



## BRIEFING

### Final Draft Cabinet paper: Omnibus Bill 2020 Changes to the Immigration Act 2009

<b>Date:</b>	15 April 2020	<b>Priority:</b>	Urgent
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2992 19-20

Action sought		
	Action sought	Deadline
Hon Iain Lees-Galloway Minister of Immigration	<b>Agree</b> to additional settings for proposed amendments to the Immigration Act 2009  <b>Agree</b> to lodge the attached Cabinet paper for consideration on 16 April 2020	15 April 2020

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Siân Roguski	Manager, Immigration Policy	04 901 1572	s 9(2)(a)	✓
Claire McGeorge	Policy Advisor		s 9(2)(a)	

The following departments/agencies have been consulted

Minister's office to complete:

☐ Approved

☐ Declined

☐ Noted

☐ Needs change

☐ Seen

☐ Overtaken by Events

☐ See Minister's Notes

☐ Withdrawn

Comments



## BRIEFING

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#### Purpose

To seek your agreement to additional settings for proposed amendments to the Immigration Act 2009, and provide you with a final draft of a Cabinet paper seeking approval to include these amendments in an upcoming Omnibus Bill for submission by 6pm today, 15 April 2020, and talking points to support discussion.

#### Recommendation Action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that on 9 April 2020, we briefed you on eight proposed amendments to the Immigration Act 2009 for an upcoming Omnibus Bill [BR 2966 19 20] and on 14 April 2020 you directed us to progress them
- Noted*
- b **Note** that the attached paper is substantively the same as the version provided to you on 9 April 2020, but reflects feedback from your office, further policy development and consultation within the Ministry, and consultation with other agencies, and in particular:
- i. includes detail on
    - a) the conditions which would trigger the availability of some of the proposed powers
    - b) how the powers should be exercised (i.e. by special direction or order in council), and
    - c) which of the powers should be delegable to an immigration officer
  - ii. removes one proposal that we recommend not be progressed at this time (former Proposal four) and renumbers the subsequent proposals
  - iii. has small proofreading changes.

*Noted*

*Trigger conditions for some of the proposed powers*

- c **Agree** that the following powers should be triggered only in special circumstances, such as epidemics, natural disasters, where a state of emergency has been declared, or where permitted by Order in Council:

Proposal	Agree	Disagree	Discuss
Proposal One: The power to vary the conditions of classes of temporary visa holders			

Proposal	Agree	Disagree	Discuss
Proposal Two: The power to extend the expiry date of visas for a class of people			
Proposal Six: The power to suspend the ability to make applications for visas by classes of people			
Proposal Seven: The power to revoke the entry permission of people deemed to hold a visa and entry permission			

- d **Agree** that the remaining powers (Proposals Three, Four and Five) can be used whether or not there are special circumstances

*Agree / Disagree / Discuss*

*How the powers should be exercised*

- e **Agree** that, given their wide-reaching nature, some of the powers should be constrained by the requirement to exercise them by special direction or Order in Council as laid out in the table below:

Proposal	Agree	Disagree	Discuss
Proposal One: The power to vary the visa conditions of classes of temporary visa holders <b>by special direction</b>			
Proposal Two: The power to extend the expiry date of visas for a class of people <b>by special direction</b>			
Proposal Three: The power to grant visas to individuals and classes of people in the absence of an application <b>by special direction</b>			
Proposal Four: The power to waive any regulatory requirements for making an application for classes of people <b>by special direction</b>			
Proposal Five: The power to waive, in an individual case, the requirement to obtain a transit visa <b>by special direction</b>			
Proposal Six: The power to suspend the ability to make applications for visas by classes of people <b>by Order in Council</b>			

- f **Agree** that powers exercised by special direction will be able to be scrutinised by Parliament and the public, in that they will be published in the Gazette, and will be a disallowable instrument presented to the House of Representatives

*Agree / Disagree / Discuss*

*The ability to delegate certain powers to an immigration officer*

- g **Agree** that the following powers should be delegable to an immigration officer, as they are administrative in nature and involve individuals (rather than classes of people):

Proposal	Agree	Disagree	Discuss
Proposal Three: The power to grant visas to <u>individuals</u> in the absence of an application			
Proposal Five: The power to waive, in an individual case, the requirement to obtain a transit visa			
Proposal Seven: The power to revoke the entry permission of people deemed to hold a visa and entry permission			

- h **Agree** that the following powers should not be delegable to an immigration officer, as they are wide-reaching and/or involve classes of people:

