

In confidence

Office of the Minister of Immigration

Chair, Cabinet

Immigration (COVID-19 Response) Amendment Bill: Approval for Introduction

Proposal

1. This paper seeks Cabinet's approval to introduce the Immigration (COVID-19 Response) Amendment Bill (the Bill). This Bill implements Government policy to make amendments to the Immigration Act 2009 (the Immigration Act), to enable the Government to respond to the COVID-19 emergency. It also seeks Cabinet's agreement to extending one proposal, in the Bill that applies to temporary entry class visa holders, to cover holders of resident class visas with conditions as well.

Policy

2. The Bill gives effect to a decision by the COVID-19 Ministerial Group on 16 April 2020, to amend the Immigration Act to enable the Government to better respond to the COVID-19 emergency situation [CAB-20-MIN-0130].

Background

3. The effects of COVID-19 on the administration of the immigration system are far-reaching and are likely to last well beyond the expiry of the current Epidemic Management Notice. In addition to the likelihood that border restrictions will continue for an extended period of time, the make-up of New Zealand's labour market in the near future is likely to be very different to that of the recent past. Some of the settings in the Immigration Act constrain the government's administrative ability to respond flexibly to suddenly changing situations and have affected large numbers of visa holders.
4. The administrative powers that are proposed in this Bill are intended to be generally exercised to the benefit of the foreign national (visa holder or visa applicant). They will for example enable the Minister of Immigration to grant work or study rights to classes of people who are stranded in New Zealand, or to grant visas to classes of people without the need for a formal application accompanied by documentation and fees. Immigration officers can facilitate individuals already, but that process is cumbersome and slow when dealing with large numbers of people.

Why a bill is required

5. Changes to the Immigration Act are needed to ensure that the Government can respond to the COVID-19 emergency in an appropriate and efficient way. The effects of the COVID-19 pandemic on the immigration system are likely to be felt until well

after the Epidemic Notice has expired. This means a temporary measure, such as an Immediate Modification Order, would not have been appropriate.

6. However, given the speed with which these changes are proposed to be made, Cabinet has agreed that these amendments be time-limited in the first instance, such that they expire twelve months after enactment. I will raise with Cabinet at a later date whether any or all of them should be made enduring powers.
7. The Bill will also require that, where a power is exercised by special direction by the Minister of Immigration for a class of applicant or visa holder, it must be published in the Gazette and is a disallowable instrument and must be presented to the House of Representatives. Additionally the special direction, together with an explanation of its effect, must be published on the Department's website. One power can only be exercised through an Order in Council.

Key elements of the Immigration Amendment Bill

Certain powers should only be able to be exercised in special circumstances

8. Given the broad scope of some of the powers contained in the Bill, the Bill will restrict certain powers so that they may only be exercised if the Minister of Immigration is satisfied that the exercise of the power is necessary or desirable to manage the effects or deal with the consequences of border control measures taken under the Immigration Act, or other measures taken under other acts, or otherwise to contain or mitigate the outbreak of COVID-19. These powers are:
 - a. the power to impose, vary or cancel the visa conditions for classes of temporary entry class visa holders
 - b. the power to extend the expiry date of visas for classes of temporary entry class visa holders, and
 - c. the power to suspend the ability to make applications for visas or to submit expressions of interest in applying for classes of people.
9. The power to suspend the ability to make applications for visas or to submit expressions of interest in applying for visas by classes of people is a broad power that affects the operation of the Immigration Act and regulations made under it, and potentially has significant impacts on a large number of people. I therefore recommend that this power can only be exercised by Order in Council and only for three months at a time (with the ability to extend).
10. The power to revoke the entry permission of any individual, including of people deemed to hold a visa and entry permission, is a power which should only be exercised in special circumstances. It is however a power that should be able to be exercised by an immigration officer.

The power to impose, vary or cancel conditions of visas for classes of temporary entry class visa holders

11. The Bill will amend the Immigration Act to grant the Minister of Immigration the power to impose, vary or cancel conditions of visas for classes of temporary entry class visa

holders, by special direction. This is a non-delegable power, exercisable only by the Minister of Immigration.

12. The Immigration Act primarily deals with individuals and individual applications for visas and there is very limited ability to deal with applicants as a class or group of individuals. Given the immense scale of people affected by the COVID-19 pandemic, dealing with visas on an individual basis may not be the most efficient or appropriate method. Being able to vary conditions of classes of people holding temporary visas would allow the Government to respond in an appropriate way to meet the needs of visa holders in New Zealand.

