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Employment Relations Employee Remuneration Disclosure Amendment Bill

Submissions from The Law Association of New Zealand Employment Law Committee

INTRODUCTION

The Law Association of New Zealand (TLANZ) is an independent membership organisation for the NZ legal profession with more than 7,000 members. TLANZ maintains expert committees that support legal review and policy advocacy on legal issues.

The TLANZ Employment Law Committee welcomes the opportunity to comment on the proposed amendments to the Employment Relations Act 2000 under proposed new section 110C. These submissions focus on the drafting of the Bill to improve its clarity and practical application, rather than expressing a position regarding the need for such legislation. The Committee believes that addressing ambiguities in the Bill will enhance its effectiveness while mitigating unintended consequences.

SUBMISSIONS

New Section 110C

The Committee has concerns about the breadth of protections provided by section 110C as currently drafted and invites the Select Committee to revisit the extent of these protections. In particular, the Bill does not contemplate restricting remuneration disclosures if they are made in bad faith. By failing to consider the reasons behind remuneration disclosures, the Bill risks shielding employees who disclose such information in bad faith—such as with the intent to harm their employer or share confidential information with competitors (i.e., for reasons that are not consistent with the purpose of these proposed amendments).

To prevent these unintended consequences, we recommend that the Bill distinguishes between disclosures made in good faith (i.e., to promote transparency or address inequities) and those made with harmful or malicious intent (i.e., made in bad faith).

To address this issue and protect against potential abuses, the Committee suggests incorporating the concept of "bad faith disclosures" into the Bill, providing explicit examples of such conduct that should not be shielded by the legislation. "Bad faith disclosures" might include:

- Disclosing remuneration details with the primary aim of undermining an employer's competitive position;
- Disclosures made for frivolous or irrelevant reasons that do not contribute to workplace fairness or equity;
- Disclosing remuneration predominantly for personal gain, such as leveraging pay information in negotiations with competitors or for personal financial benefits unrelated to workplace grievances.

By clearly defining these types of disclosures, the Bill would offer robust protections for disclosures made in good faith—those aimed at promoting transparency and addressing legitimate grievances—while safeguarding employers from the detrimental impacts of disclosures made in bad faith. This distinction is crucial for maintaining a balanced approach to employee rights and employer protections.

Alternatively, instead of including a definition of "bad faith disclosure," the Committee recommends that the Bill incorporate a framework similar to section 77(3) of the UK Equality Act 2010, which provides that:

"A disclosure is a relevant pay disclosure if made for the purpose of enabling the person who makes it, or the person to whom it is made, to find out whether or to what extent there is, in relation to the work in question, a connection between pay and having (or not having) a particular protected characteristic."

Adopting this approach would ensure that protections are focused on disclosures made for legitimate purposes, such as promoting transparency and addressing potential inequities related to protected characteristics. This would provide a clear, targeted framework for remuneration disclosures while maintaining a balanced approach to both employee and employer interests.

In addition to the above, we also recommend that the Bill clarifies that an employee is restricted from disclosing sensitive confidential information, such as remuneration tied to specific formulas (e.g., EBITDA calculations) and/or various performance metrics.

Recommendations in relation to new Section 110C(2)(a)

The current wording of section 110C(2)(a) is ambiguous and risks narrowing the scope of legitimate disclosures or inquiries. To improve clarity, the Committee suggests defining "remuneration disclosure reason" to explicitly include:

1. Instances where an employee discloses their remuneration to any other person, whether internal or external to the organisation;
2. Situations where an employee inquires about the remuneration of another employee; and
3. Cases where an employee discusses their remuneration with another person.

However, these protections should be limited to circumstances where the disclosure, inquiry, or discussion does not fall under the category of "bad faith disclosures" as defined earlier. This refinement would establish a clearer framework for both employees and employers, ensuring that legitimate conduct is protected while discouraging misuse or malicious intent.

Clarifying the "Workplace"

The current references to "workplace" in section 110C(2)(a) and (b) constrain the Bill's application. Under the existing definition in section 5 of the Employment Relations Act 2000, "workplace" refers to a physical location where an employee works. This interpretation fails to account for contemporary employment arrangements, including remote work, flexible working environments, and employees operating across multiple locations or within group companies.

