

In Confidence

Office of the Minister of Immigration

Chair, COVID-19 Ministerial Group

Omnibus Bill 2020: Changes to the Immigration Act 2009

Proposal

- 1 I propose that Cabinet agree to include amendments to the Immigration Act 2009 (the Immigration Act) in an upcoming Omnibus Bill.

Relation to government priorities

- 2 The proposed changes to the Immigration Act will support New Zealand's response to the COVID-19 emergency situation, and emergency situations in the future.

Executive Summary

- 3 This paper seeks Cabinet's agreement to include a number of amendments to the Immigration Act in the proposed Omnibus Bill. These amendments will ensure that the Government can respond appropriately and efficiently to the COVID-19 pandemic whilst ensuring the safety of New Zealanders and migrants who are currently in New Zealand. The proposed changes are enduring, as they will enhance the Government's ability to respond to other emergencies in the future. These changes will ensure that our immigration system is flexible and responsive to this emergency situation and also to other emergency situations that may occur in the future.
- 4 I propose that the Immigration Act 2009 be amended to:
 - a. 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
 - b. grant the Minister of Immigration the power to extend the expiry dates of visas for classes of people, by special direction
 - c. grant the Minister of Immigration (or a delegated officer) the power to grant visas to individuals and (not delegated) classes of people in the absence of an application, by special direction
 - d. grant the Minister of Immigration the power to waive any regulatory requirements for certain classes of applications, by special direction
 - e. grant the Minister of Immigration (or a delegated officer) the power to waive the requirement to obtain a transit visa, in an individual case, by special direction
 - f. grant the Minister of Immigration 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, by Order in Council, and to

- g. enable the Minister of Immigration or an immigration officer to revoke the entry permission of a person who has been deemed by Regulation to have been granted entry permission.
- 5 Given the speed with which these changes are proposed to be made, I recommend 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.

Background

- 6 On 25 March 2020, Parliament passed the COVID-19 Response (Urgent Management Measures) Legislation Act. Its purpose was to enable arrangements for Alert Level 4 and enable the government to respond effectively to COVID-19 more generally.
- 7 Work on possible changes needed to the Immigration Act 2009 to respond to the COVID-19 emergency, has progressed in anticipation of a second COVID-19 Omnibus Bill being taken forward in the future.
- 8 The immigration-related effects of COVID-19 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 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 ability to respond flexibly to suddenly-changing situations which affect large numbers of visa holders.
- 9 I have identified seven discrete changes to the Immigration Act 2009 which I consider are appropriate to support New Zealand's immediate response to the COVID-19 pandemic.

The seven proposals for change are discrete and proportionate

- 10 The proposals set out below would increase the flexibility of the immigration system in times of emergency, through reducing or removing some of the statutory requirements for visa applications, the grant of visas, and the variation of conditions on visas. Most of the powers would be useful at any point in the future where Immigration New Zealand suffered an unexpected reduction in visa processing capability due to an emergency, such as a large earthquake in a New Zealand urban centre.
- 11 To balance this increase in flexibility, I propose constraining most of the changes through the requirement that they be exercised through the making of a special direction. Where a power is being exercised by special direction made by the Minister of Immigration, the Minister of Immigration would be required to formally agree that any particular additional flexibility or removal of requirements was justified in the circumstances. One of the powers (proposal six) is constrained through the requirement that it be exercised through an Order in Council.
- 12 I also propose to include the requirement that, where a power is exercised by special direction by the Minister of Immigration it:
 - a. must be published in the Gazette, and notified in writing through diplomatic channels, and

- b. is a disallowable instrument and must be presented to the House of Representatives.
- 13 These requirements are similar to the gazetting requirements already contained in the Immigration Act for special directions for classes of people (such as those in section 69(4)).

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

- 14 Given the wide-reaching nature of some of the powers proposed in this paper, I recommend that some powers can only be exercised in special circumstances such as epidemics, natural disasters, where a state of emergency has been declared, or by an Order in Council. These powers are:
- a. the power to vary the visa conditions of classes of people
 - b. the power to extend the expiry date of visas for classes of people
 - c. the power to suspend the ability to make applications for visas or to submit expressions of interest in applying for visas, for classes of people, and
 - d. the power to revoke the entry permission of people deemed to hold a visa and entry permission.
- 15 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 has significant impacts on a large number of people, and I therefore recommend that this power can only be enacted by Order in Council.
- 16 The power to revoke the entry permission of any individual, including of people deemed to hold a visa and entry permission, is a power that should only be exercised in special circumstances due to its broad nature. However I do consider that it is a power that could be exercised by the Minister of Immigration or an immigration officer. Immigration officers already have the power to revoke the entry permission of any person where they believe that a visa has been granted due to an administrative error (section 113 of the Immigration Act). That power is exercised for air arrivals: the new revocation power will extend this to certain maritime arrivals as well.
- 17 However, for all the other powers that must be exercised in special circumstances I recommend that these are non-delegable and can only be exercised by the Minister of Immigration.

