities are structured, governed and dissolved.

Outside of the Review, there is a variety of other regulatory and non-regulatory work going on across MBIE and the government that will have a positive impact and support the range of proposals in reducing migrant exploitation. The Review supplements policy developments underway including:

- changes to the employer-assisted temporary work visa policy, including requirements for employers to be accredited under a new application process before they can hire migrants on the new work visa
- improving Government procurement practices, in particular the priority outcome to improve conditions for workers and future-proof the ability of New Zealand businesses to trade
- improving rights and protections for vulnerable contractors, and
- introducing protections for businesses against unfair contract terms and 'unconscionable' or 'oppressive' conduct.

2.3 What is the policy problem or opportunity?

Exploitation has negative impacts on migrant workers and New Zealanders

Temporary migrant workers are being exploited in large numbers, and current regulatory settings are not effectively preventing exploitation or providing for effective enforcement responses. Exploitation can cause or increase the risk of harms to the economic, social, and physical well-being of migrant workers. The impact on victims can be extreme, and leave them with physical and mental health problems.

In addition to the direct harms to migrant workers, it is important to note that temporary migrant worker exploitation is a problem that affects all New Zealanders. Exploitation:

1. Undermines the efforts of New Zealand businesses that comply with the law.
2. Undermines work and working conditions for New Zealand residents, particularly other groups of vulnerable workers, and is associated with crimes that affect the wider community such as fraud and money laundering. It also

puts pressure on New Zealand's tax and health care systems.

3. Damages New Zealand's international reputation as a safe place to work, live and study. It can damage our ability to attract and retain the migrant workers New Zealand wants and needs.

The available data indicates exploitation is a significant problem

There are approximately 235,000 temporary migrant workers currently in New Zealand, compared to New Zealand's usually resident working-age population of 1.92 million.[9] However, 64 per cent (384) of the 599 investigations completed by the Labour Inspectorate in 2018/19 involved one or more migrant workers. Nearly half (177) of those cases were recorded as having involved calculated conduct with a serious departure from legislated minimum standards.

By comparison, in 2018/19, INZ opened 100 case files as a result of allegations of exploitation (as defined for the purpose of section 351 of the *Immigration Act 2009*), involving 218 individuals and 172 businesses. This does not include allegations of the most serious exploitative offences, for example, slavery or human trafficking.

Overall, seven per cent of migrants (including residents and temporary migrants) who responded to New Zealand's Migrant Survey 2018 said they had not received one or more of their minimum employment rights or had been asked to pay money to their employer to get or keep their job. Migrants on a temporary work visa were more likely than those on a resident visa to say that they had experienced one or more of these situations (eight per cent compared to four per cent), including 13 per cent of working holiday makers.

This is likely to be an underestimate of the real figure, as migrant workers may: be unaware of their minimum employment rights; be reluctant to speak out if they are being exploited or are in breach of their visa conditions; and have language difficulties.

Overall, 6 per cent of Migrant Survey 2018 respondents said that they had contacted someone for help with their work conditions. Of those who had experienced one or more instances of exploitation, only 19 per cent sought help.

The Migrant Survey 2018 also identified significant industry trends. Nearly one in five migrants working in the agriculture, forestry and fishing industry (18 per cent) and retail industry (17 per cent) indicated that they had not received at least one of their minimum employment rights or had been asked to pay money to their employer to get or keep their job.

Independent research confirms that exploitation in New Zealand takes many forms

As part of the Review, MBIE commissioned wide-ranging independent research on the nature of temporary migrant worker exploitation in New Zealand.[10] This included 131 semi-structured interviews with 64 temporary migrant workers who had been victims of exploitation, and a range of stakeholders including unions, community organisations, lawyers, employers, industry representatives, and immigration advisers.

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9 Statistics New Zealand Household Labour Force Survey, December 2019 quarter. Note that the estimated working-age population is an estimate of the usually resident, non-institutionalised, population of New Zealand aged 15 years and over.

10 Detailed findings are included in the report, which is available at: https://www.mbie.govt.nz/dmsdocument/7109-temporary-migrant-worker-exploitation-in-new-zealand

The research identified multiple types and instances of exploitation in New Zealand, and varying levels of intentionality

The independent research found that exploitation occurred in multiple ways and with varying degrees of harm, suggesting that nuanced and proportionate approaches to addressing problems are needed.

The key types of exploitation identified in the research included: under-payment or non-payment of wages; non-compliance with documentation requirements; non-payment of PAYE taxes; denial of holidays entitlements; and seeking payments in exchange for support for the migrant to gain an essential skills visa and/or residence.

The research identified that exploitation also occurs with different levels of intentionality. Some employers exploited migrant workers deliberately and systematically – and in some cases actively created and maintained their employees' vulnerability by, for example, controlling their accommodation or making threats to have their visa cancelled. In other cases, the exploitation appeared to be opportunistic rather than systematic.

Migrant exploitation harms individual well-being, society and the economy

During interviews, migrants frequently discussed the personal cost of being exploited. This included feeling trapped in exploitative situations because they saw no other option, while others experienced emotional tolls. Thirty-six participants talked of experiencing emotional and physical stress, and seven complained of exhaustion. Some participants expressed that they suffered from depression and anxiety, while others contemplated suicide.

One lawyer interviewed as part of the independent research noted they had seen a client after the police had found them attempting to commit suicide because of their work conditions. Lawyers noted seeing issues with people running out of money or getting into debt, and reported seeing domestic violence issues associated with income difficulties. Lawyers also highlighted that fear around loss of immigration status hindered reporting, and that exploitation therefore often remained a "hidden shame".

In addition to experiencing breaches of employment standards, migrant workers are also at greater risk of poor health and safety outcomes. International research shows that while the incidence of fatal occupational injuries has decreased over time in many countries, it has increased in the migrant, foreign-born and ethnic minority worker population.[11] The literature review component of the independent research indicated that in New Zealand health and safety violations are particularly prevalent in industries and workplaces or sites employing a large proportion of migrant workers.[12]

These harms extend to migrants' families, whether they are in New Zealand or their country of origin. One interview participant noted that although they had an open work visa allowing them to find another job, they did not have time to seek one due to the number of hours worked each week (59 hours typically, with an extreme of 91 hours one week). The participant's family financially depended on them, and they were not willing to report their situation for fear that they and others would lose their jobs.

11 See https://worksafe.govt.nz/research/health-and-safety-regulators-in-a-superdiverse-context/

12 See 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

Exploitation undercuts good employers, and deters migrant workers from coming to New Zealand

Exploitation disadvantages those businesses that comply with their legal obligations. This can be particularly significant for businesses operating in sectors where labour accounts for a higher proportion of cost. There is also an economic impact to the extent that migrants are deterred from migrating to New Zealand due to a lack of confidence in the opportunities available to find decent work compared to other countries.

The broad range of harms and costs associated with exploitation, together with its hidden nature, mean it is not possible to quantify the overall cost. However, the available evidence suggests that there are a range of problems and these can have significant impacts at a personal and wider level.

Current labour market conditions could be contributing to poor employment outcomes for migrant workers and other groups

New Zealand continues to have low rates of unemployment, which is likely to affect demand for temporary migrant workers including in industries associated with lower-paid work. The unemployment rate was 4.0 per cent as at the December 2019 quarter, and has ranged between 4.0 and 4.5 per cent in each quarter since December 2017.

Despite the low unemployment rate generally, some groups, including Māori and Pacific Peoples and young people, consistently experience poor employment outcomes, and there are potentially many working-aged people who could be brought into the labour market with the right offer (attractive wages, conditions and supports). Migrant exploitation can contribute to wage suppression and job displacement, further affecting the employment outcomes of those population groups which have a higher vulnerability to poor outcomes.

Our analysis suggests that there are a number of issues in the immigration and employment standards regulatory systems which contribute to the overarching problem of migrant worker exploitation

We have undertaken analysis of the immigration and employment standards regulatory systems, and have identified a number of issues which we believe contribute to the overarching problem of temporary migrant worker exploitation:

1. Business models and practices can increase the risk of employers exploiting migrant workers.
2. Company structures can enable exploitation.
3. The immigration regulatory system does not provide adequate tools for responding efficiently to lower level breaches of immigration law, which can lead to serious exploitation.
4. Employers can delay the Labour Inspectorate's investigations into employment standard breaches by failing to provide Inspectors with requested documents in a reasonable timeframe.

We have also identified an opportunity to increase the impact of the stand-down list, which is an existing non-regulatory intervention and a joint initiative of the Labour Inspectorate and INZ.

These problems are the focus of our proposals in Phase One of the Review. We discuss them in further detail in the relevant Option Identification sections below.

We do not consider that individuals or businesses are able to effectively resolve these problems on their own under existing arrangements. Power and information asymmetries in relationships can lead to the exploitation of workers, and this may be exacerbated in the case of vulnerable workers such as temporary migrant workers whose vulnerability may be leveraged (as described above). Furthermore, there are a lack of incentives to drive good behaviours, and a lack of tools for regulators to address poor behaviours and practices. This is contributing to the high rates of migrant exploitation observed.

