

Addressing Modern Slavery in New Zealand Law

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I. Introduction

New Zealand, like many other developed, wealthy countries, is a destination for modern slavery and human trafficking. As New Zealand becomes a more popular, international travel destination, the dark underbelly of exploitation and trafficking becomes more prevalent. This paper aims to show that the behaviours commonly associated with modern slavery are inadequately addressed in New Zealand law to deter and prevent these behaviours.

The definition and scope of modern slavery is important in determining the behaviours that exist in the present day that the law should be addressing. For the purposes of this paper, the scope and definition of modern slavery will be as per Crane in *Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation*. This includes:

People [who] are forced to work under threat; controlled or owned by an employer, typically through mental, physical or threatened abuse; dehumanized and treated as a commodity; ... physically constrained or restricted in freedom of movement ... and as being subject to economic exploitation through underpayment...¹

This definition does not include forced marriage or other aspects that do not relate to labour law.

Within New Zealand, there has been little literature on modern slavery behaviours and law. Christina Stringer has been on the forefront of identifying cases of the exploitation of workers in New Zealand. Her report *Not in New Zealand Waters, Surely? (Not in New Zealand Waters)* on the exploitation of migrants on fishing ships in New Zealand provided the beginning of the cases, stories and exposés on modern slavery in the New Zealand media.² More recently, she published *Worker Exploitation in New Zealand, a Troubling Landscape*, but her focus was on the conditions and forms which slavery and worker exploitation takes.³ Heesterman's *Protection against Slavery in New Zealand* focusses on the obligations of New Zealand to improve their actions against slavery,⁴ rather than on the scope of the law addressing the behaviours. The majority of the information about modern slavery and exploitative behaviours have come through the media, which have highlighted reports by non-profit organisations, cases and reports to illustrate the problem to the general public.

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¹ Andrew Crane "Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation." (2012) 38 (1) Academy of Management Review, at 49-69.

² Christina Stringer and Greg Simmons "Not in New Zealand Waters, Surely" (2013) July (65). Forced into Slavery. Samudra Report.

³ Christina Stringer, *Worker Exploitation in New Zealand, a Troubling Landscape* (2016) Prepared for The Human Trafficking Research Coalition.

⁴ Katja Heesterman "Protection Against Slavery in New Zealand" (LLB Honours Dissertation, Victoria University of Wellington, 2014.)

Within New Zealand, the behaviours associated with modern slavery cover a range of range activities, including dehumanising behaviour, control over workers and restriction of movement. Broadly, victims of modern slavery in New Zealand are migrants who have come from the Pacific Islands, India and Asia looking for a better life.⁵ In recent years, the number of migrant victims has increased, due to the relaxation of the language requirements for entry into New Zealand,⁶ creating an environment that lends itself to the exploitation of migrant workers. The Filipino migrants in the Christchurch rebuild and the Masala restaurant chains in Auckland have gained national attention as examples of migrant exploitation.⁷ Most recently, the focus has been on the international education sector and the processes of overseas recruitment agencies, in which individuals pay for jobs and permanent visas in New Zealand, only to find themselves in poorly paid jobs, exploited and with debt to those that organised it.⁸ A common behaviour is the non-payment and underpayment of holiday pay and wages to staff, reported in all sectors, but commonly found in the hospitality industry.⁹ In addition, the many reports of the poor conditions to which fruit pickers in the Hawkes Bay are subjected are behaviours associated with modern slavery that is apparent in New Zealand.¹⁰

In general, New Zealand's law on behaviours surrounding modern slavery is reactive not proactive, the laws change to react to major developments and revelations. Many of the major law changes tend to be one or two years after a major modern slavery development. For example, the Immigration Act 2009 was amended¹¹ after *Not in New Zealand Waters* was released and highly publicised in the media.¹² In addition, the Immigration Act 2009 was amended further¹³ after the migrant worker exploitation in the Christchurch rebuild was revealed.¹⁴ Many of the relevant legislative provisions reflect New Zealand's obligations under international law, for example, the Employment Relations Act 2000 was introduced two years after the International Labour Organisation (ILO)'s Declaration of Fundamental Principles in 1998. Given this, the scope of New Zealand's law on addressing modern slavery comes from the interaction of many different areas of law, including the Crimes Act 1961, Immigration Act 2009, Employment Relations Act 2000, Wages Protection Act 1983, Minimum Wage Act 1983, Health and Safety at Work Act 2015, and the Income Tax Act 2007. It is through these different pieces of legislation that the relevant cases and amendments that New Zealand addresses modern slavery.

This paper is divided into two parts to examine how modern slavery is addressed in New Zealand law. Firstly, a discussion of a few of the identified behaviours and the New Zealand law that addresses them, illustrating that the current law does not deter the behaviours from continuing. The behaviours focussed on will be dealing in slaves, the exploitation of migrant workers, the manipulation and underpayment of wages and tax, and accommodation provided as part of employment. Finally, changes are recommended to the way that New Zealand addresses modern slavery in its law.

⁵ Above n 3; Department of Labour *Plan of Action to Prevent People Trafficking* (July 2009)

⁶ Above n 3.

⁷ Olivia Carville "Uncovered: Exploitation of migrant workers rife in NZ" *New Zealand Herald* (Online ed, New Zealand, 14 December 2016).

⁸ Above n 3.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Immigration Amendment Act 2013

¹² Above n2.

¹³ Above n 11.

¹⁴ Above n7.

