



## COVERSHEET

<b>Minister</b>	Hon Priyanca Radhakrishnan	<b>Portfolio</b>	Associate Workplace Relations and Safety
<b>Title of briefing</b>	Worker Protection (Migrant and Other Employees) Bill: Approval to Introduce	<b>Date to be published</b>	9 November 2022

<b>List of documents that have been proactively released</b>		
<b>Date</b>	<b>Title</b>	<b>Author</b>
23 September 2022	Worker Protection (Migrant and Other Employees) Bill: Approval to Introduce	Office of the Associate Minister for Workplace Relations and Safety
27 September 2022	Cabinet Minute of Decision: CAB-22-MIN-0415	Cabinet Office

### **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 the 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.

In Confidence

Office of the Associate Minister for Workplace Relations and Safety  
Cabinet Legislation Committee

## **Worker Protection (Migrant and Other Employees) Bill: Approval for Introduction**

### **Proposal**

- 1 I propose that the Worker Protection (Migrant and Other Employees) Bill be approved for introduction to the House.

### **Policy**

- 2 The Worker Protection (Migrant and Other Employees) Bill (the Bill) gives effect to a March 2020 decision to amend the *Companies Act 1993*, the *Immigration Act 2009* and the *Employment Relations Act 2000* to strengthen the offence and penalty regime to deter employer non-compliance with immigration and employment law [DEV-20-MIN-0034].

### **Executive Summary**

- 3 On 11 March 2020, the Cabinet Economic Development Committee agreed to nine proposals to reduce the exploitation of temporary migrant workers, including international students [DEV-20-MIN-0034].
- 4 The first of these proposals was a package of operational changes that came into force on 1 July 2021. The remaining proposals require legislative changes. This Bill will implement those changes via amendments to the *Employment Relations Act 2000*, *Immigration Act 2009*, and the *Companies Act 1993*.
- 5 The Bill is an omnibus Bill to be introduced under Standing Order 267(1)(a). It amends multiple pieces of legislation to implement a single broad policy, that being, to improve compliance and enforcement legislation to deter employers from exploiting migrant workers. The aim is to deter employer non-compliance with immigration and employment law.
- 6 To achieve that purpose, the Bill:
  - 6.1 amends the *Immigration Act 2009* to create a document production power for immigration officers to request documents to verify that employers of migrant workers are complying with their obligations:
  - 6.2 allows labour inspectors and immigration officers to issue an infringement notice when employers fail to provide requested information within a reasonable timeframe:

- 6.3 establishes new infringement offences in the *Immigration Act 2009* and *Employment Relations Act 2000*:
- 6.4 amends the *Immigration Act 2009* so the chief executive of MBIE can publish the names of employers convicted of offences under the *Immigration Act* (and details about the offending):
- 6.5 amends the *Companies Act 1993* so a person convicted of migrant exploitation and people trafficking offences cannot be a director or manager of a company where the offending was enabled or otherwise related to the use of a company.

## Background

- 7 In September 2018, Cabinet agreed to progress the Temporary Migrant Worker Exploitation Review (the Review), to take serious action on migrant exploitation, particularly of international students. In 2019, the Ministry of Business, Innovation and Employment (MBIE) undertook public consultation on a set of proposed changes to reduce the exploitation of temporary migrant workers in New Zealand.
- 8 Based on the Review, Cabinet agreed in March 2020 to nine legislative, operational and policy changes to address temporary migrant worker exploitation. These changes were accompanied by \$50 million in funding over four years from 2020 to 2024, to support an end-to-end approach to reduce migrant exploitation and ensure employers are complying with their immigration and employment obligations.
- 9 The first changes came into force on 1 July 2021. These were a new dedicated 0800 number and reporting and triaging web form to make it easier to report migrant worker exploitation, and the Migrant Exploitation Protection Visa (MEPV) which supports migrants to leave exploitative situations quickly and remain lawfully in New Zealand. The new reporting tools and MEPV have both seen significant uptake since their launch.
- 10 The proposals in this Bill will implement the remaining legislative changes agreed in March 2020. Taking action to address temporary migrant worker exploitation was part of the 2017 Coalition agreement and was also a commitment in the Government's 2020 Manifesto.

