



## COVERSHEET

<b>Minister</b>	Hon Kris Faafoi	<b>Portfolio</b>	Immigration
<b>Title of Cabinet paper</b>	Immigration (COVID-19 Response) Amendment Bill 2021	<b>Date to be published</b>	1 April 2021

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
February 2021	Immigration (COVID-19 Response) Amendment Act 2020: proposed extension of powers	Office of the Minister of Immigration
24 February 2021	Immigration (COVID-19 Response) Amendment Act 2020: proposed extension of powers DEV-21-MIN-0016	Cabinet Office
March 2021	Immigration (COVID-19 Response) Amendment Bill 2021: Approval for Introduction	Office of the Minister of Immigration
25 March 2021	Immigration (COVID-19 Response) Amendment Bill 2021 LEG-21-MIN-0030	Cabinet Office

### Information redacted

**YES**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reason of Confidential advice to Government.

In Confidence

Office of the Minister of Immigration

## **Extension of powers under the Immigration (COVID-19 Response) Amendment Act**

### **Proposal**

- 1 I propose that Cabinet agree to amend the *Immigration Act 2009* to extend the Minister of Immigration's powers, inserted by the *Immigration (COVID-19 Response) Amendment Act 2020*, which are currently due to be repealed on 15 May 2021. I also seek Cabinet's agreement to extend the duration of fixed-term regulations made under one of those powers from three to six months. I will seek a shortened Select Committee process to enable the Bill to come into effect before the current powers expire.

### **Relation to government priorities**

- 2 The proposed changes to the Immigration Act will continue to support New Zealand's response to COVID-19.

### **Summary**

- 3 The *Immigration (COVID-19 Response) Amendment Act 2020* (the Amendment Act) came into force on 16 May 2020. It was intended to support the Government's response to the effects of the COVID-19 outbreak on the immigration system and on migrants by introducing eight new powers, bounded by three major safeguards.
- 4 Firstly, six of the eight powers can only be exercised through a special direction (in the case of groups, only by the Minister of Immigration, through an instrument that must be published – see Annex one) and another can only be exercised through regulations. Secondly, the decision maker must also be satisfied in each case that the exercise of the power (such as the making of the special direction) is reasonably necessary to manage the effects and deal with the consequences of measures taken to contain or mitigate the outbreak of COVID-19.
- 5 Finally, the majority of the powers can only be exercised to benefit (or at minimum not disadvantage) visa holders. The major exception to this, the power to suspend the ability of offshore persons from making temporary entry class visa applications, is the power that must be exercised through regulations.
- 6 The two minor exceptions to the non-disadvantage requirements comprise the power to revoke an individual's deemed entry permission (this mirrors the situation for people granted entry permission by an Immigration Officer at the border) and the obligations placed on all temporary entry class visa holders to comply with COVID-19-related Orders or instructions from a Medical Officer of Health, which has public health benefits for the New Zealand community.
- 7 The Amendment Act's powers will expire on 15 May 2021, when the amendments to the Immigration Act will be repealed. I am seeking Cabinet's agreement to the introduction of legislation that will remove the repeal date, while retaining the existing safeguards, on the grounds that the international progress of COVID-19 and ongoing impacts on the immigration system and migrants

means that there will continue to be a need for those powers to be exercised. I am also seeking Cabinet's agreement to the extension of the maximum duration of the effect of regulations suspending the ability to make temporary entry class visa applications offshore, from three to six months, to give more certainty of planning (including to migrants offshore) and to reduce administrative costs.

- 8 As the current legislation will expire relatively soon, I am seeking agreement to a truncated parliamentary process for the Bill, involving a shortened Select Committee process, on the grounds that the changes sought are minor.

### **Background**

- 9 Parliament unanimously passed the Amendment Act in May 2020. The Amendment Act was intended to ensure that the Government could respond appropriately and efficiently to the COVID-19 outbreak by providing additional flexibility in the immigration system by introducing eight powers, as follows:
- 9.1 the power to impose, vary or cancel conditions for classes of temporary entry class visa holders, by special direction
  - 9.2 the power to vary or cancel conditions for classes of resident class visa holders, by special direction
  - 9.3 the power to extend the expiry dates of visas for classes of people, by special direction
  - 9.4 the power to grant visas to individuals and classes of people in the absence of an application, by special direction
  - 9.5 the power to waive any regulatory requirements for certain classes of application, by special direction
  - 9.6 the power to waive the requirement to obtain a transit visa in individual cases, by special direction
  - 9.7 the power to suspend the ability to make applications for visas or submit Expressions of Interest in applying for visas by classes of people, by Order in Council, and
  - 9.8 the power to revoke the entry permission of a person who has been deemed by Regulations to hold a visa and have been granted entry permission.
- 10 The powers are wide ranging, and Parliament therefore approved a number of safeguards to their use. The three most important safeguards are that:
- 10.1 firstly, most can only be exercised through a special direction (in the case of groups, only by the Minister of Immigration, through an instrument that must be published);
  - 10.2 secondly, the decision maker must be satisfied in each case that the exercise of the power (such as the making of the special direction) is reasonably necessary to manage the effects and deal with the consequences of measures taken to contain or mitigate the outbreak of COVID-19; and
  - 10.3 thirdly, that almost all powers can only be exercised to benefit (or not disadvantage) individual or classes of visa holders. The major exception to this, the ability to suspend the making of applications, must be done

through regulations (see paragraph 13 below for a discussion of the minor exception to this requirement).