I recommend that other, minor, powers can be used whether or not there are special circumstances

- 18 The other proposals are more administrative in nature. I therefore recommend that in those cases the power can be exercised whether or not there are special circumstances.
- 19 Where a power only relates to the visa or visa conditions of an individual, I recommend that the Minister of Immigration should have the ability to delegate that power to an immigration officer. These powers would be the power to grant visas to individuals in the absence of an application, and the power to waive, in an individual case, the requirement to obtain a transit visa.

- 20 However where a power relates to the visas or visa conditions of a class of people, this power should only be exercised by the Minister of Immigration. These powers can be wide reaching and may affect a large group of people. These powers are the power to waive any regulatory requirements for certain classes of applications, and the power to grant visas to classes of people, in the absence of an application.

Proposal one: The power to vary the visa conditions of classes of temporary entry visa holders

- 21 I propose that the Omnibus Bill includes an amendment to the Immigration Act that allows the Minister of Immigration to impose, vary or cancel the conditions of visas for classes of temporary entry class visa holders. I propose that the Minister of Immigration be able to exercise this power by special direction.
- 22 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.
- 23 There is likely to be entire classes of visa holders affected by the pandemic who will all need the conditions of their visa varied in the same way. For example, student visa holders may need the conditions of their visa varied so that they can undertake more hours of work, and certain working holiday visa holders may need the conditions of their visas varied so that they can work for an employer for longer than three months. Such flexibility of temporary work visa settings have been introduced during COVID-19 in order to ensure that 'stranded' temporary workers can continue to support the COVID-19 response effort and themselves.
- 24 Restricting it to temporary visa holders means that the rights of resident class visa holders, which are recognised in the Immigration Act as greater than those of people who have not made a commitment to New Zealand, would not be able to be varied in this fashion.
- 25 Officials have considered whether there are options to address this issue within existing settings. However existing settings can only be utilised on an individual, case by case, basis. In New Zealand as at the end of March there were approximately 390,000 temporary entry class visa holders. They included:
- a. 83,000 visitor visa holders
 - b. 50,000 essential skills work visa holders
 - c. 34,000 working holiday visa holders, and
 - d. 81,000 student visa holders.
- 26 Dealing with numbers this large on a case by case basis may overwhelm the immigration system. It will also divert resources which would be better utilised elsewhere.

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

- 27 I propose that the Omnibus Bill include an amendment to the Immigration Act that will allow that Minister of Immigration to extend the expiry date of visas of a class of people for a maximum of six months, although this period may be extended if necessary. I propose that the Minister of Immigration exercise this power by special direction.
- 28 Section 78 of the Immigration Act 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.
- 29 However this is a blanket provision that 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. At present the ongoing ability of migrants to travel to New Zealand within the validity of visas that have already been granted is unknown. 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.
- 30 In addition, it does not enable the differentiation of different groups of onshore visa holders: it may be appropriate, for example, to grant different extension lengths to certain groups of workers or students. The Epidemic Management Notice will also mean that there will be a large cohort of visa holders who will all have visas expiring on the same date. It may be beneficial to stagger this workload so that Immigration New Zealand is not overloaded with applications.
- 31 Given the global scale of the COVID-19 pandemic, it is unclear when border restrictions will be lifted. It is also uncertain as to when commercial flights to and from New Zealand will resume their normal frequency and routes. Migrants may not be able to easily leave New Zealand until after the current expiry dates provided in accordance with section 78 of the Immigration Act.

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

- 32 I propose that the Omnibus Bill 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.
- 33 The Immigration Act establishes that individuals may make applications for visas (section 57) which the Minister of Immigration or an immigration officer must or may determine (sections 72 and 76). The only power under the Immigration Act to grant a visa in the absence of an application, is in section 61 and applies only where a person is unlawfully in New Zealand.
- 34 An individual's visa may expire while they are in New Zealand as 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. Those individuals held deemed visas (as they had entered New

Zealand by cruise vessel) which expired when their cruise vessel left New Zealand.