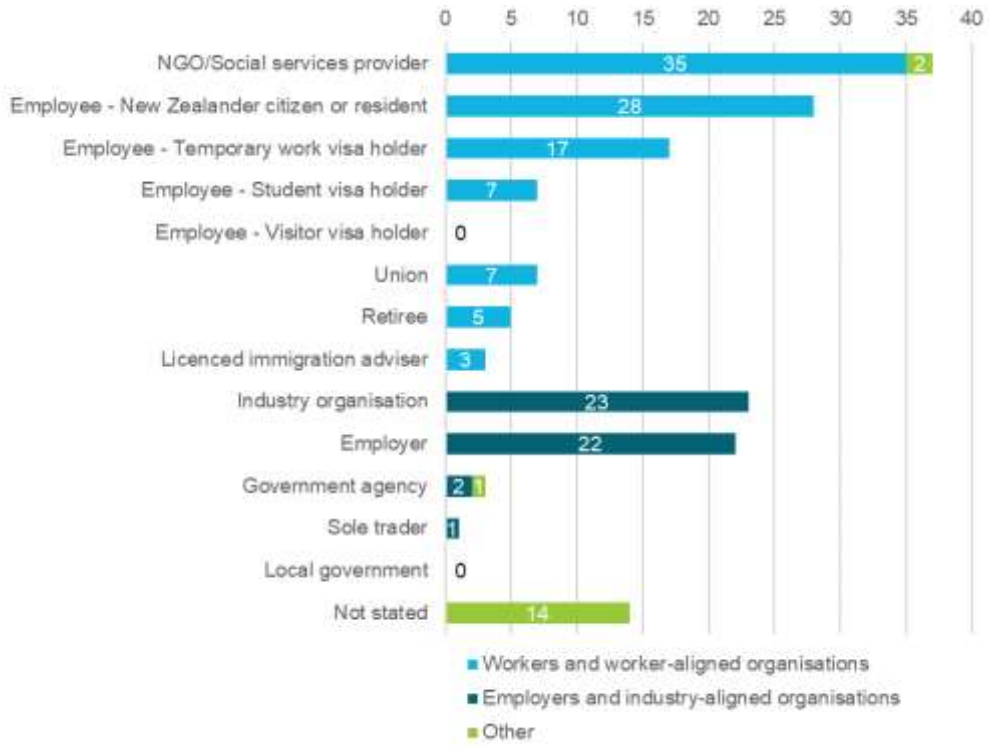
Measures to better identify and sanction migrant exploitation will contribute to the more effective implementation of the rights and freedoms contained in International Labour Organization (ILO) Conventions and human rights treaties to which New Zealand is a party. The mechanisms proposed would also enable better enforcement of rights, more effectively implementing existing ILO commitments in the areas of labour inspection, employment policy and equal treatment for migrants. We are not aware of any adverse impacts on Māori interests or the Crown's Treaty of Waitangi obligations arising from the proposals.

2.4 What do stakeholders think about the problem?

As part of the Review we established an external Consultation Group representing migrants, businesses, unions and international students. We consulted with this group in developing the proposals put forward in public consultation, and detailed in this RIS.

The widespread impact of exploitation is reflected in the submissions we received as part of the public consultation, which came from a broad range of stakeholders as follows:

Figure 1. Temporary migrant worker exploitation review consultation submissions received by submitter type



It has been made clear through our engagement with both the Consultation Group and wider public that the problems are multifaceted and in turn require responses across all parts of the regulatory, policy and operational spectrum, as well as responses outside of

Government.

All stakeholder groups agree that migrant exploitation is problematic and efforts should be undertaken to address it. However, there are varying perceptions regarding how prevalent exploitation is in New Zealand, as well as what the key problems are and how Government should address them.

A number of submitters suggested that employer-assisted temporary work visas should provide greater (or full) flexibility for migrants to switch to different employers. Others suggested that more action needed to be taken against offshore education agents selling 'pipe dreams' to international students. Some considered that existing settings were adequate, but greater resourcing was needed for the regulators to more actively enforce the law.

However, despite these submissions, there was widespread support for all the proposals tested in public consultation. The least supported proposal was supported by 58 per cent of submitters (with 22 per cent unsure), while the most supported proposal was supported by 97 per cent of submitters.

2.5 What are the objectives sought in relation to the identified problem?

The objectives for the Review as a whole include making recommendations on potential regulatory, policy or operational changes (including labour market protections) to mitigate vulnerability and reduce migrant worker exploitation [DEV-18-MIN-0179 refers]. This first phase of the Review has focused primarily on the Employment Relations and Standards, and Immigration regulatory systems. It has been based around achieving three key objectives:

- *prevent* the occurrence of workplace (and other) conditions that might enable temporary migrant worker exploitation;
- *protect* temporary migrant workers in New Zealand and enable them to leave exploitative employment; and
- *enforce* immigration and employment law to deter employer non-compliance through a fit-for-purpose offence and penalty regime.

Proposals One and Three in this RIS primarily aim to achieve the 'prevent' objective, while Proposals Six, Seven and Eight primarily aim to achieve the 'enforce' objective. The 'protect' objective is primarily achieved by non-regulatory proposals to:

- establish a dedicated migrant exploitation 0800 phone line and online reporting tool, and a specialised migrant worker exploitation-focused reporting and triaging function, and
- create a new visa for exploited migrant workers.

However, the objectives are interconnected and the individual proposals are accordingly intended to improve outcomes across each of them.

Proposal One: Option identification

3.1 What options are available to address the problem?

Problem: Business models can increase the risk of exploitation occurring

Under current settings it is generally the direct employer that is liable for ensuring minimum employment standards are met for each of their employees. However, this allows for third parties to have significant control or influence over employers and, provided they do not engage directly in employment matters, preclude themselves from accountability over employment outcomes.

This can enable a business to exercise control over various aspects of an employer's business and create pressures (particularly cost pressures) leading to poor employment outcomes, while avoiding accountability for those outcomes. At a broader level, it is also recognised that businesses can effectively drive compliance down their supply chains, both domestically and internationally.[13] It has also been suggested that enforcement should focus on actors up the supply chain, in the wake of increasingly 'fissured' workplaces where lead firms collectively determine the market conditions in which wages and conditions are set.[14]

The independent research indicated subcontracting and franchising can be problematic business models

The independent research commissioned for the Review noted that migrant exploitation was associated with smaller businesses and, in particular, subcontracting and franchising arrangements where the main contractor or franchisor had little oversight of labour practices.

The research found that some migrants were working for franchisees with multiple stores who "had built a low-cost business model on the recruitment and exploitation of a migrant workforce." In relation to subcontractors, stakeholders noted that "shop floor" practices could be beyond the sight of the main contractor. The research also identified less systematic exploitation in these instances, where business owners appeared to either be unaware of their employment obligations or willing to ignore rules that they perceived to be cumbersome.

Challenges associated with franchising arrangements and subcontracting, particularly in complicated supply chain networks, have been well reported internationally.[15]

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13 See, for example: Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division, Weil 2010 (https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/strategicEnforcement.pdf); and the OECD Guidelines for Multinational Enterprises (http://www.oecd.org/daf/inv/mne/48004323.pdf).

14 Enforcing Labour Standards in Fissured Workplaces: The US Experience, David Weil, 2011, The Economic and Labour Relations Review Vol. 22 No. 2, pp. 33–54. Available at: https://web.law.columbia.edu/sites/default/files/microsites/career-services/David%20Weil%20Enforcing%20Labour%20Standards%20in%20Fissured%20Workplaces.pdf

15 See, for example, the United Kingdom Labour Market Enforcement Strategy 2018/19 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf); and, in an Australian context, the 2019 Report of the Migrant Workers' Taskforce (https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/mwt_final_report.pdf)

Franchises can present a particular risk of exploitation arising from downward pressures placed on franchisees by franchisors

This can include pressures associated with, for example, ongoing fee/royalty payment obligations, the price-setting function of franchisors, and requirements to use particular providers of goods and services. Franchising is also an attractive business model to new business owners, including migrants, who may be less familiar with their employment obligations.

Issues with the franchising model were investigated in Australia's recent Parliamentary Inquiry into franchising,[16] which noted that the power imbalance inherent in franchising relationships can expose franchisees to the risk of being exploited by unscrupulous franchisors. The Committee also observed that wage theft occurred in many franchises, partly due to the business model ("to stay afloat in a financially constrained business model given wages are one of the greatest costs in the franchisee's control") and partly due to a range of socio-cultural problems. The Committee heard from franchisors that this behaviour was driven by greed, but noted the issue was "far more complex and partly inherent to the business models' structural breakdown of power and the imposition of cost controls."

The risk factors associated with franchising in Australia are relevant to New Zealand. Although we have not experienced significant cases across particular franchising systems to the extent seen in Australia,[17] those risk factors appear to be supplemented by the Labour Inspectorate's investigations data. In the 12 months from 1 December 2018 (when data collection on franchises began) to 30 November 2019, 81 investigations associated with franchises were undertaken and breaches were identified in 45. As at November 2019 there were 73 open investigations. MBIE analysis of the 338 employers placed on the stand-down list from April 2017 to March 2019 suggested that 16 per cent were franchises. It further suggested that 19 per cent of the highest harm employers (those receiving fines above $20,000) were franchises.

We note that detail is not available regarding the nature of the franchising arrangements and the extent to which pressures were passed on from the franchisor to employees. However, the data does suggest that risks associated with the business model and practices are reflected in poor employment outcomes.

Subcontracting chains are also associated with exploitation, with increasing cost pressures along each stage of a subcontracting chain

Exploitation has recently been observed in the construction industry, including in relation to the rollout of ultrafast broadband (see Figure 2 below).

16 Australian Parliamentary Joint Committee on Corporations and Financial Services Report on The operation and effectiveness of the Franchising Code of Conduct, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising

17 See, for example: https://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/april-2016/20160409-7-eleven-presser

Figure 2. Subcontracting chain example

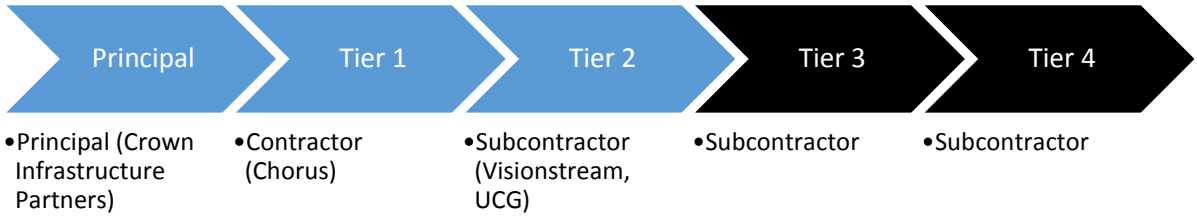

Figure 2 illustrates the subcontracting chain in the ultrafast broadband rollout. Significant exploitation was found from the third tier of subcontracting, leading to Chorus commissioning MartinJenkins to independently review their contracting model.

The MartinJenkins review noted 365 subcontractors had been engaged through Visionstream and UCG to deliver ultrafast broadband connection services.[18] Of that number, the Labour Inspectorate has investigated 82 subcontractors and taken compliance action against 69, with four cases in progress (as at February 2020). Breaches observed included employers failing to: maintain employment records; pay employees' minimum wage or holiday entitlements; and provide employment agreements. In a number of cases it was found that contractors deliberately used practices such as 'volunteering' or extended trial and training periods without pay.

The prevalence of exploitation found across otherwise independent employers strongly suggests there were systemic problems and that these were driven by features of the contracting model. Further, the MartinJenkins report noted that around 50-60 per cent of the workforce was comprised of temporary migrant workers.[19] However, all cases of non-compliance found to date have involved employers of migrant workers – suggesting that migrants are disproportionately affected by those systemic problems.

