New Zealand Law Society
Te Kāhui Ture o Aotearoa

Employment Relations (Termination of Employment by Agreement) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

22 May 2025

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Employment Relations (Termination of Employment by Agreement) Amendment Bill (**Bill**), which seeks to allow for the termination of employment contracts by mutual consent between the parties in certain circumstances.[1]

1.2 This submission has been prepared with input from the Law Society's Employment Law Committee.[2]

1.3 The Law Society does not wish to be heard in relation to this submission.

2 Relationship with the current legal framework and upcoming policy reforms

2.1 The Government recently announced upcoming changes to the Employment Relations Act 2000 (**Act**) which will introduce an income threshold of $180,000 per annum for unjustified dismissal personal grievances.[3] If those changes are introduced, the Act would provide for two ways of terminating high income earners' employment agreements where there is no employment relationship problem. It would be prudent to consider the reforms in this Bill in conjunction with those wider reforms in order to ensure both sets of legislative changes are workable.

2.2 It is also worth noting the common law currently recognises, in employment cases, that:

(a) An employee may be able to satisfy a constructive dismissal claim in circumstances where they are given no option but to resign, or where the employer follows a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.[4]

(b) Without prejudice communications are protected under the common law, and are deemed inadmissible as evidence in certain circumstances,[5] and it is irrelevant which party initiated the without prejudice discussion in such circumstances.[6]

2.3 If enacted, this Bill will likely supersede these long-standing common law principles. In our view, further policy work should first be completed in order to understand the full extent of the impact these amendments could have on the current legal landscape, and to gauge whether the policy objective of the Bill could be achieved in other ways (ideally, alongside other reforms which have been announced, as noted above). We do not recommend the Bill proceed until this additional policy work has been completed.

2.4 If the Bill is nevertheless to proceed, we make the following comments and recommendations to improve its drafting and clarity.

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1 Explanatory Note of the Bill.

2 See the Law Society's website for more information about this Committee: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/employment-law-committee/.

3 See: https://www.beehive.govt.nz/release/more-flexible-dismissal-process-high-income-employees.

4 *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374.

5 *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340.

6 Above n 5 at [31].

3 The scope of the Bill

3.1 As currently drafted, the Bill would enable employers and employees to agree to terminate their employment relationship for *any* reason (including for the sole purpose of avoiding legal consequences which would otherwise follow if either party failed to meet their obligations under the Act).

3.2 The Select Committee should carefully consider whether it would be appropriate to enable employers and employees to bypass existing statutory processes and protections in this way, and whether it would be appropriate to expressly limit the scope of the Bill so these provisions cannot be used where (for example):

(a) either party alleges that there has been a breach of the duty to deal with each other in good faith; or

(b) an employee alleges that their employer has defaulted on the payment of wages or other money payable under their employment agreement.

4 Recommendations to improve the drafting and clarity of the Bill

Meaning of "offer"

4.1 It is unclear whether a verbal offer would be sufficient for the purposes of this clause, or whether any offer made under this new section needs to be in writing (noting the Bill only specifies that "agreements" made under this new section to be in writing).[7]

4.2 A written offer is more likely to:

(a) provide greater clarity to both parties as to whether the requirements of new section 101A have been met; and

(b) assist the employee with obtaining independent advice before accepting such an offer.

4.3 We therefore suggest amending new section 101A to clarify that an offer made to an employee under this section must be in writing, and clearly specify the terms of the offer, including:

(a) that the employment relationship would be terminated if the offer is accepted, and the employee would not have the ability to subsequently raise a personal grievance in relation to that offer;

(b) that the employee has a reasonable opportunity to obtain independent advice about the offer; and

(c) the specified sum that is to be paid by the employer to the employee under new section 101A(1)(a)(ii).

7 New section 101A(3)(a).

Meaning of "specified sum"

4.4 The Bill does not define this term, nor specify a minimum monetary sum the employer must offer to the employee under new section 101A(1)(a)(ii).[8] Further, the wording of new section 101A does not in itself *require* an employer to provide anything to an employee in full and final settlement of any cause of action (as the drafting appears to focus on the fact that anything offered would not constitute grounds for a personal grievance).

4.5 As a result, employers need not offer anything (including any monetary compensation) to an employee in return for their agreement to leave the employment without raising a personal grievance.

4.6 We query whether this is in fact the intention of the Bill (noting the first reading debates on the Bill refer to "compensation" for employees, including "a monetary sum, a reference, or other mutually agreed upon conditions").[9] If the intention is for employees to be compensated for leaving their employment (while losing their ability to raise a personal grievance), this should be clearly provided for in the Bill.

4.7 It could also be helpful to specify whether a minimum monetary sum should be paid to employees, and, if so, how that minimum sum is to be determined (this could be, for example, the employee's average weekly earnings over a specified period).

Meaning of "full and final settlement"

4.8 We recommend amending the Bill to clarify whether any full and final settlement of any cause of action under new section 101A(1)(a)(ii) applies:

(a) to both the employer and employee (i.e., with both agreeing to release the other from future claims arising from the employment relationship); or

(b) only to the employee.