- 35 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 when they are severely unwell. I propose that this power be able to be delegated to immigration officers with regard to individuals, but not be delegated for classes of people.

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

- 36 I propose that the Omnibus Bill include amendments to the Immigration Act which will allow the Minister of Immigration to waive requirements imposed by regulation in relation to making an application for classes of people, by special direction. This power would not be delegable.
- 37 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 (such as the requirement to pay a fee or levy, to provide a passport or birth certificate, or to furnish a medical or police clearance) on a case by case basis. However there is no power to waive regulatory requirements for making an application for a class of persons.
- 38 The ability for foreign nationals to be able to apply for and be granted new visas, or variations of conditions of their existing visas during the COVID-19 emergency has been additionally hampered by obstacles around waiving prescribed fee and levy charges. This is because, although Immigration New Zealand staff can process visa applications, off site they cannot meet banking security requirements which would enable them to process fees. Those requirements have had to be waived on a case by case basis. Similarly, in an emergency situation it may be difficult for people to access an electronic form, or difficult for Immigration New Zealand to quickly deploy a new certified form. Applicants may however be easily able to meet truncated information requirements through another medium, such as email.
- 39 Ongoing flexibility, controlled through the conditions on special directions, will continue to be useful during the COVID-19 response and recovery. Considerable Immigration New Zealand staff time is currently being spent on time-consuming case by case processes. 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.

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

- 40 I propose that the Omnibus Bill include an amendment to the Immigration Act that gives the Minister of Immigration the power to waive, in an individual case, the requirement to obtain a transit visa, by special direction.

- 41 Before the COVID-19 emergency, New Zealand operated a comprehensive transit visa waiver process. This meant that most travellers who needed to transit New Zealand were not required to apply for and be granted a transit visa before travelling. To implement decisions on the border restrictions I have, by special direction, now suspended all transit visa waivers under section 86 of the Immigration Act. However Immigration New Zealand continues to receive requests to allow persons who formerly did not need a transit visa to transit New Zealand en route to their home country. While classes of applicants can be given transit visa waivers by special direction, individuals cannot. This appears to be an oversight as, for example, individual visitor visa waivers, which are similar in intent, can be granted by special direction.
- 42 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.

Proposal six: The power to suspend the ability to make applications for visas by classes of people

- 43 I propose that the Omnibus Bill include provisions amending the Immigration Act to allow the Minister of Immigration to be able to suspend, by Order in Council, the ability to make applications of particular classes and type, including to express interest in making an application, for a period of up to three months. (This could be repeated.) Any applications which fall within these classes or types for that period could not be accepted by Immigration New Zealand.
- 44 Currently, the Immigration Act allows for individuals to apply for a visa, provided that they:
- a. meet the pre-requisites of being a person who may apply (as per sections 71, 79 and 81 of the Immigration Act), and
 - b. apply in the prescribed manner (as per the Immigration (Visa, Entry Permission and Related Matters) Regulations 2010).
- 45 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. Lawful applications are continuing to be made to Immigration New Zealand, even though:
- a. it is unlikely any visa granted will be able to be used to travel to New Zealand due to border restrictions
 - b. there is limited Immigration New Zealand resource to process lawfully-made applications due to the effects of the COVID-19 pandemic, and
 - c. for some visa types, the policy rationale for the visa may become uncertain due to changing conditions in New Zealand.

- 46 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 when any visa granted could not be used due to border (or other) restrictions.
- 47 However I would note that this power could not be used to prevent people from applying for refugee or protected person status.

Proposal seven: The power to revoke the entry permission of an individual deemed to hold a visa and entry permission

- 48 I propose that the Omnibus Bill contains provisions amending the Immigration Act to allow the Minister of Immigration or an immigration officer to revoke the entry permission (and thus cancel any visa and deny entry to New Zealand) to any individual, including people deemed to hold a visa and entry permission.
- 49 The Immigration Act currently allows for entry permission to be revoked for a person who arrives at an Immigration Control Area (commercial air passengers and crew) and who was granted entry permission as a result of an administrative error. This power exists up to the point the person enters and while the person is in the Immigration Control Area (it extends to the doors of the airport.) However there is no power to revoke entry permission outside of this provision.
- 50 Allowing the Minister of Immigration or an immigration officer to revoke the entry permission of a person deemed to hold entry permission before they enter New Zealand¹ (either by arriving on New Zealand soil, if travelling by private aircraft, or entering the internal waters of New Zealand if on a cargo vessel, or arguably on a private yacht) will align the border restrictions of all incoming passengers regardless of whether they arrive by commercial or private means.
- 51 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 arriving in New Zealand while the border restrictions have been in place by virtue of their status of being deemed to hold entry permission. Border officers have very few tools to prevent this.
- 52 There is similarly currently no legal mechanism to revoke entry permission that has been deemed to have been granted. This may pose serious health risks to New Zealand if individuals arriving by private aircraft or by a marine cargo vessel or private yacht can bypass the border restrictions.