The MartinJenkins review found that "Chorus relied too heavily on a model whereby workforce risk, including the risk of migrant exploitation, was managed by the service companies [Visionstream and UCG] without sufficient oversight". It suggested more could have been done to protect workers in the contracted supply chain from exploitation, including by addressing migrant workers' fear that complaining about labour standards could threaten their right to work in New Zealand. The review also heard that subcontractors faced high capital costs in being eligible to carry out work on the network and that the associated debt (primarily associated with the purchase of a vehicle and tools) limited their ability to exit.

It is worth noting that Chorus and its service partners were not directly responsible or liable for any of the aforementioned breaches of employment standards, and had no legal obligation to take any action to address the problems. However, they have subsequently taken action to mitigate the risk of further exploitation occurring within the ultrafast broadband connect supply chain.[20] That has included introducing a mandatory Supplier Code of Practice; auditing subcontractors; improving the fairness of its pay system; and introducing an independent whistle-blower process. This suggests there are actions that contractors at the head of a chain can take, and that those actions can complement

18 See https://www.martinjenkins.co.nz/assets/Uploads/Client/Final.Independent.Review.of.Chorus.Contracting.Model-April.2019.pdf

19 Conversely, it found that 11.6 per cent of UCG technicians (of 320 workers) and 29.7 per cent of Visionstream technicians (of 574 workers) had New Zealand citizenship or permanent residence.

20 See https://company.chorus.co.nz/chorus-making-good-progress-supply-chain-reforms

enforcement activity (including information and education) by the Labour Inspectorate and INZ.

We have considered three options to drive changes in the way businesses engage in relation to employment matters, in situations where a person has significant control or influence over an employer's affairs. The options are mutually exclusive from each other.

Option 1 – A third party franchisor or holding company with significant control or influence over an employer will be liable for breaches unless they took reasonable steps

This option is to adopt the provisions introduced in Australia through the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*. This would hold a third party franchisor or holding company liable for a breach if they:

1. Had significant control or influence over the employer's affairs
2. Knew, or could reasonably have been expected to have known, that the breach or a breach of the same or similar character was likely to occur
3. Did not take reasonable steps to prevent the breach (i.e. it would be a defence if they took reasonable steps)

The test of control or influence would include consideration of the degree to which the person has control or influence over matters such as the employer's operational, financial and corporate affairs. It would not capture, for example, situations where the third party simply procures goods or services from an employer, even if that procurement accounted for a large proportion of the employer's revenues.

The third party could be liable for both civil penalties and for the repayment of arrears associated with the breach.

Option 2 – A third party with significant control or influence over an employer will be liable for breaches unless they took reasonable steps

This option, which was tested in public consultation, applies the same tests and requirements as Option 1 but applies them to all third parties with significant control or influence over an employer.

Whereas the Australian provisions apply only to franchisors and holding companies, we considered a broader approach applicable to all business types would be more appropriate. This broader approach was recommended by the Migrant Workers' Taskforce[21], established by the Australian Government following the identification of significant wage underpayments in certain sectors.

Although franchising agreements generally provide some level of control by a franchisor over a franchisee, this can vary depending on the particular agreement and would not always be significant. On the other hand, a subcontracting arrangement (for example) could provide a contractor with significant control over the affairs of the subcontractor. We tested a broader approach aimed at addressing the risks seen with this kind of arrangement, without creating opportunities for businesses to structure themselves in such a way as to avoid falling in scope of the defined business type.

21 See https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/mwt_final_report.pdf

Option 3 (recommended) – A third party with significant control or influence over an employer will have a duty to take reasonable steps to ensure the employer is compliant

Option 3 would similarly involve holding a person liable where they have significant control or influence over an employer that breaches employment standards. However, it would go further by introducing a positive duty to take reasonable steps to ensure the employer is complaint, rather than providing for a reasonable steps defence.

Under this option the person could be penalised for failing to meet their duty, regardless of whether there was a connected breach of employment standards. The penalty is suggested to align with the existing civil penalty provisions in the *Employment Relations Act 2000* (up to $10,000 for an individual and $20,000 for a corporation), for breaches of that Act. Proceedings could only be brought by the Labour Inspectorate.

Option 3 has been developed following the public consultation, which was based around Option 2. Some submitters suggested connecting that proposal to the health and safety framework, including the 'person conducting a business or undertaking' concept. Consideration of a 'duty' was also raised in several submissions, including as a specific duty "to report breaches", "to ensure proper practices are upheld" or "to enquire and make sure processes are appropriate", or as a broad duty of care.

3.3 What other options have been ruled out of scope, or not considered, and why?

We considered expanding existing accessory liability provisions under the *Employment Relations Act 2000*

As part of the status quo, 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 individuals (primarily company directors) involved in exploitation to account. Businesses other than the employer could potentially also be held to account under these provisions if it can be proven that they had knowledge of the breach and participated in it.

Consideration was given as to whether there could be an opportunity to extend the existing accessory liability provisions to cover a broader range of circumstances. However, the existing accessory liability provisions are still relatively new and their scope needs further testing in New Zealand courts. Further, those provisions were not intended to capture circumstances where a party indirectly pressures an employer to adopt practices reliant on, or otherwise resulting in, exploitation. The options under consideration are intended to be complementary to those existing accessory liability provisions.

Proposal One: Impact Analysis

	No action	Option 1 – Reasonable steps defence (franchisors and holding companies)	Option 2 – Reasonable steps defence	Option 3 – Duty to take reasonable steps
Effectiveness	**0**	**+** Australian provisions have not been tested in court, but anecdotal evidence suggests there have been changes in business practices.	**++** As with Option 1, but Option 2 applies to a broader range of relationships and is more targeted at the nature of the relationship.	**+++** Places a stronger obligation on relevant persons by using a positive duty-based approach, which is likely to be more effective in changing behaviours.
Impact on businesses	**0**	**-** Novel to New Zealand and would therefore require time for businesses to implement. Impacts related employers whether or not they are already compliant. Compliance costs would vary depending on the relationship between the third party and employer.	**- -** Compliance costs as with Option 1, but higher in total due to the wider number of businesses likely to be affected. Option is intended to require businesses to take reasonable steps, not to make legitimate business models unviable.	**- -** Compliance costs for individual businesses substantially similar to those associated with Options 1 and 2. Scope of businesses covered are as with Option 2.
Impact on regulators	**0**	**0 / +** Would require time for the regulator to develop guidance and enforcement approach, including operating procedures. Would enhance efficiency and effectiveness of enforcement by targeting a broader range of actors where there has been non-compliance.	**+** Cost impact unlikely to be materially different in comparison to Option 1. Enables more efficient targeting of investigations by allowing opportunity to target the controlling or influential businesses up the supply chain.	**+** As with Options 1 and 2, this is a novel approach which would require time for the regulator and businesses to implement. Enables more efficient targeting of investigations as with Option 2.
Overall assessment				**Recommended**

Key:

+++ much better than doing nothing/the status quo **++** better than doing nothing/the status quo **+** slightly better than doing nothing/the status quo

0 about the same as doing nothing/the status quo

- slightly worse than doing nothing/the status quo **- -** worse than doing nothing/the status quo **- - -** much worse than doing nothing/the status quo

Proposal One: Conclusions

5.1 What option, or combination of options is likely to best address the problem, meet the policy objectives and deliver the highest net benefits?

Option 3 is the preferred option because a reasonable steps obligation is likely to be more effective as a positive duty than as a defence, while issues relating to cost are similar across all options. By applying to all arrangements involving significant control or influence by a person over an employer, rather than such arrangements involving a franchising (or other specified) agreement, the option is also better targeted towards mitigating risks associated with the nature of the relationship.

In taking this approach, there are similarities with the 'person conducting a business or undertaking' (PCBU) concept introduced through the *Health and Safety at Work Act 2015* (HSWA). The HSWA shifted duties away from employer-employee and principal-contractor relationships towards a broader approach, under which the duty holder includes persons that do not directly engage employees or contractors. This followed from recommendations by the Independent Taskforce on Workplace Health and Safety to extend duties to all upstream participants in the supply chain, and to adopt the concept of a PCBU – "recognising that the traditional employer-employee relationship is now only one way in which firms organise their workforces." [22]

Although there has not yet been a formal evaluation of the *Health and Safety at Work Act 2015*, an evaluation of the Australian Model Law (which forms the basis for New Zealand's settings) found that the duties framework is "settling in people's understanding and working well" and that "initial concerns with the introduction of the PCBU concept have been largely unfounded".[23] It found that most people consulted as part of the evaluation were supportive of the PCBU concept and considered it was working well.

Notably, the MartinJenkins report into Chorus' contracting model indicates that while there were poor employment practices throughout the subcontracting network, it appeared that health and safety practices were followed – and the training was appropriately adjusted as the workforce became increasingly diverse. We anticipate this option should compel similar action in relation to employment matters.

The Labour Inspectorate has undertaken proactive investigations of a range of related employers, most prominently in relation to those subcontractors responsible for ultrafast broadband connection. This proposal provides a tool that bolsters this work by enabling action to be taken by controlling or influential parties in the supply chain. It calls on primary contractors and others to consider their approaches to contracting and the steps that can be taken to mitigate the risk of exploitation occurring; and provides for enforcement where reasonable steps are not taken.

We anticipate this proposal may require implementation over a longer timeframe, to provide adequate opportunity for businesses to adjust their practices.

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22 Report of the Independent Taskforce on Workplace Health and Safety, available at: http://hstaskforce.govt.nz/documents/report-of-the-independent-taskforce-on-workplace-health-safety.pdf

23 Review of the model Work Health and Safety Laws, available at: https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf

Public consultation indicated there was support for this approach broadly

From the public consultations, the proposal received 123 responses with 73 per cent supporting, 17 per cent opposing, and 10 per cent unsure. Of the 73 worker and worker-aligned organisation submitters, 88 per cent supported, 7 per cent opposed, and 5 percent were unsure. Among the 36 employer and industry-aligned submitters, 42 per cent supported, 36 per cent opposed, and 22 per cent were unsure.

It should be noted that the recommended option differs from that which was proposed, though submitters varied in how they interpreted the proposal and how it should or could work. That being the case, several submitters proactively linked the proposal to the 'person conducting a business or undertaking' concept in the health and safety at work system, while others envisaged various duties as being attached to the proposal.

