MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Temporary Migrant Worker Exploitation Review: Penalising and deterring employer non-compliance

Date:	12 July 2019	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	3573 18-19

Action sought

	Action sought	Deadline
Hon Iain Lees-Galloway **Minister of Immigration Minister for Workplace Relations and Safety**	**Provide feedback and give direction** on the proposals for penalising and deterring employer non-compliance for inclusion in a work programme to address temporary migrant worker exploitation.	17 July 2019
Hon Poto Williams **Associate Minister of Immigration**	For information	N/A

Contact for telephone discussion (if required)

Name	Position	Telephone		1st contact
Nita Zodgekar	Manager, International Labour Policy	Privacy of natural persons		✓
Alison Marris	Principal Advisor, International Labour Policy	Privacy of natural persons	N/A	
Sammie Lassen	Policy Advisor, International Labour Policy	Privacy of natural persons	N/A	

The following departments/agencies have been consulted

The Department of the Prime Minister and Cabinet, The Treasury, Ministries of Education and Justice, New Zealand Police, Inland Revenue, WorkSafe New Zealand, Office of Ethnic Communities

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments

BRIEFING

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Purpose

This briefing seeks your feedback and decisions on proposals for penalising and deterring employer non-compliance, for inclusion in a broader work programme to address temporary migrant worker exploitation.

Executive summary

This briefing focuses on the Ministry of Business, Innovation and Employment (MBIE) regulatory toolkit for penalising and deterring employer non-compliance, and links to briefings on the other priority workstreams: the pathway for reporting and referral, and business models that facilitate exploitation. We suggest reading this in conjunction with the briefing *Temporary Migrant Worker Exploitation Review: Overview* [0080 19-20].

In the context of proposals to deter and penalise employer non-compliance, our overall objectives for the regulatory response to migrant exploitation are that:

- employers are deterred from non-compliant behaviour as much as possible
- non-compliant behaviour receives a robust, proportionate and efficient response
- our response makes best use of available resources and opportunities for collaboration
- the public (particularly victims) has confidence that action will be taken.

Analysis of the current toolkit has identified some gaps that limit its ability to effectively deter employers from non-compliance. The immigration system prioritises high-harm cases, but limited resource means few cases are prosecuted. [redacted] Maintenance of the law [redacted] We propose to expand the immigration toolkit by establishing an infringement regime for employer non-compliance linked to migrant exploitation.

The employment regulatory system has a varied toolkit which was recently updated and expanded, to ensure it covers the spectrum of breaches. While this suite of tools remains fit for purpose, we propose a small change to the infringement regime which would provide a stronger incentive for employers to retain documentation required under existing legislation (such as employment agreements and wage records).

While there are some good examples of cross-MBIE and cross-agency collaboration, we propose changes to strengthen this further. The existing stand-down list could be expanded to provide a stronger deterrent, and we propose that workers affected by the stand-down should be formally notified. As the lead agency in relation to migrant exploitation, we propose MBIE develop a joint compliance and enforcement strategy on migrant exploitation, to provide guidance on how our two main regulators work together and to make the best use of our available resources. We propose to

support cross-agency work by ensuring all relevant information-sharing agreements are in place and that we have resource available to prepare cases for consideration under the Police asset recovery framework.

We established a set of criteria for evaluating the changes proposed to reduce migrant exploitation and mitigate vulnerability. The analysis of each of our proposals against the criteria is summarised in the table below, with more information provided in **Annex One**. Additional information on the criteria used to assess the options is provided in the Overview briefing.

TABLE ONE: HIGH-LEVEL ASSESSMENT OF PROPOSALS AGAINST CRITERIA

Proposals	Efficiency	Effectiveness	Confidential advice t	Simplicity
We propose to expand the tools available to INZ in order to ensure that more employers are held to account (paragraphs 14-22):				
1. Establish infringement offences for non-compliant behaviour	✓✓	✓✓✓	Confiden tial advice	✓✓✓
2. Linking warning letters with infringement offences	✓✓	✓✓		✓✓✓
We propose to address a gap in the employment infringement offences to ensure that provide employment documentation when requested (paragraphs 30-31)				
3. Allow the Inspectorate to issue an infringement notice to employers who not provide documents requested within a reasonable timeframe	✓✓	✓✓✓	Confidential advi	✓✓✓
We propose to expand the scope of the stand-down list to provide a stronger deterrent effect and notify employees so that workers understand what the stand-down means for them (paragraphs 36-41)				
4. Expand the stand-down list to capture existing immigration offences, and in future, immigration infringement offences	✓✓✓	✓✓	Confidential advi	✓✓✓
5. Notify those employees on employer-assisted visas if their employer is stood-down	✓	✓✓✓		✓✓
We propose a joint compliance and enforcement strategy to formalise protocols and remove of any barriers to cross agency working (paragraph 50):				
6. Develop a joint compliance and enforcement strategy between INZ and the Inspectorate on migrant exploitation	✓✓✓	✓✓✓	Confidential advi	✓✓✓
We propose further work to reduce barriers to cross-government working (paragraphs 51-52)				
7. Address any barriers to cross agency collaboration, including by progressing any agreements required to share information with other agencies	✓✓	✓✓	Confidential adv	✓✓
We propose to increase our focus on asset recovery to prevent poor employers from starting new businesses (paragraphs 53-54):				
8. Increase MBIE's focus on preparing cases for referral to Police for asset recovery	✓✓✓	✓✓✓	Confidential ad	✓✓✓

Recommended action

The Ministry of Business, Innovation and Employment (MBIE) recommends that you:

a **Note** that the current immigration and employment regulatory toolkits have some gaps that limit the ability to effectively deter employers from non-compliance and there are some opportunities to strengthen our cross-MBIE and cross-agency response to migrant exploitation

Noted

b **Agree** to proceed with the following proposals for change in relation to the immigration toolkit:

Proposal 1: Establish infringement offences for non-compliant behaviour that contributes to vulnerability or exploitation of workers	**Yes / No**
Proposal 2: Follow warning letters relating to employer non-compliance with an infringement notice if an employer doesn't remedy the specified matter within the time indicated	**Yes / No**

c **Note** that if you agree to proceed with proposal one above, officials will develop detailed advice on the specific infringement offences and fees that would apply in consultation with the Ministry of Justice

