

Regulatory Systems (Workforce) Amendment Bill (No 2)

Government Bill

Explanatory note

General policy statement

This Bill is an omnibus Bill and one of a package of 3 omnibus Bills that contain amendments to legislation administered by the Ministry of Business, Innovation, and Employment. The policy objective of the Bill is to improve regulatory systems by ensuring that they are effective and efficient and accord with best regulatory practice. The amendments will achieve this objective by—

- clarifying and updating statutory provisions to give effect to the purpose of each Bill’s principal Act and its provisions:
- addressing regulatory duplication, gaps, errors, and inconsistencies within and between different pieces of legislation:
- keeping the regulatory system up to date and relevant:
- removing unnecessary compliance costs and costs of doing business.

The amendments were identified as part of the Ministry’s regulatory systems work programme, which arises from the chief executive’s responsibility to relevant Ministers for the stewardship of the legislation administered by the Ministry under section 32 of the State Sector Act 1988.

The Bill responds to the New Zealand Productivity Commission’s June 2014 report, *Regulatory Institutions and Practices*. The report states that it can be difficult to find time on the parliamentary calendar for “repairs and maintenance” of existing legislation. As a result, regulatory agencies often have to work with legislation that is out of date or not fit for purpose. This creates unnecessary costs for regulators and regulated parties and means that regimes may not keep up with public or political expectations.

The Bill is a vehicle for smaller regulatory fixes to the Holidays Act 2003, the Employment Relations Act 2000, and the Parental Leave and Employment Protection Act 1987 to be progressed in a timely and cost-effective fashion in order to deliver the

flow-on benefits to business and the wider economy. It includes the following amendments.

Holidays Act 2003

The amendment to the Holidays Act 2003 clarifies that the maximum penalty for a person involved in a breach depends on whether the person is an individual or a body corporate, rather than depending on whether the employer is an individual or a body corporate.

Employment Relations Act 2000

The purpose of the change with respect to the Remuneration Authority is to allow for the Remuneration Authority to set the remuneration of Employment Relations Authority members who are delegated to take over the responsibilities of the Chief of the Authority. An amendment to the Remuneration Authority Act 1977 is also required to effect this change.

The amendment clarifying the powers of Labour Inspectors will allow for more effective proactive enforcement of employment standards. Clarifying that Labour Inspectors may use their investigative powers to ascertain whether workers are employees will ensure that Labour Inspectors can access sufficient information to form a view on workers' employment status (this being a necessary precursor to the enforcement of employment standards).

Remuneration Authority Act 1977

This change is in line with the related change to the Employment Relations Act 2000 (allowing for the Remuneration Authority to set the remuneration of Employment Relations Authority members who are delegated to take over the responsibilities of the Chief of the Authority).

Parental Leave and Employment Protection Act 1987

The amendments to the Parental Leave and Employment Protection Act 1987 clarify that the spouse or partner of a biological mother can become the primary carer of a child in cases where—

- the spouse or partner is not a transferee of, or successor to, any entitlement of the mother to a parental leave payment; and
- the spouse or partner takes permanent primary responsibility (to the exclusion of the mother) for the child's welfare for any reason, for example, if the biological mother dies; and
- at the time the spouse or partner takes that permanent primary responsibility, the biological mother either has not applied for, or does not qualify to apply for, a parental leave payment.

Departmental disclosure statement

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2018&no=101>

Regulatory impact assessment

The Ministry of Business, Innovation, and Employment produced a regulatory impact assessment on 5 December 2016 to help inform the policy decisions in relation to the Employment Relations Act 2000 and Holidays Act 2003 taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact assessment can be found at—

- <http://www.mbie.govt.nz/about/our-work/roles-and-responsibilities/regulatory-systems-programme/regulatory-systems-bills/documents-image-library/ris-clarifying-inspectors-ability-to-investigate-whether-workers-are-employees.pdf>
- <http://www.treasury.govt.nz/publications/informationreleases/ris>

The Regulatory Quality Team at the Treasury has determined that the regulatory decisions in relation to the Parental Leave and Employment Protection Act 1987 are exempt from the requirement to provide a regulatory impact assessment because they are likely to have minor impacts.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 provides that this Bill comes into force on the day that is 2 months after the date on which it receives the Royal assent.