## Key elements of the Worker Protection (Migrant and Other Employees) Bill

- 11 The policy changes made by this Bill are consistent with previous Cabinet decisions and no substantive policy decisions are needed. However, Cabinet's decision to expand the stand-down list to include offending under the *Immigration Act* does need to be clarified to include infringement offences. This is explained more fully in paragraphs 34 through 37.

*Why a Bill is required*

- 12 There are gaps in the enforcement regime that exists to ensure employers of migrant workers are complying with their obligations. Immigration New Zealand do not have mechanisms outside of criminal prosecution before a court to address low-level non-compliant employer behaviour. This is a time-consuming, expensive and inefficient response which undermines the effectiveness of immigration and employment law and places migrant workers at risk of more serious exploitation.
- 13 Establishing a more effective enforcement toolkit to address lower-level immigration offending requires changes to primary legislation. The Bill also helps align the powers of the Labour Inspectorate and Immigration New Zealand, to support greater collaboration between the two regulators to undertake compliance and enforcement activity.
- 14 To achieve that purpose, a Bill is needed to:
  - 14.1 amend the *Immigration Act 2009* to create a document production power for immigration officers to request documents to verify that employers of migrant workers are complying with their obligations:
  - 14.2 allow labour inspectors and immigration officers to issue an infringement notice when employers fail to provide requested information within a reasonable timeframe:
  - 14.3 establish new infringement offences in the *Immigration Act 2009* and *Employment Relations Act 2000*:
  - 14.4 amend the *Immigration Act 2009* so the chief executive of MBIE can publish the names of employers convicted of offences under the *Immigration Act* (and details about the offending):
  - 14.5 amend the *Companies Act 1993* so a person convicted of migrant exploitation and people trafficking offences cannot be a director or manager of a company where the offending was enabled or otherwise related to the use of a company.
- 15 The Bill is an omnibus Bill to be introduced under Standing Order 267(1)(a). It amends multiple pieces of legislation to implement a single broad policy, that being, to improve compliance and enforcement legislation to deter employers from exploiting migrant workers. The aim is to deter employer non-compliance with immigration and employment law.

*Creating a document production power for immigration officers*

- 16 Employers who support visa applications make commitments about the pay and conditions of the worker. To verify employers are meeting these commitments, immigration officers must be able to require relevant employment records.

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- 17 Immigration officers have some powers of entry and inspection relating to records of employers under section 277 of the *Immigration Act*. That power allows them to enter an employer's premises and inspect or copy records or documents under the employer's control, provided the immigration officer has reasonable grounds to believe there may be information in those records or documents which relates to non-compliance with the *Immigration Act* or the deportation liability of a worker.
- 18 The new document production power will differ from this entry and inspection power by allowing a desk-based immigration officer to require the production of documents and records to verify that an employer is employing a person in a role, or under conditions, that match those supplied in the employer-supported visa application. The document production power will only be applicable to employers who have supported a work visa and is necessary to support post-decision verification, assurance and compliance activity.
- 19 The document production power relates to documents that the employer is obliged to hold under relevant legislation or documents relating to the remuneration or employment conditions of a supported employee. The kinds of records and documents that immigration officers could request from employers could include wage, time and leave records, employment agreements, bank statements, and financial statements. These records would allow immigration officers to assess, for example, whether a migrant worker is being paid the salary stated in the employer-supported visa application.
- 20 The information gathered using this power could, in some circumstances, indicate that an employer has breached employment standards or has committed a more serious criminal offence. In these circumstances, immigration officers will be permitted to share the information gathered with the relevant regulator if they consider it will assist with their regulatory functions, duties or powers under or in relation to other Acts.
- 21 The relevant Acts that information may be shared in relation to, and regulatory agencies with whom that information may be shared, are specifically listed in the new information sharing provision in the *Immigration Act*.

*Allowing labour inspectors and immigration officers to issue an infringement notice where employers fail to provide requested documents within a reasonable timeframe*

- 22 The Labour Inspectorate experiences delays to investigations when employers fail to provide information within a reasonable period. Labour inspectors currently have two production powers under section 229 of the *Employment Relations Act*, but this section does not stipulate any timeframe for compliance with requests for information.
- 23 The Bill will amend the *Employment Relations Act* to require an employer to comply with a document production request within 10 working days. Labour Inspectors will be able to issue an infringement notice to employers who fail to comply with such a request within 10 working days.

