

**Employment Relations  
(Termination of Employment by Agreement)  
Amendment Bill**

**Submissions on behalf of  
The Law Association of New Zealand  
by the  
Employment Law Committee**

## 1. INTRODUCTION

- 1.1 The Law Association of New Zealand (**TLANZ**) is an independent membership organisation representing over 7,000 legal professionals. Through its expert law committees, TLANZ provides informed contributions to legal review and policy advocacy. TLANZ' Employment Law Committee (**the Committee**) appreciates the opportunity to submit on the Employment Relations (Termination of Employment by Agreement) Amendment Bill (**the Bill**).
- 1.2 The Bill creates a protection mechanism for an employer to seek to terminate an employment agreement by mutual consent with the employee for a specified compensation sum, by precluding the application of the personal grievance procedure. The Bill enables negotiations to occur between an employer and an employee which are inadmissible in any future proceedings relating to the employment relationship unless certain exceptions apply. In our view the Bill raises many questions and concerns, particularly around how it would be aligned with other legislation and legal frameworks. We address these below and refer to our recommended actions.

## 2. EXECUTIVE SUMMARY

2.1 The Bill proposes a mechanism to enable employers to initiate negotiations with an employee for a compensation sum as part of a termination agreement, by creating protection for the employer against a personal grievance claim. It fails to recognise that there already exists in law a mechanism for termination of employment by consent<sup>1</sup>, which is commonly used in practice, which works well and has worked well for a long time, and which has established safeguards around it to ensure that it is used fairly and lawfully. We note that this is similar to the Australian position where in accordance with the general principles of contract, a contract of employment may be discharged by mutual agreement.<sup>2</sup> However, the UK has specific legislation for pre-termination negotiations in s111A of the Employment Rights Act 1996 (which will be discussed later in this submission). Therefore, the Committee's overall submission, with respect, is that this Bill is unnecessary and trying to find a solution to a problem that does not exist.

2.2 However if the Bill is to proceed, the Committee has identified several concerns:

The Bill encourages employers and employees to navigate the pre-termination negotiations without requiring legal representation for either party. This has the potential for pre-termination negotiations to be foisted on an employee who may feel under pressure of circumstances to agree to them. One of the objectives of the Employment Relations Act is to address the inherent imbalance of power between employer and employee and this Bill might cut across that objective by opening the door for employers to pressure employees who do not feel able, or do not have the wherewithal, to negotiate a fair exit agreement particularly without legal representation.

- a) Section 101A(3)(d) of the proposed Bill requires the employer to have given the employee a reasonable opportunity to obtain independent advice before the employee signs the termination agreement, although this does not necessarily mean legal advice. Further, this does not afford the same level of

---

<sup>1</sup> As referred to by Chief Judge Inglis in the recent decision of *Ellish v Network Service Providers Ltd* [2021] NZEMPC 175

<sup>2</sup> *Halsbury's Laws of Australia* (2018) Employment at [165-565].

protection as the certification process of settlement agreements pursuant to section 149 of the Employment Relations Act 2000 (**the Act**) which ensure the employee understands the terms and implication of the settlement agreement as certified by a mediator employed by the Ministry of Business, Innovation and Employment (**MBIE**), which also ensure that no minimum entitlements are breached in the reaching of the settlement agreement, and which further ensure that the settlement agreement can be enforced through the Employment Relations Authority if it is breached.

- b) An employer and an employee cannot lawfully contract out of minimum employee entitlements e.g., money or leave entitlements under the Minimum Wage Act 1983, or the Holidays Act 2003, or the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016 as specified in section 148A(3) of the Act. However, these exclusions are not in the current wording of the Bill.
- c) Section 101B(1): This provides that protected negotiations would be inadmissible in the Employment Relations Authority (**the Authority**), however clarity is needed as to whether this will extend to any other courts or legal forums and further whether this extends to the Employment Court.
- d) Section 101B(3) also provides that evidence of pre-termination negotiations is inadmissible *“in any proceeding”* rather than being limited to any personal grievance proceeding. This potentially cuts across the ability for employees to bring not only personal grievances but also other claims such as for breach of the duty of good faith and breach of contract.
- e) Section 101B(3): The exception to the inadmissibility status of the negotiations applies if there is *“a prima facie case that the communication was made or received, or the information was compiled or prepared for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence.”* The Committee’s view is that this exception is far too narrow and needs to be significantly broadened to prevent abuse of the section; further the term “dishonest” lacks clarity and could lead to extensive litigation.
- f) Section 101B(4) is not aligned with section 57(3) of the Evidence Act 2006 (**the Evidence Act**) which has broad application of without prejudice privilege in the civil and criminal courts and is also generally applied in the employment jurisdiction.