Part 1

Amendments to Employment Relations Act 2000 and consequential amendment

Subpart 1—Amendments to Employment Relations Act 2000

Clause 3 states that *subpart 1 of Part 1* amends the Employment Relations Act 2000 (the **ERA**).

Clause 4 amends section 171(3) of the ERA to allow for enhanced remuneration for members of the Employment Relations Authority to whom the functions, duties, or powers of the Chief of the Authority (the **Chief**) have been delegated.

Clause 5 inserts *new section 229A*, which authorises a Labour Inspector to use the powers under section 229 of the ERA to investigate the question of whether an

employment context exists (and therefore is a situation to which various employment-related statutes apply).

Clause 6 amends section 230 to add a cross-reference to *new section 229A*.

Clause 7 amends section 231 to provide for a warrant in circumstances where *new section 229A* applies.

Clause 8 amends section 233 to add a cross-reference to *new section 229A*.

Clause 9 amends section 233A to add a cross-reference to *new section 229A*.

Subpart 2—Consequential amendment

Clause 10 replaces an item in Schedule 4 of the Remuneration Authority Act 1977 consequential on the amendment in *clause 4* of the Bill allowing the Remuneration Authority to set the remuneration of the members of the Employment Relations Authority to whom the Chief's functions, duties, or powers have been delegated.

Part 2

Amendment to Holidays Act 2003

Clause 11 amends section 75(1)(a) and (b) of the Holidays Act 2003. That section provides for 2 tiers of penalties (one for individuals, another for corporations). The amendment clarifies that those tiers apply to any person who is involved in a failure to comply with specified provisions of that Act according to whether that person is an individual or a corporation instead of according to whether the principal contravener (in whose failure to comply the person is involved) is an individual or a corporation.

Part 3

Amendments to Parental Leave and Employment Protection Act 1987

Clause 12 states that *Part 3* amends the Parental Leave and Employment Protection Act 1987 (the **PLEPA**).

Clause 13 amends section 1B(5) of the PLEPA to refer to the possibility of the spouse or partner of a primary carer becoming the primary carer of a child.

Clause 14 amends section 7 to provide that a spouse or partner of the biological mother is the primary carer of a child where the child is under 1 year of age, the spouse or partner has taken permanent primary responsibility for the care, development, and upbringing of the child to the exclusion of the biological mother, and, at the time the spouse or partner took that permanent primary responsibility, the biological mother either had not applied for, or did not qualify to apply for, a parental leave payment.

Clause 15 amends section 8 to ensure that a spouse or partner who is a primary carer under the *new section 7(1)(b)(iii)* is not disqualified from entitlements under the

PLEPA as a primary carer because of having taken partner's leave before becoming the primary carer.

Clause 16 amends section 10 to provide for primary carer leave for a spouse or partner who is a primary carer under *new section 7(1)(b)(iii)* to begin within a reasonable period after the spouse or partner becomes the primary carer, on the date agreed upon between employer and employee.

Clause 17 amends section 30B to allow a spouse or partner who is a primary carer under *new section 7(1)(b)(iii)* to request negotiated carer leave within a reasonable period after becoming the primary carer.

Clause 18 amends section 31 to provide that a spouse or partner who is a primary carer under *new section 7(1)(b)(iii)* must give notice of their wish to take parental leave within a reasonable period after becoming the primary carer.

Clause 19 amends section 36 to provide that the employer's notice responding to the employee's request for parental leave must be given, in the case of a spouse or partner who is a primary carer under *new section 7(1)(b)(iii)*, within a reasonable period after the employee becomes the primary carer, but not later than the 21-day period provided under section 36(1) and (2).