- 11 In addition, Parliament agreed that the powers would be repealed one year after the Amendment Act received Assent.
- 12 Since the legislation was passed in May 2020, almost all of the powers have been used (the ability to revoke the entry permission of a person deemed to hold entry permission has not been exercised). In particular, I note that seventeen class special directions have been gazetted (see Annex one for a complete list to date). Most have been used to make beneficial changes to classes of persons, such as extending their period of stay in New Zealand, enabling workers to work for a wider range of employers, extending the time available to travel to New Zealand for visa holders outside New Zealand who do not qualify for MIQ places at present, or waiving application fees or other regulatory requirements.
- 13 The only non-beneficial special direction has required all temporary entry class visa holders to comply with COVID-19-related Orders or instructions from a Medical Officer of Health. This was to make it clear that non-compliance by a temporary entry class visa holder with requirements imposed to contain or mitigate the outbreak of COVID-19 will be viewed seriously and may result in the visa holder being made liable for deportation.
- 14 A broader review of the *Immigration Act 2009* is in its early scoping stages. If Cabinet agrees to this review proceeding it will, among other things, look at the longer-term role of the powers and their efficacy in responding to emergency situations.

### **I propose the removal of the expiry date from the powers**

- 15 While New Zealand's domestic situation has improved since the introduction of the powers, the global circumstances under which the powers were initially passed still stand – a continued border closure and global pandemic, with wide-ranging impacts on temporary visa holders both onshore and offshore. The arguments for continuing to maintain flexibility in control over applications for temporary entry class visas will remain until border restrictions are lifted.
- 16 For example, I am currently considering whether to again extend the expiry dates of some classes of onshore temporary visa holders, noting issues such as the potential benefit to New Zealand's domestic tourism industry of visitors who are still onshore.
- 17 I also note that the powers are still required in order to allow the government to respond effectively to suddenly-changing situations which affect large numbers of visa holders. These could include any scenarios which might impact Immigration New Zealand's (INZ's) processing capacity: for example, a further lockdown in Auckland would again result in the temporary closure of offices and have a corresponding impact on INZ's processing capacity.
- 18 I consider that the power to suspend the ability to make visa applications for classes of people remains critical as long as borders remain closed. Under the Immigration Act, visas cannot be granted if the holder is unlikely to be allowed to enter, but they cannot be declined if they meet the relevant policy settings. Before we suspended the ability to make offshore temporary entry class visa

applications in August 2020, INZ had a backlog of almost 39,000 such temporary entry visa applications on hand and was receiving another 3,000 to 4,000 such applications per month.

- 19 As visa applications age the supporting details provided with them (such as medicals or job offers) go out of date and the reason for travel may evaporate, meaning that applicants would need to resubmit much of the material at the point that the border reopens. In addition, it is likely that a proportion of applicants would eventually request refunds, and this carries a relatively high administrative cost.
- 20 Finally, I note that the ongoing special direction settings (such as the current waiving of immigration application fees for Recognised Seasonal Employer (RSE) applications) will at present be revoked on 16 May 2021. This means that employers who are planning to bring staff into New Zealand in a few months (and the RSE workers themselves) will face costs that I considered should be waived for the full RSE season, subject to revocation.
- 21 I have considered an option to establish a new repeal date for the powers (three years from now, in 2024), but consider there is a risk that a full review of the Immigration Act, which will examine the longer-term role of the powers, may not be implemented by this date. Removal of the repeal provision avoids the potential necessity of another roll-over of the powers in three years' time.
- 22 As noted above (see paragraph 10), there are a number of safeguards already built into the Bill which also mitigate the risks of the wide-ranging nature of the powers, as follows:
  - 22.1 the majority need to be exercised by special direction (and some can only be exercised by the Minister of Immigration), while one (the ability to suspend applications) requires an Order in Council which must be renewed periodically (currently every three months)
  - 22.2 the powers can only be used to manage the effects or consequences of measures taken under the Immigration Act or any other enactment to contain or mitigate the outbreak of COVID-19 or its effects, or any other measures to contain or mitigate the outbreak of COVID-19 or its effects – due to this, the powers will have a natural expiry at the end of the pandemic, and
  - 22.3 most of the powers must be used for the benefit of visa holders only.