Of those in favour of the proposal, it was most commonly suggested that the proposal would increase accountability and awareness of employment obligations. Others considered the proposal would send a strong signal that migrant exploitation is not tolerated, and deter or disincentivise further exploitation as well as encourage behaviour changes. Some submitters expected that business practices would improve, encouraging businesses to better understand their workforce and their needs, and improving competition by reducing the ability for exploitative businesses to undercut those that meet their obligations.

Some submitters expressed concerns about cost and uncertainty

The primary concern with the proposal related to cost, in relation to establishing audit and compliance systems, and undertaking monitoring and enforcement activity. Some submitters also noted they had limited ability to influence employers in practice, and that this proposal could create confusion regarding who the employer is or lead to poor practices by employers. For example, one submitter suggested the proposal "may have the unintended impact of the making employers (e.g. franchisees) becoming reliant on the advice of others and not taking ownership for responsibilities they need to manage themselves."

Uncertainty with this proposal generally could be mitigated in the legislation and through the provision of guidance by MBIE's Employment Services. As part of the legislative design, officials will be considering and developing a list of factors for a court to have regard to in determining whether reasonable steps were taken (as in the Australian legislation). This could include, for example, consideration of the person's ability to influence the employer's conduct; and any actions taken towards promoting compliance such as the provision of education, monitoring arrangements, and avenues for employees to raise concerns.

The cost for individual businesses would also vary based on their existing practices. The consultation document asked "What steps does your business take to identify and mitigate the risk of exploitation occurring in your supply chain?" 20 submitters responded to this question and noted that they: undertake audits including of pay records (7); set expectations or contractual provisions (5); have policies and procedures including on-boarding processes (3); have a complaints or whistleblower process (3); have a supplier code (3); provide systems (2); and undertake due diligence (2).

Notably, the duty would also only apply where the third party had significant control or influence over an employer's affairs. It would not capture, for example, situations where the

third party simply procures goods or services from an employer, even if that procurement accounts for a large proportion of the employer's revenues.

The 'control versus independence' legal test (established by the courts) for employee status provides an indication of the relevant factors to be considered, and adapting those existing tests was suggested through a Law Society submission. This could include consideration of whether the third party has control over: where, when, what or how the work is to be done; working hours; the availability of the person to perform work; whether the person can work for others; and the supervision and direction of the person.

5.2 Summary table of costs and benefits of the preferred approach

Affected parties	Comment	Impact	Evidence certainty
Additional costs of proposed approach compared to taking no action			
Regulated parties (businesses)	Compliance costs for individual businesses will vary depending on factors including the size of the business and the nature of the business' relationships with employers, as well as their existing practices. Franchising Association of NZ indicates costs could be up to $200,000 up-front and then $50,000 - $200,000 annually to implement a full compliance system. However, we do not anticipate this would reflect the standard level of cost for franchisors or other businesses. Third party certification such as the NZGAP Social Practice Standard (in relation to the horticulture sector) can assist in providing assurance, with an estimated cost for employers of $4,000-5,000 every three years. The aggregate impact is unknown as the nature and prevalence of private contracts is unknown.	Medium	Low
Regulators (Employment Services)	Additional resourcing would improve effectiveness but is not fundamental to implementation. Reprioritisation of resources will be required to: develop guidance, information and education to stakeholders; arrange internal operating procedures; and to enforce the provisions.	Low	Medium
Wider government	Expenses associated with examination by the Employment Relations Authority	$24,311 - $60,778	Medium

	and Employment Court, based on an estimated two to five cases per year. Costs expected to be within baselines.		
Other parties			
Total Monetised Cost		Low	Medium
Non-monetised costs		Low-Medium	Low

Expected benefits of proposed approach compared to taking no action			
Regulated parties	Reputational benefits for businesses and employers. May translate into trade opportunities as increasingly international companies are demanding evidence of good employment practices.[24]	Medium	Low
Regulators (Employment Services)	Enables more efficient targeting of investigations by allowing the regulator to target controlling or influential businesses up a supply chain.	Medium-High	Medium
Wider government	Enhances New Zealand's reputation as a destination for migrant workers and investment.	Medium	Medium
Other parties	Vulnerable workers are expected to receive the greatest benefit. We would anticipate wider societal and economic benefits to the extent that exploitation is reduced.	Medium	Low
Total Monetised Benefit			
Non-monetised benefits		Medium-High	Low-Medium

5.3 What other impacts is this approach likely to have?

We note that uncertainty relating to cost arises as the nature and prevalence of private contracting arrangements is unknown. However, we anticipate the legislative design process will serve to inform detailed design matters and mitigate the risk of unintended consequences arising.

[24] See for example: https://www.newsroom.co.nz/2019/01/17/401633/near-misses-for-export-industry-due-to-worker-exploitation.

Proposal Three: Option identification

3.1 What options are available to address the problem?

Problem: Company structures can enable exploitation

It is possible for company directors to liquidate their businesses and create new companies with clean records. As part of liquidation a company's obligation to meet its liabilities ceases, including liabilities in the form of money owed to employees arising from non-compliance with employment standards. We have heard from the Labour Inspectorate and in public consultation that some people use these company settings to facilitate exploitation by avoiding liability and/or detection from regulators, though we do not know how often this occurs.

Under the *Companies Act 1993* the Court can disqualify a person from directing a company where they have been convicted of certain imprisonable offences such as crimes involving dishonesty. Migrant exploitation is a particularly egregious form of offending from which the public should be protected. Expanding the offences for which someone can be disqualified from being a director to include exploitation offences could help to protect the public from this offending occurring in future.

Banning orders made under the *Employment Relations Act* serve a similar purpose and role to director disqualification, and can be used to prevent a person from being an employer for up to 10 years. However, enforcement primarily relies on third party reporting to the Labour Inspectorate. Preventing an offender from directing a company would mitigate risk by prohibiting their use of the limited liability structure.[25]

Proposal Three entails explicitly linking exploitation offending to the existing director disqualification provisions in the *Companies Act* where the offending was enabled by, or otherwise related to, the use of a company. A person that has been disqualified from being a director may still run a business as a sole trader, under which they would be personally liable for any debts incurred. They would also be free to work as an employee.

The options below capture the spectrum of serious offences which have been considered. They are not mutually exclusive, and can work in full or partial combination.

Option 1 (recommended) – Disqualify persons convicted of migrant exploitation under the Immigration Act

Option 1 was tested in public consultation, where it was supported by 86 per cent of submitters. This option would enable director disqualification where a person was convicted of exploitation under section 351 of the *Immigration Act* ('Exploitation of unlawful employees and temporary workers') and the offence was enabled by, or otherwise related to, the use of a company. This captures the most serious cases of employment offending involving temporary migrant workers, and is a criminal offence that is punishable upon conviction by up to 7 years imprisonment, a $100,000 fine, or both.

Prosecutions for exploitation under the *Immigration Act* have typically involved a company (as the employer which committed the offence), with company directors joined as parties to the offending via section 66 of the *Crimes Act 1961*. In line with section 66, a company

[25] 86 per cent of employers placed on the stand-down list (291 of 338) between 1 April 2017 and 30 March 2019 were limited liability companies.

director is only able to be prosecuted as a party to the offence where they have:

- Actually committed the offence; or
- Done or omitted an act for the purpose of aiding the company in committing the offence; or
- Abetted the company's commission of the offence; or
- Incited, counselled, or procured the company to commit the offence.

Preventing a person from directing a company in future, where they have played an active part in the exploitation of others through a company, would mitigate the risk of their undertaking further exploitation by prohibiting their use of the limited liability structure.

Option 2 (recommended) – Disqualify persons convicted of trafficking in persons

Both exploitation under the *Immigration Act* and trafficking in persons under the *Crimes Act 1961* are criminal offences which involve exploiting victims for profit. They are each punishable upon conviction by a term of imprisonment and/or a financial penalty.

The nature of the penalty for a trafficking conviction is unusual in the context of the *Crimes Act*. This construction enables the charging of a fine in addition to imprisonment, and therefore explicitly enables companies to be fined (as a party to the offence) in addition to natural persons. New Zealand has had only one trafficking in persons conviction to date, and a company was not charged alongside the perpetrator. However, in that case the perpetrator arranged for victims to work at his own construction company as well as for an acquaintance (who was convicted of exploitation under the *Immigration Act*).

While this option was not tested in public consultation, the similarities between exploitation under the *Immigration Act* and trafficking in persons offences (which we consider to be similar but more serious) warrant its consideration as a further option.

Option 3 – Disqualify persons convicted of other modern slavery offences (s98 and s98AA of the Crimes Act)

'Modern slavery' is an umbrella term that generally captures cases of exploitation where a person cannot leave due to threats, violence, deception, coercion and/or abuse of power. This can include forced labour, debt bondage, forced marriage, other slavery and slavery-like practices (such as servitude or serfdom), and human trafficking.

This option entails linking convictions for offences under section 98 (Dealing in slaves) and section 98AA (Dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour) of the *Crimes Act* to director disqualification, on the basis that those offences can include labour exploitation. However, it is not recommended as those offences have not typically been undertaken in connection with a company.

Option 4 – Disqualify persons who have engaged in a serious breach of employment standards

From the public consultation, around one-third of submitters expressing support considered the prohibition should also be widened to capture people who have engaged in a wider range of serious employment offences or breaches. They considered this would further help to mitigate the risk of people breaching employment standards, and send a

stronger message against such behaviour.

This option has been considered following public consultation, but is not recommended as we consider banning orders under the *Employment Relations Act* provide a similar but more appropriate tool in these circumstances.

3.3 What other options have been ruled out of scope, or not considered, and why?

We have not undertaken a first principles review of who should or should not be entitled to create a company. Our consideration of options as part of the Review has been undertaken while seeking to ensure consistency with the rationale and intent behind the existing company law settings.