Instead, the Committee recommends removing the term "workplace" entirely and replacing it with a broader term that captures all employees working for the same employer or within the same group of related companies, irrespective of physical location. This approach would ensure that the Bill's protections extend to all employees under an employer's direction, whether they work from home, at multiple offices, or within a group of related companies.

Defining "Remuneration"

We recommend the term "remuneration" in section 110C is defined, as its undefined scope could lead to disputes and inconsistent interpretations. Without a precise definition, there is uncertainty as to whether

"remuneration" includes only salary and wages, or if it extends to other forms of compensation, such as bonuses, commissions, and non-cash benefits.

If the Select Committee decides to include a definition, we invite the Select Committee to exclude certain categories of information from the definition to safeguard employer confidentiality. For instance, proprietary data, such as bonus formulas based on EBITDA or other performance metrics, should not fall within the definition of "remuneration." Similarly, confidential terms of discretionary benefits, including employee share schemes and executive compensation policies, should be excluded to prevent the disclosure of commercially sensitive information that could harm an employer's competitive position.

Inquiries About the Remuneration of Other Employees

The Bill provides protections for employees making inquiries about the remuneration of others but lacks clarity on whether these protections apply strictly to direct inquiries or if they extend to indirect or speculative situations. This ambiguity raises concerns about potential misuse and unintended consequences. The Committee recommends limiting the scope of this protection to direct, good-faith inquiries between employees (e.g., Employee A asking Employee B about their own remuneration). We invite the Select Committee to exclude indirect or speculative inquiries from the Bill, such as Employee A asking Employee B about Employee C's remuneration, as this could lead to privacy violations and disrupt workplace harmony.

Addressing Adverse Conduct

The Committee supports the Bill's provisions addressing adverse conduct, particularly the prohibition on penalising employees for legitimate remuneration disclosures or inquiries. However, these protections must strike a fair balance by allowing employers to respond appropriately to bad-faith disclosures or breaches of confidentiality. The absence of such provisions risks creating a framework that could be misused by employees, undermining workplace trust and exposing employers to undue harm.

Section 110C(3) introduces a presumption against employers for adverse reactions to remuneration disclosures. To prevent misuse, the Committee recommends explicitly defining "adverse conduct" and providing examples of both prohibited employer behaviours and justified responses to harmful disclosures. For instance, adverse conduct should not include reasonable disciplinary actions taken in response to disclosures made with malicious intent, such as sharing confidential information to damage the employer's reputation or competitive standing.

Additionally, if the Select Committee is minded to align the Bill more closely with the principle Act's balanced approach to employment relations, the Bill could adopt a framework similar to section 65(2)(b) of the Employment Relations Act 2000, which allows employees to seek penalties for non-compliance while preserving employers' ability to address legitimate grievances. This balanced approach would ensure that protections for employees are not overextended to shield inappropriate or damaging conduct. Employers should retain the ability to address breaches of workplace policies or confidentiality agreements, provided such actions are proportionate and reasonable.

Retrospective Application Concerns

The Committee recommends that the Bill's provisions apply prospectively rather than retrospectively. Retrospective application risks penalising employers for actions that were lawful and compliant under the

existing framework at the time they were taken. This could create significant uncertainty for employers and employees alike, undermining trust in the fairness of the legislative process.

To address this, the Committee recommends introducing transitional provisions that provide employers with a clear grace period to align their policies and practices with the new legal requirements. This period would allow organisations to review employment agreements, update confidentiality provisions, and implement training to ensure compliance. Such transitional measures would mitigate disruption and ensure that all parties are adequately prepared for the changes.

CONCLUSION

The TLANZ Employment Law Committee is grateful for the opportunity to contribute to the consultation on this Bill. The incorporation of insights from committee members has been instrumental in refining the drafting of the Bill to ensure its practical applicability and alignment with international best practices. By adopting clearer definitions and addressing key ambiguities, the Committee aims to ensure that the Bill fulfils its intended purpose without leading to unintended consequences. We remain available for further engagement to refine and enhance the proposed legislation.

Should further discussions be required, we are prepared to meet via Teams. For any clarifications or additional information regarding the matters raised, please contact Moira McFarland, the TLANZ Employment Law Committee Secretary, at Moira.McFarland@thelawassociation.nz

ACKNOWLEDGMENTS

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Ngā mihi nui,

Catherine Stewart
Convenor, TLANZ Employment Law Committee