II. Dealing in Slaves

The earliest New Zealand law addressing slavery was inherited from the Slavery Abolition Act 1833 (UK). This Act was the first piece of legislation in New Zealand law to make slavery illegal, at the same time as England and all colonies under English rule.¹⁵

Within modern slavery law internationally, the law relating to the dealing in slaves is historic, relating to the original prohibition of the slave trade. The primary usage of slavery, and slaves, in New Zealand law is the dealing in slaves provision in the Crimes Act 1961.¹⁶ This states that dealing in slaves is illegal, and defines dealing in slaves as a range of behaviours including the sale and purchase of a slave, using or permitting a person to be enslaved, sale of a child into slavery, or agree or offer to do any of the behaviours listed in the section.¹⁷ This offence applies to acts inside and outside of New Zealand. The wording of this section is based on English law, derived from the Slave Trade Act 1824 and 1843.¹⁸ In addition, it is designed to meet New Zealand international obligations under the ILO's Worst Forms of Child Labour Convention 1999 and the United Nations (UN) Supplementary Convention 1956 on the abolition of slavery.¹⁹

New Zealand law defines a slave in the Crimes Act 1961 as including "...without limitation, a person subject to debt-bondage or serfdom."²⁰ With debt-bondage defined as:²¹

...the status or condition arising from a pledge by a debtor of his or her personal services, or of the personal services of any person under his or her control, as security for a debt, if the value of those services, as reasonably assessed, is not applied towards the liquidation of the debt or if the length and nature of those services are not limited and defined...

While serfdom is defined as:²²

...the status or condition of a tenant who is by any law, custom, or agreement bound to live and labour on land belonging to another person and to render some determinate service to that other person, whether for reward or not, and who is not free to change that status or condition.

The primary case in New Zealand under dealing in slaves involved a Thai woman who was sold as a slave to an undercover police officer.²³ In deciding the case, the Court of Appeal focussed on the definition of a slave under the Crimes Act 1961. The definition used was from the Chambers English Dictionary, where, specifically, slave was defined as "a person held in property." This definition reflects the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, which refers to slavery as "the status of a person over whom powers attached to the rights of ownership are exercised."²⁴

¹⁵ Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Westlaw) at [CA98.02]

¹⁶ Crimes Act 1961, s 98.

¹⁷ *Ibid*, s 98 (1).

¹⁸ Slave Trade Act 1824 (UK); Slave Trade Act 1843 (UK).

¹⁹ Above n 15.

²⁰ Above n 16, s 98 (2)

²¹ *Ibid*, s 98 (2)

²² *Ibid*, s 98 (2)

²³ *R v Decha-Iamsakun* [1993] 1 NZLR 141.

²⁴ *Ibid*.

Within New Zealand, the dealing in slaves provision provides limited scope to the behaviours associated with modern slavery. Given this, the majority of other modern slavery behaviours are addressed through other areas of law.

III. Exploitation of Migrant Workers

Recently within New Zealand, the exploitation of migrant workers is gaining focus as a behaviour that New Zealand law should be preventing. It is the current focus of the New Zealand government²⁵ and examples of modern slavery in migrant workers have been reported extensively in newspapers.²⁶ The exploitation of migrant workers manifests itself in two broad forms of behaviour. The first is the hiring temporary and illegal workers who have entered New Zealand looking for work. The second is the recruitment of workers overseas, transporting them to New Zealand and then exploiting them once they arrive. Both are prohibited in New Zealand law through the trafficking provisions in the Crimes Act 1961 and Immigration Act 2009.

In *R v Ali and Kurisai (R v Ali)*, Heath J stated:²⁷

People trafficking is an abhorrent crime. It is a crime against human dignity. It undermines the respect that all of us should have for the human rights and the autonomy of individual people. Such conduct degrades human life. It is a crime that should be condemned in the strongest possible terms.

Those who are exploited also lose dignity. By exploiting people brought to New Zealand under false pretences you have demonstrated that you are prepared to ignore standards of pay and conditions generally expected of New Zealand society.

In examining how the exploitation of migrant workers is addressed in New Zealand law, and to determine whether the law is adequate in deterring the behaviour, the Crimes Act 1961 and the Immigration Act 2009 will be examined. In addition, the landmark case of *R v Ali* will be examined as the first case to be tried under the current trafficking provisions introduced in 2015,²⁸ and has been reported as the “tip of the iceberg” in regards to the extent of trafficking and exploitation of migrant workers in New Zealand.²⁹

a. Crimes Act 1961

The exploitation of migrant workers is addressed in the Crimes Act 1961 through the smuggling and trafficking in people provisions.³⁰ The trafficking provision of the Act provides the harshest penalties available in the New Zealand law addressing modern slavery, comparable

²⁵ George Mason “Role of the Labour Inspectorate in enforcing minimum standards” [2017] ELB 53

²⁶ Jess Pullar “Man jailed for false refugee claims in landmark human trafficking trial” *Nelson Mail* (online ed, New Zealand, 29 January 2016); “Restaurant boss fights deportation after mistreating workers” *Radio New Zealand* (online ed, 5 November 2016); “Abuse of young and migrant workers uncovered” *Radio New Zealand* (online ed, 21 December 2015); and Edward Gay “Chef paid \$40 for two months' work” *Radio New Zealand* (online ed, 8 September 2015).

²⁷ *R v Ali & Kurisi* [2016] NZHC 3077.

²⁸ *Ibid.*

²⁹ Olivia Carville “Guilty: First human trafficking convictions in New Zealand” *New Zealand Herald* (Online ed, New Zealand, 15 September 2016).

³⁰ Above n 16, s 98B; s 98C; s 98D; s 98E; s 98F.

to those for homicide and rape. Thus, the scope of these provisions are an important tool for addressing modern slavery in New Zealand, the more that can be included within the scope the more behaviours will be deterred.