Proposal Three: Impact Analysis

	No action	Option 1 – Exploitation under the *Immigration Act*	Option 2 – Trafficking in persons	Option 3 – Other modern slavery offences (s98, 98AA)	Option 4 – Breaches of employment standards
Effectiveness	**0**	**++** Exploitation offences appear to often be enabled by or otherwise related to the use of company structures, based on cases observed to date.	**+ / ++** Unclear connection with company structures as few cases taken (though there appear to have been connections when looking at prosecutions). Internationally, trafficking and forced labour are often linked to supply chains.	**0** Crimes observed to date undertaken outside of companies, suggesting no common connection between offending and use of corporation.	**+** Breaches typically occur through companies.[26] 17 of 67 cases brought by the Labour Inspectorate between July 2018 and September 2019 joined one or more company directors as a person involved.
Impact on businesses	**0**	**0** Substantial but highly targeted impact. No compliance cost for legitimate businesses.	**0** Extremely targeted impact. One conviction since the offence was established in 2002 (though one case is currently before the courts).	**0** Highly targeted impact. Crimes do not necessarily involve the management of a company or have business elements.	**- -** Could have disproportionate impact; employment standards are part of the civil law system under which the standard of proof is the balance of probabilities.
Impact on regulators	**0**	**0** Minor impact, with around two to three cases per year.	**0** Negligible impact.	**0** Likely small impact.	**- -** Larger increase in the number of cases that would need to be processed. May require additional funding.
Overall assessment		**Recommended**	**Recommended**		

[26] 86 per cent of employers placed on the stand-down list (291 of 338) between 1 April 2017 and 30 March 2019 were limited liability companies.

Proposal Three: Conclusions

5.1 What option, or combination of options is likely to best address the problem, meet the policy objectives and deliver the highest net benefits?

We recommend proceeding with Options 1 and 2.

Exploitation offending appears to commonly be enabled by or otherwise related to the use of company structures. Blocking the use of company structures is therefore likely to be effective in preventing the ability for unscrupulous persons to engage in exploitation in the same way in future.

Option 1 was supported by 86 per cent of submitters in public consultation. Those who were unsure or opposed to the option noted that the approach should be fair and proportionate, or considered that existing law was sufficient. We note that under existing *Companies Act* settings the court can only make an order for a period over 10 years in the most serious cases. Regardless of the period of the disqualification, it is possible for a person to seek the leave of the court to become a director.

Option 2 was not tested in public consultation. However, the nature of the trafficking in persons offence is similar to Option 1 and we therefore consider it appropriate to align protections and treatments across the two options. The inclusion of Option 2 was tested with the Review's external Consultation Group, and we consider it likely that there would be public support for this proposal consistent with the level of support expressed in relation to Option 1.

Option 3 is not recommended as it reflects a departure from the rationale for director disqualification. Those offences have not typically involved the exploitation of a person in connection with the use of a company.

Option 4 is not recommended as it is inconsistent with current settings behind director disqualification. Under current settings the threshold for a director disqualification is high, reflecting the seriousness and impact of the disqualification. The current grounds for disqualification generally relate to conviction for an offence, proven beyond reasonable doubt, which is punishable by no less than three months' imprisonment. On the other hand, employment standards are part of the civil law system where penalties are typically financial, and the standard of proof is the balance of probabilities.

A banning order made under the *Employment Relations Act* has a similar effect, by prohibiting a person from being an employer for up to 10 years. The court can make a banning order against a person that has engaged in serious or persistent breaches of employment standards, and the standard of proof is the balance of probabilities. We consider this serves as an appropriate mechanism for addressing employment offences and breaches more broadly.

5.2 Summary table of costs and benefits of the preferred approach

Affected parties	Comment	Impact	Evidence certainty
Additional costs of proposed approach compared to taking no action			
Regulated parties (company directors)	No direct cost associated with disqualification, which would only apply to very few people who have been convicted of exploitation. The person may continue to run a business as a sole trader.	Low	High
Regulators (INZ; Companies Office)	Cost associated with making two to three applications per year for court orders are expected to be small and within baselines, as there are few such cases and the relevant facts should largely have been established. Companies Office processing cost to implement an order would be minimal and met from existing baselines.	Up to $40,000 for first case; significantly less for subsequent cases.	Medium
Wider government	Cost associated with examination by the High Court, estimated using Budget appropriation information based on two to three additional cases per year. Actual costs likely to be less than the average drawn from appropriation information, and are expected to be within baselines.	$29,743 - $44,615	Medium
Other parties			
Total Monetised Cost		Up to $54,872 for first case and significantly less for subsequent cases	Medium
Non-monetised costs		Low	High
Expected benefits of proposed approach compared to taking no action			
Regulated parties	Employers complying with the law will not be undercut by non-compliant employers.	Low	Medium
Regulators	Investigation resource savings to the extent that disqualified directors	Medium	Low

	are prevented from reoffending.		
Wider government	The Government will be seen to be taking action against exploitation of migrant workers, reinforcing New Zealand's good international reputation.	Medium	Medium
Other parties	Indirect benefit to future employees, to the extent they are able to avoid working for the most unscrupulous employers.	Medium	Medium
Total Monetised Benefit			
Non-monetised benefits		Medium	Medium

5.3 What other impacts is this approach likely to have?

A person who has been disqualified from being a director may experience flow-on effects which they may not otherwise experience on the basis of an exploitation or trafficking in persons conviction. For example, the *Real Estate Agents Act 2008* prohibits a disqualified director from holding a real estate license, and the *Chartered Professional Engineers of New Zealand Act 2002* prevents such a person from being a member. In determining whether the person is a fit and proper person, the New Zealand Institute of Chartered Accountants considers a person's disqualification from acting as a director of a company (among other matters).

We do not hold a record of which professional bodies or other groups consider director disqualification for membership purposes. We therefore do not know the extent to which there are secondary implications arising from director disqualification.

Proposal Six: Option identification

3.1 What options are available to address the problem?

Problem: The immigration regulatory system does not provide adequate tools for responding effectively to low-level immigration offences which increase a worker's vulnerability to exploitation.

Prosecution is currently the only available enforcement tool in the immigration regulatory system for breaches of immigration law. While prosecution is an appropriate tool for addressing serious criminal offending, such as systematic exploitation of migrant workers, it is not always an effective response to low-level breaches of immigration law, because it requires significant human and financial resource to investigate and take a case to trial. This is a problem because low-level breaches of immigration law exacerbate a migrant worker's vulnerability and may be the precursor behaviour of more serious exploitation. INZ needs an efficient and effective enforcement tool to capture and deter this non-compliant behaviour early, before it develops into exploitation.

We have identified three types of low-level non-compliant employer behaviour that is linked to, or increases the risk of, migrant exploitation. These behaviours create vulnerability, and undermine procedures for employer accreditation related to verification, auditing and assurance:

Non-compliant employer behaviour	Examples
Employing a person not entitled under the *Immigration Act 2009* to work in the role.	Employing workers holding visas for a different employer / workplace location (including working holiday visa holders beyond limit).
	Employing students in excess of the 20 hour limit on their visa.
	Employing migrants who do not hold a valid visa.
Employing a person in a role or under conditions which do not match those provided in an employer-supported visa application.	Inflating job offers to meet employer-sponsored visa requirements.
	Paying a worker a lower salary than that promised in a sponsored visa application
Failing to provide requested documents to an immigration officer in a reasonable timeframe.	Impeding INZ verification and assurance activities (specifically investigation of whether the role/conditions match those in the visa application) by failing to provide an immigration officer with copies of wage and time records, employment agreements, IRD records, and financial statements.

Option 1 (Recommended): Establish new infringement offences for low-level non-compliant employer behaviour

Option 1 is to establish three new infringement offences capturing the non-compliant

behaviour described above. These offences would allow INZ to issue infringement notices, with a fee (noted in the table below), to non-compliant employers, offering a more proportionate, timely and cost-effective response to low-level level non-compliance than prosecution before the courts.

Proposed infringement offence	Proposed infringement fee
Employing a person not entitled to work in the role	$1,000 per worker where the employer is an individual $3,000 per worker where the employer is a body corporate
Employing a person in a role or under conditions which do not match those supplied in an employer-sponsored visa application	
Failing to provide documents requested by an immigration officer within 14 calendar days	$1,000 per notice

An infringement fine (double the infringement fee) would be available where an employer unsuccessfully disputes an infringement notice in a defended hearing

Employers who receive an infringement notice will have the opportunity to dispute it in a defended hearing before the District Court. If the District Court finds an employer liable following a defended hearing, the Court has the discretion to require an employer to pay an "infringement fine" (per section 375 of the *Criminal Procedure Act 2011*).

We propose clarifying in the *Immigration Act 2009* that the infringement fine payable would be double the infringement fee, to reflect the additional costs to government resulting from the dispute and enforcement. Clear rules around infringement fines would also further the objective of Option 1 to keep low level, high volume matters out of the court system by reducing the incentive for employers to bring trivial challenges.

To implement Option 1, immigration officers require a statutory power to compel employers to provide relevant documents

To prove that an employer is employing a person in a role or under conditions that do not match those supplied in the employer-sponsored visa application, immigration officers will need to gather a number of records, including: employment agreements; wage, time and leave records; bank statements; Inland Revenue records; and financial statements. These records allow immigration officers to assess, for example, whether a migrant worker is being paid the salary stated in the employer-sponsored visa application.

Employers who are accredited under the new temporary work visa system will be required to agree to provide these documents on request as a condition of their accreditation status. However, where these employers delay providing the documents, or where a sponsoring employer sits outside the accreditation system (e.g. employers supporting a migrant worker for a skilled migrant resident visa), immigration officers will need the ability to compel employers to provide this information, and ensure that employers do not slow down INZ's verification, auditing, assurance and compliance activities.

A power to compel employers to produce wage and time records, and any other documents related to a worker's employment, already exists under the *Immigration Act 2009* (section 277). However, this power requires an immigration officer to enter an

employer's premises before it can be exercised.

To achieve the underlying objective of Option 1 (to give INZ more efficient enforcement tools for addressing low-level non-compliant employer behaviour), we consider that a desk-bound immigration officer should be able to compel production of documents necessary for post-decision verification, auditing, assurance and compliance, without the need to conduct a site visit, ensuring the system remains efficient. We therefore propose introducing a new statutory power allowing immigration officers to compel an employer to produce this information. Failure to supply it within 14 calendar days would be an infringement offence resulting in an infringement notice as noted above. The 14 calendar day timeframe aligns with our recommended option for an analogous infringement offence under Proposal Seven.

Option 1 aligns with international practice

Penalties such as administrative fines without prosecution are used in other countries to respond to employer non-compliance in the immigration space, including in the United Kingdom (UK), Canada and Australia. For example, the UK imposes civil penalties on employers who hire illegal workers. Canada uses administrative financial penalties and bans employers from being involved in their Temporary Foreign Workers Program where they do not meet their obligations as an employer who is part of the programme. Australia also uses civil penalties for employers who hire migrants who hold no visa or are in breach of their visa conditions.