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- 24 This infringement offence will be replicated in the *Immigration Act*, to enable immigration officers to similarly issue infringement notices. Introducing this infringement offence for both labour inspectors and immigration officers will help ensure that employers comply with document requests. The penalty for employers issued an infringement notice for failure to provide documents within a reasonable timeframe is \$1,000 per notice.

*Establishing new Immigration Act infringement offences*

- 25 Currently, the *Immigration Act* allows employers to be prosecuted for incidences of serious migrant exploitation or other offending but does not provide a proportionate enforcement response for less serious or less intentional offending. Lower-level breaches of immigration law exacerbate migrant workers' vulnerability and may be the precursor to more serious exploitation.
- 26 The Bill will amend the *Immigration Act* to create three new immigration infringement offences to deter lower-level non-compliant employer behaviour that is linked to, or increases the risk of, migrant exploitation. The offences are when an employer:
- 26.1 allows a person who is not entitled under the *Immigration Act* to work in the employer's service (\$1,000 per worker for individuals or \$3,000 per worker for body corporates):
  - 26.2 does not employ a person in a way that is consistent with a work-related condition of that person's visa (\$1,000 per worker for individuals or \$3,000 per worker for body corporates):
  - 26.3 fails to provide documents requested by an immigration officer within a reasonable timeframe (discussed above).
- 27 The first infringement offence above is currently an offence against section 350(1)(b) of the *Immigration Act*. The Bill amends section 350 so the provision will only penalise an employer who, knowing that a person is not entitled to work, allows or continues to allow them to work. Re-establishing s 350(1)(b) within the infringement regime avoids duplication of the same offence in the *Immigration Act*, while retaining the more serious offence where an employer wilfully employs someone they know is not entitled to work.
- 28 Employers who are issued an infringement notice for any of the new offences will have the ability to challenge it in a defended hearing before the District Court. Where an employer is found liable by the Court after challenging an infringement notice, the Court can impose a fine double the amount of the total infringement fees payable.
- 29 The Bill also provides the ability for regulations to prescribe an offence as an employment infringement offence under the Act, to support the new infringement regime.

*Expanding the stand-down list*

- 30 Under section 223AAA of the *Employment Relations Act*, the chief executive of MBIE is authorised to publish comments about employers found in breach of minimum employment standards. The chief executive currently uses this discretion to publish what is known as the stand-down list. Employers who are published on the stand-down list are prohibited from supporting a visa application for both temporary and residence class visas for the duration of their stand-down period.
- 31 Currently, the authorisation to publish names of employers does not extend to employers convicted of offences or issued infringement notices under the *Immigration Act*.
- 32 The Bill introduces a new provision into the *Immigration Act* to enable the chief executive of MBIE to publish the offence-related details of employers who are convicted of immigration offences or issued with infringement notices under the *Immigration Act*. Employers could then be included on the stand-down list.
- 33 Expanding the stand-down list to cover *Immigration Act* offences will help prevent employers convicted of employment or immigration offences from supporting a visa application for both temporary entry and residence class visas. An expanded stand-down list will also reduce the need for immigration officers to undertake an assessment of an employer's compliance with their obligations at each application, and clearly indicate to employers that they are ineligible to employ migrants under the accreditation process.

*I propose clarifying Cabinet's earlier decision to explicitly include infringement offences issued under the Immigration Act on the stand-down list*

- 34 In March 2020, Cabinet agreed to expand the stand-down list to cover *Immigration Act* offences, including infringement offences. However, the recommendations that Cabinet agreed to only allow for the publication of names of employers convicted of offences under the *Immigration Act*, and do not specifically allow for the publication of names of employers issued infringement notices under the Act [DEV-20-MIN-0034].
- 35 Parliamentary Counsel Office has advised that this decision does not explicitly allow for the publication of names of employers who have been issued infringement notices under the *Immigration Act*.
- 36 To ensure the policy intent behind expanding the stand-down list is met, I propose that Cabinet clarify its previous decision to allow the publication of offence-related details of employers who have been convicted of offences or issued infringement notices under the *Immigration Act*. This would ensure that the expansion of the stand-down list aligns with current practice under the *Employment Relations Act* and will be important to ensure the overall reforms to the immigration and employment enforcement regime within the Bill are effective and work as intended.