Noted

d **Agree** that MBIE monitor the use of immigration search and entry powers, with a view to a comprehensive review of these powers in the future

Agree / Discuss

e **Agree** to proceed with the following proposal for change in relation to the employment standards toolkit:

Proposal 3: Provide an ability for the Labour Inspectorate to issue an infringement notice to employers who do not provide documents requested within a reasonable timeframe (where there is an existing infringement offence for failure to retain those documents)	**Yes / No**

f **Agree** to proceed with the following options in relation to the stand-down list:

Proposal 4: Expand the stand-down list to capture existing immigration offences and, in the future, immigration infringement offences for employer non-compliance	**Yes / No**
Proposal 5: Notify those employees on employer-assisted visas who work for an employer who is stood-down, so that they can consider what action they might take if their visa expires during the stand-down period	**Yes / No**

g **Note** that if you agree to expand the stand-down list, we will provide further advice on the offences that should be captured, and the appropriate stand-down period

Noted

h **Agree** to proceed with the following options regarding MBIE's operational response:

Proposal 6: Develop a joint compliance and enforcement strategy on migrant exploitation, to support the proposals above, provide guidance for how and when the two regulators will work together, and ensure better consistency across regions	**Yes / No**
Proposal 7: Address any barriers to cross agency collaboration, including by progressing any agreements required to share information with other agencies	**Yes / No**
Proposal 8: Increase MBIE's focus on preparing cases for referral to New Zealand Police for asset recovery, subject to further detail on financial implications	**Yes / No**

Nita Zodgekar
Manager, International Labour Policy
Labour, Science and Enterprise, MBIE
11 / 07 / 19

Hon Iain Lees-Galloway
Minister of Immigration
Minister for Workplace Relations and Safety
23 / 07 / 19

Background

1. In April 2019, you agreed to a multi-year work programme to reduce the exploitation of temporary migrant workers (including international students) and mitigate their vulnerability. The work is grouped under the three themes of prevention, protection and deterrence [briefing 2874 18-19 refers].

2. This briefing advises you on proposals for penalising and deterring employer non-compliance in relation to migrant exploitation and is focused on MBIE's regulatory toolkit. It links to briefings on the other priority workstreams:
   - Improving the pathway for reporting and referring [briefing 3490 18-19 refers]
   - Business models and practices [briefing 3821 18-19 refers].

3. Two further workstreams are scheduled for work in 2020 and beyond. One relates to the international education regulatory system, and the other relates to immigration policy settings and how they can be used to mitigate vulnerability.

4. An outline of the proposals across all workstreams is provided in the Overview briefing. The proposals are informed by the independent research (to be discussed in an upcoming briefing) and our discussions with the Steering and Consultation Groups.

The problem: The current MBIE toolkit has some gaps that limit its ability to effectively deter employers from non-compliance

5. Penalties for employer non-compliance in the migrant exploitation space sit mainly in employment and immigration legislation:
   - Minimum employment standards such as the minimum wage, holiday entitlements and protections against premiums charged for jobs are generally enforced through a civil penalty regime under employment legislation.
   - The *Immigration Act 2009* provides criminal sanctions for employers who employ migrants who are not entitled to work, and employers responsible for serious failures under the *Holidays Act 2003*, *Minimum Wage Act 1983* and *Wages Protection Act 1983* (in relation to temporary and unlawful workers), and employers responsible for coercion and control behaviours.
   - People smuggling and human trafficking offences, which may be linked with migrant exploitation, sit within the *Crimes Act 1961*.

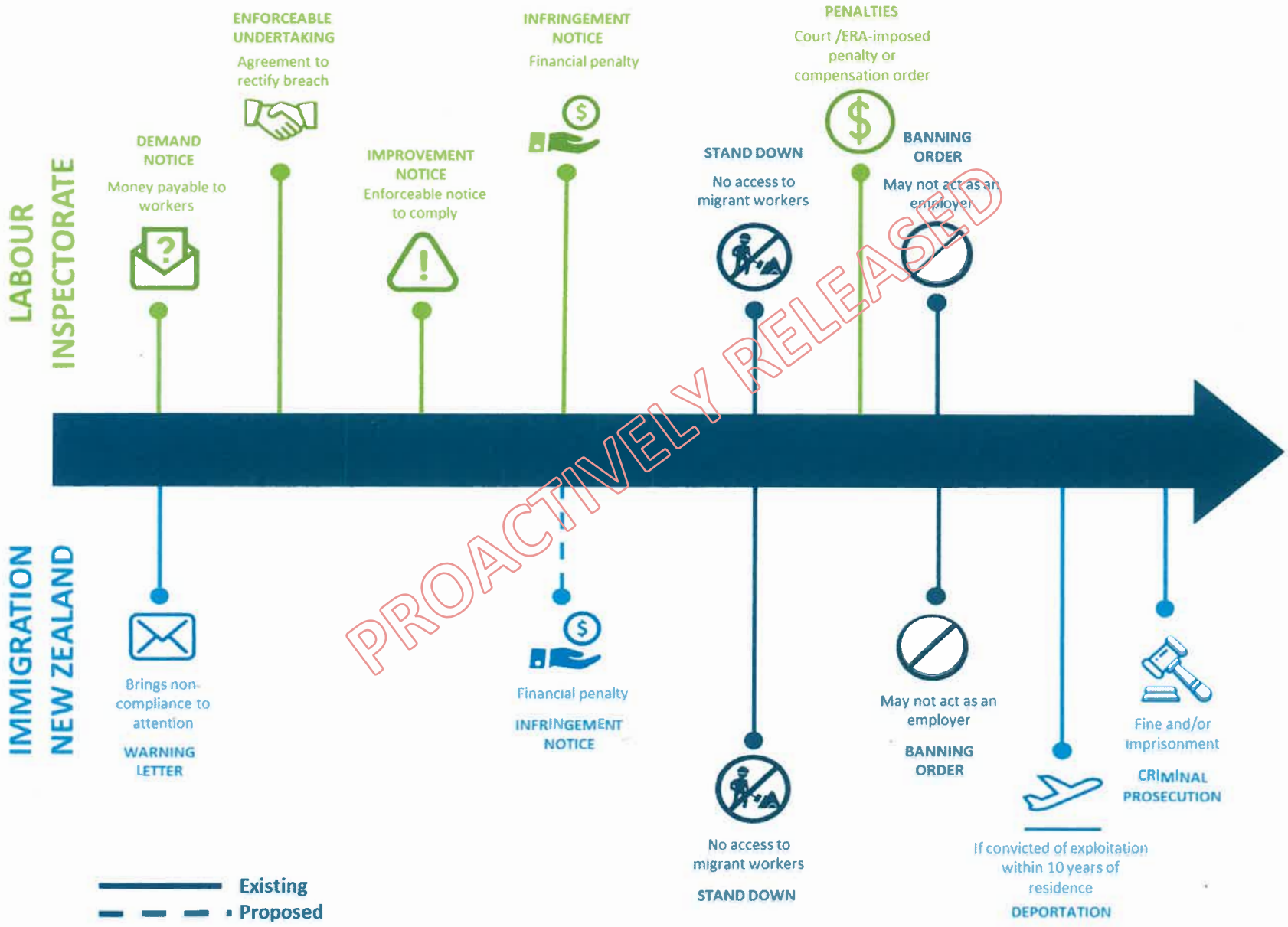
6. In the context of proposals to deter and penalise employer non-compliance, our overall objectives for the regulatory response to migrant exploitation are that:
   - employers are deterred from non-compliant behaviour as much as possible
   - non-compliant behaviour receives a robust, proportionate and efficient response
   - our response makes best use of available resources and opportunities for collaboration
   - the public (particularly victims) has confidence that action will be taken.