### 2.3 To address these concerns, if the Bill is to proceed the Committee recommends:

- a) If evidence is deemed inadmissible in the Authority, then further clarification is needed regarding which other courts this extends to (including the Employment Court).
- b) Prior to any agreement being entered into there should be an opportunity for the employee to obtain “independent advice, including legal advice”, rather than simply independent advice, and the opportunity for employees to involve lawyers in the actual negotiations if they wish to, to ensure employees’ rights are protected. Any agreement to terminate should also require a similar

process and protection for employees as set out in section 149 of the Act, to ensure the employee understands the settlement terms, the implication of signing the termination agreement, and to ensure the employee has not forgone any minimum entitlements.

- c) The wording of the proposed section 101B(1) should confine the inadmissibility to personal grievance proceedings (which is what the Bill is designed to prevent, as set out in section 101A(2)) rather than “*any proceeding*”.
- d) The wording of section 101B(4) should be aligned with section 57(3) of the Evidence Act, by inserting a clause identical to section 57(3)(d).
- e) The exception of “dishonest purpose” in the proposed section 101B(3) should be changed to “improper purpose” similar to the legislation in the United Kingdom (section 111A of the Employment Rights Act 1996), and clarity should be provided that this would include a purpose (whether intentional or unintentional) that amounts to coercion, unfair bargaining, duress, discrimination, harassment or retaliation against an employee in breach of section 21 of the Protected Disclosures (Protection of Whistleblowers) Act 2022. There should also be an express carve-out in the section to ensure that minimum standards are not breached.
- f) MBIE should publish substantial policy and practical guidance for employers on how to carry out negotiations in accordance with this legislation without breaching employment law standards.

### 3. SUBMISSIONS

#### 3.2 The Current Framework for Without Prejudice Privilege

**3.2.1** The Bill as currently drafted purports to override well-established principles of “without prejudice” privilege which ensure that there are safeguards around the use of inadmissible material in proceedings. Without prejudice privilege currently exists in law for parties who are in a “dispute”. The condition of being in a “dispute” is found in section 57(1) of the Evidence Act, which provides for privilege for settlement negotiations and mediation for parties in a dispute in which relief may be given in a civil proceeding. This applies in the Courts of New Zealand, and although the Evidence Act does not expressly apply to the employment jurisdiction it is well established as “persuasive” in matters of evidence.<sup>3</sup>

**3.2.2** In *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, the Court of Appeal noted two key aspects of the “well settled” law of without prejudice privilege:

- (a) The public policy of encouraging parties to negotiate and resolve a dispute; and
- (b) Where both parties agree they wish to negotiate in a confidential manner, then their agreement to do so should be upheld.<sup>4</sup>

---

<sup>3</sup> For example see the recent case of *Downer v LM Architectural Builders Ltd* [[2024] NZERA 204, at [37].

<sup>4</sup> At [11].

- 3.2.3** The Court of Appeal applied the public policy to the employment context and noted the three conditions for privilege to apply:
- (a) There must be a serious employment relationship problem (i.e. a dispute); and
  - (b) The problem must be one which could give rise to litigation; and
  - (c) Both parties agree that the discussion is made on a without prejudice basis.

**3.2.4** The Bill proposes to abolish all three components in the employment context for pre-termination negotiations. This is a significant departure from established law, and one which we think carries significant risks not only of unfairness but also of extensive litigation.