Specifically, the Crimes Act 1961 prohibits trafficking³¹ and smuggling³² in or out of New Zealand or any other state. Under this section, New Zealand courts have jurisdiction³³ over offences when the conduct occurs wholly outside of the country, but the Attorney-General's consent is required for prosecution.³⁴ Generally, smuggling requires illegal documentation, either through forgery or using a document for a purpose other than its lawful use, usually for the benefit of the person moving. Trafficking is the more serious offence and the most related to modern slavery and migrant worker exploitative behaviours in New Zealand.

The trafficking provision makes it an offence to be involved in the process of moving a person over country lines, either through coercion and deception, or for the purposes of exploitation. It makes it an offence to arrange, organise or procure a person into or out of New Zealand or any other state,³⁵ in addition to the reception, recruitment, transport, transfer, concealment or harbouring of a person.³⁶ This makes all the steps of the process included within the offence, including the arranging and organising, and smaller roles, including the recruiting and the reception of potential workers.

It is a trafficking offence to arrange entry when it is done for the facilitation or purpose of exploitation.³⁷ The exploitation of a person includes slavery and practices similar to slavery, for example servitude, forced labour and other forced services. The inclusion of forced labour into the list of practices distinguishes this section from the dealing in slaves provision.³⁸ Iain Lees-Galloway MP stated, when debating the Organised Crime and Anti-Corruption Bill:³⁹

[b]y including forced labour as something that is explicitly defined as exploitation for the purposes of this section, we might actually have a better opportunity to prosecute some of those offences under this Act. I would think, and I would hope, that the penalties... are a far greater disincentive to conducting the type of exploitation than the penalties that are available under our employment legislation.

The addition of forced labour into the definition of exploitation and, subsequently the offence of trafficking, widens the scope to have a greater effect on modern slavery in New Zealand law.

In addition to the purpose of exploitation, an individual is liable to the offence by knowing that the action or process involves coercion or deception.⁴⁰ This requires the knowledge that the person has been coerced or deceived on at least one occasion during the movement process.⁴¹ An act of coercion includes abduction, use of force, harm, or threatening, either

³¹ Ibid, s 98D.

³² Ibid, s 98C.

³³ Ibid, s 7A.

³⁴ Above n 15at [CA98D.01].

³⁵ Above n 16, s 98D (1) (a).

³⁶ Ibid, s 98D (1) (b).

³⁷ Ibid, s 98D (1) (a) (i) and (b) (i).

³⁸ Ibid, s 98.

³⁹ (21 October 2015) 709 NZPD 7446.

⁴⁰ Above n 16, s 98D (1) (a) (ii) and (b) (ii).

⁴¹ Above n 15 at [CA98D.03]

expressly or implied, to the person or some other person.⁴² On the other hand, an act of deception includes fraudulent actions.⁴³ These definitions provide a wide range of prohibited behaviours, which enables the offence of trafficking to capture a wide range of practices associated with modern slavery. The wide range reflects the seriousness of taking someone away from their home, whether through force or manipulation. The inclusion of deception allows for the manipulation of circumstances and future promises to be behaviours included within the trafficking offence.

The amendment to the Act in 2015 resulted in the trafficking in persons provision to be replaced to ensure that New Zealand met its obligations under the United Nations (UN) Convention against Transnational Organised Crime and the UN Convention against Corruption.⁴⁴ Jacinda Ardern, MP, said in the Organised Crime and Anti-Corruption Bill debate that:⁴⁵

[t]here are two areas we are meant to ensure that our legislation covers. Our legislation needs to clearly and precisely define the constituent elements... of the offence... to allow the identification of trafficking victims, and we need to ensure that the... offence reflects the three constitution elements of actions, mean and exploitative purpose.

This amendment provides an extension to the forms of exploitation previously included, and explicitly removed the transnational requirement of trafficking. This allows cases of victims who have come to New Zealand legally and subsequently exploited to be covered. These amendments provide an extension of liability, resulting in more modern slavery behaviours being treated as an offence and subject to the most serious penalties in modern slavery law in New Zealand.

b. Immigration Act 2009

The Immigration Act 2009 prohibits behaviours associated with the exploitation of migrant workers and modern slavery. Specifically, aspects of trafficking and immigration under false pretences, including violations relating to entering New Zealand, breach of visa and exploitation of unlawful and temporary workers.⁴⁶

Section 341 of the Immigration Act 2009 makes it an offence to act in a way that helps a person enter New Zealand unlawfully or breach their visa. This includes aiding and abetting a person to be in New Zealand or to breach their visa conditions, whether for material benefit or not.⁴⁷ Specifically within modern slavery related behaviour, it makes it an offence to ensure that workers remain in New Zealand past the end of their visa or to force them to work when their visa restricts it.⁴⁸ Further, it is an offence under this act to aid, abet or encourage a person to complete a document required for a visa or other required documentation that they know is false or misleading.⁴⁹ For example, completing a visitor's visa with the intention to come to New Zealand to work.

Section 351 of the Immigration Act 2009 is the primary provision to prevent the exploitation of unlawful and temporary workers. This section is the most similar to the Crimes Act 1961

⁴² Above n 16, s 98B.

⁴³ Ibid, s 98B.

⁴⁴ Above n 15 at [CA98D.03]

⁴⁵ Above n 39.

⁴⁶ Immigration Act 2009.

⁴⁷ Ibid, s 343 (1) (a) and (d).

⁴⁸ Ibid, s 343 (1) (a) and (d).