7. To meet these objectives, we need a toolkit that can respond efficiently across the spectrum of low-to high-level breaches. We consider that it remains appropriate for the Labour Inspectorate (the Inspectorate) to respond to breaches of minimum employment standards, with Immigration New Zealand (INZ) prosecuting serious breaches that meet the threshold

for migrant exploitation, as set out in the *Immigration Act*. However, there are other breaches of immigration requirements that create vulnerabilities for migrant workers and may involve exploitation, such as working unlawfully or in breach of visa conditions (including students working in excess of their work rights).

8. The figure below shows existing tools for both regulatory systems and a proposed addition for the immigration toolkit (discussed in more detail below). We have assessed the proposals with the above objectives in mind and against criteria of: efficiency, effectiveness, cost and simplicity for system users. A summary of this analysis is provided in the A3 contained in **Annex One**.

FIGURE ONE: LABOUR INSPECTORATE AND IMMIGRATION NEW ZEALAND REGULATORY TOOLKIT WITH PROPOSED CHANGES



Note: Diagram provides a general indication of seriousness only - there will be variance in individual cases e.g. penalties could range from small to significant, as can enforceable undertakings.

The immigration regulatory system prioritises high-harm cases, but doesn't provide adequate tools for responding efficiently to lower level breaches

9. INZ received around 320 complaints of exploitation between 2011/12 and 2017/18. It focuses on high-harm offending and undertakes a limited number of investigations into migrant exploitation each year Maintenance of the law Maintenance of the law

10. INZ has limited options for responding to migrant exploitation. The *Immigration Act* provides significant penalties for non-compliant employer behaviour such as serious breaches of minimum standards,[1] and some of these provisions (see section 351 below) were updated in May 2015 when provisions of the *Immigration Amendment Act 2015* came into force. Key immigration tools are outlined in the table below:

TABLE TWO: KEY IMMIGRATION ACT OFFENCES

Section 350: Offences by employers	• When knowing the worker is not entitled to work: a fine not exceeding $50,000. • Without the knowledge element: a fine not exceeding $10,000. • The *Immigration Act* contains a defence for employers who did not know the person was not entitled to work and took reasonable precautions and exercised due diligence to ascertain entitlement to work.
Section 351: Exploitation of unlawful employees and temporary workers	• Where employer knows person holds a temporary visa or is unlawful: imprisonment for a term not exceeding 7 years, a fine not exceeding $100,000, or both. • Where employer is reckless as to the worker's status: imprisonment for a term not exceeding 5 years, a fine not exceeding $100,000, or both.
Section 161: Deportation of a residence class visa holder convicted of criminal offence	• Someone convicted under section 350 (the knowledge offence only) and section 351, not later than 10 years after first holding a residence visa is liable for deportation.

11. Maintenance of the law

12. Prosecution remains an appropriate tool for serious and systematic exploitation of migrant workers, and is supported by participants in the independent research, some of whom raised the need for more resources and visibility of enforcement tools. Research participants also called for stronger penalties, however with penalties of up to seven years in prison and/or a maximum $100,000 fine for migrant exploitation offences, our view is that penalties are generally considered sufficient (noting that courts do not necessarily impose penalties at the higher end of the scale). Maintenance of the law Maintenance of the law

[1] Section 351 sets out offences for employers who commit serious breaches of minimum standards or who attempt to prevent workers from leaving a job, leaving New Zealand, ascertaining or seeking their lawful entitlements, or disclosing the circumstances of their work for that employer.

[redacted] such as employers who employ someone who is not entitled to work in New Zealand (placing a worker in a vulnerable situation that may result in exploitation). There is also a need to consider the role of prosecution in cases not considered high-harm, as prosecutorial action at various levels of harm may create stronger deterrence overall.