Option 2: Establish strict liability offences

Option 2 is to establish strict liability offences, instead of infringement offences, for the low-level non-compliant employer behaviour we have identified. Strict liability offences offer more flexibility in the size of the financial penalty that could be built in, and they result in criminal convictions. We could, for example, set a higher penalty of $5,000 for employing a person not entitled to work in the role, and this, coupled with a formal criminal conviction, could more effectively deter employers from committing immigration offences, and reduce the risk of more serious exploitation.

While strict liability offences need to be charged and prosecuted in a court, because a mental element (e.g. knowledge or intent) does not need to be proved beyond reasonable doubt, strict liability offences are not as resource-intensive as the status quo and would be more effective at efficiently addressing low-level non-compliance.

We note that employers who commit offences under both Options 1 and 2 would be temporarily barred from sponsoring migrant workers for a visa via the stand-down list (see Proposal Eight).

3.3 What other options have been ruled out of scope, or not considered, and why?

We ruled out reviewing the size of the penalty for exploitation under section 351

Some submitters in the public consultation called on the Government to increase the size of the penalty for exploitation under section 351 of the *Immigration Act 2009*. Exploitation carries a term of up to 7 years imprisonment, or a fine of up to $100,000. For the moment, we consider this penalty appropriate, and have determined that it should not be reviewed in this phase of the Review.

We ruled out infringement offences covering more serious non-compliant employer behaviour, and infringement offences for education providers

Some submitters also suggested that new infringement offences should cover exploitative behaviour like retaining passports, forcing false information from applicants, failing to supply employment agreements to employees, or demanding payment for work, accommodation or tools. We consider the behaviours identified serious, not low-level, non-compliance, and are therefore inappropriate for an infringement regime.

We considered recommending establishing infringement offences for education providers in default of their obligations under the *Immigration Act 2009*. However, we ruled this out of scope of this phase of the Review, as our focus for this phase is the non-compliant behaviour of employers.

Proposal Six: Impact Analysis

	No action	Option 1: Establish new infringement offences	Option 2: Establish new strict liability offences
Effectiveness	**0**	**+++** Allows for much more efficient responses to low-level breaches of immigration law than status quo, reducing the risk of low-level non-compliant behaviour exacerbating migrant worker vulnerability and/or developing into serious exploitation.	**+** Allows for more efficient responses to low-level breaches of immigration law than status quo, but less efficient than infringement offences as it still requires a court proceeding to implement.
Impact on businesses	**0**	**0 / -** No novel compliance costs on business as no new obligations will be introduced, however, the small number of non-compliant businesses who receive an infringement notice will be stood-down from sponsoring new migrant workers for a set period (from 6 months to a maximum of 24 months).	**0 / -** No novel compliance costs on business as no new obligations will be introduced, however, the small number of non-compliant businesses convicted of a strict liability offence will be stood-down from sponsoring new migrant workers for a set period (from 6 months to a maximum of 24 months).
Impact on regulators	**0**	**+** Significantly increases INZ's ability to effectively and efficiently carry out its functions and duties, but requires time to implement and establish operational framework. This option cannot be met in baselines (i.e. it is not self-funding via visa fees), and requires additional funding.	**+** Small increase to INZ's ability to effectively and efficiently carry out their functions and duties.
Overall assessment		**Recommended**	

Key:

+++ much better than doing nothing/the status quo **++** better than doing nothing/the status quo **+** slightly better than doing nothing/the status quo

0 about the same as doing nothing/the status quo

- slightly worse than doing nothing/the status quo **- -** worse than doing nothing/the status quo **- - -** much worse than doing nothing/the status quo

Proposal Six: Conclusions

5.1 What option, or combination of options is likely to best address the problem, meet the policy objectives and deliver the highest net benefits?

Option 1 better fulfils the Review's objectives and addresses the problems in INZ's enforcement toolkit we have identified

We recommend proceeding with Option 1. While Option 2 offers more flexibility in the penalties which could be imposed, we believe that Option 1 betters addresses the problem we have identified in the immigration regulatory system; the lack of an enforcement tool, outside of a criminal prosecution, to efficiently capture and deter the low-level non-compliance which could lead to exploitation. On balance, we believe Option 1 better addresses this issue because it offers INZ an enforcement tool that is not reliant on court proceedings. Because of this, we also believe Option 1 better contributes to the overarching objectives of the Review.

INZ estimates that it would issue between 500 and 1,000 infringement notices to non-compliant employers per year if infringement offences are established. Penalising more non-complaint employers than the status quo, albeit with a lower penalty than that available via prosecution, would send a clear message that this behaviour will not be tolerated, and would therefore contribute to the underlying objectives of the Review.

Option 1 was broadly supported in public consultation…

An option to establish immigration infringement offences was broadly supported in the Review's public consultation. Seventy-six submitters (82 per cent) agreed that INZ should be able to issue infringement notices when an employer does not comply with immigration law or policy.

…and the proposed offences, fees and fines fully meet Ministry of Justice guidelines

The infringement offences, fees and fines described above fully meet the Ministry of Justice's guidelines for infringement regimes:

- These offences will be distinct from existing criminal offences (subject to amending some provisions of the *Immigration Act 2009*).
- They are easy to identify and prove
- They relate to low-level minor offending
- They carry the Ministry of Justice's recommended fees, and
- The fines payable after unsuccessfully disputing a notice are no more than three times the size of the infringement fee.

They have been developed in close consultation with INZ, the Ministry of Justice, and the Migrant Exploitation Review Consultation and Steering groups.

A concern raised in public consultation will be mitigated by INZ and the Labour Inspectorate's Joint Compliance and Enforcement Framework

During public consultation, a small number of submitters raised concerns about the effect new immigration infringement offences could have on the regulatory demarcation between INZ and the Labour Inspectorate. They commented that new immigration infringement offences could lead to duplication, complexity and inefficiency and that Government should instead focus on adequately resourcing both regulators to use their existing enforcement

tools.

We consider that an infringement regime would enable faster, more proportionate and efficient responses to low-level non-compliance than a criminal investigation and prosecution. While increased resourcing for existing enforcement mechanisms will help increase the number of prosecutions INZ takes to court, our view remains that prosecution is not a cost-effective, efficient response to low-level non-compliance. Where there is potential overlap, INZ and the Labour Inspectorate will work together, using a new Joint Compliance and Enforcement Framework under development, to tackle non-compliant behaviour, and avoid unnecessary duplication.

We need to clarify what happens when information gathered by INZ reveals serious non-compliance

Information gathered under the proposed power to compel documents from employers could in some circumstances indicate that an employer has breached employment standards, or has committed a more serious criminal offence (e.g. exploitation under section 351 of the *Immigration Act*). In these circumstances, we consider that immigration officers should be permitted to share the information gathered with the relevant regulator for further investigation, for example, the Labour Inspectorate. The detailed design of the provision will permit information sharing, and manage any other legal risks related to procedural fairness, such as the privilege against self-incrimination.

This proposal will be implemented over a longer timeframe

We anticipate this proposal will require implementation over a longer timeframe, to provide adequate opportunity for INZ to operationalise it.

5.2 Summary table of costs and benefits of the preferred approach

Affected parties	Comment	Impact	Evidence certainty
Additional costs of proposed approach compared to taking no action			
Regulated parties	The small number of non-compliant employers who receive an infringement notice will be placed on the stand-down list for a set period, affecting their ability to sponsor new migrant workers for a visa.	Low	Low
Regulators (INZ)	INZ will incur costs setting up operational processes for new infringement offences and notices.	$1.6m establishment cost; $1.39m ongoing operational costs. These costs require additional budget funding.	Medium
Wider government			

Other parties			
Total Monetised Cost		$1.6m up-front establishment costs; $1.39m ongoing cost.	
Non-monetised costs		Low	

Expected benefits of proposed approach compared to taking no action			
Regulated parties	Employers doing the right thing are less likely to be undercut by non-compliant employers.	Medium	Low
Regulators	INZ will have more effective enforcement tools at their disposal for low-level non-compliance.	High	Medium
Wider government	The Government will be seen to be taking action against exploitation of migrant workers, reinforcing New Zealand's good international reputation.	Medium	Medium
Other parties	Better outcomes for migrant workers.	Medium	Medium
Total Monetised Benefit			
Non-monetised benefits		Medium	Medium

5.3 What other impacts is this approach likely to have?

Option 1 reinforces upcoming changes employer accreditation in the temporary work visa system

Option 1 complements upcoming changes to the temporary work visa system agreed by Cabinet. It will give INZ the ability to issue an infringement notice and fee to accredited employers who are not abiding by the employment conditions they promised to workers on employer-assisted work visas. It would, for example, capture employers who pay a lower salary than promised in an employer-assisted visa application.

Proposal Seven: Option identification

3.1 What options are available to address the problem?

Problem: While employers have an obligation to provide documents on request to labour inspectors, some employers delay investigations and enforcement action by failing to provide them in a reasonable timeframe

Labour Inspectorate experience indicates that some employers are slow to provide, or seek to delay, the provision of documents when these are requested by a labour inspector (e.g. wage and time records or employment agreements), despite their obligation to provide such documents "forthwith" under the *Employment Relations Act* (per section 229(2)). This impacts the finalisation of a case, and potentially prevents enforcement action for breaches of minimum employment standards. While some delays may not be preventable, some employers may be using the delay to create records in order to satisfy their legal obligation to hold such documents.

The employment relations and standards system includes an infringement offence for employers who do not retain certain records required by law (such as time and wage records and employment agreements). While there is an infringement offence for employers who do not hold these documents, it is not linked to providing them within a reasonable timeframe (although the *Employment Relations Act* separately includes a provision to comply with requests for documents "forthwith"). As noted above, some employers delay providing the information, and may create new documents to meet the requirement.

To deter this behaviour, there is an opportunity to establish a new infringement offence (and fee) where an employer fails to provide requested documents within a specific timeframe. This is the proposal we consulted on. Eighty-one (90 per cent) submitters agreed with this proposal. The options we have considered relate to what the "reasonable timeframe" should be, and are mutually exclusive.

Option 1 (Recommended): Establish an infringement offence for failing to provide requested documents within 14 calendar days

Submitters in our public consultation most commonly suggested 14 days as an appropriate deadline for employers to produce documents.

Option 2: Establish an infringement offence for failing to provide requested documents within 7 calendar days

Others submitters suggested that a shorter timeframe, for example 7 days, would be reasonable, considering that employers are already required under employment standards legislation to hold the documents Labour Inspectors request.