⁴⁹ Ibid, s 343 (1) (c).

trafficking provisions, but has more detail on what can be considered exploitation, and encompasses a broader scope of behaviour. Firstly, it is an offence under this provision, when an employer is responsible for a serious failure, to pay the minimum standards required under the Holidays Act 2003, Minimum Wage Act 1983 and the Wages Protection Act 1983.⁵⁰ The seriousness is determined through considering the amount of money, the number of instances, the period during which they occurred and the intentionality of the act.⁵¹ Secondly, an employer commits an offence when they prevent or hinder a worker from leaving their service or New Zealand, seeking their entitlements under New Zealand law or preventing them from discussing the circumstances of their work.⁵² Examples of this behaviour include taking and retaining a passport and other travel documentation, preventing the person from using a telephone or leaving the premises, or hindering a labour inspector from entering the premises.⁵³ What distinguishes these provisions from the Crimes Act 1961 is the explicit mention of the minimum statutory labour rights to which all workers are entitled. Further, the intentions of the employer and the examples of behaviour that are listed in the Immigration Act 2009 signify the concept of control over the worker rather than the concept of ownership used in the dealing in slaves provision.⁵⁴ The Crimes Act 1961 refers to exploitation in terms of forced labour, which, although may include violations of minimum standards and the concept of control over workers, it is not explicitly included.

The 2015 amendment to the Immigration Act 2009 provided temporary workers with the same protection under the Act as unlawful workers, and provided immigration officials with warrantless entry if they believe that migrants were working there unlawfully or being exploited.⁵⁵ Specifically, this amendment included adding temporary workers in every place there was unlawful workers and changing the title of the provision. As a response to the exploitation of migrant workers in the Christchurch rebuild,⁵⁶ the changes to the Immigration Act 2009, through this amendment, improved the previous law in identifying the areas, behaviours and the workers that need targeting for protection. Changing the title of the section indicates a change from targeting those that are not legally entitled to work in New Zealand to protecting them from exploitation. The addition of temporary workers to the Act addressed the gap in the law which allowed vulnerable migrant workers with the right to work in New Zealand no protection from exploitation under the Immigration Act 2009. Prior to the amendment, protection and redress came from the Employment Relations Act 2000, which required knowledge of rights and going to court to receive their entitlements.

c. R v Ali and Kurisai

Many of the modern slavery behaviours that commonly exist among the exploitation of migrant workers were exhibited in *R v Ali*. There are no other reported court cases that have relied on the trafficking provisions of the Crimes Act 1961 and Immigration Act 2009 as heavily as in the prosecution of Ali. Specifically, he was charged with 15 counts trafficking human beings by deception,⁵⁷ aiding and abetting, and the exploitation of temporary workers under the Immigration Act 2009.⁵⁸

⁵⁰ Ibid, s 351

⁵¹ Ibid, s 351

⁵² Ibid, s 351

⁵³ Ibid, s 351

⁵⁴ Above n 16, s 98.

⁵⁵ Immigration Amendment Bill (No 2) 2013 (select committee report).

⁵⁶ Ibid.

⁵⁷ Above n 16, s 98D (1) (a).

⁵⁸ Above n 46, s 343 (1) (a) and (b); s 351 (1) (a) (i) and (ii); *R v Ali & Kurisi* [2016] NZHC 3077 at [5] and [6].

The victims of Ali were predominately vulnerable workers from Fiji, who responded to local newspapers advertising work in New Zealand. Advertisements were placed by travel agencies in Fiji that were affiliated with Ali and required those interested to pay extra ordinate fees at every step in the process. Many of those that applied were forced to borrow from family and their community to afford the fees demanded by Ali and his colleagues. When they entered New Zealand, they were met by Ali who took them to work either as fruit pickers in the Bay of Plenty or for Ali in his construction business in Auckland.⁵⁹ In evaluating the facts during sentencing, Heath J noted that it was a “joint criminal enterprise designed to extract money.”⁶⁰ They were induced to travel to New Zealand through deception where Ali was to receive them, making him liable for the deception in Fiji. Specifically, the deception was “on the basis of false representations as to their working conditions, pay and ability to work lawfully”⁶¹ Heath J noted that:⁶²

...they relied on representations to the effect that work permits or visas would be arranged... I am satisfied that [Ali] knew representations of that type were being made... and that they were false.”

Ali “was to receive them in New Zealand so that they could be put to work in exploitative circumstances.”⁶³

These actions make Ali liable under the trafficking human beings by deception provision in the Crimes Act 1961.⁶⁴ Under the Immigration Act 2009, Ali was liable for aiding and abetting by inciting his victims to breach the terms of their visitors’ visa by working.⁶⁵ More than once he “took a victim to a solicitor in Auckland to ensure documentation was prepared to extend their visitor visa.”⁶⁶ Ali’s incitement by ensuring that his victims breached their visa requirements was done for the purpose of exploiting them, which resulted in a material benefit to him⁶⁷ and was done knowing it was unlawful through deception.⁶⁸ In addition, Ali exploited the victims by failing to pay them what they were entitled to under the Holidays Act 2003 and Minimum Wage Act 1983. Heath J stated that “[w]ithout any official record of the victims working in New Zealand, there was no impediment to your exploitation of them.”⁶⁹

When considering the aggravating factors during the sentencing of Ali, the court treated the trafficking by means of deception and the exploitation suffered as one offence, as many of the behaviours exhibited related to both charges. Especially the organised nature of the offending, the extent which victims were subjected to inhumane or degrading treatment, the number of victims, and the extent that material benefit was derived from offending.⁷⁰ Heath J also referred to “the scale of the offending, the commercial motivation, the premeditation, the actual exploitation and the harm caused both financial and emotionally”⁷¹ Heath J/His Honour broke down the considerations into the 18 aggravated factors that were relevant, including the nature

⁵⁹ *R v Ali & Kurisi* [2016] NZHC 3077.

⁶⁰ *Ibid*, at [16]

⁶¹ *Ibid*, at [16]

⁶² *Ibid*, at [18]

⁶³ *Ibid*.

⁶⁴ Above n 16, s 98D.

⁶⁵ Above n 46, s 343 (1) (a) and (d).