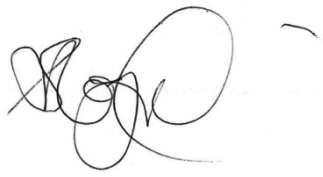
Proposal	Agree	Disagree	Discuss
Proposal One: The power to vary the visa conditions of classes of temporary visa holders			
Proposal Two: The power to extend the expiry date of visas for a class of people			
Proposal Three: The power to grant visas to <u>classes</u> of people in the absence of an application			
Proposal Four: The power to waive any regulatory requirements for making an application for classes of people			
Proposal Six: The power to suspend the ability to make applications for visas by classes of people			

*Sunset clause and further examination*

- i **Agree** that the amendments be time limited in the first instance, such that they expire twelve months after enactment  
*Agree / Disagree / Discuss*
- j **Agree** to note that that you will raise with Cabinet at a later date whether any or all of the amendments should be made enduring powers  
*Agree / Disagree / Discuss*

*Delaying progressing previous Proposal Four (removing the requirement to provide an address for service)*

- k **Note** that we now recommend that you delay progressing the previous Proposal Four (removing the requirement for visa applications to provide an address for service), since this could have unintended consequences for the Immigration Act's enforcement provisions, noting that this could be picked up at Select Committee stage or in a future enactment  
*Noted*
- l **Agree** to delay progressing previous Proposal Four (removing the requirement for visa applications to provide an address for service)  
*Agree / Disagree*
- m **Agree** to submit the attached Cabinet paper to Cabinet Office by 6pm today, Wednesday 15 April 2020, for consideration by the COVID Ministerial Group on Thursday 16 April 2020.  
*Agree / Disagree*



Siân Roguski  
**Manager, Immigration Policy**  
Labour, Science and Enterprise, MBIE

15 / 04 / 2020

Hon Iain Lees-Galloway  
**Minister of Immigration**

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## Background

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1. On Tuesday 14 April, you agreed to progress eight proposed amendments to the Immigration Act 2009 for inclusion in a forthcoming Omnibus Bill [BR 2996 19-20]:
  - Proposal One: The power to vary the visa conditions of classes of temporary visa holders
  - Proposal Two: The power to extend the expiry date of visas for a class of people
  - Proposal Three: The power to grant visas to individuals and classes of people in the absence of an application
  - Proposal Four: Removing the requirement for visa applicants to provide an address for service (now deferred and removed from consideration – discussed below)
  - Proposal Five (new Four): The power to waive any regulatory requirements for making an application for classes of people
  - Proposal Six (new Five): The power to waive, in an individual case, the requirement to obtain a transit visa
  - Proposal Seven (new Six): The power to suspend the ability to make applications, and express interest in applying, for visas by classes of people
  - Proposal Eight (new Seven): The power to revoke the entry permission of people deemed to hold a visa and entry permission
2. We have worked at pace through some of the detail of these proposals, and in particular have developed the conditions which should trigger the availability of some of the proposed powers, how the powers should be exercised (i.e. by special direction or order in council), and which of the powers should be delegable to an immigration officer. We have also corrected some proof reading and minor factual errors in the draft Cabinet paper.
3. This briefing provides you with further advice on the proposed changes to the amendments, and seeks your agreement to them. Talking points to support discussion are attached at **Annex One** and a final draft of the Cabinet paper incorporating these details (as well as feedback from the agencies we have consulted) is attached at **Annex Two**.

## We recommend that some powers only be available in special circumstances

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4. Some of the amendments we have proposed are wide-reaching and will have significant impacts on a large number of people, specifically:
  - Proposal One: The power to vary the conditions of classes of temporary visa holders
  - Proposal Two: The power to extend the expiry date of visas for classes of people, and
  - Proposal Three: The power to suspend the ability to make applications for visas and to express interest in applying for visas.
5. We recommend that these powers should only be available in special circumstances, such as epidemics, natural disasters, where a state of emergency has been declared, or where permitted by Order in Council.
6. We also recommend that Proposal Seven (the power to revoke the entry permission of people deemed to hold a visa and entry permission) should only be available in these special circumstances. While it deals with individuals and therefore does not have the wide-reaching impacts of the proposals listed above, it overrides existing settings in Regulations, and should only be used in special circumstances.

7. We consider the remaining proposals more administrative in nature, and recommend that they should be available at all times, whether or not there are special circumstances.