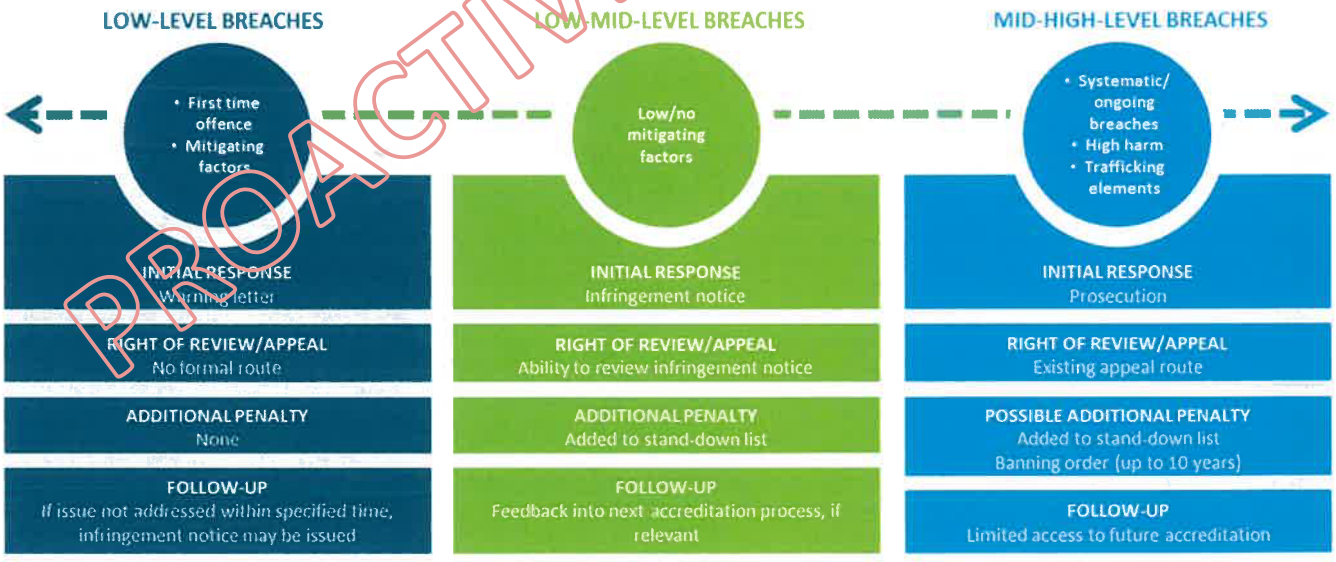
13. For lower-level breaches, INZ has the option to send a warning letter to the employer. Warning letters are designed to alert employers to the problem and provide them with information on what they need to do to comply. There is currently no mechanism to penalise the employer if they do not remedy the issue (aside from taking a prosecution for the conduct itself where that is an option). INZ does not collect data on the number of warning letters issued to non-compliant employers.

We propose to expand the tools available to INZ in order to ensure that more employers are held to account

14. For employer non-compliance linked to migrant exploitation, we propose a three-pronged approach for INZ:

- warning letters for very low level breaches where there might be reasons to provide an employer with an opportunity to rectify the matter
- infringement notices for low-to-mid level breaches
- continued prosecutions for mid-high level breaches, such as systematic breaches or those where lower-level interventions have failed, and consideration of prosecution as a tool for mid-level breaches, in order to create a stronger deterrence message.

FIGURE TWO: OVERVIEW OF PROPOSED INZ RESPONSE TO EMPLOYER NON-COMPLIANCE



Adding infringement notices to the toolkit would provide a useful response to low-level breaches

15. INZ already operates an infringement regime for carriers (mainly airlines) who fail to provide certain information about passengers they bring to New Zealand, with 733 infringement notices served in 2017/18. We propose to expand the infringement offences to include non-compliant behaviour that is linked to, or increases the risk of, migrant exploitation.

16. 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, and publishes a list of offenders if they do not pay the penalty or upon receiving a second or subsequent penalty. 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. It also publishes a list of employers found to be non-compliant. Australia also uses civil penalties for employers who hire migrants who hold no visa or in breach of their visa conditions.

17. Infringement notices provide a proportionate and efficient response to non-compliance at the minor end of the scale. They do not require court proceedings, or the level of resource required for a full investigation. They are, however, only suitable for strict liability offences (i.e. no requirement to prove intent), do not result in a criminal conviction or prison sentence, and generally carry lower financial penalties than prosecuted offences. However, given the small proportion of non-compliant employers currently being held to account, penalising a greater number of employers, albeit with a lower penalty, would send a clear message that this behaviour will not be tolerated and is likely to be penalised.

18. It is our intention to focus the infringement regime on behaviours that increase vulnerability for workers and, may either be present alongside exploitation, or lead to exploitation. Examples of behaviour that might be addressed by infringement notices include:

    - failing to provide information or documents when requested by an immigration officer (which may impede an investigation into migrant exploitation)
    - employing workers who are not entitled to work in New Zealand, or in breach of their visa conditions (which puts workers in a vulnerable position at risk of exploitation)
    - paying less than the salary or wages documented in a visa application, but above minimum wage (which creates vulnerabilities for the workers and may indicate the application included false information).

19. A review mechanism would be provided on the same basis as the existing carrier infringement regime. This provides an ability for the employer to raise any issues or request a court hearing with 28 days of service. We will work with the Ministry of Justice to develop advice on the detailed infringement settings, including the setting of infringement fees.

20. We will also be doing some further thinking about how infringement offences link to the proposed accreditation system, particularly in terms of the kinds of behaviours that would result in someone losing accreditation or not being re-accredited.

Warning letters could be used more effectively when linked to infringement notices

21. Under existing settings, INZ already use warning letters to bring non-compliance to the attention of employers and provide an opportunity for them to remedy the issue. With the proposed infringement regime, future written warnings would explain what action is required and specify a time limit for taking action, noting that the non-compliant behaviour, if not addressed, may result in an infringement notice.

22. It is not intended that use of an infringement notice would require a warning letter as the first step. We propose a warning letter would be used where it is clear an employer has committed an infringement offence, and where there are mitigating circumstances that mean an infringement should not be the first action taken. Mitigating factors might include first time offences, low level breaches, and evidence of genuine attempts to comply. Linking warning letters with infringement notices provides an incentive to comply in order to avoid a penalty.

Future work may be required to strengthen the immigration search and entry powers

23. Section 277A of the *Immigration Act* provides search and entry powers designed to support action against employers under sections 350 (employers who employ people not entitled to work) and 351 (exploitation). You were briefed on the operation of section 277A in early May 2019 in the briefing 3320 18-19, as the Immigration Act required a report three years after the section came into force. The powers have not been used and are not the preferred mechanism in the migrant exploitation space. The preference is to seek a warrant and have Police Officers accompany INZ officers. Operational experience indicates that this process works effectively.

24. The existing warrantless search powers are part of a criminal offence regime with penalties of up to seven years in in prison. Therefore, a high threshold of belief is required in order to exercise the powers. The scope of the power is also narrow, and is limited to a specific, identified person or employee (so officers are unable to seek information from other employees at the premises regarding their immigration status). The settings may be overly restrictive, particularly in the context of a more proactive approach to compliance. [redacted]

Legal professional privilege [redacted]

25. Training was provided on the use of the 277A powers in October 2018. It would be useful to monitor the issue and gain some experience applying the power, so that we can better identify where the issues are and build a stronger case for change. There would also be value in looking at the search and entry powers as a whole, as they apply across various scenarios, and with a broader lens than migrant exploitation. We propose to monitor the use of the existing search and entry powers, with a view to a comprehensive review of these powers in future.