We note that employers who receive an infringement notice under this proposal would be placed on INZ's stand-down list for a set period (starting 6 months, to a maximum of 24 months), meaning that they will be unable to sponsor any new migrant workers for a visa (see Proposal Eight, below).

3.3 What other options have been ruled out of scope, or not considered, and why?

We considered not specifying a particular timeframe for producing documents

Instead of specifying a timeframe in calendar days, we considered simply establishing an offence for failing to provide documents "in a reasonable timeframe". This followed feedback in our public consultation that the Labour Inspectorate needed to have the flexibility to grant some leeway where business demands (e.g. seasonal pressures in the primary sector) cause delays, rather than deliberate attempts to frustrate the Labour Inspectorate's investigations. "A reasonable timeframe", however, lacks the clarity that an infringement offence needs to meet the Ministry of Justice's guidelines for infringement offences, and so has not been given further consideration.

Proposal Seven: Impact Analysis

	No action	Option 1: Establish an infringement offence for failing to provide documents in 14 calendar days	Option 2: Establish an infringement offence for failing to provide documents in 7 calendar days
Effectiveness	**0**	**+** Investigations into employer non-compliance will not be unduly delayed by employers failing to produce documents. This will enable faster responses to employer non-compliance than the status quo and will deter more serious exploitation.	**++** Investigations into employer non-compliance will not be unduly delayed by employers failing to produce documents. This will enable faster responses to employer non-compliance than Option 1 and will deter more serious exploitation.
Impact on businesses	**0**	**0 / -** While there are no additional compliance costs for business, Option 1 may put more time pressure on businesses to produce documents to Labour Inspectors than the status quo. The small number of non-compliant employers who receive an infringement notice will be stood-down from sponsoring migrant workers for a set period (from 6 months up to a maximum of 24 months).	**-** Option 2 puts more time pressure than Option 1 on businesses to produce documents to Labour Inspectors, particularly for large requests. The small number of non-compliant employers who receive an infringement notice will be stood-down from sponsoring migrant workers for a set period (from 6 months up to a maximum of 24 months).
Impact on regulators	**0**	**++** Increases the Labour Inspectorate's ability to effectively and efficiently carry out its functions and duties. The cost of implementing and delivering the option can be met through baselines.	**++** Increases the Labour Inspectorate's ability to effectively and efficiently carry out its functions and duties. The cost of implementing and delivering the option can be met through baselines.
Overall assessment		**Recommended**	

Key:

+++ much better than doing nothing/the status quo **++** better than doing nothing/the status quo **+** slightly better than doing nothing/the status quo

0 about the same as doing nothing/the status quo

- slightly worse than doing nothing/the status quo **- -** worse than doing nothing/the status quo **- - -** much worse than doing nothing/the status quo

Proposal Seven: Conclusions

5.1 What option, or combination of options is likely to best address the problem, meet the policy objectives and deliver the highest net benefits?

We recommend proceeding with Option 1. We have consulted the Labour Inspectorate on the feedback we received in public consultation. Employers are required to hold the documents that Labour Inspectors are requesting under employment legislation, and should be able to produce them quickly when required. However, employers may require a longer period of time to respond to larger requests.

Our view is that a 14 calendar day timeframe provides a reasonable and appropriate deadline for employers of all sizes to meet. This also allows sufficient time for employers to compile documents as part of large requests.

We recommend setting this as a hard deadline in the *Employment Relations Act*. We believe that a clear rule, with no room for interpretation, will be a better enforcement tool for the Labour Inspectorate.

We recommend setting a $1,000 infringement fee for failing to provide the requested documents in time. Those who fail to provide the documents by the deadline could have an infringement notice issued against them. The recommended fee aligns with the other infringement fees in the Labour Inspectorate's infringement regime, and with the Ministry of Justice's recommendations on fees for new infringement offences.

5.2 Summary table of costs and benefits of the preferred approach

Affected parties	Comment	Impact	Evidence certainty
Additional costs of proposed approach compared to taking no action			
Regulated parties	The small number of non-compliant employers who receive an infringement notice will be placed on the stand-down list for a set period, affecting their ability to sponsor new migrant workers for a visa.	Low	Low
Regulators			
Wider government			
Other parties			
Total Monetised Cost			
Non-monetised costs		Low	Low

Expected benefits of proposed approach compared to taking no action			
Regulated parties	Employers doing the right thing are less likely to be undercut by non-compliant employers.	Medium	Low
Regulators	The Labour Inspectorate will have a more effective enforcement tool at their disposal to address employers attempting to stall investigations.	High	Medium
Wider government	The Government will be seen to be taking action against exploitation of migrant workers, reinforcing New Zealand's good international reputation.	Medium	Medium
Other parties	Better outcomes for migrant workers.	Medium	Medium
Total Monetised Benefit			
Non-monetised benefits		Medium	Medium

5.3 What other impacts is this approach likely to have?

We need to clarify what happens when an employer partially complies with a request to produce documents

There are uncertainties around whether an employer who partially complies with a request to produce documents could be issued with an infringement notice under this proposal, for example, by providing some but not all of the documents requested. This risk will be addressed in the detailed legislative design process.

Proposal Eight: Option identification

3.1 What options are available to address the problem?

Opportunity: The stand-down list is an effective tool and there is an opportunity to increase its impact

The stand-down list is a collaborative tool between the Labour Inspectorate and INZ established in April 2017. Under this policy, implemented through Immigration Instructions, employers that receive a penalty from the Employment Relations Authority or Employment Court, or an infringement notice for non-compliance with employment law from the Labour Inspectorate, face a stand-down period from six to 24 months (depending on the penalty). During this time the employer cannot support a visa application for a migrant worker, seek accreditation, or apply for an Approval in Principle. However, current migrant employees can continue to work for the non-compliant employer until their visas expire.[27]

The stand-down list is published on the employment.govt.nz website.[28] While there is no ability to challenge the stand-down itself, employers have access to existing review mechanisms for the penalty that resulted in a stand-down period.

Expanding the stand-down list to include immigration non-compliance would improve its effectiveness

Employers who are convicted of offences under the *Immigration Act 2009* are not added currently to the stand-down list which creates an anomaly.

While immigration instructions do require employers to have a history of compliance with immigration and employment law, this is not applied consistently by immigration officers and is not very transparent. This may result in some employers who are convicted being able to support applications despite the risks they pose, or conversely some employers who had a minor breach could be prevented from employing migrants for periods of time that are out of proportion to the offending.

Capturing other kinds of non-compliance that place migrant workers at risk, specifically offences under the *Immigration Act 2009*, would improve the effectiveness of the stand-down list by preventing a wider range of higher-risk employers from employing temporary migrant workers for a period of time.

The stand-down list itself is established through Immigration Instructions, and amending the list criteria does not involve amending regulations. However, a regulatory amendment to the *Immigration Act* is required to give effect to the inclusion of immigration offences, by providing the Chief Executive with powers to publish comments in relation to particular persons. This would be similar to the functions of the Chief Executive under the *Employment Relations Act*, which include under s223AAA(a)(iv) “publishing comments about employment relationship matters in relation to particular persons”.

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27 Under current settings, unless they are directly affected by an employer’s non-compliance, current migrant employees may be unaware that their employer has been placed on the stand-down list. Under a separate proposal in the Review (Proposal Nine, not discussed in this RIS because it does not require regulatory change to implement), current employees on an employer-assisted visa will be notified that their employer has been placed on the stand-down list, will be provided with information on how to report exploitation and how to apply for a new visa for exploited migrant workers.

28 See https://www.employment.govt.nz/resolving-problems/steps-to-resolve/labour-inspectorate/employers-who-have-breached-minimum-employment-standards/

Linking the stand-down list to immigration non-compliance is consistent with international practice

Canada and the UK both publicly list employers responsible for immigration non-compliance in some way. Canada lists employers who receive a penalty for being non-compliant with their obligations as an employer under the Temporary Foreign Worker Program, and the UK lists employers who have not paid penalties (or receive second or subsequent penalties) for hiring illegal workers.

We have considered two options to expand the stand-down list to include immigration offences. These options are mutually exclusive.

Option 1: Expand the stand-down list to cover all *Immigration Act* offences

We consulted on a proposal to expand the stand-down list to cover all existing *Immigration Act* offences, including the new immigration infringement offences which may be established under Proposal Six.

Expanding the stand-down list to cover all *Immigration Act* offences would establish consistent rules for how an employer's non-compliance will affect their ability to sponsor migrant workers, and for how long.

Option 2 (Recommended): Expand the stand-down list to cover certain *Immigration Act* offences

Some offences under the *Immigration Act* are not relevant to the employment context (particularly offences that are not likely to be committed by an employer or during the course of an employment relationship). Some are also serious criminal offences, with large fines and custodial sentences possible on conviction. For example, convictions for aiding a person to remain unlawfully in New Zealand under section 343(1)(a), supplying false or misleading information under section 342(1)(b), and exploitation under section 351 of the Act all carry up to 7 years imprisonment and a fine of up to $100,000. Employers with such convictions arguably should not, by default, be able to sponsor migrant workers for a visa.

To ensure that the stand-down list continues to be a targeted and proportionate response to employer non-compliance, Option 2 is to limit the stand-down list's expansion to relevant, low to mid-level offences under the *Immigration Act*, including the new immigration infringement offences established under Proposal Six. The existing *Immigration Act* offences in scope of this option are:

Proposed Immigration Act offences which will result in a stand-down		
Section	**Offence**	**Penalty**
343(1)(d)	Aiding, abetting etc any person to be or remain unlawfully in NZ or in breach of visa conditions (no requirement of material benefit)	Imprisonment for <3 months and/or <$10,000 fine
344(d)	Resisting or intentionally obstructing an immigration officer	
342(1)(a)	Making a statement / providing information knowing it is false or misleading	<$5,000 fine

347	Knowingly publishing false or misleading information	
350(1)(a)	Knowingly employing a person not entitled to do that work	<$50,000 fine

We propose adopting the formula currently used for penalties in the employment standards regulatory system to calculate stand-down periods for these convictions:

Proposed formula for calculating stand-down periods	
Formula for low to mid-level Immigration Act offences in table above	
< $1,000	6 months
$1,000 to $10,000	12 months
$10,000 to $25,000	18 months
Over $25,000	24 months
Formula for future infringement offences established under Proposal Six	
Single infringement notice	6 months
Each subsequent notice	Further 6 months
Maximum stand-down for multiple infringement notices issued at one time	12 months

Employers with convictions for criminal offences at the more serious end of the scale, listed in the table below, will be barred via Immigration Instructions from sponsoring migrant workers for a visa.