## **We recommend that most of the powers be exercised by special direction, and one by Order in Council**

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8. As a constraint on the proposed powers with wide-reaching consequences, we recommend that the majority be exercised by special direction:
- Proposal One: The power to vary the conditions of classes of temporary visa holders
  - Proposal Two: The power to extend the expiry date of visas for a class of people
  - Proposal Three: The power to grant visas to individuals and classes of people in the absence of an application
  - Proposal Four: The power to waive any regulatory requirements for making an application for classes of people
  - Proposal Five: The power to waive, in an individual case, the requirement to obtain a transit visa
9. A special direction would require the Minister of Immigration to formally agree that the way the power will be used is justified in the circumstances.
10. The power to suspend the ability to submit visa applications, or Expressions of Interest in applying for a visa by classes of people (Proposal Six) is a particularly broad power with significant impacts on a large number of people. To reduce the risk that it could be used to address operational issues (such as where backlogs were occurring) or to short cut appropriate policy processes, we recommend that this power only be exercised where permitted by an Order in Council.
11. We do not consider that the power to revoke the entry permission of a person who has been deemed by Regulation to have been granted entry permission (Proposal Seven) requires a special direction. This is because it is equivalent to an existing power which is already exercised for air passengers by immigration officers under section 113 of the Immigration Act.

*We recommend allowing the public and parliament to scrutinise powers exercised by special direction*

12. Where a power is exercised by special direction, we recommend that it be a disallowable instrument that must be presented to the House of Representatives (in addition to being published in the Gazette).
13. This is similar to existing gazetting requirements already contained in the Immigration Act for special directions for classes of people (e.g. section 69(4)).

## **We recommend that administrative powers affecting individuals be delegable to an immigration officer**

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14. Some of the proposed powers are administrative in nature and affect individuals rather than classes of people. We consider it appropriate that these powers be delegable to an immigration officer:
- Proposal Three: The power to grant visas to individuals in the absence of an application
  - Proposal Five: The power to waive, in an individual case, the requirement to obtain a transit visa, and

- Proposal Seven: The power to revoke the entry permission of people deemed to hold a visa and entry permission.
15. A number of the proposals could affect a class of people. We recommend that these powers should not be able to be delegated by the Minister of Immigration to an immigration officer. These proposals are:
- Proposal One: The power to vary the conditions of classes of temporary visa holders
  - Proposal Two: The power to extend the expiry date of visas for a class of people
  - Proposal Three: The power to grant visas to classes of people in the absence of an application
  - Proposal Four: The power to waive any regulatory requirements for making an application for classes of people, and
  - Proposal Six: The power to suspend the ability to make applications, and to express interest in applying for, visas by classes of people.

### **The paper recommends a sunset clause for the powers**

16. Given the extreme speed with which this work is being undertaken, it is prudent to limit the extent of the proposed new powers in the first instance. The paper therefore recommends that they expire 12 months after enactment, but invites you to return to Cabinet at a later date to raise with your colleagues whether any or all of the amendments should be made enduring powers.

### **We recommend delaying progressing an amendment to the requirement to provide an address for service**

17. We recommend delaying progressing the previous Proposal Four (removing the requirement for visa applicants to provide an address for service) from this Omnibus Bill. This is because this proposal could have had unintended consequences for enforcement provisions of the Immigration Act 2009 which require an address for service, and we would need more time to explore them. If a future decision was made to progress the proposal, it could be introduced at Select Committee stage or alternatively through a future amendment vehicle.
18. We also note that the problem this proposal is intended to address (facilitating visa applications for visitors who may be stranded in New Zealand and do not have a permanent address) is already broadly covered by other proposals which will enable visas to be issued to individuals without a formal application.

### **Next steps**

19. We will continue to work through the proposals to ensure that they are fully internally consistent. If any further issues are raised during the consultation and drafting processes, we will address them and brief you as appropriate. We note that the legislative process for the Bill, including its time at Select Committee, will also enable any further issues to be addressed.
20. Possible timings for the paper and Bill are set out in the table below.

Date	Deliverable
Wednesday 15 April	Final Cabinet paper provided to Minister's office
Wednesday 15 April	Paper lodged with Cabinet Office
Thursday 16 April	The COVID-19 Ministerial Group considers the paper



Date	Deliverable
Monday 20 April	Cabinet confirms the COVID-19 Ministerial Group's decisions
Monday 27 April / Monday 4 May	Cabinet approves Bill for introduction and refers it to Executive Council
Week beginning 27 April / Week beginning 4 May	Bill introduced to House
Early May	Select Committee consideration (brief)
Mid-May	New legislation enacted

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## **Annex One: Talking points**

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### ***Opening remarks***

- The paper aims to progress some changes to the Immigration Act 2009 which will support New Zealand's ongoing response to the COVID-19 emergency situation, and to potential emergency situations in the future.
- Some of these changes would have been useful for addressing situations that arose post the Canterbury earthquakes, and similarly are likely to be useful if the big one hits the Wellington region in the future. One in particular would have been useful for the Whaakari / White Island event.
- The speed of this work means that my officials and office have not been able to undertake the depth of consultation that would normally be standard. I therefore propose that the powers expire 12 months after enactment in the first instance. I am likely to return to Cabinet to discuss whether some or all of the powers should be made enduring powers within the Immigration Act.