**3.2.5** Section 57 of the Evidence Act provides for the following exceptions to the inadmissibility of the Without Prejudice communications:

*(2B) However, the court may order the disclosure of the whole or any part of a communication or document privileged under subsection (2A) if the court considers that—*

- (a) the disclosure is necessary for a subsequent prosecution for perjury; or*
- (b) the disclosure is necessary to clarify the terms of an agreement reached, if the terms are later disputed or are ambiguous; or*
- (c) after due consideration of the importance of the privilege and of the rights of a defendant in a criminal proceeding, it would be contrary to justice not to disclose the communication or document or part of it.*

*(3) This section does not apply to—*

- (a) the terms of an agreement settling the dispute; or*
- (b) evidence necessary to prove the existence of such an agreement in a proceeding in which the conclusion of such an agreement is in issue; or*
- (c) the use in a proceeding, solely for the purposes of an award of costs, of a written offer that—*
  - (i) is expressly stated to be without prejudice except as to costs; and*
  - (ii) relates to an issue in the proceeding; or*
- (d) the use in a proceeding of a communication or document made or prepared in connection with any settlement negotiations or mediation if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations or mediation.*

**3.2.6** The Bill's framework differs materially. The statutory language of section 101B(1) renders protected negotiations inadmissible without reference to whether a dispute exists or whether the communication was made for the purpose of

settlement or even whether both parties agreed to have the communications. This automatic inadmissibility lacks the balancing safeguards provided under the Evidence Act, such as section 57(3) which allows exceptions which might apply where, for example, inadmissibility would conceal misconduct or mislead the court.

### **3.3 The Current Framework for Inadmissibility in the Authority**

- 3.3.1** The employment jurisdiction is unique in that it also has an equity and good conscience jurisdiction which enables the Authority or the Court “to consider privileged evidence if the circumstances so require. The discretion must be exercised in a principled way, having regard to common law, and principles of the Evidence Act 2006.”<sup>5</sup>
- 3.3.2** Section 160(2) of the Employment Relations Act provides “The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.”
- 3.3.3** The Authority has an overriding discretion to admit privileged communications.
- 3.3.4** The Bill proposes to limit this discretion to cases of “dishonest purpose” or enabling the planning or commission of an offence. This is a significant departure from established law which we consider to be of concern.

### **3.4 The Objectives of the Bill**

- 3.4.1** The Bill aims to provide a protected framework to enable employers and employees to negotiate an agreed settlement sum as part of an agreement to terminate. The Explanatory Note does not state any policy reasons for this Bill; it is assumed that the purpose is to assist employers and employees with settlement negotiations without the delays and legal costs involved in a formal employment process and dispute resolution procedure.
- 3.4.2** While the Committee acknowledges the objective of cost-effective dispute resolution procedures, the proposed mechanisms require careful scrutiny to ensure they do not undermine the fundamental employment principles which require the parties to deal with each other in good faith,<sup>6</sup> and require the parties to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative,<sup>7</sup> and that there is protection for employees due to the inherent imbalance of power that exists in an employment relationship.

### **3.5 Comparative Analysis with the United Kingdom Framework**

- 3.5.1** It is noted that this Bill appears to draw partial inspiration from section 111A of the United Kingdom’s Employment Rights Act 1996. Section 111A permits pre-termination negotiations to be inadmissible in certain unfair dismissal

---

<sup>5</sup> *VJZ v KJT* [2023] NZERA 403 at [38].

<sup>6</sup> Section 4 (1)(a) of the Act.

<sup>7</sup> Section 4 (1A), the Act.

proceedings, but the statutory design contains several limitations which have set out in the section itself and which have also evolved through case law and interpretation.

**3.5.2** There are two important exceptions in the UK legislation that the Bill does not have.

#### *Automatic Unfair Dismissals*

**3.5.3** The first is that there exists a statutory category of automatically unfair dismissals which are expressly excluded from the protection offered by section 111A(1), pursuant to section 111A(3). This ensures that employers cannot avoid scrutiny or liability through confidential settlement negotiations in cases involving significant statutory rights.