*Disqualifying persons convicted of migrant exploitation or people trafficking from managing or directing a company*

- 37 Some company directors leverage corporate structures to avoid personal liability and avoid detection while exploiting migrant workers. This Bill will amend section 383 of the *Companies Act 1993* so that persons convicted of exploitation under section 351 of the *Immigration Act* or people trafficking under section 98D of the *Crimes Act 1961* cannot be directors, promoters or managers of any company when their offending was enabled or otherwise related to the use of a company.
- 38 Enabling the court to make an order to disqualify persons convicted of migrant exploitation or human trafficking from being a director, promoter or manager of any company will help to reduce migrant exploitation. It will prevent people who have been convicted of serious exploitation that involved the use of a company from using company structures to exploit others in the future. This measure will supplement existing protections which currently allow persons to be banned from being employers for up to 10 years under the *Employment Relations Act*.

### Impact analysis

- 39 The impact analysis requirements apply to the proposals being given effect through the Worker Protection (Migrant and Other Employees) Bill and a regulatory impact statement was submitted at the time that policy approval relating to the Bill was sought [DEV-20-MIN-0034].

### Financial analysis

- 40 The legislative changes to be introduced have financial implications, for which \$50 million was appropriated through Budget 2020. This funding supports the implementation of changes needed for an end-to-end approach to reduce migrant exploitation and ensure employers are complying with their immigration and employment obligations.
- 41 This funding helps ensure that the Labour Inspectorate and Immigration New Zealand are properly resourced to respond to reports of exploitation and take action. The funding also supports a migrant exploitation information and education action plan, which focusses on providing more information and education outreach on employment rights and obligations for both employers and migrant workers.

### Compliance

- 42 I consider the Bill complies with:
- 42.1 the principles of the Treaty of Waitangi;
  - 42.2 the rights and freedoms contained in the *New Zealand Bill of Rights Act 1990* and relevant international obligations;

- 42.3 the disclosure statement requirements. A disclosure statement (Departmental Disclosure Statement: Worker Protection (Migrant and Other Employees) Bill) has been prepared and is attached to this paper;
- 42.4 the Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee (LDAC). LDAC was consulted on the proposals prior to legislative drafting and their feedback was incorporated into the drafting instructions provided to Parliamentary Counsel Office.

## Privacy

- 43 Three changes in the Bill raise issues with potential privacy implications. The Office of the Privacy Commissioner was consulted on the privacy issues and the Bill's interactions with the *Privacy Act 2020*. A comment from the Office of the Privacy Commissioner is below at paragraph 59.

## *Document production power*

- 44 The establishment of a document production power to allow a desk-based immigration officer to require employment and remuneration documents from an employer is necessary to support the new immigration infringement regime. The document production power only relates to documents that the employer is obliged to hold under relevant legislation or documents relating to the remuneration or employment conditions of a supported employee. Supported employees are defined in the Bill as migrant workers who require an offer of employment from an employer to be granted a visa, or who have a visa condition requiring that they only work for a specified employer.
- 45 To ensure this power is used appropriately, immigration officers using the document production power will be required to hold a Warrant of Designation, which will limit the number of officers who have authority to compel documents from employers. The kinds of documents that can be requested are also specified in the legislation.

## *Information sharing between regulators*

- 46 The second aspect relates to information gathered using the document production power. In some circumstances, this information could indicate that an employer has breached employment standards or has committed a more serious criminal offence. In these circumstances, immigration officers will be permitted to share the information gathered with the relevant regulator if they consider it will assist with their regulatory functions, duties or powers under or in relation to other Acts.
- 47 The relevant Acts that information may be shared in relation to, and regulatory agencies with whom that information may be shared, are specifically listed in the new information sharing provision in the *Immigration Act*. The provision also specifies that it applies subject to any other enactment, including the *Privacy Act 2020*.