Clause 20 amends section 71D to ensure that a spouse or partner who is a primary carer under *new section 7(1)(b)(iii)* is not disqualified from a parental leave payment because of having taken partner's leave before becoming the primary carer.

Clause 21 amends section 71I to provide for a spouse or partner who is a primary carer under *new section 7(1)(b)(iii)* to apply for a parental leave payment within a reasonable period after becoming the primary carer.

Clause 22 amends section 71K to provide that, in the case of a person who is a primary carer of a child under *new section 7(1)(b)(iii)*, the parental leave payment period ordinarily begins on the date that the person designates, which must ordinarily be on, or within a reasonable period after, the date on which the person becomes the primary carer.

Hon David Parker

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Regulatory Systems (Workforce) Amendment Act **(No 2) 2018**.

2 Commencement

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This Act comes into force on the day that is 2 months after the date on which it receives the Royal assent.

Part 1

Amendments to Employment Relations Act 2000 and consequential amendment

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Subpart 1—Amendments to Employment Relations Act 2000

3 Amendments to Employment Relations Act 2000

This subpart amends the Employment Relations Act 2000.

4 Section 171 amended (Salaries and allowances)

In section 171(3), after “Chief of the Authority”, insert “or of a member of the Authority to whom a delegation has been made under section 166B”. 15

5 New section 229A inserted (Investigating question of employment)

After section 229, insert:

229A Investigating question of employment

- (1) For the purpose of performing the Labour Inspector’s functions and duties under any Act specified in section 223(1), a Labour Inspector may, subject to sections 229(5), (5A) and (6) and 230 to 233, also exercise any of the powers under section 229 to investigate whether— 5
- (a) any place is a workplace; or
 - (b) any person performing work is an employee (as distinct, for example, from an independent contractor or a volunteer); or
 - (c) any person for whom work is being performed is an employer.
- (2) In relation to the exercise of those powers in such an investigation, section 229 is to be read with any appropriate modifications, including that— 10
- (a) the power of entry under section 229(1)(a) applies with respect to any premises where the Labour Inspector has reasonable grounds to believe work is being performed; and
 - (b) the power to interview under section 229(1)(b) applies with respect to any person present in such premises; and 15
 - (c) **employee**, except in the reference in section 229(1)(a) to any other employee of the department, includes any person who performs work; and
 - (d) **employer** includes any person for whom work is performed; and 20
 - (e) the powers under section 229(1)(c) and (d) apply with respect to any record or document that the Labour Inspector reasonably believes may assist in determining a matter referred to in **subsection (1)(a) to (c)**.
- (3) Every person for whom work is performed and who, without reasonable cause, fails to comply with any requirement made of that person under section 229(1)(c) or (d) as modified by **subsection (2)(e)** is liable, in an action brought by a Labour Inspector, to a penalty under this Act imposed by the Authority. 25

6 Section 230 amended (Entry of dwellinghouses)

In section 230(1), replace “section 229” with “section 229 or **229A**”. 30

7 Section 231 amended (Entry warrant)

Replace section 231(a) and (b) with:

- (a) is a place in which any person is employed or is the only practicable means through which such a place may be entered; or
- (b) in any case to which **section 229A** applies, is a place in which any person performs work or is the only practicable means through which such a place may be entered,— 35

8 Section 233 amended (Obligations of Labour Inspectors)
In section 233(1), (2), and (3), replace “section 229(1)(a)” with “section 229(1)(a) or **229A**”.

9 Section 233A amended (Obligation of Labour Inspector and department not to disclose information) 5
In section 233A, replace “section 229” with “section 229 or **229A**”.