**3.5.4** Section 111A(3) reads:

*“Subsection (1) does not apply if the tribunal finds that the circumstances are such that the dismissal was automatically unfair under section 104, 105 or 105A.”*

**3.5.5** This means the protection of confidentiality does not apply where the claim is for automatic unfair dismissal under certain grounds. These grounds are listed in:

- Section 104: Asserting a statutory right
- Section 105: Selection for redundancy for certain reasons (e.g., union membership, whistleblowing)
- Section 105A: Related to employee representatives

**3.5.6** "Automatically unfair" dismissals are a specific category in UK law where the reason for dismissal automatically renders it unfair, regardless of reasonableness. Examples include dismissal due to:

- Pregnancy or maternity leave (s99)
- Whistleblowing (s103A)
- Trade union membership or activities (s152)
- Asserting a statutory right (s104)
- Participating in lawful industrial action (s152–s153)
- Health and safety concerns (s100)

**3.5.7** While not all these are listed in section 111A(3), other provisions outside section 111A further limit its application. For instance, Acas Guidance and case law have clarified that 111A protection only applies to “ordinary” unfair dismissal cases under section 98. For anything else—including discrimination or automatic unfairness—the inadmissibility protection does not apply.

**3.5.8** This has been confirmed by judicial interpretation. In *Faithorn Farrell Timms LLP v Bailey*<sup>8</sup> the Employment Appeal Tribunal confirmed:

- The inadmissibility rule under s111A only applies to ordinary unfair dismissal claims, not to automatic unfair dismissals.
- Even within ordinary unfair dismissal claims, improper behaviour (s111A(4)) can lift the protection.

---

<sup>8</sup> [2016] ICR 1035 (EAT),

This means that if a dismissal falls into a category deemed automatically unfair by statute (e.g. whistleblowing, pregnancy, asserting rights), evidence of settlement discussions can be admitted, and section 111A(1) offers no protection to the employer.

#### *Improper Behaviour*

**3.5.9** The second important exception is section 111A(4) of the Employment Rights Act 1996 in UK is the exception for “improper behaviour” which removes section 111A protection in certain cases.

**3.5.10** What constitutes improper behaviour is ultimately for a tribunal to decide on the facts and circumstances of each case. Improper behaviour includes, but is not limited to, behaviour that would be regarded as “*unambiguous impropriety*” under the “without prejudice” principle. The Employment Appeal Tribunal (EAT) in *Faithorn Farrell Timms LLP v Bailey*, the first appellate decision on section 111A, confirmed that the concept of improper behaviour in section 111A(4) is wider than the “unambiguous impropriety” exception. The tribunal noted that Parliament had deliberately chosen a different phrase, thus allowing a potentially broader approach to the behaviour in issue and a greater degree of flexibility for the tribunal.

**3.5.11** When determining whether there was improper behaviour, the tribunal is asked to go through two separate stages in order to decide whether the inadmissibility rule applies. It must first consider whether there was improper behaviour by either party during the settlement negotiations, and if this is the case, the tribunal must then decide the extent to which confidentiality should be preserved in respect of the settlement negotiations. In other words, taking into account all the circumstances, whether the employer’s decision to dismiss fell within the range of reasonable responses. Should there be improper behaviour, it is at the tribunal’s discretion whether they admit all or part of the evidence.

**3.5.12** Examples of improper behaviour (non-exhaustive):

- All forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour;
- Physical assault or the threat of physical assault and other criminal behaviour;
- All forms of victimisation;
- Discrimination because of age, sex, race, disability, sexual orientation, religion or belief, transgender, pregnancy and maternity and marriage or civil partnership; and
- Putting undue pressure on a party, for example:
  - Not giving reasonable time for consideration;
  - An employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee will be dismissed; and
  - An employee threatening to undermine an organisation’s public reputation if the organisation does not sign the agreement unless the provisions of the Public Interest Disclosure Act 1998 apply.

**3.5.13** These examples are not intended to prevent, for instance, a party setting out in a neutral manner the reasons that have led to the proposed settlement agreement, or factually stating the likely alternatives if an agreement is not reached, including the possibility of starting a disciplinary process if relevant.

