

# **Employment Relations (Flexible Working Hours) Amendment Bill**

Member's Bill

As reported from the Transport and Industrial Relations Committee

## **Commentary**

### **Recommendation**

The Transport and Industrial Relations Committee has examined the Employment Relations (Flexible Working Hours) Amendment Bill and recommends that it be passed with the amendments shown.

### **Introduction**

The purpose of this bill is to amend the Employment Relations Act 2000 to provide certain employees with children under five or with disabled children the statutory right to request changes to their working hours.

### **Background**

Flexible working arrangements can mean flexible starting and finishing times, job sharing, part-time work, compressed working weeks, working in term-time only, or working from home.

We acknowledge that many employers already offer staff some flexibility in working practices, but many do not. The majority of us believe the right to request flexible working arrangements would help to change workplace culture, as it has in the United Kingdom, and encourage more flexibility in working arrangements generally. The majority of us believe it will help to widen the recruitment pool,

and will benefit employers as well as families and people caring for adult dependents.

It was submitted that employees want more flexibility and control over the hours they work. The bill recognises, however, that not all employers will be able to provide flexible working arrangements, and so provides employers with the grounds to refuse such a request.

New Zealand currently has a shortage of skills and labour. It was submitted that flexible working practices can enlarge the recruitment pool and raise the return rate of employees from parental leave, and the number of employees with young children and of skilled, older people in the workplace. Further, we heard that businesses with flexible working practices benefit in many ways—from increased good will, better staff morale, reduced turnover, sick leave, and absenteeism, and increased productivity.

We note that New Zealand has a culture of long working hours, with people working on average 1,809 hours a year (compared with the average Briton who works 1,672 hours a year, and the average German who works 1,435 hours a year). About 40 percent of New Zealand employees work more than 45 hours a week, and 21 percent of New Zealanders work more than 50 hours a week.

Increasingly both parents in families work; it was submitted that as a result, many parents are under constant stress, and families are suffering as a result.

It was submitted that long working hours are taking a toll on some employees, especially those with young families, who are finding it increasingly difficult to juggle paid work and family commitments, and are spending less time with their families. A survey by the Equal Employment Opportunities Trust found that the single most important factor that would help working parents would be flexible start and finish times.

In the United Kingdom, where similar legislation has been in place for three years, nine out of ten requests that have been made have been accepted, and 90 percent of the employers surveyed reported no significant problems complying with the new requirements.

All of us agree, in principle, on the right of employees to request flexible working hours in certain circumstances, and the right of employers to refuse the request for particular reasons. The majority of us agree that there is a need to legislate on this matter to ensure the consistent and fair availability of these rights across the workforce.

The main focus of our consideration was initially whether legislation was in fact required. Our consideration then turned to the circumstances in which an employee should have the right to request flexible working hours and the reasons for which an employer might legitimately refuse such a request. Our consideration was influenced by legislation introduced in the United Kingdom in 2003, upon which this bill is based, and subsequent research and amendments to this legislation.

## **Amendments**

### **Flexible working arrangements**

The majority of us recommend that the right to apply for changes to hours of employment and days of work be extended to include changes to an employee's place of work. This would allow an employee to apply to work from a place other than the employer's place of work, such as, for example, the employee's home. The majority of us believe this to be a practical and useful amendment in line with the purpose of the bill.

The majority of us therefore recommend that the word "hours" in the phrases "flexible working hours" and "working hours" be replaced with word "arrangements" as a more accurate description, and that this be reflected in an amendment to the title of the bill.

### **Commencement**

The majority of us recommend an amendment to the commencement clause to change the day this bill will come into force from the day after it receives the Royal assent to 1 July 2008 to allow employers and employees time to familiarise themselves with the new requirements.

### **Extension of the right to request flexible working arrangements**

The bill as drafted would give the right to request flexible working arrangements to an employee who has full-time care of—

- a child or children under five years
- a disabled child or children under 18 years.

The majority of us recommend that this right be extended, to include an employee who has care of—

- a child or children under five years
- a disabled child or children

- a dependent relative or relatives.