⁶⁶ Above n 59, at [23].

⁶⁷ Above n 46, s 343 (1) (a).

⁶⁸ *Ibid*, s 343 (1) (b).

⁶⁹ Above n 59, at [23].

⁷⁰ *Ibid*.

⁷¹ *Ibid*, at [49]

and degree of deception, the degree of manipulation, the psychological and financial harm caused to the victims, and the motive of financial nature that led to the offending. Heath J acknowledged that the relative seriousness of the offending by Ali, in comparison to potential future cases, noting that:⁷²

This is a serious case of its type but it is possible to envisage much worse. In my view, your offending sits around the middle of the range for offending of this type.

Many of the examples of modern slavery in migrant workers do not contain as extensive deception, visa manipulation and coordinated efforts for financial gain as *R v Ali*.

In many ways, this case is consistent with the experience of other migrant workers who have been promised work in New Zealand, especially the fees charged and the promise of better pay.⁷³ But in *Ali*, the specific combination of the modern slavery behaviours made this a case that fits easily within the examined provisions of the Crimes Act 1961 and the Immigration Act 2009,⁷⁴ especially the number of victims and the exploitation for financial gain, part of which remained in Fiji. In addition, a key difference is the high level of deception that was practised by *Ali*, and the coordinate efforts by *Ali* and his associates to deceive the victims. This includes the advertisements to the vulnerable in Fiji, the photos taken of them working to send home, the lies told to officials, and the manipulation of visas.⁷⁵ This provided a clear case of deception and manipulation of the entry into New Zealand. It is implied by Heath J that the matter of most importance was the deception, not the “validity of travel documents.”⁷⁶ In cases of other migrant workers, both those recruited overseas and those finding work in New Zealand, there is likely not to be as clear a case of deception as in *R v Ali*. Many migrant workers have legitimate documentation to enter and work in New Zealand; it is the manipulative promises made about their potential jobs which are the common modern slavery behaviour. Provided the deceptive recruitment practices involve the movement of workers, the provisions in the Crimes Act 1961 and the Immigration Act 2009 have the ability to sentence those responsible. But, the penalties and likelihood of the punishment must be enough to deter the behaviour.

IV. Manipulation and Underpayment of Wages and Tax

Within behaviours associated with modern slavery, withholding and manipulating wages is a prominent method of controlling and coercing victims to remain within control of an employer.⁷⁷ There have been reports of non-payment and underpayment of wages and holiday pay, and other manipulation of wages to withhold the full payment to workers. In many cases, this behaviour is followed by manipulation of tax requirements, including not paying or underpaying Pay-As-You-Earn (PAYE) taxes, using the same Inland Revenue Department (IRD) identification numbers for different employees, or the tax records being different from payslips given to workers.⁷⁸

⁷² *Ibid.*

⁷³ Above n 3.

⁷⁴ Above n 16, s 98D and s 98F; Above n 46, s 343 and s 351.

⁷⁵ As compared to *Commissioner of Police v Investments Ltd* [2015] NZHC 3139; *Above n 59*.

⁷⁶ *Above n 59*, at [10].

⁷⁷ International Labour Organisation *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (International Labour Organisation, Report, September 2017).

⁷⁸ Above n 3.

An important method in New Zealand law to address these behaviours is through the New Zealand tax regime. Specifically, the record keeping requirements in the PAYE system and the provisions related to the manipulation of tax payments. The relevant tax law in New Zealand, overseen and controlled by the IRD, is governed by the Tax Administration Act 1994 and the Income Tax Act 2007. The Tax Administration Act 1994 governs the administrative related provisions in New Zealand's tax law, while the Income Tax Act 2007 includes a detailed set of provisions relating to how income tax is calculated, including PAYE and company income tax. Generally, the focus of the tax regime in New Zealand is the collection of tax, given this, there are few excessive requirements imposed on companies. Many of those that commit offences under the tax scheme are also likely to commit behaviours associated with modern slavery. The procedures used by the IRD, in the process of identifying those committing offences under the tax scheme, can lead to the identification of those committing behaviours associated with modern slavery.

a. Record Keeping Requirements

The New Zealand tax regime, particularly the PAYE system, imposes record keeping requirements on employers. These include specifying the form and information that needs to be recorded, and the possibility of an audit of the records to ensure compliance. It is within this regime that the discrepancies between wages paid to workers and the wages declared to the IRD can be detected. The PAYE system provides detailed rules and guidelines on how to calculate the rates and amounts for employees, and when they should be paid. Generally PAYE is paid by the employer on behalf of the employee. Liability operates by way of deeming provisions, when employees are paid wages, employers are deemed to have withheld the PAYE from their wages which the employers pass on to the Government. It is a legal requirement for the employers to pay the PAYE for all employees.⁷⁹

Record keeping under the PAYE regime requires employers to keep copies of pay sheets given to employees, PAYE payment receipts and other wage records for at least seven years. These records must be kept in English, though, there is an option to use computer systems to keep track of payroll or to use an intermediary.⁸⁰ As part of these records and PAYE payment receipts especially, the name of the employee, their IRD number, and the amount of tax paid are required to be recorded. In doing this, the IRD can notice duplicate IRD numbers and non-payment of taxes. Further, the requirement to keep pay sheets and PAYE payment slips means the IRD will also notice the difference between pay sheets and tax payments in their audits. In performing the audit, the officers will spend most of their time checking records, including ledgers, journals, invoices, personal and business bank accounts and other records that are associated with ensuring the correct tax has been paid. As part of the audit, the IRD may contact third parties to gather information, which can include suppliers and contractors. Obstructing an audit, through refusing access to the premise, destroying files and records, lying or falsifying records or causing a deliberate delay in the investigation, may make the employer liable for penalties.⁸¹

In *R v Dhillon (Dhillon)*, in addition to not paying PAYE, he did not pay goods and services tax (GST) on invoices. These regimes propose similar obligations and requirements on employers as, in both cases, they are a middle man for tax between the government and the person paying.⁸² In *Dhillon*, the tax was not passed and Dhillon was subsequently charged.

