
Crimes (Theft by Employer) Amendment Bill

12/10/2023

Submission on Crimes (Theft by Employer) Amendment Bill 2023

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Crimes (Theft by Employer) Amendment Bill (**Bill**), which seeks to amend the Crimes Act 1961 (**Act**) to clarify that not paying an employee their wages is theft.¹
- 1.2 This submission has been prepared with input from the Law Society’s Criminal Law Committee and Employment Law Committee.² For the reasons set out below, the Law Society recommends this Bill not proceed in its current form. Further policy work is first needed to address the significant legal and practical issues which will arise as a result of the current drafting, and to establish how the Bill will achieve the objective of ensuring employees are ultimately “paid what they are due”.³
- 1.3 If the Bill is reinstated in the new Parliament, the Law Society wishes to be heard in relation to this submission.

2 Problems with achieving objective of Bill

- 2.1 The “General policy statement” in the Bill states:
- “Currently, offences relating to theft by a person in a special relationship are insufficient to account for wage theft by employers. Existing processes are too complex, and can be a deterrent for those that are victims of wage theft.”
- 2.2 The first sentence is true to a point, as the offence in section 220 of the Act is not an effective provision to deal with deliberate non-payment in circumstances where a defendant could pay money due, but evades the legal responsibility to do so. The second sentence may also be true to some extent – employees who are not paid what they are due can seek a civil remedy, but this may, or may not, result in full or part-payment of what they are owed.
- 2.3 However, if this Bill is passed, the costs of litigation will transfer to the Crown, and so too will any money recovered by way of fines. This is because section 32 of the Sentencing Act 2002, which authorises a court to order reparation, applies only where the commission of the offence has caused a person to suffer:
- (a) loss of or damage to property; or
 - (b) emotional harm; or
 - (c) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

¹ Explanatory Note of the Bill.

² See the Law Society’s website for more information about these committees:
<https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

³ Explanatory Note.

2.4 Of these only (a) could plausibly be relevant to the proposed new offence. However, in our view, the better interpretation is that the new offence would not cause a person to suffer “loss of or damage to property”. Section 2 of the Act states:

“**property** includes real and personal property, and any estate or interest in any real or personal property, money, electricity, and any debt, and any thing in action, and any other right or interest”

2.5 A person who performs duties under an employment agreement, but is not paid what is due, does not lose “property”. They have exactly what they had before non-payment – i.e., a “thing in action”⁴ or a right which they can seek to enforce by law if necessary. If the wages are not paid, the “thing in action” remains in the employee’s hands. Its value is effectively diminished, but it is neither lost nor damaged.

2.6 Therefore, any money recovered by way of fines will likely be passed on to the Crown, rather than the affected employees. We note the Bill does not contain any mechanism which would allow for this money to be transferred to the affected employees. As a result, it is unclear how the Bill will ultimately ensure these employees are “paid what they are due”.⁵ We recommend the select committee give further thought to how the Bill could be modified to achieve this objective, if it is to proceed.

3 The scope and definition of person ‘A’ (the employer)

Impact on the Crown

3.1 Section 2 of the Act contains a broad definition of “person” which includes, inter alia, the Crown. This definition will apply to the provisions amended by the Bill, unless the context requires otherwise.

3.2 As a general rule, the Crown is not amenable to prosecution unless a statute specifically says so.⁶ Given the Crown is the largest employer in New Zealand, it is important to clarify whether the intention is for the Crown to be amenable to prosecution under this proposed legislation. If so, we note that this would be a significant expansion of the Crown’s potential liability.

Limited liability companies

3.3 Another key issue is that a significant proportion of employers in New Zealand will be operating through limited liability companies.⁷ While many of these are likely to be ‘one-person’ companies with a single dominant shareholder, any employment agreement will be with the company, and not the dominant shareholder. If the dominant shareholder chooses not to ensure the company pays its employees, the company could, under the proposed new offence, be prosecuted and, if found guilty, fined.

⁴ See the definition in s 48 of the Property Law Act 2007.

⁵ Explanatory Note.

⁶ See, for example, Crown Organisations (Criminal Liability) Act 2002, s 6.

⁷ This is recognised in the proposed penalty provisions but not elsewhere in the Bill.

- 3.4 In such circumstances, it is possible for unscrupulous traders to simply liquidate the company, leaving unpaid debts (including unpaid wages) behind. There is then no mechanism under the Bill to ensure the affected employees are paid any amounts they are owed (noting that any penalty imposed on the company could not be used to pay affected employees, as discussed above). There would be the possibility for the dominant shareholder to be prosecuted as a secondary party to any offending by the company, but that may be procedurally difficult, and therefore, a rather ineffective deterrent.
- 3.5 The use of a corporate structure will also raise questions about the relationship between the proposed new offence, and the legal duties imposed by insolvency laws and/or laws governing company directors (as discussed further below, in section 8).