**3.5.14** Examples of improper behaviour identified in case law (which have tended to be quite obvious):

- *Malik v Al Mubarakia Ltd* ET Case No. 3202708/20 – the redundancy consultation process was a sham and the tribunal concluded that there had been improper behaviour.
- *Lingard v Leading Learners Multi Academy Trust* ET Case No. 2401985/17 – the claimant was told by the CEO of the Trust that they were not willing to accept responsibility for the poor performance issues raised in a welfare meeting and made an offer of settlement of £19,270. The Employment Tribunal noted that “improper behaviour” was widely defined, and that the Acas Code<sup>9</sup> recommended face-to-face meetings at an agreed time and place. This did not occur in this case, and therefore the behaviour of the CEO was improper and it would be just to admit evidence of the settlement negotiations.

**3.5.15** In *Faithorn Farrell Timms LLP v Bailey*<sup>10</sup> the Employment Appeal Tribunal clarified that discussions must not extend into improper behaviour or breaches of statutory duty. Moreover, the Employment Rights Act includes explicit exceptions that ensure fairness for employees and prevent employers from relying on the privilege to mask unlawful or discriminatory conduct.

**3.5.16** Even with these limitations, the UK regime has generated extensive litigation regarding its application. Case law, such as *Faithorn Farrell Timms LLP v Bailey*, and commentary (e.g. Robert Pullen, “Protected conversations: a decade of s111A”) demonstrate that without clear guidance and statutory safeguards, parties may misinterpret the scope and protection of pre-termination negotiations.

**3.5.17** The proposed framework of the Bill is much more restrictive than section 111A of the UK Employment Rights Act 1996. The Bill lacks any of the equivalent safeguards that are incorporated into the UK legislation. The Committee recommends incorporating equivalent provisions to protect core employment rights and align with public interest objectives.

## **3.6 Psychological Readiness and Risks of Settlor’s Remorse**

**3.6.1** The Committee expressed concern about the psychological pressure employees may feel when approached with a protected negotiation proposal. Employees may not be ready to contemplate termination, especially if they are not aware of any issues in the workplace or have not raised a personal grievance.

---

<sup>9</sup> The Advisory, Conciliation and Arbitration Service (Acas) is an independent public body that receives funding from the government which aims to improve workplace relationships. The Acas Statutory Code of Practice under section 111A of the Employment Rights Act 1996 does not set down legal requirements, but rather it was designed to help employers, employees and their representatives understand the implications of the section for the negotiation of settlement agreements before the termination of employment. Although failure to follow the code does not make a person or organisation liable to proceedings, nor will it lead to an adjustment in any compensation award made by an employment tribunal, the Code is admissible in evidence and if it is relevant to any question arising in the proceedings it will be taken in account in determining that question.

<sup>10</sup> [2016] UKEAT 0025\_16\_2806,

- 3.6.2** This can lead to settlor's remorse – a recognised phenomenon where employees later regret the decision, especially if made under perceived pressure. Such remorse can give rise to further litigation, including attempts to rescind or challenge the agreement or indirect actions such as complaints against the employer to regulatory bodies.
- 3.6.3** To reduce this risk, the Bill should mandate a mandatory reflection period of at least five working days between the offer and any agreement being signed. This ensures decisions are made with appropriate deliberation, and the employee can access legal support or counselling if necessary.

### **3.7 Interaction with the Income Threshold for Personal Grievances**

- 3.7.1** The Bill should clarify its relationship with the recently proposed income threshold for unjustified dismissal claims, which limits access to the personal grievance procedure for high-income employees. During the transitional period, these employees can negotiate compensation and termination terms at the outset of employment.
- 3.7.2** It remains unclear whether an employee covered by the income threshold would be eligible to enter a protected negotiation under this Bill. If so, it should be specified whether the settlement protections afforded under the Bill override or coexist with those transitional provisions. Failing to provide this clarity may lead to uncertainty and inconsistent application in employment practices if both Bills are passed.