⁷⁹ Inland Revenue Department *Employer's guide (IR335)* (April 2017), at 6 -7.

⁸⁰ *Ibid*, at 20.

⁸¹ Inland Revenue Department *Audits: How we will work with you* (August 2006).

⁸² *R v Dhillon* [2009] NZCA 597.

Through the PAYE system and the similar mechanisms in GST, the Government identified issues and subsequently investigated. Through using this method on companies practising wage and PAYE manipulation, the IRD will be able to investigate issues and identify companies that are also practicing modern slavery behaviours.

b. Income Tax Procedures

For many employers who follow the minimum standard required by law, the income tax regulations will deter behaviours associated with the economic exploitation of workers. The Income Tax Act 2007 provides the standards for employers to follow and the IRD has established systems that enable the identifying of inconsistent behaviours. Those that are not following the tax law are likely to be pursued by the IRD for tax evasion. In investigating the tax evasion, many of the behaviours associated with the economic exploitation of workers and other behaviours associated with modern slavery will be discovered. The *Commissioner of Police v Investments Ltd (Masala)*⁸³ was an instance where wide spread exploitation of workers was discovered by the IRD during their investigation of the Masala restaurant chain in Auckland, illustrating the importance of income tax law in deterring modern slavery behaviours.

The overall structure of the tax scheme encourages the payment of wages, especially through the Income Tax Act 2007. The more that an employer pays in wages, the less tax that needs to be paid as wages are deducted from total taxable income. Those that underpay their workers will not declare their actual wages, to ensure they can deduct more from their taxable income. It is more likely that deductions for wages will be over declared, which will alert the IRD to the behaviour and cause them to investigate. The record keeping requirements make deductions for wages traceable, discouraging from under paying wages or taking deductions for amounts larger than the payment. The risk of being caught and punished will likely deter some employers from carrying out modern slavery behaviours. The structure of the tax scheme encourages those employers to spend at least the minimum wage to maximise the deductions available. Those that operate in the borderline areas of tax law may be deterred through the general anti-avoidance rule in the Income Tax Act 2007, which captures manipulative behaviours that are not covered by other areas of the Act but result in the avoidance of tax.⁸⁴ The Tax Administration Act 1994 governs the provisions surrounding tax avoidance and other requirements on the administration of tax which do not fall within the other tax legislation. Through this provision, those committing tax fraud and tax evasion offences through the manipulation of income tax will be uncovered and penalised.

The case of *Masala* is one of the highest profile cases of modern slavery in New Zealand. The Masala restaurant chain and its owners engaged in substantial tax evasion, in addition to the widespread worker exploitation and modern slavery behaviours. In this case, the parties and companies involved evaded assessment and payment of tax by systematically stripping cash from restaurants and neither declared the cash sales in GST nor returned the cash income.⁸⁵ Involved in the process were a large number of companies, individuals and properties, which allowed for the ease of movement of cash and people to minimise the tax paid and their exposure to being caught. In addition, the employers' under-reported salaries and wages paid to employees and failure to declare employees in monthly schedules to IRD. The PAYE was underpaid in respect of salaries and wages paid to employees and was not deducted from

⁸³ *Commissioner of Police v Investments Ltd* [2015] NZHC 3139.

⁸⁴ Income Tax Act 2007, s BG1.

⁸⁵ Above n 83.

payments and benefits.⁸⁶ This resulted in Masala underreporting substantial earnings and evaded payment of over \$7.4 million of tax owed, including interest and penalties.⁸⁷

V. Accommodation provided as part of employment

It is common practice in industries in rural New Zealand to provide accommodation as part of the employment agreement. The practice of providing accommodation is used in some industries and regions of New Zealand to facilitate modern slavery. Within the horticulture and viticulture industries, there have been reports of those staying there, especially migrant workers, being subject to restricted movement, taken passports, and verbal and physical abuse from locals.⁸⁸ Further, the standard of accommodation is not always acceptable; for example, a case of a male and two females sharing one basement room, with one mattress on the floor to share between them.⁸⁹ Despite the potential poor standards, it is common practice for an employer to deduct the cost of accommodation from wages.

In dealing with provided accommodation in New Zealand law, the relevant areas of legislation are the Minimum Wage Act 1983, the Wages Protection Act 1983 and the Health and Safety at Work Act 2015, each of which impacts the deductions employers may take and the standard of accommodation provided.

a. *Minimum Wage Act 1983*

Low payment of wages is a common behaviour related to modern slavery, it enables employers to exercise control over their workers through economic exploitation. The Minimum Wage Act 1983 states the work that is entitled to receive the minimum wage.⁹⁰ This work is subject to deductions that are detailed in the Act,⁹¹ including deductions for board and lodging in s 7. Section 7 reads:⁹²

In any case where a worker is provided with board or lodging by his employer, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wage calculated at the appropriate minimum rate by more than the cash value thereof as fixed by or under any Act, determination, or agreement relating to the worker's employment, or, if it is not so fixed, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wages (as so calculated) by more than 15% for board or by more than 5% for lodging.

The wording of this section is long and confusing. It is unclear what the section means and the amount that can be taken from wages. The section is not going to deter modern slavery if the requirements behaviours for deductions from wages are not clear.

The Employment New Zealand website provides guidance for the interpretation of this passage.⁹³ The employer and employee can agree that the accommodation will be deducted

⁸⁶ Ibid.