The committee considered at length how wide or limited the right to request flexible working arrangements should be. We acknowledge that at some point in the future it might be deemed reasonable that all employees, regardless of their situation, have the right to do so. For now the majority of us agree that a targeted approach is the best way to proceed to allow employers to adapt to the new provisions.

We considered the United Kingdom legislation, and particularly the 2007 amendment which broadened the right to request to include carers for adults. The number of people who care for adults, particularly elderly parents, is significant, and the ability to provide such care is important to the wellbeing of society. In many ways the requirements for the care of such adults are comparable with those of the original target groups. A criticism of the United Kingdom legislation, before the 2007 extension, was that it was inequitable for this reason and created resentment towards those employees with the right to request flexibility from those who did not have the right but felt that the circumstances and the demands upon them were no different.

We also considered the restriction to a disabled child or children under 18 years. The majority of us found the restriction to be anomalous as the circumstances of the care of a disabled child of 18 do not change once that child turns 19. The cessation of entitlement under the bill once a disabled child reaches 18 years does not take into account the reality that children with disabilities may remain dependent upon their parents for basic functioning beyond this age. It would be unjust if a carer for a disabled child aged 18 were eligible but a colleague with a similarly disabled child of 19 were not. This anomaly has been corrected by widening the proposed target groups to include a dependent relative or relatives.

The majority of us consider this is an appropriate starting point for the New Zealand legislation, and that, as in the United Kingdom, the legislation should be periodically reviewed to assess its impact, effectiveness, and the desirability of any extension to its provisions.

The majority of us, therefore, recommend a further amendment inserting new section 69AAJ, which would require the operation and effects of this legislation to be reviewed two years after it has come into force.

**Extension of the grounds for refusal**

The majority of us recommend an extension of the grounds on which an employer may refuse an application for flexible working arrangements to include—

- the burden of additional costs
- a detrimental effect on the ability to meet customer demand
- the undermining of the terms of a collective agreement where the work done by the employee making the request comes within the coverage clause of the collective agreement.

The first two grounds were included in the 2003 United Kingdom legislation. Records in the United Kingdom have shown “a detrimental effect on the ability to meet customer demand” to be the second most common reason for declining a request. This was noted by submitters, and employers’ groups made strong representations for the inclusion of these grounds in our legislation. The majority of us agree that they should be included.

The bill has the potential to affect or undermine collective agreements. The majority of us therefore recommend that undermining the terms of a collective agreement be inserted as a ground for refusing an application.

We recommend the insertion of new section 69AAF, which would require an employer to consult the relevant union about a request if the employer proposes to agree to the request, the employer is a party to a collective agreement, and the work done by the employee comes within the coverage clause of the collective agreement.

**Labour inspectors and mediation**

The majority of us recommend the insertion of new section 69AAG and 69AAH which would allow an employee to refer the refusal of the request for flexible working arrangements to a labour inspector, who must, to the extent practicable in the circumstances, assist the employee and employer in resolving the matter. If, after doing this, the employee is dissatisfied, on reasonable grounds, with the result, the employee may refer a refusal of a request for flexible working arrangements to mediation under Part 10 of the Act.

The majority of us believe that the availability of on-site assistance with this legislation, provided by a labour inspector, would benefit both employers and employees and that mediation, as the next step in the dispute resolution process, should be available as a means of

settling disputes regarding requests for flexible working arrangements.

### **Limit on amount Authority can award**

The majority of us recommend an amendment to clause 7 to limit to eight weeks of the employee's pay the amount the Employment Relations Authority may award an employee in the event that the Authority determines that an employer has not complied with section 69AAE.

The amount of compensation a body such as the Authority can award is generally a reflection of the seriousness of the breach and the culpability of the individual or company ordered to pay. Setting a statutory limit on the amount the Authority can award sends a clear message as to the seriousness with which the legislature believes such awards should be treated.

The majority of us expect that the primary finding of the Authority would be that an employer must reconsider their refusal of a request for flexible working arrangements. But where the Authority believed an order of compensation was appropriate the majority of us believe that a limit on that compensation of eight weeks of the employee's pay is appropriate.

### **Criteria an employee must meet before making a request**

The majority of us recommend an amendment to the criteria which an employee must meet before he or she makes a request, so that during the six months immediately preceding the request, an employee must have been employed by his or her employer on average for not less than ten hours a week and for not less than one hour a week or 40 hours a month. This would bring the eligibility requirements in this legislation into line with parental leave legislation.