The employment regulatory system has a varied toolkit, covering the spectrum of breaches, although changes would improve our enforcement

26. The Inspectorate has a number of tools available for responding to non-compliant employers who breach minimum employment standards, and those tools are predominantly civil penalties. Substantive changes to the toolkit were made on 1 April 2016, when the *Employment Relations Amendment Act 2016* came into force, increasing penalties and powers for Labour Inspectors. These changes aimed to address widespread non-compliance, including growth in serious breaches involving vulnerable groups. The key Inspectorate tools for non-compliance are:

- **Enforceable undertakings:** Agreement between the Inspectorate and an employer to rectify a breach, pay money or take other action by a certain date.
- **Improvement notices:** Notice requiring an employer to comply with a provision of the relevant legislation, used where the inspector reasonably believes the employer has failed to comply. May be enforced using a compliance order, and failure to comply may result in a fine not exceeding $40,000 or imprisonment up to 3 months.
- **Infringement notices:** Notice requiring payment of $1,000 per breach up to a maximum of $20,000 in any 3-month period, used mainly in relation to record-keeping offences, such as failing to retain copies of employment agreements.
- **Court or Employment Relations Authority-imposed penalties:** A labour inspector may apply for:

- declarations of a breach for serious minimum entitlement breaches
- pecuniary penalty orders for serious minimum entitlement breaches[2]
- compensation orders for serious minimum entitlement breaches where employees have suffered
- banning orders for persistent breaches to prevent someone acting as an employer or being involved with hiring employees for up to 10 years (breach of the order can result in a fine up to $200,000 and/or imprisonment not exceeding 3 years).

27. Migrant exploitation makes up a significant proportion of Inspectorate investigations. Between 2013/14 and 2017/18, there were 2,558 completed investigations, with 1,461 involving a migrant worker (57 percent). Alongside systemic breaches and non-compliant business models, migrant exploitation is a key priority for the Inspectorate. The table below shows the outcomes for cases identified as relating to migrant exploitation.

TABLE THREE: LABOUR INSPECTORATE MIGRANT EXPLOITATION DECISIONS (AS A PROPORTION OF ALL DECISIONS) 1 MAY 2018 - 20 APRIL 2019

Decision Type	All	Migrant Exploitation-related
Application to Higher Courts	3	1 (33%)
Application to the Authority	39	20 (51%)
Application to the Employment Court	5	1 (20%)
Employer appealed to the Employment Court	3	1 (33%)
Enforceable Undertaking	110	14 (13%)
Improvement Notice	203	86 (42%)
Infringement Notice	76	34 (45%)

28. Confidential advice to Government In addition, Inspectorate experience indicates that a reasonable proportion of 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). This impacts the finalisation of the case and potentially prevents enforcement action. While some delays may not be preventable, Maintenance of the law and Free and frank opinions Maintenance of the law and Free and frank opinions

29. All tools added or amended in the 2016 changes have been used since coming into force, although some have been used rarely (such as banning orders, which are generally reserved for very serious or systematic breaches). Like INZ, the Inspectorate is limited by available resources, and this was noted as a limitation by participants in the independent research, some of who noted the need for more resource and indicated that a perceived lack of action prevented them from coming forward to report. Aside from the issues mentioned above, the Inspectorate toolkit is generally acknowledged as providing the right tools, and remains fit for purpose in the context of migrant exploitation.

[2] A person cannot be ordered to pay a pecuniary penalty and be liable to a fine or term of imprisonment under the *Employment Relations Act* or the *Immigration Act* for the same conduct. Section142U, *Employment Relations Act 2000.*

We propose to address a gap in the employment infringement offences to ensure that employers provide employment documentation when requested

30. The employment regime 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 "forthwith"). As mentioned, some employers delay providing the information, Maintenance of the law and Free and frank opinions Maintenance of the law and Free and frank opinions

31. We propose to include an ability to specify a timeframe for the provision of this information (for example, the Inspectorate generally allows two weeks when requesting this information). The consequence for not meeting that timeframe would be an infringement in line with the current infringement fee for those who are found to not hold the information which is $1,000 per breach up to a maximum of $20,000 in any 3-month period).

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

32. The stand-down list is a collaboration between the Inspectorate and INZ established in April 2017. Under this policy (implemented through Immigration Instructions), employers who receive a penalty (or similar) for non-compliance with employment law face a stand-down period (from six to 24 months depending on the penalty) and cannot support a visa application for a migrant worker during that time, seek accreditation, or apply for an Approval in Principle. Current employees can continue to work for the non-compliant employer until their visas expire. The list is published on the employment.govt.nz website and there is no ability to challenge the stand-down itself, but employers have access to existing review mechanisms for the penalty that resulted in a stand-down period.

33. Canada and the UK both publicly list employers responsible for immigration non-compliance in some way. As mentioned, 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.

34. The regulators that use or interact with the stand-down list generally agree that it is working effectively. It is deemed to be cost-effective, simple for employers to understand and for regulators to administer. Participants in the independent research had mixed comments - some thought the stand down periods should be longer, and some suggested it had more of an impact on workers than employers. While there is no real evidence that the stand-down list is increasing compliance, few employers have been placed on the list more than once and the stand-down period provides some protection for migrant workers who may have been employed by poor employers otherwise.

35. Maintenance of the law

There are also opportunities to increase the impact of the list by capturing other kinds of non-compliance that would place workers at risk, such as employers convicted of *Immigration Act* offences.

We propose to expand the scope of the stand-down list to provide a stronger deterrent effect and notify employees so that workers understand what the stand-down means for them

36. An opportunity exists to improve the stand-down list's deterrence impact as follows:

- expanding the list of offences that can result in a stand-down to include immigration offences, and
- adding provisions to inform migrant workers of their employer's stand-down.

37. We propose phasing the work to expand the stand-down list so that it captures other non-compliant behaviours by employers. This would provide a more effective mechanism to penalise employers and offer protection to a larger group of migrants than the status quo.