I recommend that these powers are initially made time-limited

- 53 These amendments are necessary to respond to the COVID-19 emergency situation in New Zealand and as such they will go through an expedited process with limited capacity for public consultation. Therefore I recommend that these amendments be made 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.

¹ Under Schedule 3 of the Immigration (Visa, Entry Permission and Related Matters) Regulations 2010

Financial Implications

- 54 There are no direct financial implications arising from the proposals in this paper. While in some cases the changes to visas would otherwise attract a fee, this is likely to be more than counter balanced by the reduction in work on unfunded case by case decisions, such as that currently being undertaken by Immigration New Zealand staff.

Legislative Implications

- 55 It is proposed that the policy recommendations in this paper are given effect to in the COVID-19 Response Omnibus Bill, which is planned for introduction to the House when Parliament resumes.

Impact Analysis

Regulatory Impact Statement

- 56 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].

Human Rights

- 57 While 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. The Ministry of Business, Innovation and Employment considers that the proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Consultation

- 58 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.

Communications

- 59 No proactive publicity is planned. Cabinet's decisions on any proposed amendments to the Immigration Act 2009 will be made public as part of the parliamentary process for the proposed Omnibus Bill.

Proactive Release

- 60 The paper will be proactively released, subject to any redactions consistent with the Official Information Act 1982.

Recommendations

The Minister of Immigration recommends that the Committee:

- 1 **Note** that work on possible amendments to the Immigration Act 2009 has been progressed in anticipation of a second COVID-19 Omnibus Bill being taken forward in the future;

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- 2 **Note** that changes are proposed to settings which constrain the government's ability to respond flexibly to suddenly-changing situations which affect large numbers of visa holders;
- 3 **Agree** to include amendments to the Immigration Act 2009 to allow the Minister of Immigration to impose, vary or cancel conditions for classes of visa holders, by special direction, in the Omnibus Bill;
- 4 **Agree** to include amendments to the Immigration Act 2009 to allow the Minister of Immigration to extend the expiry dates of visas for a maximum of six months which may be extended if necessary, for classes of people, by special direction, in the Omnibus Bill;
- 5 **Agree** to include amendments to the Immigration Act 2009 to allow the Minister of Immigration to grant visas to individuals and classes of people in the absence of an application, by special direction, in the Omnibus Bill;
- 6 **Agree** to include amendments to the Immigration Act 2009 to allow the Minister of Immigration to waive, for classes of people, any regulatory requirements for making an application, by special direction, in the Omnibus Bill;
- 7 **Agree** to include amendments to the Immigration Act 2009 to allow the Minister of Immigration to waive, in an individual case, the requirement to obtain a transit visa, by special direction, in the Omnibus Bill;
- 8 **Agree** to include amendments to the Immigration Act 2009 to allow the Minister of Immigration to suspend the ability of classes of people to make applications for visas or to submit expressions of interest in applying for visas, by special direction, in the Omnibus Bill;
- 9 **Agree** to include amendments to the Immigration Act 2009 to allow the entry permission of a person who has been deemed by Regulation to have been granted entry permission, to be revoked;
- 10 **Agree** that the powers to vary the visa conditions of classes of people, extend the expiry date of visas for classes of people, suspend the ability to make applications for visas or to submit expressions of interest in applying by classes of people, and to revoke the entry permission of any person can only be exercised in special conditions such as in an epidemic, natural disaster, where a state of emergency has been declared or by Order in Council;
- 11 **Agree** that these amendments expire 12 months after enactment;
- 12 **Invite** the Minister of Immigration to return to Cabinet at a later date to discuss whether any or all of these enactments should be made enduring powers;
- 13 **Invite** the Minister of Immigration to issue drafting instructions to the Parliamentary Counsel Office to amend the Immigration Act 2009 in accordance with the decisions in paragraphs 3 to 11 above; and
- 14 **Authorise** the Minister of Immigration to make decisions on any minor or technical matters, consistent with the policy proposals in this paper, that may arise during the drafting process.

Authorised for lodgement

Hon Iain Lees-Galloway
Minister of Immigration

Proactively Released