### **Requirements relating to a request**

The majority of us recommend an amendment to clarify that a request for flexible working arrangements is to be made in writing.

The majority of us recommend an amendment to require that an employee must state in their request whether the arrangement would be permanent, or, if not, the duration of the arrangement. The majority of us believe this will provide more certainty on what is being agreed.

The majority of us recommend an amendment to require that a request must include an explanation of how the variation will enable the employee to care better for their child or dependent relative. The majority of us believe that this will help the employee and employer to ascertain more accurately the need for and viability of the request.

The majority of us recommend an amendment to set a three-month timeframe for employers to deal with a request. The majority of us believe that it is necessary for a request to be dealt with promptly. The majority of us expect that such requests will be dealt with well within the limit of three months, but accept that individual requests or an employer's situation might require more time; but we consider that even in these circumstances an employer should take no more than three months to deal with a request.

#### **National Party view**

The National Party believes that flexible working arrangements are in principle a good idea. We are convinced, however, that the legislation as proposed is, first of all, unnecessary in order to secure flexible working arrangements and, secondly, may be counter-productive in securing truly flexible working arrangements.

The National Party believes that employees and employers are already free to bargain in good faith over flexible working arrangements. The success of this is shown by the work brought in front of the committee by the Department of Labour and other submitters which showed that businesses are, where possible, already seeing the benefits of voluntarily providing flexible working arrangements. It is in businesses interests to allow flexible arrangements where they possibly can in order to retain productive employees. We are not convinced that the addition of yet another prescriptive piece of employment law will increase the number of persons getting flexible working arrangements because it does nothing to increase the ability of businesses to provide these arrangements.

The National Party believes that this legislation will actually work against the provision of truly flexible working arrangements. We note that while at present it is possible for employees to bargain and re-bargain for flexible working arrangements as circumstances change, this piece of legislation says that employees can only ask for flexible working arrangements once a year. This seems counter-productive to the goals of the Act. Additionally we remain concerned that employers may be dissuaded from employing persons who fit the profile of someone who in the future may request flexible

working arrangements because of the added procedures that they could be subject to under the Act.

## **Appendix**

### **Committee process**

The Employment Relations (Flexible Working Hours) Amendment Bill was referred to the committee on 7 April 2005. The closing date for submissions was 13 July 2005. We received and considered 103 submissions from interested groups and individuals. We heard 41 submissions, which included hearings in Auckland.

We received advice from the Department of Labour.

### **Committee membership**

Hon Mark Gosche (Chair)

Hon Maurice Williamson (Deputy Chair)

David Bennett

Peter Brown

Darien Fenton

Sue Moroney

Lesley Soper

Hon Judith Tizard

Kate Wilkinson

Pansy Wong

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**Employment Relations (Flexible  
Working Hours) Amendment**

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**Key to symbols used in reprinted bill**

**As reported from a select committee**

**Struck out (majority)**

Subject to this Act,

Text struck out by a majority

**New (majority)**

Subject to this Act,

Text inserted by a majority

<*Subject to this Act,*>

Words struck out by a majority

<Subject to this Act,>

Words inserted by a majority

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*Sue Kedgley*

## **Employment Relations (Flexible Working 〈Hours〉 〈Arrangements〉) Amendment Bill**

Member's Bill

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**The Parliament of New Zealand enacts as follows:**

- 1 Title**  
This Act is the Employment Relations (Flexible Working  
〈Hours〉 〈Arrangements〉) Amendment Act **2005**.

**2 Commencement**

This Act comes into force on <the day after the date on which it receives the Royal assent> <1 July 2008>.

**New (majority)****2A Principal Act amended**

This Act amends the Employment Relations Act 2000.

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**3 Purpose****Struck out (majority)**

- (1) The purpose of this Act is to grant qualifying employees the right to change their working hours where they have the full-time care of—
- (a) a child or children under 5 years; or
  - (b) a disabled child or children up to and including 18 years.
- (2) Employers will be required to make a formal business assessment of how flexible working hours can be achieved.