TABLE FOUR: PROPOSAL TO EXPAND THE STAND-DOWN LIST

<table>
<tr><th>Option</th><th>Description</th></tr>
<tr><td>Status Quo</td><td>The list contains the following stand downs, linked only to breaches of minimum employment standards under the Holidays Act 2003, Employment Relations Act 2000, Minimum Wage Act 1983, and Wages Protection Act 1983:
• Infringement notices: Six month stand down for a single notice, 12 month stand down for multiple notices.
• Non-pecuniary penalties:
<table>
<tr><th>Individual</th><th>Company</th><th>Stand down</th></tr>
<tr><td>$1,000 or less</td><td>$1,000 or less</td><td>6 months</td></tr>
<tr><td>More than $1,000, less than $10,000</td><td>More than $1,000, less than $20,000</td><td>12 months</td></tr>
<tr><td>$10,000 or more, less than $25,000</td><td>$20,000 or more but less than $50,000</td><td>18 months</td></tr>
<tr><td>$25,000 or more</td><td>$50,000 or more</td><td>24 months</td></tr>
</table>
• Pecuniary penalties: 24 month stand down.
• Declaration of breach: 12-24 month stand down (to reflect penalties ordered).
• Banning order: 12 month stand down for a banning order up to five years (to be added on at end of ban period) or 24 months stand down for a banning order over five years (to be added on at end of ban period).</td></tr>
<tr><td>Preferred option: Expand the list</td><td>Phase one:
• Retain existing stand downs (subject to future review).
• Expand the list to provide stand down periods for specific Immigration Act offences, including section 350 (employing workers not entitled to work) and section 351 (exploitation) and Crimes Act offences including section 98 (smuggling and trafficking in people).
Phase two:
• Expand the list to provide stand-down periods for future immigration infringement offences (discussed at paragraph 30).</td></tr>
</table>

38. If you agree, we will develop more detailed advice on the offences to include and the appropriate stand-down period for inclusion in the upcoming Cabinet paper.

39. You are taking proposals to Cabinet shortly to require employers of employer-assisted temporary work visas to be accredited. As part of the employer-assisted visa reforms, you

have agreed that employers cannot have a history of non-compliance with either the employment and immigration systems. Expanding the stand-down list to cover immigration non-compliance and implementing an infringement regime is consistent with the approach being taken in the employer-assisted reforms. Having a wider stand-down list would reduce the need for immigration officers to undertake an assessment of an employer's compliance with the immigration system at each accreditation application and clearly indicate to employers (and migrants) that they are ineligible to employ migrants under the employer-assisted category.

Notifying employees would help workers to understand what the stand-down means for them

40. If a migrant worker's visa expires while their employer is stood-down, that worker will not be granted a further visa linked to that employer. Currently, INZ does not systematically advise employees that their employer has been added to the stand-down list (although the list is published on the Employment Services website). This means a worker may not have the ability to take action prior to the expiry of their visa (by seeking alternative employment for example).[3]

41. We propose that INZ would notify impacted employees (those on Employer-Assisted visas linked to that employer) of the stand-down. For example, a letter would be sent to those migrants whose visa expires during the stand-down period detailing the impact of the stand-down and the next steps the worker may wish to take. This would ensure the migrant understood the impact and has time to consider their options for alternative employment where necessary.

There are future options for preventing access to a broader group of migrant workers and expanding the scope of the stand-down by capturing non-compliance from other regulatory systems

42. Under current conditions, stood-down employers are prohibited from supporting a visa application for both temporary and residence class visas, and as part of the Recognised Seasonal Employer scheme. Maintenance of the law and Free and frank opinions

Maintenance of the law and Free and frank opinions

43. To better strengthen the policy intent of the stand-down list to create incentives for employers to comply with their obligations, and to better protect temporary migrant workers across visa types, an option exists to ban stood-down employers from employing any migrant. This would include all temporary and residence class visa-holders.

44. Capturing other visa types is not proposed for action at this stage, as more work needs to be undertaken, particularly regarding the impacts on student and work visa holders. While widening the scope of the stand-down to include hiring migrants on other visa types would provide a stronger deterrent, it would also affect a larger number of workers who would need to find alternative employment. The logistics and financial implications of enforcing and monitoring such a ban are also yet to be determined, given there is currently no mechanism requiring migrants outside the employer-assisted space to advise INZ of their employer. Officials will consider this further in the context of any future review of the stand-down list.

45. In order to increase the stand-down list's deterrence impact further, consideration could be given in future to incorporating:

[3] In some instances, migrant workers under stood down employers may be eligible for the migrant exploitation assurance-type visa proposed as part of the wider package of options under the Review.

- health and safety offences, including prosecutions and infringement notices under the *Health and Safety at Work Act 2015*; and/or
- tax offences, including employers convicted of tax evasion, income suppression, or PAYE filing non-compliance that do not meet the threshold for prosecution.

46. Further work is required to assess the compatibility with other systems (such as the tax and health and safety systems), and it would be valuable to monitor the impact of including employers penalised under the proposed infringement regime before including additional regulatory systems. Agencies will be better positioned to begin this work once other initiatives, such as information sharing agreements (where needed) are in place.

There are opportunities to strengthen our cross-MBIE and cross-agency collaboration

47. There are some good examples of collaboration on specific cases. However, there is an opportunity to strengthen the system that guides how and when INZ and the Inspectorate engage with each other. At the moment, there is no formal agreement to guide engagement between to two regulators, such as information-sharing and referral of cases, and a lack of consistency regarding the use of joint investigations.

48. Some attempts have been made at cross-system and cross-agency mechanisms, such as the Joint Agency Group and Combined Law Agency Group, with varied success. The Joint Agency Group provides scope for a more joined up approach across INZ and the Inspectorate, but provides limited co-ordination, is used inconsistently from region to region and is not well linked back into central MBIE for monitoring and reporting functions (that could then be used to influence systems change). The Combined Law Agency Group is a cross-agency group of around 25 agencies that look across systems for gaps in the legal framework, but is not focused on exploitation.

49. There are some barriers to full co-operation with other agencies such as the need to develop information-sharing agreements, which requires resources to be put in place, but would have a positive impact on our ability to receive and share information across agencies to better inform investigations. There is also a desire to make better use of the Police criminal proceeds process, which is limited by current MBIE capacity.