The power to extend the expiry dates of visas for classes of people

13. The Bill will amend the Immigration Act to grant the Minister of Immigration the power to extend the expiry dates of visas for classes of people, by special direction. The Minister of Immigration will be able to extend these visas for a maximum of six months, although there is the ability for this period to be extended where necessary. This is a non-delegable power, which is only able to be exercised by the Minister of Immigration.
14. Section 78 of the Immigration Act already automatically extends onshore temporary entry class visas (that were current immediately before the commencement of an epidemic management notice) during an epidemic, until three months after the epidemic notice expires or the visa is cancelled. This allows any migrant who is stranded in New Zealand to remain here lawfully. It was applied to more than 80,000 people in New Zealand at the point that the epidemic management notice commenced.
15. However this is a blanket provision and it applies only to certain groups of people. The Immigration Act contains no powers to extend the expiry date of visas for classes of people outside of this section, such as persons who hold visas and are offshore, who may not be able to travel to New Zealand within the validity of their visas. This risk is particularly acute for holders of certain temporary class visas, such as students or long-term work visa holders who are currently offshore. Cabinet has therefore agreed to extend this power to temporary class visa holders.

The power to vary or cancel visa conditions for individuals holding resident class visas

16. It has been brought to my attention that certain resident visa holders who have conditions on their visas, may have issues relating the expiration of visa conditions or being unable to fulfil certain visa conditions. This includes resident class visa holders with travel conditions who may currently be outside New Zealand and unable to return before those conditions expire, and resident class visa holders in New Zealand who are required to remain in a specified job for a period of time, who may lose that job as a result of the COVID-19 situation. I therefore seek Cabinet's agreement to grant the Minister of Immigration the power to vary travel conditions and vary or cancel work conditions for individuals holding resident class visas, by special direction. The Minister of Immigration would be able to delegate this power to an immigration officer.

The power to grant visas to individuals and classes of people in the absence of an application

17. The Bill will amend the Immigration Act to allow the Minister of Immigration to grant visas to individuals and classes of people in the absence of an application, by special direction. The Minister of Immigration will be able to delegate the ability to grant visas to individuals in the absence of an application, to an immigration officer. However the Minister of Immigration will not be able to delegate the power to grant visas to classes of people in the absence of an application, due to the broad nature of this power and the large scale of people who may be affected.
18. An individual's visa may expire while they are in New Zealand if they are unable to either make an application or to instruct an agent to make an application on their behalf before their visa expires. This is most common when foreign nationals become severely unwell while in New Zealand, which was the case for certain individuals affected by the Whakaari / White Island eruption who remained in hospital. The outbreak of COVID-19 means that there is a risk that foreign nationals in New Zealand may become ill with the virus. Allowing the Minister of Immigration to grant visas to individuals or classes of people in the absence of an application will enable the Government to manage foreign nationals in New Zealand with the specific aim of ensuring their ongoing lawful status, even for example when they are severely unwell.

The power to waive any regulatory requirements for making an application for classes of people

19. The Bill will amend the Immigration Act to grant the Minister of Immigration the power to waive any regulatory requirements for making an application for classes of people, by special direction. This is a non delegable power, only exercisable by the Minister of Immigration.
20. The fundamental requirements for making an application for a visa are prescribed in the Immigration (Visa, Entry Permission and Related Matters) Regulations 2010. Immigration officers with appropriate delegations can waive certain requirements on a case by case basis. However there is no power to waive regulatory requirements for making an application for a class of persons. Ongoing flexibility, controlled through the conditions on special directions, will continue to be useful during the COVID-19 response and recovery. Allowing matters to be dealt with on a "class of persons" basis will reduce the compliance costs and resource burden on Immigration New Zealand and enable Immigration New Zealand to provide a more timely and responsive service to clients.

The power to waive, in an individual case, the requirement to obtain a transit visa

21. The Bill will amend the Immigration Act to grant the Minister of Immigration the power to waive, in an individual case, the requirement to obtain a transit visa. The Minister of Immigration will be able to delegate this power to an immigration officer.
22. Due to the current border restrictions I have, by special direction, suspended all transit visa waivers under section 86 of the Immigration Act. However I have waived the requirement for transit visas for the nationals and residents of certain countries

where there is a reciprocal government to government agreement supporting the repatriation of stranded individuals. Immigration New Zealand continues to receive requests to allow individuals (not covered by a government to government agreement) to transit New Zealand en route to their home country.

23. This power will enable individual transit visa waivers to be granted in cases where the risks of COVID-19 are mitigated and it is appropriate to do so. Examples are likely to include diplomats and consular staff who are returning to their home countries from postings in the Pacific and South America, and individuals who have humanitarian reasons for transiting New Zealand to return home.