Overseas employers

- 3.6 It should also be noted that there may be an issue of extra-territoriality, as it is increasingly common for persons resident in New Zealand to be employed by overseas employers. We recommend clarifying whether the Bill intends for such employers to be liable to prosecution in New Zealand.

4 Effect on employees covered by collective agreements

- 4.1 New section 220AA(1)(b) clarifies that the provisions in the Bill only apply where the employer is required to pay money to the employee under an employment agreement *between them* (i.e., under an individual employment agreement), or as otherwise required by law. The drafting of this provision effectively excludes employees who are covered by collective agreements (which can be between one or more employers, and one or more unions, but which do not have the individual employees as party to the agreement).⁸ As the exclusion of this cohort of employees is likely unintended, we recommend amending the Bill to clarify that the proposed provisions also apply to employees who are covered by collective agreements.

5 Effect on contracts of service

- 5.1 As currently drafted, it may be unclear whether the proposed offence in new section 220AA(1) will extend to cases where payment is due under an enforceable contract for service. We acknowledge that new section 220AA(1) will apply where person A employs person B, and person A is required to pay any money owed to B in relation to the employment. However, the use of the phrase “as required under law” in subsection (1)(b)(ii) could suggest the offence also applies to other contracts for service. This could create confusion, and difficulties in enforcing the legislation where an employer disputes the classification of a worker under the Bill. The application of this clause should therefore be clarified.

⁸ Employment Relations Act 2006, s 5.

5.2 In doing so, the select committee will need to consider whether the proposed offence should extend to individuals who are engaged under contracts for services, and are not paid what they are owed under those contracts. In offering greater protections only for employees, the Bill may lead to undesirable outcome of exploitative employers looking to make greater use of contracts for services to obtain services without payment.

6 Issues arising from requirement to pay “money owed”

6.1 A potential problem with new section 220AA is that it may not be clear at any given time whether or not particular sums of money are due by law.⁹ For example, is it intended that the offence will be committed if an employer does not pay the sum which the employee claims is due, but the employer disputes liability, and the position is later resolved by the Employment Relations Authority or a court? Such decisions would have retrospective effect in relation to the contractual rights and obligations of the parties, but it would be a fairly drastic step to make it the basis for criminal liability. It is important to give further thought to how such issues will be addressed under the proposed legislation.

7 The mens rea element of the proposed offence

7.1 Section 219 of the Act states that theft or stealing is the act of:

- “(a) dishonestly and without claim of right, taking any property with intent to deprive any owner permanently of that property or of any interest in that property; or
- (b) dishonestly and without claim of right, using or dealing with any property with intent to deprive any owner permanently of that property or of any interest in that property after obtaining possession of, or control over, the property in whatever manner” (emphasis added).¹⁰

7.2 We note the Bill does not adopt the ‘dishonestly and without claim of right’ formula used in the Act as part of mental element for the offence (the test is simply whether the employer “intentionally fails to pay the money” to the employee).¹¹ We suggest it would also be helpful to include the ‘dishonestly and without claim of right’ formula in proposed new section 220AA. This could address issues which arise where, for example:

- (a) the employer genuinely disputes the amount owed to the employee, or
- (b) the employee has freely agreed to receive less than the actual wages due (for example, where the employer has given a loan to the employee, which is being repaid by deductions from the employee’s wages).

⁹ We understand there have been, for example, numerous matters before the Employment Court and the Employment Relations Authority regarding the amounts owed in relation to holiday pay and minimum wage.

¹⁰ Section 2 of the Act defines “claim of right” as “a belief at the time of the act in a proprietary or possessory right in property in relation to which the offence is alleged to have been committed, although that belief may be based on ignorance or mistake of fact or of any matter of law other than the enactment against which the offence is alleged to have been committed”.

¹¹ New s 220AA(2)

7.3 It may also be helpful to clarify that an employer would be liable only where they fail to pay any money owed at the time payment is due, *and* the employer is reckless as to the possibility that the employee will not receive the full amount due.¹² This would help avoid undesirable outcomes where, for example:

- (a) the timely payment of wages is impacted by events which are outside the employer's control (such as a power cut or an internet outage); or
- (b) an employer who knows that their payroll system underpays holiday pay, and intends to remedy this as soon as possible.