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**New (majority)**

The purpose of this Act is to insert a new **Part 6AA** into the principal Act to—

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- (a) provide a statutory right to employees who meet specified criteria as to the period of their employment to request a variation of certain terms and conditions of their working arrangements because they provide care of certain persons; and
- (b) place certain duties on employers who receive those requests.

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**Struck out (majority)****4 Interpretation**

Section 5 of the principal Act is amended by inserting, in their appropriate alphabetical order, the following definitions:

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**Struck out (majority)**

“**disabled child** means a child who is entitled to a disability living allowance within the meaning of section 39A of the Social Security Act 1964

“**flexible working hours** mean working arrangements for qualifying employees such as job-shares, part-time work, and hours of work by arrangement with the employer

“**qualifying employee** means an employee who has—

“(a) full-time care of a child or children under 5 years or has full time care of a disabled child or children up to and including 18 years; and

“(b) has been for the immediately preceding 6 months, in the employment of the same employer”.

**5 Act to bind the Crown**

This Act binds the Crown.

**6 New sections 61A to 61C inserted**

The principal Act is amended by inserting, after section 61, the following sections:

**“61A Right to request variation of employment agreement**

“(1) Despite section 61, a qualifying employee may apply to his or her employer for a change in his or her terms and conditions of employment if—

“(a) the change relates to—

“(i) the hours the employee is required to work; or

“(ii) the days on which the employee is required to work; and

“(b) the employee’s purpose for applying for the change is to enable the employee to care for someone who, at the time of application, is a child under the age of 5 years, or a disabled child up to and including the age of 18 years.

“(2) An application under this section must—

“(a) state that it is such an application:

“(b) specify the change applied for and the date on which it is proposed the change should become effective:

**Struck out (majority)**

- “(c) explain what effect, if any, the employee thinks making the change applied for would have on his or her employer and how, in the employee’s opinion, any such effect might be dealt with; and
- “(d) explain how the employee meets, in respect of the child concerned, the conditions as specified in **subsection (1)(b)**. 5
- “(3) An application under this section must be made before the fourteenth day before the day on which the child concerned reaches the age of 5 or, if disabled, 18 years.
- “(4) If an employee has made an application under this section, he or she may not make a further application under this section to the same employer before the end of the period of 12 months beginning with the date on which the previous application was made. 10
- “(5) For the purposes of this section and **sections 61B and 61C**, **employee** means a qualifying employee. 15
- “61B Employer’s duties in relation to application under section 61A**
- “(1) An employer must acknowledge that a qualifying employee has the right to work whenever possible. 20
- “(2) An employer to whom an application under **section 61A** is made must—
- “(a) deal with the application as soon as possible; and
- “(b) refuse the application only when it cannot reasonably be accommodated on one or more of the following grounds: 25
- “(i) inability to re-organise work among existing staff:
- “(ii) inability to recruit additional staff:
- “(iii) detrimental impact on quality: 30
- “(iv) detrimental impact on performance:
- “(v) insufficiency of work during the periods the employee proposes to work; and
- “(vi) planned structural changes.

**Struck out (majority)**

- “61C Complaints to Employment Relations Authority**
- “(1) An employee who makes an application under **section 61A** may lodge an application with the Employment Relations Authority if—
- “(a) the employer has failed in relation to the application to comply with **section 61B(2)**; or 5
  - “(b) a decision made by the employer to reject the application was based on incorrect facts. 10
- “(2) No complaint under this section may be made in respect of an application which has been disposed of by agreement or withdrawn. 10
- “(3) In the case of an application which has not been disposed of by agreement or withdrawn, no complaint under this section may be made until the employer notifies the employee of a decision to reject the application on appeal. 15
- “(4) The Authority must not consider a complaint under this section unless it is presented—
- “(a) before the end of the period of 3 months beginning with the relevant date; or
  - “(b) within such further period as the Authority considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of 3 months. 20
- “(5) In **subsection (4)(a)**, **relevant date** means, in the case of a complaint permitted by **subsection (3)**, the date on which the employee is notified of the decision on the appeal.” 25

## New (majority)

**6A New Part 6AA inserted**

The following **Part** is inserted after Part 6:

**“Part 6AA  
“Flexible working**

**“69AA Object of this Part**

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The object of this Part is to—

“(a) provide certain employees with a statutory right to request a variation of their working arrangements if they have the care of—

“(i) a child or children under 5 years:

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“(ii) a disabled child or children:

“(iii) a dependent relative or relatives; and

“(b) require an employer to deal with a request as soon as possible but not later than 3 months after receiving it; and

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“(c) provide that an employer may refuse a request only if it cannot reasonably be accommodated on certain grounds; and

“(d) if a request is refused and mediation under Part 10 does not resolve the matter, provide for employees to apply to the Employment Relations Authority to determine whether the employer has dealt with the request in accordance with this Part.

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**“69AAA Interpretation**

In this **Part**, unless the context otherwise requires,—

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“**disabled child** means a child in relation to whom a child disability allowance may be granted under section 39A of the Social Security Act 1964

“**relative**, in relation to an employee, means a person who is 18 years of age or older and is the employee’s—

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“(a) spouse, civil union partner, or de facto partner:

“(b) parent:

“(c) child:

“(d) brother or sister:

“(e) grandparent:

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“(f) grandchild:

**New (majority)**

“(g) spouse’s or partner’s parent

“**request** means a written request made—

“(a) under this Part; and

“(b) by an employee to his or her employer to vary the employee’s terms and conditions of employment relating to the employee’s working arrangements

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“**working arrangements**, in relation to an employee, means 1 or more of the following:

“(a) hours of work:

“(b) days of work:

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“(c) place of work (for example, at home or at the employee’s place of work).

*“Employee’s statutory right to make request*

**“69AAB When employee may make request**

“(1) An employee may make a request—

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“(a) if the employee satisfies the criteria specified in **subsection (2)**; and

“(b) subject to the limitation in **section 69AAD**.

“(2) The criteria are that—

“(a) the employee has the care of—

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“(i) a child or children under 5 years:

“(ii) a disabled child or children:

“(iii) a dependent relative or relatives; and

“(b) the employee has been employed by his or her employer for not less than 6 months; and

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“(c) during the 6 months immediately preceding the request, the employee has been employed by his or her employer,—

“(i) on average, for not less than 10 hours a week; and

“(ii) for not less than 1 hour a week or 40 hours a month.

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**“69AAC Requirements relating to request**

A request must be in writing and—

“(a) state—

“(i) the employee’s name; and

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## New (majority)

“(ii) the date on which the request is made; and “(iii) that the request is made under this <b>Part</b> ; and	
“(b) specify the variation of the working arrangements requested and whether the variation is permanent or for a period of time; and	5
“(c) specify the date on which the employee proposes that the variation take effect and, if the variation is for a period of time, the date on which the variation is to end; and	
“(d) explain, in the employee’s view, how the variation will enable the employee to provide better care for the child or dependent relative concerned; and	10
“(e) explain, in the employee’s view, what changes, if any, the employer may need to make to the employer’s arrangements if the employee’s request is approved.	15
<b>“69AAD Limitation on frequency of requests</b>	
“(1) <b>Subsection (2)</b> applies if an employee has made a request under this <b>Part</b> and his or her employer has approved or refused the request.	
“(2) The employee is not entitled to make another request under this <b>Part</b> to his or her employer earlier than 12 months after the date on which the previous request was made.	20
<i>“Duties of employer</i>	
<b>“69AAE Employer’s duties in relation to request</b>	
“(1) An employer must deal with a request as soon as possible but not later than 3 months after receiving it and—	25
“(a) notify the employee whether his or her request has been approved or refused; and	
“(b) if the request is refused,—	
“(i) notify the employee of the ground for refusal; and	30
“(ii) provide sufficient explanation of the reasons for that ground.	
“(2) An employer may refuse a request only if it cannot reasonably be accommodated on 1 or more of the grounds specified in <b>subsection (3)</b> .	35