We propose a joint compliance and enforcement strategy to formalise protocols between INZ and the Inspectorate

50. We propose that MBIE develops a joint compliance and enforcement strategy on migrant exploitation to cover INZ and the Labour Inspectorate. This strategy could:
    - provide guidance and protocols for how and when the two regulators will work together, including which cases should be referred to the other regulator or progressed jointly,
    - agree what governance structures are required and what information we will collect to monitor the impact we're having, and
    - help to ensure that we use our combined resources to best effect.

We propose further work to reduce barriers to cross-government working

51. In order to ensure there are no barriers to cross-agency collaboration, we propose to progress any agreements required to share information with other agencies (including consideration of a multi-agency information-sharing agreement). There may also be an opportunity to consider whether our legislative settings adequately support joint investigations, for example there may be changes needed to ensure that INZ and the

Inspectorate can accompany each other when entering a premises in order to seek information or interview those in a workplace.

52. While regulatory systems outside immigration, employment, health and safety and international education are outside the scope of this work, there may be an opportunity for further work across broader regulatory systems in future. Anecdotal evidence indicates that employer non-compliance in one area is likely to be accompanied by non-compliance in other areas. This provides an opportunity to consider whether a penalty in one space creates risk factors in another space and should trigger a response. For example, where an employer of a liquor store is penalised for breaching the minimum wage, it may follow that this should trigger a reconsideration of their ability to hold a licence for the sale of alcohol.

We propose to increase our focus on asset recovery to prevent poor employers from starting new businesses

53. Police has a mandate to undertake the forfeiture of criminally-required assets under the *Criminal Proceeds (Recovery) Act 2009* (CPRA) for all law enforcement agencies. Seizing assets of employers (where those assets result from non-compliance with immigration and employment law, and through the exploitation of workers) provides a useful mechanism to prevent employers using those resources to re-start or continue their business, and potentially protect further migrant workers from exploitation.

54. Progressing a case under this framework requires investigators to show that it was "more likely than not" that the employer was engaged in significant criminal activity and that property and/or benefit has been derived from this activity. We see value in increasing our work in this area across both INZ and the Inspectorate, so that more cases are prepared and referred to Police for asset recovery. This is a much lower bar than that required for prosecution, and requires less investigative resource. Section 97 of the CPRA provides for the appointment of "outside investigators" who are envisaged to be investigators within ministries such as MBIE. These investigators can exercise certain investigation powers conferred within the CPRA. While it would require some investment in MBIE's investigative function, more focus on this would result in some efficiency gains, and through the deterrent effect, offer broader protection against exploitation where employers have limited resources to build or maintain a business.

Proposed changes will be supported by existing initiatives already underway

55. There are a number of initiatives already underway that will complement and support the changes proposed above. These are summarised in the Overview paper.

There are some significant gaps in our data collection that limit our ability to understand what is working and what could be improved

56. Data about the efficacy of enforcement measures is limited, making it difficult to evaluate the impact our current interventions are having on employer behaviour. The Inspectorate is able to provide high level information on decision outcomes and isolate cases relating to migrant exploitation, but does not collect information on other characteristics, such as visa type. The Application Management System used by INZ is focused on managing visa applications and doesn't provide a systematic way of capturing detail regarding compliance and enforcement activities. INZ can provide high level numbers of allegations, but there is no ability to break this information down into types of allegations and limited ability to analyse the outcomes of investigations. There is currently no real integration of the two systems across MBIE.

57. The roll-out of TIKA (a case management system used by the Inspectorate) across INZ has provided an opportunity to consider what data we collect and how we can address the

current gaps. We also see the development of the proposed joint compliance and enforcement strategy as a key opportunity to consider in more detail what we should collect across MBIE so that we can make the most of our combined resources, and consider how this should be used to monitor our impact.

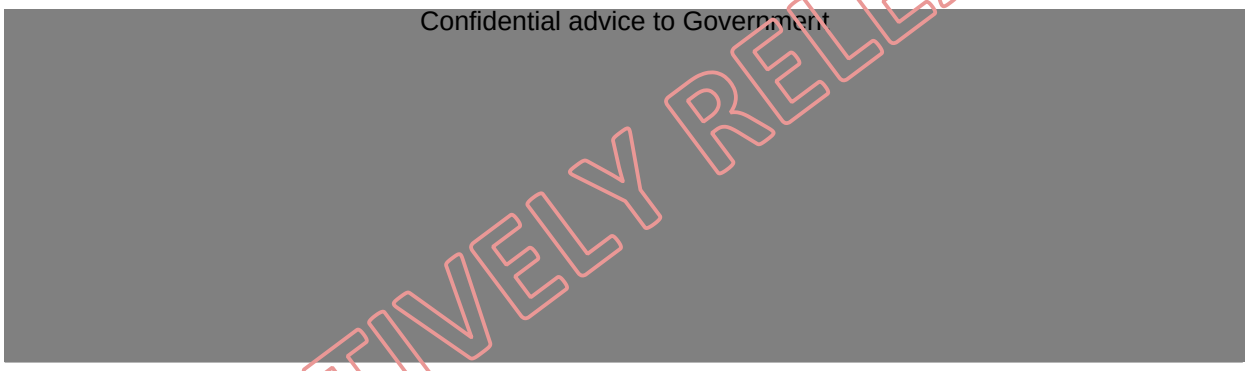
Regulatory and financial implications

58. Legislative and regulatory changes are required to:

- establish an immigration infringement regime for employer non-compliance
- amend the employment infringement regime to provide a penalty for employers who do not provide the requested documents within a reasonable timeframe.

59. Cabinet decisions are required for changes to the stand-down list and for any Approved Information-Sharing Agreements required to support cross-agency work. A joint compliance and enforcement strategy for migrant exploitation would be agreed within MBIE, with Ministerial oversight as desired.

60. Confidential advice to Government



61. We will develop more detailed advice on financial implications for inclusion in the Cabinet paper, based on your decisions regarding which proposals to proceed with.

Next steps

62. After you have provided us your feedback, and given us direction, we will develop a draft Cabinet paper and public consultation document. We will also consult affected internal teams and Government agencies further. The Cabinet paper will be a tool for you to update Cabinet on the Review and to seek agreement to public consultation on the proposals, including the proposals you have chosen to progress and those that require further exploration (along with the work already being done). It will note the complexity of the issue and the mechanisms needed to address temporary migrant worker exploitation. It will inform Cabinet that there are likely to be costs associated with any proposals that they agree to at a later date.