### **3.8 Clarification on the Scope of 'Any Proceedings' and of 'Personal Grievance'**

- 3.8.1** The current wording of section 101B(1) states that negotiations are inadmissible in proceedings before the Authority. However, it remains uncertain whether this inadmissibility also applies to the Employment Court or other forums with jurisdiction over employment-related matters. For example, how will the protected discussions be dealt with by the Human Rights Review Tribunal or Privacy Commissioner – will they be treated as not admissible there? What sort of comity principles will be used? What about the Official Information Act and the public interest factor?
- 3.8.2** Other courts or statutory bodies that need to be expressly addressed in the section include the Employment Court, the Human Rights Review Tribunal, Privacy Commissioner investigations, and civil proceedings, for example for breach of statutory duty or tort. The Committee strongly recommends that the legislation clearly specify the range of proceedings where inadmissibility applies and that this is harmonised with existing provisions such as sections 106(2) and 189(2) of the Act and section 57 of the Evidence Act 2006.
- 3.8.3** It is also unclear whether the reference in section 101A(2) which provides that an offer “does not in itself constitute a personal grievance” applies only to a personal grievance for unjustified dismissal only after the discussions have occurred, and the extent to which the privilege applies. For example, could an employee raise a personal grievance orally during a protected discussion? Could having a

protected discussion lead to a personal grievance for unjustified action causing disadvantage? What about personal grievance for things that the employee is not yet aware of (for example, unknown claims)? What about claims against parties that are not parties to the protected discussions, for example the employee sues the managing director personally? Will employees know that they cannot use controlling third parties if the underlying personal grievance is settled? What about disparity of treatment? What if some people have a protected discussion and enter into settlement agreements but other employees are not given that ability – is the protected discussion inadmissible in those circumstances?

**3.8.4** These are all matters that, in our view, must be addressed in the Bill for clarity.

### **3.9 Expanded Recommendations on Good Faith and Procedural Fairness**

**3.9.1** A recurring concern of the Committee is the risk that the Bill may be used as a shortcut to avoid fair process. Employment relationships are governed by good faith principles under section 4 of the Employment Relations Act, requiring active, constructive engagement and procedural fairness.

**3.9.2** The Bill in its current form may be interpreted as a means of bypassing those obligations. The Committee proposes the following additional safeguards: a mandatory five-day cooling-off period, written summaries of discussions for transparency, and the right to representation at every stage of negotiation.

**3.9.3** The Committee also suggests requiring a statement within the agreement that certifies no minimum employment standards have been waived or compromised. This should be confirmed by an independent certifier, akin to the MBIE mediation process, to give weight and enforceability to the agreement in a manner consistent with section 149 of the Act.

### **3.10 Transitional Alignment with Income Threshold for Unjustified Dismissal Claims**

**3.10.1** The Committee considers it important that the Bill expressly address its interaction with the proposed income threshold for personal grievance claims before the Select Committee. That provision excludes certain high-earning employees from bringing unjustified dismissal claims, subject to a transitional period.

**3.10.2** The transitional provision anticipates negotiated compensation at the outset of employment. However, the Bill introduces a distinct mechanism for terminating employment through protected negotiations.

**3.10.3** The Committee is concerned that the two regimes may conflict, or create parallel frameworks that confuse the rights and obligations of the parties.

**3.10.4** Clarification is needed to determine whether:

- High-income employees can rely on both frameworks simultaneously;
- An agreement reached under the Bill affects an employee's ability to rely on negotiated terms under the transitional regime; and

- The protections under the Bill apply to agreements entered into at the start of the employment relationship.

**3.10.5** The Committee recommends that the Bill be amended to clarify the interaction of these provisions, either by express exclusion or detailed guidance in the Explanatory Note.

## **4. RECOMMENDATIONS**

### **4.1. Policy and Operational guidance from MBIE for employers and employees**

Under the existing legal framework an employer is free to initiate Without Prejudice discussions with an employee if a dispute giving rise to civil litigation has occurred, and both parties agree to enter into settlement discussions. A dispute has usually been initiated on behalf of an employee by an employment lawyer or advocate raising a formal personal grievance pursuant to section 103 of the Act, or other claims that can be raised under the Act. The employee relies on the advice of the employment lawyer or advocate regarding what their legal grounds for challenge are, and legal options for negotiating a resolution, or alternatively if resolution is not reached, proceedings before the Authority.