**New (majority)**

- “(3) The grounds are—
- “(a) inability to reorganise work among existing staff:
  - “(b) inability to recruit additional staff:
  - “(c) detrimental impact on quality:
  - “(d) detrimental impact on performance: 5
  - “(e) insufficiency of work during the periods the employee proposes to work:
  - “(f) planned structural changes:
  - “(g) burden of additional costs:
  - “(h) detrimental effect on ability to meet customer demand: 10
  - “(i) undermining the terms of a collective agreement where the work done by the employee making the request comes within the coverage clause of the collective agreement.
- “69AAF Consultations with unions 15**
- “(1) This section applies in relation to a request if—
- “(a) the employer is a party to a collective agreement; and
  - “(b) the work done by the employee making the request comes within the coverage clause of the collective agreement. 20
- “(2) The employer must consult the union about the request if the employer proposes to agree to the request.
- “Resolving disputes*
- “69AAG Role of Labour Inspector**
- “(1) For the purposes of this **Part**, a Labour Inspector may provide 25  
to employees and employers such assistance as he or she considers appropriate in the circumstances.
- “(2) This section applies subject to **section 69AAH(2)**.
- “69AAH Mediation**
- “(1) This section applies if— 30
- “(a) an employer gives an employee notice under **section 69AAE(1)** refusing the employee’s request; and
  - “(b) the employee is dissatisfied on reasonable grounds with his or her employer’s refusal of the request.

## New (majority)

- “(2) The employee may refer the refusal of the request to a Labour Inspector who must, to the extent practicable in the circumstances, assist the employee and employer to resolve the matter.
- “(3) If, after completion of the process under **subsection (2)**, the employee is dissatisfied with the result, the employee may refer the refusal of the request to mediation under Part 10. 5
- “(4) For the purposes of this section, the refusal of the request is to be treated as if it were an employment relationship problem.
- “69AAI Employee may apply to Authority for determination as to compliance 10**
- “(1) This section applies if—
- “(a) an employer gives an employee a notice under **section 69AAE(1)** refusing the employee’s request; and
- “(b) mediation under Part 10 has not resolved the matter. 15
- “(2) The employee may apply to the Authority for a determination as to whether the employer, in dealing with the request, has complied with **section 69AAE**.
- “(3) An application under **subsection (2)** must be made within 3 months after the date on which the employer notified the employee that the employee’s request was refused. 20
- “(4) However, the Authority may extend the period within which an application must be made under **subsection (3)** if the Authority is satisfied that it was not reasonably practicable for the employee to comply with **subsection (3)**. 25

*“Review of Part*

- “69AAJ Review of operation of Part after 2 years**
- “(1) The Minister must, as soon as is practicable, 2 years after the commencement of the **Employment Relations (Flexible Working Arrangements) Amendment Act 2007**, require a report to be prepared on the operation and effects of this **Part**. 30
- “(2) The Minister must ensure that the persons and organisations (including representatives of employees and employers), that

**New (majority)**

the Minister thinks appropriate, are consulted during the preparation of the report about the matters to be considered in the report.

- “(3) The Minister must present a copy of the report to the House of Representatives.”

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**7 Jurisdiction**

- (1) Section 161(1) <of the principal Act> is amended by inserting <the following paragraph> after paragraph <(c)> <(cb)><, the following paragraph>:

**Struck out (majority)**

“(ca) matters alleged to arise under **section 61B** in relation to an employer’s duties:”

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**New (majority)**

“(cc) determining whether an employer has complied with **section 69AAE**:”.

- (2) Section 161 <of the principal Act> is amended by adding the following subsections:

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- “(4) Where the Authority <finds a complaint under **section 161(1)(ca) well-founded**> <determines that an employer has not complied with **section 69AAE**>, it must make a declaration to that effect and may make <an order requiring the employer to reconsider the employee’s request.>

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**Struck out (majority)**

- “(a) an order for reconsideration of the application; and  
“(b) an award of compensation to be paid by the employer to the employee.

**Struck out (majority)**

“(5) The amount of compensation awarded under section 161(4) must be such amount, not exceeding the permitted maximum, as the Authority considers just and equitable in all the circumstances.”

**New (majority)**

“(5) If the Authority makes an order under **subsection (4)**, it may also make an award of compensation to be paid by the employer to the employee for an amount up to 8 weeks of the employee’s pay.”

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**Legislative history**

17 March 2005  
7 April 2005

Introduction (Bill 253–1)  
First reading and referral to Transport and Industrial  
Relations Committee

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