Annex

Annex One: Proposals for Workstream Two: Penalising and Deterring Non-Compliant Employers

Annex One: Proposals for Workstream Two: Penalising and Deterring Non-Compliant Employers

	Proposal	Problem	Efficient	Effective	9(2)(f)(iv)	Simplicity
Expanding the toolkit	**1. Establish infringement offences for non-compliant behaviour that contributes to vulnerability or exploitation of workers**	INZ has limited options for responding to migrant exploitation. Prosecution is an appropriate tool for serious and systematic exploitation of migrant workers but limited resource means few cases are prosecuted, sending a poor deterrence message to employers who are not compliant and to victims who do not see action being taken when allegations are made.	Infringement notices provide a proportionate response to non-compliance for minor breaches. They do not require court proceedings, or the level of resource required for a full investigation.	This change provides additional options for responding to a larger volume of employer non-compliance, sending a stronger overall deterrence message that even lower-level breaches are not acceptable.	9(2)(f)(iv)	Once established, system is straight-forward to administer and relatively light touch in terms of investigative resource. Process for users is also easy, without complex review processes or cost of legal representation unless desired.
	2. Follow warning letters relating to employer non-compliance with an infringement notice if the matter is not addressed	INZ currently has the option to send a warning letter to the employer if they are found to be non-compliant. However, there is currently no mechanism to penalise the employer if they do not remedy the breach that warranted the warning letter (aside from taking a prosecution for the conduct itself where that is an option).	Allows INZ to respond quickly to breaches, with a lower-level response where that is warranted, and provides a clear escalation pathway if the issue is not addressed.	Linking warning letters with infringement notices provides an incentive to comply in order to avoid a financial penalty.	9(2)(f)(iv)	A tailored, easy approach for employers who are provided information on what they need to do and the consequences of not addressing the issue.
	3. Allow the Inspectorate to issue an infringement notice to employers who do not provide documents requested within a reasonable timeframe	The status quo does not set a timeframe for providing documents (such as employment agreements) when requested by a Labour Inspector. This gap allows employers to delay investigations, and/or acts as an opportunity for non-compliant employers to avoid the penalty 6(c) and 9(2)(g)(i)	Allows the Inspectorate to respond quickly where a breach is identified, while providing adequate time for an employer to comply.	Provides an incentive to comply in order to avoid a financial penalty.	9(2)(f)(iv)	Accessible for users (both employers and officials), as it aligns with the current infringement offence regime.
Improving the stand-down list	**4. Expand the stand-down list to include existing INZ offences and in future, immigration infringement offences**	The current list does not capture other behaviours that should prevent employers from employing migrant workers (such as those prohibited under the Immigration Act 2009) and therefore offers limited protection for workers. Expanding the scope of the breaches that can result in a stand-down ensures that employers who demonstrate a wider range of non-compliant behaviours are no longer given the privilege of accessing migrant workers.	Provides a cost-effective and efficient lever for penalising employers based on information drawn from penalties issued. There is no complex appeal processes, as that function is linked to the issuing of the penalty rather than the stand-down itself. The process for determining the appropriate stand-down for each immigration offence will be straight-forward operationally, as offences parallel those that currently warrant a stand-down under employment standards legislation.	Systems that rely on the list for decision-making will be better informed, such as INZ when assessing the accreditation of employers. Targeting forms of non-compliance outside employment standards decreases migrants long-term risk of exploitation, mitigating associated negative economic and societal impacts. 6(c) and 9(2)(g)(i)	9(2)(f)(iv)	While an expanded stand-down list would require initial resource to establish, the process for administering the new list once implemented would be relatively straightforward. The impact on employers is clear.
	5. Notify employees on employer-assisted visas if their employer is stood down and informing them of visa implications	Currently, employees are rarely notified of their employers' stand-down. The lack of process/support for employees affected by the stand-down list causes stress and ambiguity for migrants unable to continue employment under their current employer, particularly when some employers withhold or manipulate information regarding their stand-down (and the visa implications that result from a stand-down) from employees.	Based on current systems, this proposal would rely on manual work to produce letters for affected employees. We will, however, consider ways that our IT systems could best support this proposal.	Contacting the migrant with timely and comprehensive information empowers the migrant to make informed decisions on their employment and visa options, thereby diminishing unscrupulous employers' ability to withhold this information.	9(2)(f)(iv)	A notification process would be simple for INZ to implement, and would likely fall within existing teams and baselines, depending on volumes (particularly once immigration infringement offences are operating).
Strengthening our cross-agency work	**6. Develop an INZ/Inspectorate joint compliance strategy on migrant exploitation**	Currently, there is no formal agreement to guide engagement between INZ and the Inspectorate, such as information-sharing and referral of cases, and a lack of consistency in approach.	A joint compliance and enforcement strategy would help to ensure MBIE regulators make the best use of their resources	Would ensure consistency across regions, by specifying protocols for how the two regulators will work together, and how governance structures should work.	9(2)(f)(iv)	The strategy would provide a useful guidance and training document for INZ and the Inspectorate and be accessible to users.
	7. Remove any barriers to cross-agency collaboration	There are opportunities to enrich the information held by MBIE regulators on employers by sharing information with other agencies.	Further work is required to determine how efficient this process would be, but generally speaking, further information has potential to strengthen investigations and make links across regulatory systems.	Information -sharing agreements would be an effective input into our information holdings regarding employers and help to support our investigations.	9(2)(f)(iv)	Once in place, most information-sharing would be done digitally. Further work is required to design the exact information requirements and how the sharing is to be done.
	8. Increase our focus on preparing cases for referral to Police for asset recovery	Current resources limit MBIE's capacity to prepare cases to refer to Police to consider asset recovery.	Asset recovery cases require a lower level of proof than a full investigation and prosecution, therefore is a much more efficient use of resources.	Effective use of the asset recovery will limit an employer's ability to draw on assets to establish the next business and potentially exploit further migrants.	9(2)(f)(iv)	MBIE already has some experience preparing cases for asset recovery, so is familiar with the process. This proposal would increase the volumes of cases processed.