⁸⁷ Ibid

⁸⁸ Above n 3.

⁸⁹ Above n 59.

⁹⁰ Minimum Wage Act 1983, s 6.

⁹¹ Ibid, s 7 and 8.

⁹² Ibis, s 7.

⁹³ Ministry of Business, Innovation and Employment "Deductions" Employment NZ

<www.employment.govt.nz/hours-and-wages/pay/deductions>

from wages, but the cost to the employee must be detailed and reasonable. The tenancy or accommodation agreement should be separate, or be able to be separated, from the employment agreement. Further wage records should show wages before the accommodation was deducted, this amount is used to calculate the minimum wage. If there is no agreement, then 15 per cent or five per cent can be deducted at the appropriate wage rate, depending on the type of accommodation provided.

This section appears to give employers the ability to take all of their workers' take home pay. If the board and lodging deduction specified in the employment agreement is for the total minimum wage required to be paid to the worker, then the employer has met the requirements under the Minimum Wage Act 1983. The power imbalance between an employer and workers, and the high number of migrant, vulnerable workers that are common in this industry, it is easy for the employer to insert the provision into the contract. Out of fear or under threat of losing their job or being deported, the workers have little choice but to agree to the terms laid out by their employer. But, when considering this provision alongside an unreasonable deduction provision in the Wages Protection Act 1983, this behaviour may be deterred.⁹⁴

b. Wages Protection Act 1983

The ability for employers to make deductions from wages is the easiest method to underpay workers and facilitate modern slavery through economic exploitation. The Wages Protection Act 1983 provides the basis for the allowable deductions from a workers wages, which include a variety of different behaviours and circumstances. Section 4 states that the entirety of the wages, without deduction but subject to s 5 (1) and 6 (2), shall be paid to the worker.⁹⁵ Section 5 allows employers to take deductions from workers' wages for a lawful purpose with the written consent of the worker or at the workers' request through a general deduction clause in an employment agreement.⁹⁶ This increases the power of employers by giving the ability to take deductions from workers' take home pay, with potentially arbitrary and unjustified rationales. An amendment in the Employment Relations Amendment Act 2015 introduced the concept of an unreasonable deduction to wages.⁹⁷ Section 5A, Wages Protection Act 1983, qualifies s 5, stating "...an employer must not make a deduction under section 5 from wages payable to a worker if the deduction is unreasonable."⁹⁸

This is an improvement on the previous versions which did not have this unreasonable requirement, as it requires some justification and rationale for the deduction from wages. The provision was designed to cover employers deducting from wages for events outside of the employees' control and not contributed to through negligence, for example thefts by customers.⁹⁹ Prior to the amendment, there was no reasonableness test in the Act, nor was there a requirement for the employer to notify the worker of the impending deduction from their wages. The concept has been applied by government authorities to deductions for board and lodging.¹⁰⁰ It is not clear if s 5A applies to a deduction for accommodation, the unreasonable deduction provision was designed for general deductions clauses in employment agreements not for other deductions found in the Minimum Wage Act 1983 or specified in the employment agreement.

⁹⁴ Wages Protection Act 1983, s 5A.

⁹⁵ Ibid, s 4.

⁹⁶ Ibid, s 5.

⁹⁷ Wages Protection Amendment Act 2016, s 7

⁹⁸ Above n 94, s 5A.

⁹⁹ *Wages Protection Act 1983 Commentary* (looseleaf ed, Westlaw) at [s7].

¹⁰⁰ Above n 93.

There is little case law and guidance on how reasonableness will be interpreted in the wider scope of potential deductions. There are a range of factors which a deduction can be based on, all of which can result in a reasonable deduction but a different value. For example, the value could be based on common rental values in the area, which could vary across the country. Further, the differences between furnished and unfurnished rentals may vary what is a reasonable deduction. Each of these could change depending on the time of the year and developments in the area, and each are arguably a reasonable method to base a deduction on. In addition, it is unclear if the reasonableness of the deductions are to be taken as a total of all the deductions in an agreement or if each deduction is considered individually. The basis of a reasonable deduction remains unclear, specifically what makes a deduction reasonable or unreasonable. The scope of the reasonableness of deductions remains largely untested. More case law is required to determine the extent which this will deterring modern slavery behaviours in New Zealand.

c. Health and Safety at Work Act

The Health and Safety at Work Act 2015 provides the minimum health and safety requirements that an employer must maintain. It is under this Act that the standard of the accommodation is set. The duty of care for accommodation held by the person conducting a business or undertaking (PCBU)¹⁰¹ is stated in s 36. Under this section, the PCBU must, as far as reasonably practicable, maintain the accommodation so that the worker is not exposed to risks to their health and safety from the accommodation. Provided the worker occupies accommodation owned, managed or controlled by the PCBU, and the occupancy is necessary for employment or engagement because other accommodation is not reasonably available, the PCBU is responsible for the accommodation.¹⁰²

The Work Safe New Zealand website provides a fact sheet with guidelines for those supplying accommodation. It includes the availability of beds, toilets and showers, kitchen facilities and other amenities. Further, it states that all new buildings have to comply with the Buildings Act 2004. But, the fact sheet is a set of guidelines that are not enforceable in law.¹⁰³ The employers are held to the standard that accommodation must not be a risk to health and safety. This does not provide the guarantee that those living in the accommodation provided by employers will be protected from indignities or degrading conditions or treatment, like women having to share a room with men. Further, if accommodation is reasonably available outside of that supplied by the employer, then the employer may not be held to the minimum standard in the Health and Safety Act 2015, allowing their behaviour to be risky to the health and safety of workers. The standard of accommodation that employers are required to provide is inadequately addressed in New Zealand law. The Health and Safety at Work Act 2015 requires that the accommodation be kept to a standard which does not pose a health and safety risk, but the section gives no guidance as to what a health and safety risk in terms of accommodation requires.¹⁰⁴ Regardless, this standard will not include requirements to protect the mental health and dignity of workers. The dignity of workers should be an important consideration for employers, especially those which provide accommodation.