Serious criminal offences which will result in a default bar on sponsoring migrant workers			
Act	**Section**	**Offence**	**Penalty**
Immigration Act	**343(1)(a)**	Aiding, abetting etc any person to be or remain unlawfully in NZ or in breach of visa conditions for material benefit	Imprisonment for <7 yrs and/or <$100,000 fine
	345	Improper dealings with immigration or identity documents	
	348	Altering forms	
	342(1)(b)	Supplying any information to an IO or RPO that is false or misleading in any material respect	
	351	Exploitation of unlawful employees and temporary workers	

Crimes Act	**98**	Dealing in slaves	Imprisonment for <14 yrs
	98C	Smuggling migrants	Imprisonment for <20 yrs and/or <$500,000 fine
	98D	Trafficking in persons (including slavery, forced labour or forced services)	

3.3 What other options have been ruled out of scope, or not considered, and why?

We are considering expanding the stand-down list to cover offences in other regulatory systems

We are considering expanding the scope of the stand-down list to cover offences under the *Health and Safety at Work Act 2015.* Appetite for this expansion has been mixed, both within MBIE and WorkSafe, and in the public consultation. We are considering this option as part of the next phase of the Review.

Proposal 8: Impact Analysis

	No action	Option 1: Expand the stand-down list to cover all Immigration Act offences	Option 2: Expand the stand-down list to cover certain Immigration Act offences
Effectiveness	**0**	**+** Expanding the stand-down list to cover all *Immigration Act* offences will increase its impact and ensure that all non-compliant employers cannot sponsor new migrant workers for a period of time. However, imposing a temporary stand-down for more serious *Immigration Act* convictions could send the wrong signal to employers and the public, reducing the intervention's effectiveness.	**++** Expanding the stand-down list to cover low to mid-level *Immigration Act* offences will increase its impact and ensure that all employers who have been found non-compliant cannot sponsor new migrant workers for a proportionate period of time.
Impact on businesses	**0**	**0 / -** The small number of businesses or individuals who have committed *Immigration Act* offences will be named in a public list, in addition to usually being named in a court judgment. Businesses or individuals who have committed infringement offences will be named when the offence would not usually be publicly recorded.	**0 / -** The small number of businesses or individuals who have committed *Immigration Act* offences will be named in a public list, in addition to usually being named in a court judgment. Businesses or individuals who have committed infringement offences will be named when the offence would not usually be publicly recorded.
Impact on regulators	**0**	**+** Increases INZ's ability to effectively carry out its functions. INZ will have clearer rules on when an employer is unable to sponsor migrant workers for a visa, and for how long.	**+** Increases INZ's ability to effectively carry out its functions. INZ will have clearer rules on when an employer is unable to sponsor migrant workers for a visa, and for how long.
Overall assessment			**Recommended**

Key:

+++ much better than doing nothing/the status quo **++** better than doing nothing/the status quo **+** slightly better than doing nothing/the status quo

0 about the same as doing nothing/the status quo

- slightly worse than doing nothing/the status quo **- -** worse than doing nothing/the status quo **- - -** much worse than doing nothing/the status quo

Proposal 8: Conclusions

5.1 What option, or combination of options is likely to best address the problem, meet the policy objectives and deliver the highest net benefits?

We recommend proceeding with Option 2

We believe Option 2 better ensures that the stand-down list continues to be a targeted and proportionate response to employer non-compliance, and that it is more appropriate for serious criminal offences to be dealt with outside the stand-down system.

We do not recommend proceeding with Option 1, as the *Immigration Act* contains a number of offences that are unlikely to be committed by an employer or in the course of employment. Further, imposing only a temporary stand-down period for serious criminal offences under the *Immigration Act* (for example, exploitation under section 351) could undermine the deterrence objective of the Review.

The stand-down list expansion was supported in public consultation

Eighty-five per cent of submitters in the public consultation supported expanding the stand-down list. A few submitters opposed this proposal, noting concerns about an undue overlap between the employment standards and immigration systems. Other submitters commented that expanding the stand-down list would result in better consistency between immigration and minimum employment standards.

The list is a cost-effective tool for addressing non-compliance

The regulators that use or interact with the stand-down list generally agree that it is cost-effective, simple for employers to understand and for regulators to administer. While there is no direct evidence that the stand-down list is increasing compliance, few employers have been placed on the list more than once. The stand-down also provides some protection for migrant workers who may otherwise have been employed by poor employers.

5.2 Summary table of costs and benefits of the preferred approach

Affected parties	Comment	Impact	Evidence certainty
Additional costs of proposed approach compared to taking no action			
Regulated parties	The small number of businesses or individuals who have committed *Immigration Act* offences will be named in a public list, in addition to usually being named in a court judgment. Businesses or individuals who have committed infringement offences will be named when the offence would not usually be publicly recorded.	Low	Medium

Regulators			
Wider government			
Other parties			
Total Monetised Cost			
Non-monetised costs		Low	Medium

Expected benefits of proposed approach compared to taking no action			
Regulated parties	Employers doing the right thing are less likely to be undercut by non-compliant employers.	Medium	Low
Regulators	INZ will have clearer rules on when an employer is unable to sponsor migrant workers for a visa, and for how long, and will be able to carry out its functions more effectively.	Medium	Medium
Wider government	The Government will be seen to be taking action against exploitation of migrant workers, reinforcing New Zealand's good international reputation.	Medium	Medium
Other parties	Better outcomes for migrant workers.	Medium	Medium
Total Monetised Benefit			
Non-monetised benefits		Medium	Medium

5.3 What other impacts is this approach likely to have?

There is a loop-hole in the stand-down list, as non-compliant employers are still able to employ migrant workers with open work rights

While stood-down employers are prohibited from supporting a visa application for temporary and residence class visas, they have continued access to migrant workers with open work rights. This is a loop-hole that arguably undermines the value of stand-downs as a compliance tool, and places migrants at risk of exploitation when working under employers known to be non-compliant. We will explore banning stood-down employers from employing any migrant worker, including those holding visas with open work rights, as part of the next phase of the Review.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

A legislation bid was lodged in late 2019 to introduce legislation in 2020 relating to the changes that have been subject to this RIS. We anticipate the amendments to primary legislation could be introduced as a package through an omnibus bill.

We anticipate the following changes could come into force soon after Royal Assent:

- Disqualifying people from managing or directing a company where they have been convicted of migrant exploitation under the *Immigration Act* or trafficking in persons under the *Crimes Act* (Proposal Three)
- Allowing Labour Inspectors to issue an infringement notice where employers fail to provide requested documents in a reasonable timeframe (Proposal Seven)
- Making the amendments required to enable the expansion of the stand-down list (Proposal Eight).

We anticipate the following changes would require a longer timeframe:

- Introducing a duty on third parties with significant control or influence over an employer to take reasonable steps to prevent a breach of employment standards occurring (Proposal One) – which may require additional time for businesses to adjust their practices
- Introducing new immigration infringement offences targeting non-compliant employer behaviour (Proposal Six) – which may require a longer timeframe to allow for the development and implementation of necessary operational frameworks.

The regulators responsible for the ongoing operation and enforcement of the new arrangements will be the Labour Inspectorate (Proposals One, Seven), INZ (Proposals Six, Eight), and the Companies Office (Proposal Three). All regulators are based within MBIE. We understand the responsible parties are able to implement the arrangements in a manner consistent with the Government's expectations for regulatory stewardship by government agencies.

6.2 What are the implementation risks?

Proposal One will require some businesses to adopt new practices. The Franchising Association of New Zealand's submission noted that a franchisor's ability to set and enforce terms is dependent on the contract between them and the franchisee. It suggested that laws allowing for the imposition of penalties in relation to breaches of contract were only recently introduced, and lawyers are reluctant to craft contractual provisions without guidance from case law. Otherwise, it suggested a franchisor's options for addressing non-compliance with the terms of the contract are generally limited to persuading the franchisee to comply or to terminate the franchise, which could have negative implications for all parties including employees.

We note the Franchising New Zealand 2017 Survey's finding that 56 per cent of franchise

agreements are granted for a term of up to five years, and 33 per cent for between six and 10 years.[29] A reasonable steps obligation is unlikely to require that all franchisors immediately seek the renegotiation of their franchising agreements. However, the concern suggests that transitional measures and/or flexibility will be required in the legislative design to ensure that the provisions are reasonably workable in practice. As noted in section 6.1, we anticipate that Proposal One may require implementation over a longer timeframe to provide adequate opportunity for businesses to adjust their practices.

29 See Table C6, page 44 of Franchising New Zealand Survey 2017, available at: https://www.massey.ac.nz/shadomx/apps/fms/fmsdownload.cfm?file_uuid=D749D71F-2BFC-4A2F-83D8-4B66175929EF

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

The ultimate goal of each option is to reduce temporary migrant worker exploitation. As noted in section 1.2, MBIE uses administrative, survey and qualitative interview data to understand the extent and nature of exploitation. There are limitations on each of these data sources, but they are considered in combination to build the best available picture.

Subject to Budget funding, MBIE intends to develop a monitoring and evaluation framework to better understand migrant exploitation trends over time. This would include measuring the incidence of, as well as vulnerability to, exploitation. We anticipate seeing an increase in reports of exploitation initially, as others proposals in the Review will likely encourage victims to come forward, but we would expect to see this reduce over time.

The Review includes a non-regulatory proposal to establish a dedicated migrant exploitation 0800 phone line and online reporting tool, together with a specialised migrant worker exploitation-focused reporting and triaging function. We anticipate that this would also provide a means of obtaining further information on the prevalence and nature of migrant exploitation.

New data would be collected in relation to infringement offences and notices issued following implementation of Proposals Six and Seven. This would help build on existing administrative data sources to better inform our understanding of the prevalence and nature of exploitation.

7.2 When and how will the new arrangements be reviewed?

The arrangements will be monitored in line with MBIE's regulatory stewardship obligations. An earlier review of the legislation could be prompted in the event that unforeseen or unintended consequences arise.

Subject to Budget funding, MBIE intends to undertake a process evaluation approximately two to three years after implementation. This will include consideration of the end-to-end migrant experience, from when they first contact MBIE through to resolution, to test the efficiency and effectiveness of processes and identify areas for improvement. MBIE also intends to undertake a longer-term outcome evaluation regarding the impact of the programme and achievement of long term outcomes (across the Review).