Meaning of "cause of action arising out of the employment relationship"

4.9 We suggest defining this phrase to clarify the intended scope of the Bill. The definition could identify, for example, whether and how causes of action under new section 101A relate to:

(a) any of the employment relationship problems specified in section 161 of the Act;[10] and

(b) matters which are outside the exclusive jurisdiction of the Employment Relations Authority (**Authority**) (such as causes of action arising under the Privacy Act 2020 in relation to requests for personal information).

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8 An offer made under this new section could simply state, for example, that the "specified sum" is $1 (or even $0).

9 12 March 2025 (782 NZPD).

10 Including, for example, against the backdrop of the Supreme Court's decision in *FMV v TZB* [2021] NZSC 102.

Extent of protection for offers made under new section 101A(2)

4.10 New section 101A(2) states "an offer made to an employee under subsection (1) does not in itself constitute grounds for a personal grievance". We query whether such offers could nevertheless form grounds for other types of claims (including, for example, those relating to breaches of contract and breaches of good faith).

4.11 If the intention of the Bill is for employees to have no basis to make *any* claims under the Act, then this should be explicitly noted in new section 101A(2) (although we note our comments in section 3 above about limiting the scope of the Bill).

Meaning of "relevant legislation which applies to such settlement agreements"

4.12 New section 101A(3)(b) provides that agreements made under subsection (1) are enforceable only if the agreement states the "relevant legislation which applies to such settlement agreements". It is unclear whether "relevant legislation" is intended to be a reference to new section 101A, or whether this term also encompasses other legislative provisions. We suggest amending the Bill to clarify the meaning of this term.

Disclosure of terms of an agreement to an "employer's current employees"

4.13 New section 101A(4) states that an offer made under subsection (1) may include a requirement for both parties not to disclose any terms of the agreement to the "employer's current employees".

4.14 An employer's current employees could include, for example, staff from the employer's human resources and/or legal departments. These employees may be called upon to provide advice and assistance with preparing offers and agreements under new section 101A, and may consequently become privy to the terms of those agreements. We therefore invite the Select Committee to consider whether this clause should be amended or deleted.

4.15 If this clause is to remain, it would also be helpful to clarify why it is confined to an employer's "current" employees (and why it does not apply, for example, to an employer's former employees).

Prescribed form of offers and agreements which can be made under this Bill

4.16 Given the problems we have outlined above regarding the wording (and therefore, the scope) of this Bill, it could be helpful to prescribe the form and content of offers and agreements which can be made under new section 101A. This would give both employers and employees greater certainty as to whether they have each satisfied their obligations under this Bill.

4.17 We note these matters could be prescribed in regulations made under section 237 of the Act (and need not be set out in primary legislation).[11]

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11 It is worth noting that regulations which prescribe the form and content of certain documents already exist: see the Employment Relations (Prescribed Matters) Regulations 2000, which prescribes the forms of certain applications, certificates, notices and records.

Meaning of "pre-termination negotiations"

4.18 We suggest amending the definition of "pre-termination negotiations" in new section 101B(2) to clarify that these negotiations relate to offers made under new section 101A – i.e., discussions held or offers made should also satisfy the requirements in new section 101A in order for them to come within the definition of "pre-termination negotiation".

Inadmissibility of evidence of pre-termination negotiations

4.19 New section 101B(1) provides that evidence of pre-termination negotiations under section 101A is inadmissible in any proceeding before the Authority.

4.20 As noted above, the common law already recognises that 'without prejudice' communications can be protected and deemed inadmissible in proceedings in certain circumstances. However, there are several exceptions to the protected status of such communications under the common law, and while the Bill recognises one such exception (communications or information prepared for a dishonest purpose, or for the purpose of enabling or aiding the commission of an offence),[12] it does not recognise *all* exceptions under the common law.[13]

4.21 We invite the Select Committee to consider whether the Bill should be amended to provide that all common law exceptions to the without prejudice rule apply to new section 101B (noting further policy work would need to be undertaken to understand whether these exceptions could apply in the context of this Bill).

Unclear terms in new section 101B(3)

4.22 New section 101B(3) provides that, despite subsection (1), the Authority may admit evidence relating to pre-termination negotiations if it is satisfied there is a "prima facie case that the communication was made or received", or that the information was compiled or prepared for a "dishonest purpose".

4.23 These terms are not defined in the Bill or the Act, and their inclusion in the Bill could create confusion about:

(a) what constitutes a "dishonest purpose"; and

(b) what threshold must be met for there to be a "prima face case", and how this is to be measured.

12 New section 101B(3).

13 See *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, which states that protections are not available for communications which occur in circumstances where there is no dispute, or where the parties are not in a state of negotiations.

4.24 We suggest clarifying these terms in order to provide clear guidance on the admissibility of evidence relating to pre-termination negotiations. If these provisions are retained in the Bill in their current form, they could result in litigation about whether the exceptions in this new section apply (which would then cut across the objective of this Bill to provide for a simpler and more collaborative approach to the termination of an employment relationship, and to bypass stressful and time-consuming processes).[14]

David Campbell
Vice-President

14 See the first reading debates on the Bill (12 March 2025 (782 NZPD)).