- 4.1.1.** Employees rely on employment lawyers or advocates to represent them through such negotiations with the employer.
- 4.1.2.** This Bill provides for a mechanism to enable employers to initiate Without Prejudice discussions directly with an employee who will be unrepresented and likely surprised by the unsolicited approach. The Committee recommends caution is needed to ensure the employee is given sufficient time to consider all of their legal options and seek meaningful legal advice before entering into any agreement.
- 4.1.3.** The Committee considers this Bill will encourage many employers to embark on negotiations without seeking legal advice on the correct legal process and legal requirements of the legislation.
- 4.1.4.** The Committee recommends MBIE publishes substantial policy and practical guidance on the negotiation process in accordance with this legislation without breaching employment law standards, leading up to the signing of an agreement. It is recommended the guidance is published for both employers and employees, and includes detailed script sheets, FAQ's and examples of compliant and non-compliant conduct.

### **4.2. Requirements for a certification process**

**4.2.1.** Section 101A contains the following protections for employees:

(3) An agreement made under **subsection (1)** is enforceable only if—

(e) the agreement is in writing and signed by each party; and

(f) the agreement states the relevant legislation which applies to such settlement agreements; and

(g) before the employee signed the agreement, the employer advised the employee that they should seek independent advice on the proposed agreement before signing; and

(h) the employer gave the employee a reasonable opportunity to obtain independent advice before the employee signed the agreement.

**4.2.2.** The Committee is concerned that section 101A as it currently stands does not sufficiently ensure the employee is given a meaningful opportunity to obtain legal advice on the legislation, their legal options, and the implications of signing the agreement.

**4.2.3.** Section 149 of the Employment Relations Act 2000 provides a statutory framework for certified records of settlement reached with mediator involvement. These agreements are binding and enforceable, and their terms are typically the product of legally informed negotiations.

**4.2.4.** By contrast, the Bill enables agreements to be negotiated without mediator oversight, legal advice, or formal process. This risks the proliferation of poorly drafted or unconscionable agreements that may not withstand legal scrutiny.

**4.2.5.** The Committee is concerned that the Bill may be used to circumvent the structured protections of section 149, undermining the role of mediation and the effectiveness of dispute resolution mechanisms.

**4.2.6.** The Committee suggests that settlements reached under protected negotiations be subject to optional certification under section 149, or at minimum, that the legislation clarify how the two frameworks interact.

**4.2.7.** The Committee recommends section 101A is amended to include a requirement that the agreement is certified, in line with the process in section 149 of the Act, which provides a mediator employed by MBIE must:

*(a) explain to the parties the effect of subsection (3); and*

*(b) be satisfied that, knowing the effect of that subsection, the parties affirm their request.*

*(3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so, —*

*(a) those terms are final and binding on, and enforceable by, the parties; and*

*(ab) the terms may not be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017; and*

*(b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.*

*(3A) For the purposes of subsection (3), a minor aged 16 years or over may be a party to agreed terms of settlement, and be bound by that settlement, as if the minor were a person of full age and capacity.*

**4.2.8.** The Committee recommends a certification section is required in the termination agreement, similar to the standard Record of Settlement under section 149 published by MBIE which states:

- *I have been requested by the parties to sign the attached agreed terms of settlement; and*
- *before I signed the agreed terms of settlement I explained to them the effect of sections 148A, 149(1) & (3); and*
- *I confirm that the parties have advised me that to the best of their knowledge, no minimum entitlements (money or leave entitled under the Minimum Wage Act 1983, or the Holidays Act 2003, or the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016” with “the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016, or the Care and Support Workers (Pay Equity) Settlement Act 2017” have been breached in the reaching of this settlement; and*
- *I am satisfied that the parties understand the effect of sections 148A, 149(1) & (3), and have affirmed their request that I should sign the agreed terms of settlement.*

**4.2.9.** Section 148A provides the mediator:

*(2) must not sign agreed terms of settlement in which a party agrees to forgo all, or part, of the party’s entitlements specified in subsection (3).*

*(3) This section applies to wages or holiday pay or other money payable by the employer to the employee under the Minimum Wage Act 1983, the Holidays Act 2003, the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016, or the Support Workers (Pay Equity) Settlements Act 2017.*

**4.2.10.** It would be unlawful for termination agreements to include agreement for the employee to forgo the statutory entitlements listed in section 148A(3), and the Committee recommends the Bill is amended to incorporate the same proviso.