¹⁰¹ Health and Safety at Work Act 2015, s 17.

¹⁰² Ibid, s 36.

¹⁰³ Work Safe New Zealand *Fact Sheet: Worker Accommodation* (October 2016).

¹⁰⁴ Above n 101, s 36.

The only guidance provided to employers is the fact sheet published by Work Safe New Zealand,¹⁰⁵ which includes a set of guidelines with no indication as to what must be included to meet the standard of not posing a health and safety risk. Although industry groups have adopted this fact sheet,¹⁰⁶ it remains inadequate in ensuring that all workers, especially vulnerable ones, are entitled to a standard of accommodation that is not dehumanising, or provide employers with the ability to exercise significant control over workers. A minimum standard of accommodation should be required by the Health and Safety at Work Act 2015 and included in the board and lodging deduction section in the Wages Protection Act 1983.¹⁰⁷ This minimum standard should have many of the components of the Work Safe New Zealand factsheet,¹⁰⁸ especially requirements for room dimensions and furnishing accommodations with suitable beds and mattresses, washing facilities, safe drinking water, heating and smoke alarms. Although many of these would likely be included already as posing a health and safety risk, having a detailed list of requirements that are widely available would aid in the understanding and the enforceability of the minimum standard of accommodation.

VI. Recommendations

New Zealand must improve the law that addresses modern slavery in order to deter behaviour and prevent behaviours commonly associated with modern slavery. To do this, New Zealand needs to adequately enforce the law it already has, clarify confusing provisions and make adjustments and additions to areas of law that are not addressing common behaviours.

Currently, New Zealand labour inspectors are understaffed and are performing a large number of important functions in the New Zealand labour environment. More labour inspectors are needed to aid and ensure that perpetrators can be caught in order to deter future behaviours. In addition, larger penalties for serious breaches under the Employment Relations Act 2000 need to be awarded by courts to deter behaviour. Small penalties, like that in *Peter Reynolds Mechanical Ltd Trading as The Italian Job Service Centre v James Denyer, Labour Inspector*,¹⁰⁹ will not deter behaviour, as it will be seen as a cost of doing business. To prevent this, a minimum penalty should be imposed as a guideline for the Courts, in addition to the possibility of larger penalties for widespread or recurring instances of modern slavery behaviours.

The identification of victims needs improvement. It is well-known that migrant workers are the most likely to be exploited.¹¹⁰ More needs to be done to protect them before they become victims, and identify those that are. A change in immigration practices which ensures that all migrant workers become aware of the minimum labour law rights in New Zealand will help to reduce the number of migrant workers that become victims of modern slavery in New Zealand. An alternative method needs to be developed to encourage those who believe they are not receiving their minimum entitlements, rather than having to call the Ministry of Business,

¹⁰⁵ Above n 103.

¹⁰⁶ New Zealand Dairy Workers Union “Managing Health and Safety: A Guide for Farmers” (June 2014), at 26.

¹⁰⁷ Above n 94, s 7.

¹⁰⁸ Above n 103.

¹⁰⁹ *Peter Reynolds Mechanical Ltd Trading as The Italian Job Service Centre v James Denyer, Labour Inspector* [2016] NZCA 464

¹¹⁰ (21 October 2015) 709 NZPD 7419; International Labour Organisation *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (International Labour Organisation, Report, September 2017); Department of Labour *Plan of Action to Prevent People Trafficking* (July 2009)

Innovation and Employment (MBIE) office to report the behaviour. This will help identify instances of modern slavery, especially against migrant workers.

The provisions surrounding deductions from wages need to be reworked to prevent a gap in New Zealand law. Particularly, guidelines for what an unreasonable deduction is will aid in the application of the deduction provisions.¹¹¹ Currently, it is not clear what the unreasonable provision applies to, clarifying this will help to deter modern slavery behaviours. In addition, the board and lodging provision needs to be reworded, it is unclear and lengthy without additional support to interpret. Clarifying the provision will enable workers and employers to be aware of their right and responsibilities. This will prevent the employers who aim to do the minimum legally required standard from carrying out modern slavery behaviours.

Finally, a minimum standard of accommodation provided to workers should be included in the law. In particular, requirements that prevent dehumanising conditions for those living there. Although many would already pose a health and safety risk, having a detailed list of requirements that are widely available will aid in the understanding and the enforceability of the minimum standard of accommodation.

VII. Conclusion

The enforcement and penalties of the New Zealand law do not deter behaviours associated with modern slavery. The current law needs to be improved to clarify provisions in order to increase the understanding of the rights and responsibility by workers and employers. Importantly, the number of labour inspectors needs to be increased in order to identify and prosecute cases of modern slavery, as currently, perpetrators are unlikely to be caught. If perpetrators believe they are unlikely to be caught, then their behaviour will not be deterred. In addition, the penalties that are imposed on minimum employment standard breaches need to be higher to deter behaviour. High profile cases, such as *R v Ali*¹¹² and *Masala*,¹¹³ and reports on migrant worker exploitation in the media¹¹⁴ have drawn attention to behaviours associated with modern slavery to the wider public. As a result, legislation has changed and new precedence has been set which has improved New Zealand's modern slavery law. More improvement is needed to ensure that the New Zealand law deters behaviours that are commonly associated with modern slavery in New Zealand.

¹¹¹ Above n 94, s 5A.

¹¹² Above n 59.

¹¹³ Above n 83.

¹¹⁴ Above n 3; Above n 2.