8 Relationship with other enactments

Insolvency Act and Companies Act

8.1 Another issue which requires further consideration relates to the legal obligations an employer may have if they are not in a position to meet all their financial obligations. If an employer simply does not have the money to meet all obligations, it follows that someone must miss out. It is also important to note that the inability to meet financial obligations may be the result of events which are completely outside the employer's control (and this is particularly likely to be the case for employers that are smaller businesses, with the impacts of Covid-19 on small businesses being a recent example). The select committee must therefore consider how the proposed offence provisions apply to employers who become insolvent, or cannot meet all their financial obligations.

8.2 Under the Insolvency Act 2006, a debtor commits an act of bankruptcy if they make any payment to an employee, which they know will advantage the employee over other creditors.¹³ At that point any creditor (not just an unpaid employee) can apply to the court to have the bankrupt's property pass to the Assignee.¹⁴ The court *may* – not *must* – then empower the Assignee to carry on the business of the bankrupt. However, liquidation and closure of the debtor company is a real possibility, terminating the employment.

8.3 We acknowledge that section 274(2) of the Insolvency Act gives a limited preference to employees who are creditors of the insolvent company, but only with regard to wages due for the four-month period before adjudication (and not from the time of bankruptcy, or from four months before bankruptcy).

8.4 The Insolvency Act also contains offences which involve incurring credit without a reasonable basis for believing the debt could be paid when it and all other debts fell due,¹⁵ and making payments which favour one creditor over another.¹⁶ As a result, there is a risk the enactment of the proposed offence might leave an employer in a position where paying employees in full would amount to an offence under the Insolvency Act, and not paying them in full would be an offence under the Crimes Act.

¹² The offence of 'receiving', for example, includes a recklessness test – see s 246(1) of the Act.

¹³ Insolvency Act, s 19.

¹⁴ Insolvency Act, s 50(1).

¹⁵ Insolvency Act, s 419.

¹⁶ Insolvency Act, s 420.

- 8.5 Furthermore, the Companies Act 1993 imposes certain duties on directors – the principal one being to act in the best interests of the company.¹⁷ This also raises the possibility that the directors of a company with a cash-flow problem, which could be avoided by delaying payments owed to employees, could be in breach of the proposed section 220AA if they delay payment, and in breach of the Companies Act if they make the payments.
- 8.6 While these conflicting situations might not arise with much frequency, the Bill appears to oversimplify the legal position of such employers, and has the potential to create at least as much uncertainty as it hopes to avoid. We therefore strongly recommend clarifying these matters in the Bill, if it proceeds.

Employment Relations Act

- 8.7 It is also not clear how the proposed offence provisions in the Bill interact with the relevant existing non-payment provisions in the Employment Relations Act 2006 (**ERA**), including in particular:
- (a) Section 134, which states that every party to an employment agreement who breaches that agreement is liable to a penalty under the ERA;
 - (b) Section 133, which states that the Employment Relations Authority has full and exclusive jurisdiction to deal with all actions for the recovery of penalties under the ERA for any breach of an employment agreement; and
 - (c) Section 228, which provides that a Labour Inspector may commence an action on behalf of an employee to recover any wages or holiday pay or other money payable by an employer to that employee under the Fair Pay Agreements Act 2022, the Holidays Act 2003, or the Minimum Wage Act 1983.
- 8.8 We invite the select committee to consider how the proposed new offence interacts with this existing legislation which already places legal obligations on employers.

9 Number of offences

- 9.1 Finally, we note the Bill does not clarify whether a repeated failure to pay wages would be one offence involving the whole shortfall, or whether each underpayment would be a separate offence. It is important that this is clearly specified in the Bill, as prosecutors are required to provide sufficient detail which allow the person who is charged with an offence to identify the substance of that offence.¹⁸
- 9.2 The select committee may wish to consider the following when clarifying this point:
- (a) It may be easier to identify the total shortfall of wages, rather than particular payments showing underpayment of specific amounts.
 - (b) If each instance of non-payment is a separate offence, an employer could be charged with a large number of offences, with disproportionate penalties. Conversely, if there is to be one offence for the total sum owed, the maximum penalties in the Bill may be too low to be an effective deterrent.

¹⁷ Companies Act, s 131(1).

¹⁸ Criminal Procedure Act 2011, s 17(4).

- (c) The possible social stigma attached to each separate conviction (noting that there may be a significant difference between, for example, one conviction for an underpayment of \$1,000 over 20 weeks, and a total of 20 convictions, all for \$50).

A handwritten signature in black ink that reads "David Campbell". The signature is written in a cursive style with a large initial "D" and "C".

David Campbell
Vice-President