Subpart 2—Consequential amendment

Amendment to Remuneration Authority Act 1977

10 Amendment to Remuneration Authority Act 1977

(1) This section amends the Remuneration Authority Act 1977. 10

(2) In Schedule 4, replace the item relating to the Chief and other members of the Employment Relations Authority with:
The Chief of the Employment Relations Authority, members of the Employment Relations Authority to whom a delegation has been made under section 166B of the Employment Relations Act 2000, and other members of the Employment Relations Authority 15

Part 2

Amendment to Holidays Act 2003

11 Amendment to Holidays Act 2003

(1) This section amends the Holidays Act 2003. 20

(2) In section 75(1)(a) and (b), after “employer”, insert “or the person who is involved in the failure to comply”.

Part 3

Amendments to Parental Leave and Employment Protection Act 1987 25

12 Amendments to Parental Leave and Employment Protection Act 1987
This Part amends the Parental Leave and Employment Protection Act 1987.

13 Section 1B amended (Outline)

In section 1B(5),—

(a) replace “or for” with “, for”; and 30

(b) after “(see section 72B)”, insert “, or for the spouse or partner of a primary carer to become the primary carer of a child (see **section 7(1)(b)(iii)**)”.

14 Section 7 amended (Meaning of primary carer)

After section 7(1)(b)(ii), insert:

- (iii) neither subparagraph (i) nor (ii) applies and all of the following are true:
 - (A) the child is under 1 year of age; and
 - (B) the spouse or partner, because of the death of the biological mother or for any other reason, has taken permanent primary responsibility for the care, development, and upbringing of the child to the exclusion of the biological mother; and
 - (C) at the time the spouse or partner took that permanent primary responsibility, the biological mother either had not applied for, or did not qualify to apply for, a parental leave payment:

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15 Section 8 amended (Entitlement to primary carer leave)

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After section 8(2), insert:

- (3) Subsection (2) does not apply to an employee who is a primary carer under **section 7(1)(b)(iii)**.

16 Section 10 amended (Date of commencement of primary carer leave)

After section 10(a), insert:

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- (aa) in the case of an employee who is a primary carer under **section 7(1)(b)(iii)**, on the date, within a reasonable period after the date on which the employee becomes the primary carer in respect of the child, that the employee and the employer agree upon; or

17 Section 30B amended (Employee may make request)

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After section 30B(3)(a), insert:

- (aa) in the case of an employee who is a primary carer under **section 7(1)(b)(iii)**, within a reasonable period after the employee becomes the primary carer in respect of the child; or

18 Section 31 amended (Obligation to notify employer)

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After section 31(3), insert:

- (4) Despite subsection (3), in the case of an employee who is a primary carer under **section 7(1)(b)(iii)**, the notice under subsection (1) must be given within a reasonable period after the employee becomes the primary carer in respect of the child.

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19 Section 36 amended (Obligation to notify employee)

After section 36(2), insert:

(2A) In the case of an employee who is a primary carer under **section 7(1)(b)(iii)**, the employer must give notice under subsections (1) and (2) within a reasonable period, but not later than within the period provided for in those subsections.

20 Section 71D amended (Entitlement to parental leave payments) 5

After section 71D(2), insert:

(2A) Subsection (2) does not apply to an employee who is a primary carer under **section 7(1)(b)(iii)**.

21 Section 71I amended (Applications for payment)

After section 71I(2), insert: 10

(2A) Despite subsection (2), in the case of an employee who is a primary carer under **section 7(1)(b)(iii)**, the application must be made within a reasonable period after the employee becomes the primary carer in respect of the child.

22 Section 71K amended (Start of parental leave payment)

After section 71K(3), insert: 15

(4) Despite subsections (1) to (3), in the case of a person who is a primary carer under **section 7(1)(b)(iii)**, the parental leave payment period begins,—

(a) if the person is an employee who takes a period of paid leave at the start of his or her parental leave period, on the day after the date on which that period of paid leave ends, if the person so elects; and 20

(b) otherwise, on the date that the person designates, which must be on, or within a reasonable period after, the date on which the person becomes the primary carer in respect of the child.