### ***Background***

- The Immigration Act 2009 generally assumes an orderly set of processes
  - foreign nationals make applications for visas which are granted with certain conditions;
  - if the visas are temporary, the foreign national either applies for and is granted a further visa enabling them to remain in New Zealand or leaves.
  - If the foreign national's situation changes while onshore they can apply to have the conditions of their visa varied; and
  - all of the decision making work is done by staff in offices who have access to IT support, banking services, and so forth.
- There are some provisions in the Act which were made envisaging a possible pandemic, but they were theoretical and have not worked as well in practice as was originally hoped.
- It is fair to say that the Act in general does not envisage situations such as COVID-19, -
  - when Immigration New Zealand staff across the world quite suddenly cannot access their offices
  - when we might want to for example
    - suddenly amend visa conditions for large classes of people here, or
    - extend the visas of classes of people here for varying periods of time, or
    - stop people overseas from making applications that cannot be processed, or
    - refuse entry to a range of people trying to enter by sea.

### ***Comment on specific proposals***

- Proposal One: The power to vary the conditions of classes of temporary visa holders

This could be used for example to easily enable classes of visitor visa holders to work in supermarkets, or to obey the instructions of a Medical Officer of Health relating to a notifiable or quarantinable disease. Recent amendment regulations instituted this requirement on applicants for temporary visas – such as visitor visa waiver arrivals – but not on people already here.

- Proposal Two: The power to extend the expiry date of visas for a class of people

This supplements the existing pandemic provision in the Act. That provision (which extends all expiry dates to three months after the expiry of the epidemic management notice) will currently see possibly thousands of visas expiring on the same day, and is likely to have substantial operational impacts on INZ.

- Proposal Three: The power to grant visas to individuals and classes of people in the absence of an application

The Act is currently predicated on applications, except in the case of s.61 requests (which can only be made by people who are in New Zealand unlawfully). This differs from what was done for the Mosque shooting victims, where we established a special visa category with an associated application.

In the case of the Whaakari / White Island victims (whose deemed visas would have expired when the cruise vessel left) the issue was that visa records were created for them in AMS, but there was no actual legal foundation for that creation.

This proposal will enable visas to be granted even if INZ's systems and processes are severely compromised, and will ensure that foreigners who may be unable to apply for a visa due to illness can remain lawfully in New Zealand.

- Proposal Four: The power to waive any regulatory requirements for making an application for classes of people

This power exists for individuals. It is proposed that the Minister can, in extreme circumstances, similarly waive conditions for classes of person where for example, VACs or INZ systems cannot be easily accessed, fees cannot be processed, and so forth. (At present VACs are closed down around the world, while staff working from home cannot meet prudential requirements.)

It would not enable the Minister to waive a wider range of requirements than Immigration Officers currently can.

- Proposal Five: The power to waive, in an individual case, the requirement to obtain a transit visa

This seems to just be an oversight – the power exists for visitor visas. It hasn't been an issue until COVID-19.

- Proposal Six: The power to suspend the ability to make applications, and express interest in applying, for visas by classes of people

This will address issues that Immigration New Zealand is currently experiencing where people who are unlikely to ever be granted visas are continuing to apply.

- Proposal Seven: The power to revoke the entry permission of people deemed to hold a visa and entry permission

This will enable certain air and marine travellers to be treated in the same way as commercial air travellers (who can be turned around at the point they apply for entry permission). At present private aircraft passengers and crew, cargo vessel passengers and crew, and arguably people on private yachts, can argue that they cannot be refused entry because they have been deemed to hold entry permission since they left the previous port. This could frustrate the government's objectives for border restrictions.

- Previous proposal Four *IF DISCUSSION REQUIRED*: Removing the requirement for visa applicants to provide an address for service

This still makes sense (it is the sort of thing it is better to have in regulations, and therefore waivable where informal applications need to be made, than in primary legislation). However there are many references to addresses for service throughout the Act and there was not sufficient time to work through all of the implications.

**Annex Two: Final Draft Cabinet paper - *Omnibus Bill 2020: Changes to the Immigration Act 2009***

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