**4.2.11.** In light of the fact that the negotiations can occur without the precondition of any dispute having arisen, the Committee also recommends the imposition of a minimum time restraint of 5 working days before the agreement can be certified by a mediator (as noted above), to ensure the employee is not ambushed and has had sufficient time to obtain legal advice.

### **4.3. Alignment with section 57(3) of the Evidence Act**

**4.3.1.** Section 101B(4) is identical to section 57(3) of the Evidence except for the exclusion of section 57(3)(d) which provides for the following exception where the inadmissibility rule will not apply to:

*“the use in a proceeding of a communication or document made or prepared in connection with any settlement negotiations or mediation if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations or mediation.”*

**4.3.2.** Section 57(3) provides important exceptions for misconduct, undue influence, or where exclusion would mislead the court or conceal criminal conduct. The proposed section 101B lacks any such balancing mechanism. It creates an absolute rule of inadmissibility for protected negotiations, without the nuanced exceptions embedded in the Evidence Act. This may result in unjust outcomes, particularly where protected negotiations include evidence of serious wrongdoing.

**4.3.3.** This is a catch-all “interests of justice” protection well established under the Evidence Act. The Committee considers there is no policy reason to exclude this protection from the legislation proposed, and therefore this should be inserted into section 101B(4).

**4.3.4.** The Committee recommends amending section 101B to incorporate a discretion akin to section 57(3), enabling the Employment Relations Authority or Court to admit evidence in the interests of justice where exclusion would compromise the integrity of proceedings. We further recommend consistency in drafting between the Bill and the Evidence Act to reduce uncertainty and promote coherent judicial interpretation.

#### **4.4. Amendment to term “dishonest purpose”**

**4.4.1.** Section 101B(3) provides for following exceptions to the inadmissibility status of the negotiations:

- (a) if there is a prima facie case that the communication was made or received, or the information was compiled or prepared for a dishonest purpose; or
- (b) to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence.

**4.4.2.** The Committee’s view is that the term “dishonest” is ambiguous, lacks clarity and would be likely lead to extensive litigation.

**4.4.3.** The phrase “dishonest purpose” should be changed to “improper purpose” similar to the legislation in the United Kingdom (section 111A of the Employment Rights Act 1996), and clarity should be provided that this would include a purpose (whether intentional or unintentional) that is coercion, duress, discrimination, harassment or retaliation against an employee in breach of section 21 of the Protected Disclosures (Protection of Whistleblowers) Act 2022.

## 5. CONCLUSION

- 5.1. While the Committee supports efforts to facilitate early resolution of employment disputes, it considers that the Bill, in its current form, risks undermining core employment protections and introducing significant uncertainty into employment relationships. The Bill departs significantly from established legal frameworks without providing equivalent procedural safeguards. The absence of legal advice requirements, a clear standard of fairness, and alignment with broader statutory obligations creates real risks of injustice. If the Bill is to proceed, the Committee strongly urges that it be substantially revised to incorporate the safeguards, clarifications, and limitations outlined above.
- 5.2. We recommend that, to ensure the Bill achieves its intended objectives while maintaining New Zealand's commitment to fair and sustainable employment relations, Parliament should consider the recommendations outlined in this submission. We consider that the recommendations outlined in this submission would result in the legislation aligning more closely with the Evidence Act, other provisions of the Employment Relations Act, and important employment law standards and protections.
- 5.3. The Committee appreciates the opportunity to contribute to this legislative process. Should further discussion or clarification be required, we are available to provide additional insights. Please do not hesitate to contact Moira McFarland the TLANZ Employment Law Committee Executive, at [moira.mcfarland@thelawassociation.nz](mailto:moira.mcfarland@thelawassociation.nz) for any further engagement.

## 6. ACKNOWLEDGMENTS

- 6.1. The Committee acknowledges the contributions to the submissions by the following members: Catherine Stewart (Convenor), Catherine Pendleton, Simon Schofield, Moira McFarland (Committee Executive) and Annie Hu (Equal Justice Project representative from the University of Auckland).
- 6.2. We request the opportunity to present these submissions in person to the Select Committee in due course.

Ngā mihi



**Catherine Stewart**

Convenor of the TLANZ Employment  
Law Committee