The power to suspend the ability to make applications for visas or to submit expressions of interest in applying for visas

24. The Bill will amend the Immigration Act to grant the Minister of Immigration the power to suspend the ability of any person or class of people to apply for a particular type or class of visa or to submit an expression of interest in applying for a visa, by Order in Council. The Minister of Immigration will be able to suspend the ability to make applications or submit expressions of interest for a period of up to three months. The Minister of Immigration will be able to make repeated suspensions as needed. Any applications which fall within these cases or types for that period could not be accepted by Immigration New Zealand.

25. There is currently no legal mechanism to stop applicants from being able to apply for a visa of a particular class or type or from expressing an interest in obtaining invitations to apply for visas, even in the situation where the New Zealand border is closed, if Cabinet has not made a policy decision to remove that visa policy. Once an application is received, Immigration New Zealand is obliged to process and consider the application. Applications for visas are still currently being received, placing further strain on the resources of Immigration New Zealand. Immigration New Zealand has received 50,884 offshore visa applications since the first phase of border closures on 2 February 2020.

26. Allowing the Minister of Immigration to prevent applications being made for certain classes or types of visas will enable the Government to pause the receipt of visa applications in order that proper policy consideration can be given to current immigration policy settings. This change would also enable greater certainty for applicants, by not allowing applications to be made (and fee and levy payments to effectively be forfeited) when any visa granted could not be used due to border (or other) restrictions.

27. I would note that this power could not be used to prevent people from claiming refugee or protected person status.

The power to revoke the entry permission of a person who has been deemed by regulations to have been granted entry permission

28. The Bill will amend the Immigration Act to grant an immigration officer the power to revoke the entry permission (and thus cancel any visa and deny entry to New Zealand), in accordance with immigration instructions, to any individual deemed by regulations to have been granted entry permission.

29. The border restrictions that have been put in place due to the COVID-19 pandemic are meant to apply to all individuals regardless of their means of arrival in New Zealand, unless they have been specifically exempted. However there have been instances of private aircraft using their status of being deemed to have been granted entry permission to bypass New Zealand's border restrictions and enter the country. Border officers have very few tools to prevent this. This possibility also exists for other classes of traveller, such as cruise ship or cargo vessel passengers and crew, who can be deemed to have been granted entry permission.
30. Allowing the revocation of the entry permission of any person before or once they enter New Zealand (either by arriving on New Zealand soil, if travelling by air, or entering the internal waters of New Zealand) will align the border restrictions of all incoming passengers regardless of how they arrive and in what capacity.

Impact analysis

31. The Treasury has determined that this proposal is a direct Covid 19 response and has suspended the RIA requirements in accordance with Cabinet decision (CAB-20-MIN-0138).

Compliance

32. The Immigration (COVID-19 Response) Amendment Bill complies with each of the following:
- 32.1. the principles of the Treaty of Waitangi;
 - 32.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 (see paragraphs 32 – 36 below);
 - 32.3. the disclosure statement requirements (a disclosure statement has been prepared and is attached to this paper);
 - 32.4. the principles and guidelines set out in the Privacy Act 1993;
 - 32.5. relevant international standards and obligations;
 - 32.6. the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

New Zealand Bill of Rights Act 1990

33. A number of provisions in the Bill impose limits on section 27(1) of the New Zealand Bill of Rights Act 1990 (the right to the observance of the principles of natural justice).
34. Special directions are made at the discretion of the Minister of Immigration. Section 11 of the Immigration Act provides that where a decision is in the absolute discretion of the decision maker the matter or decision may not be applied for, and if a person decides to apply for the matter or decision there is no obligation on the decision maker to consider the application, inquire into the circumstances of the person or give any reasons for their decision.

35. However I consider that these limitations are demonstrably justified to ensure that the Government can respond appropriately to the COVID-19 emergency situation. Special directions allow the Minister of Immigration to make decisions regarding the COVID-19 emergency situation in an efficient manner which is necessary given the rapidly changing nature of the pandemic and the issues arising as a result of it.
36. The Bill also engages section 19 of the New Zealand Bill of Rights Act 1990 (freedom from discrimination on the basis of nationality). However I believe that this is both necessary and justified as we respond to the COVID-19 pandemic, as the immigration system may need to deal with individuals from different countries in different ways due to the scale of the virus.
37. The Bill also includes a number of safeguards around the use of these powers. Where a power is exercised, under the Bill, by special direction for a class of applicant or visa holder, it must be published in the Gazette and is a disallowable instrument and must be presented to the House of Representatives. The special direction together with an explanation of its effect must also be published on the Department's website. The Bill also places limitations on when certain powers can be used to ensure that these powers are used only when necessary to respond to the COVID-19 emergency situation. These powers can only be exercised if the Minister of Immigration is satisfied that the exercise of the power is necessary or desirable to manage the effects or deal with the consequences of border control measures taken under the Immigration Act, or other measures taken under other acts, or otherwise to contain or mitigate the outbreak of COVID-19.