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48 I note that the document production power relates only to records and documents that already exist which the employer is required to hold by law, or that they can be reasonably expected to have. The process for sharing this information is specified in the Bill and is based on precedent provisions in the *Employment Relations Act* (sections 233A and 233B). Work on how to operationalise these provisions is underway by Immigration New Zealand and will consider any privacy implications related to this.

*Publishing non-compliant employers on the stand-down list*

49 The third change is the expansion of the stand-down list to cover immigration offending and, in particular, publishing information about employers who have been issued immigration infringement notices. While information about employers who are convicted of offending under the *Employment Relation Act* or the *Immigration Act* is publicly available via court decisions, information relating to employers who have been issued infringement notices is not otherwise publicly available.

50 Information that may be published on the stand-down list is specified in the Bill. The information that may be published is the following:

50.1 the name of the employer:

50.2 the employer's trading name (if any):

50.3 the fact that the employer has been convicted of an offence against the *Immigration Act*, or issued with an infringement notice under the Act (as applicable):

50.4 a reference number for the conviction:

50.5 a description of any restrictions imposed on the employer as a consequence of being convicted:

50.6 the period during which those restrictions apply.

51 Officials will also update operational procedures in time for commencement of the Bill to require that employers applying for accreditation agree to authorise their publication on the stand-down list if they are found to be in breach of the *Immigration Act*, including if they are issued an infringement notice. Employers will be required to authorise their publication on the stand-down list as a condition of accreditation. Obtaining authorisation from employers will help ensure that publication on the stand-down list is consistent with the *Privacy Act*.

52 Initial accreditation for employers lasts for 12 months before it needs to be renewed. Once an employer renews their accreditation, it lasts for 24 months for standard businesses, as long as it has not lapsed for 12 or more months, and 12 months for franchisees and employers placing migrants with controlling third parties. Employers will be required to authorise their publication on the stand-down list each time they renew their accreditation.

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- 53 There is a general public interest in publishing employers on the stand-down list, so that employees, and prospective employees, can find out if an employer is compliant with employment and immigration standards. There are also fairness considerations for visa applicants being able to determine that an employer meets immigration instructions before having to pay Licenced Immigration Advisor costs and visa application fees.
- 54 I also note that employers who hire migrant workers do so voluntarily and are made aware of the potential consequences (i.e., being published on the stand-down list) if they breach their obligations under employment and immigration law.
- 55 Alternatively, if Cabinet does not proceed with the publication of employers who have been issued immigration infringement notices on the stand-down list, I consider that the majority of the policy intent behind the expansion of the stand-down list can still be met.
- 56 Employers who receive immigration infringement notices will still be noted internally within MBIE, and those employers can still be stood down from accessing migrant labour in accordance with current practice. However, MBIE will not have authority to publish those employers on the public stand-down list, and so that information about whether an employer is fully compliant with their immigration obligations will not be available to employees and prospective employees.
- 57 I do not recommend proceeding with a 'hybrid' stand-down list wherein some infringement offences are published on the stand-down list but not others, for example not publishing employers who receive an infringement notice for failing to comply with a document request within a reasonable timeframe. This could create perverse incentives wherein employers choose not to comply with a request for documents if they consider that receiving an infringement notice is preferable to being published on the stand-down list. This would frustrate the overall policy intent of the Bill to deter employer non-compliance with their obligations under immigration and employment law.

*Comment from the Office of the Privacy Commissioner*

- 58 The Privacy Commissioner supports the intent to address migrant worker exploitation and to enable officials to get access to personal information to address and identify offending against migrant workers. However, the Commissioner recommends the proposed proposals should carefully consider whether Privacy Act override provisions in the Immigration Act are necessary. The existing Privacy Act framework facilitates the disclosure of personal information for law enforcement and investigative purposes, and it is unclear if the proposed override provisions in the Immigration Act have limited applicability.
- 59 The Commissioner understands the intent of the proposed stand down list, and recommends this information is made available via a public register that is prescribed in primary legislation (as is the case in other legislation, such as sections 446-456 of the Insolvency Act 2006). This will achieve the policy

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intent of the stand down list, while ensuring it is designed in the most privacy-protective way.