Human Rights Act 1993

38. While section 392 of the Immigration Act 2009 recognises that immigration matters inherently involve different treatment on the basis of personal characteristics, immigration policy development seeks to ensure that any changes are necessary and proportionate.

Consultation

39. Due to the fact that I am proposing a shortened Select Committee period (see paragraph 47), I plan to undertake targeted consultation with a small number of key stakeholders prior to the introduction of the Bill. This consultation will be on the policy intent only, with a specific focus on the safeguards and limitations around the exercise of these powers. Receiving this feedback from stakeholders is key to ensuring that the proposed amendments are workable, that there are appropriate safeguards in place to ensure that these powers are used for the intended purpose and, overall, that the amendments achieve the desired administrative outcomes.
40. The following agencies have been consulted on the proposed amendments to the Immigration Act during the development of this paper and, to the extent possible given time constraints, their views have been reflected in it: the Ministries of Foreign Affairs and Trade, Education, and Social Development; the Departments of Prime Minister and Cabinet and Internal Affairs; and The Treasury.

Binding on the Crown

41. The Bill will be binding on the Crown.

Allocation of decision making powers

42. The Bill allocates new decision making powers to the Minister of Immigration, as it grants the Minister of Immigration (or an immigration officer where the power is able to be delegated) the power to:
- a. impose, vary or cancel conditions of visas for classes of temporary entry class visa holders, by special direction
 - b. extend the expiry dates of temporary entry class visas for classes of people, by special direction
 - c. grant visas to individuals and classes of people in the absence of an application, by special direction
 - d. waive any regulatory requirements for certain classes of applications, by special direction
 - e. waive the requirement to obtain a transit visa, in an individual case, by special direction, and
 - f. revoke the entry permission of a person who has been deemed by Regulation to have been granted entry permission.
43. The Bill also allocates a new decision making power to the Governor-General. The Governor-General may, by Order in Council made on the recommendation of the Minister of Immigration, suspend the ability to make applications for visas or to submit expressions of interest in applying for visas by classes of people.

Associated regulations

44. Regulations are not needed to bring the Bill into operation generally, but are required to suspend the ability to make applications for visas or to submit expressions of interest in applying for visas.

Other instruments

45. The Bill includes provisions granting the Minister of Immigration a number of powers to be exercised by special direction. Where a power is exercised by special direction that applies to a class of people by the Minister of Immigration it is a disallowable instrument and must be presented to the House of Representatives. This will ensure that the House of Representatives has appropriate oversight of the ways in which these powers are being exercised.

Definition of Minister/department

46. The Bill does not contain a definition of Minister, department, or chief executive of a department.

Commencement of legislation

47. The Bill will come into force on the day after the date of Royal assent.

Parliamentary stages

48. I plan to introduce the Bill on 4 May 2020 and depending on the availability of the House, will move for first reading as soon as possible. The Bill should be passed by mid-May if possible.
49. I propose that the Bill should be referred to the Epidemic Response Committee for a period of one week.

Publicity

50. I intend to issue a press release when the Bill is introduced.

Proactive Release

51. I intend to proactively release this paper within 30 business days, subject to any redaction as appropriate under the Official Information Act 1982.

Recommendations

The Minister of Immigration recommends that Cabinet:

1. **note** that the Bill amends the Immigration Act 2009 to enable the Government to better respond to the COVID-19 emergency situation;
2. **agree** to grant the Minister of Immigration the power to vary travel conditions and vary or cancel work conditions for individuals holding resident class visas, by special direction;
3. **note** that the Minister of Immigration plans to undertake targeted consultation on the policy intent of the Bill with a small number of key stakeholders prior to the introduction of the Bill, focusing on safeguards and workability;
4. **approve** the Immigration (COVID-19 Response) Amendment Bill for introduction, subject to the final approval of the Government caucus and sufficient support in the House of Representatives;
5. **agree** that the Minister of Immigration may approve further changes to the Bill consistent with the policy intent, prior to introduction;
6. **agree** that the Bill be introduced on 4 May 2020;
7. **agree** that the Government propose that the Bill be:
 - 7.1. referred to the Epidemic Response Committee for consideration; and
 - 7.2. enacted by mid-May, if possible.

Authorised for lodgement

Hon Iain Lees-Galloway
Minister of Immigration

Proactively Released