### **Consultation**

- 60 Public consultation on the Review was undertaken in October and November 2019. 167 public submissions were received alongside consultation meetings in the major centres. Feedback was generally supportive of the proposals. The Review also worked closely with an external tripartite Consultation Group who supported the proposals.
- 61 The following have been consulted on this paper: the Treasury, the Department of the Prime Minister and Cabinet, Inland Revenue, the Ministries of Foreign Affairs and Trade, Education, Justice, Social Development and Primary Industries, the New Zealand Police, WorkSafe New Zealand, the New Zealand Qualifications Authority, Education New Zealand, the Office of the Privacy Commissioner, Parliamentary Counsel Office, and the Ministries for Women, Pacific Peoples, and Ethnic Communities.
- 62 All regulators and bodies who have functions under the Bill were consulted during policy development.

### **Binding on the Crown**

- 63 The Bill amends the *Companies Act 1993*, *Employment Relations Act 2000* and the *Immigration Act 2009*. These Acts are binding on the Crown.

### **Allocation of decision making powers**

- 64 The Worker Protection (Migrant and Other Employees) Bill does not involve the allocation of decision-making powers between the executive, the courts, and tribunals.

### **Associated regulations**

- 65 Regulations are not needed to bring the Worker Protection (Migrant and Other Employees) Bill into operation.

### **Other instruments**

- 66 The Bill will establish a provision that provides for new regulation making powers under the *Immigration Act 2009*, to support the new infringement offence regime. This provision will be integrated with the existing regulatory functions in the *Immigration Act*. It is also consistent with the regulatory regime that supports the infringement offence regime under the *Employment Relations Act*. The explanatory note to the Bill includes this explanation for the new regulation making powers.

### **Definition of Minister/department**

- 67 The Bill does not contain a definition of Minister, department, or chief executive of a department.

### Commencement of legislation

68 The Bill will come into force 6 months after the date of Royal assent. If the Bill passes by the end of August 2023 as I am currently expecting, commencement could occur in February 2024.

### Parliamentary stages

69 I intend to introduce the Worker Protection (Migrant and Other Employees) Bill on 28 September 2022 and depending on the availability of House time, will move first reading on the week commencing 17 October 2022.

70 I propose the Bill be referred to the Education and Workforce Committee for a period of six months.

71 I propose the Bill should be passed by no later than August 2023.

### Proactive Release

72 This paper will be proactively released (subject to redactions in line with the *Official Information Act 1982*) within 30 business days of decisions being confirmed by Cabinet.

### Recommendations

73 The Associate Minister for Workplace Relations and Safety recommends that the Committee:

1 **note** that the Worker Protection (Migrant and Other Employees) Bill holds a category 4 priority on the 2022 Legislation Programme (to be referred to select committee in the year);

2 **note** that in March 2020, Cabinet agreed to amend the Companies Act 1993, the Immigration Act 2009 and the Employment Relations Act 2000 to deter employer non-compliance with immigration and employment law [DEV-20-MIN-0034];

3 **note** that the Worker Protection (Migrant and Other Employees) Bill has been drafted to give effect to this decision by Cabinet;

4 **note** that the purpose of the Bill is to improve compliance and enforcement legislation to deter employers from exploiting migrant workers;

5 **note** that the Parliamentary Counsel Office has advised that Cabinet's March 2020 decision does not explicitly allow the publication of names of employers who have been issued immigration-related infringement notices;

6 **agree** to amend the *Immigration Act 2009* to give the Chief Executive of MBIE the authority to publish the names of employers issued infringement notices under the *Immigration Act* and details related to the infringement;

OR

**IN CONFIDENCE**

**do not agree** to amend the *Immigration Act 2009* to give the Chief Executive of MBIE the authority to publish the names of employers issued infringement notices under the *Immigration Act* and details related to the infringement;

7 **approve** the Worker Protection (Migrant and Other Employees) Bill for introduction, subject to further drafting for the decision set out in Recommendation 6;

8 **agree** that the government propose that the Bill be:

8.1 referred to the Education and Workforce Committee for consideration;

8.2 enacted by August 2023.

Authorised for lodgement

Hon Priyanca Radhakrishnan  
Associate Minister for Workplace Relations and Safety

**IN CONFIDENCE**