**I also seek Cabinet's agreement to extending the duration of regulations under the power to suspend applications**

- 23 The power which allows the suspension of the ability to make visa applications requires an Order in Council, which must be renewed every three months.
- 24 I propose to extend the duration of regulations from three to six months. The frequent renewal of these regulations is imposing unnecessary administrative costs and causing uncertainty in markets (as it perpetually appears that a border opening may be imminent), and this power is likely to be needed for some time as border restrictions remain in place.

- 25 Cabinet has also agreed (most recently in October 2020) that Ministers with Power to Act (the Minister of Immigration, the Minister of Foreign Affairs, the Minister for COVID-19 Response and the Minister of Health) are authorised to revoke the regulations, in whole or in part, upon my recommendation [CAB-20-MIN-0448].
- 26 This authorisation would enable the suspension to be cancelled before the end of the period, if conditions warranted that change, such as in the case of a rapid re-opening of the border. It could also enable classes of intending travellers (such as students) to be exempted from the suspension. I note that students and other foreign nationals who are invited to apply for a visa are not subject to this suspension.
- 27 I have noted concerns from the International Education industry in particular that New Zealand may lose competitive advantage against other potential destinations for foreign fee paying students, through signalling that our borders are closed on a relatively long term basis. I am comfortable with our signalling that New Zealand's borders are closed until it is safe to reopen them, but that we will be able to move quickly to reopen at that point.

### **Financial Implications**


- 28 There are no direct financial implications arising from the proposals in this paper. However, any changes to visas by special direction which would ordinarily attract a fee as a result of the use of the powers may have indirect financial impacts on INZ. This is balanced by the ability to provide timely immigration decisions and changes to visa conditions to visa holders and their New Zealand families and employers.

### **Legislative Implications**

- 29 I propose that the policy recommendations in this paper are given effect to in a bill to be introduced to the House in March 2021.

### *Timing considerations*

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## Impact Analysis

### *Regulatory Impact Statement*

- 36 The RIA team at the Treasury has determined that the proposal to extend the expiry of powers under the Immigration (COVID-19 response) Amendment Bill is exempt from the requirement to produce a Regulatory Impact Statement, on the basis that it is intended to temporarily defer or extend legislative deadlines.

## Human Rights

- 37 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

- 38 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 Education New Zealand), and Social Development; the Department of Prime Minister and Cabinet; and The Treasury.
- 39 I will direct officials to proactively engage with targeted stakeholders during the Bill process. This mirrors the targeted consultation undertaken when the original legislation was introduced and passed in 2020.

## Communications

- 40 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 Bill.

## Proactive Release

- 41 This 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 the *Immigration (COVID-19 Response) Amendment Act 2020* introduced eight powers to provide additional flexibility in the immigration system to support appropriate and efficient responses to the COVID-19 outbreak;
- 2 **note** that the powers under the *Immigration (COVID-19 Response) Amendment Act 2020* are subject to a number of safeguards, including that
  - 2.1 most can only be exercised through a special direction (in the case of groups, only by the Minister of Immigration, through an instrument that must be published);



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- 2.2 the decision maker must be satisfied in each case that the exercise of the power (such as the making of the special direction) is reasonably necessary to manage the effects and deal with the consequences of measures taken to contain or mitigate the outbreak of COVID-19; and
- 2.3 almost all powers can only be exercised to benefit (or at a minimum not disadvantage) visa holders, while the major exception to this, the ability to suspend the making of applications, must be done through regulations;
- 3 **note** that the powers under the *Immigration (COVID-19 Response) Amendment Act 2020* are due to be repealed on 15 May 2021;
- 4 **agree** to amend the *Immigration Act 2009* to remove the expiry date from the powers granted to the Minister of Immigration under the *Immigration (COVID-19 Response) Amendment Act 2020* to respond to the COVID-19 situation;
- 5 **agree** to extend the duration of regulations made under the power to suspend the ability to make applications for visas by classes of people, from three to six months;
- 6 **invite** the Minister of Immigration to return to Cabinet at a later date to discuss a broader review of the *Immigration Act 2009*, including whether these powers should be maintained beyond the COVID-19 pandemic;

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- 8 **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 4 and 5 above; and
- 9 **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 Kris Faafoi  
Minister of Immigration

**Annex one: List of special directions made under the Immigration (COVID-19 Response) Amendment Act powers**

	<b>DATE SIGNED BY MINISTER OF IMMIGRATION</b>	<b>SECTION/S OF IMMIGRATION ACT 2009</b>	<b>EFFECT</b>
1	19 June 2020	57(3)	Reduce application requirements for transit visa applicants (including remove requirement for forms and fees)
2	6 July 2020	78A	Extend temporary work visas to enable people whose visas would otherwise expire to remain and work lawfully in New Zealand
3	7 July 2020	61A(2)(b) and 61A(5)	Grant new limited visas to onshore Recognised Seasonal Employer (RSE) workers
4	17 August 2020	78A	Extend duration of visas held by certain partners and dependants (children) of employer-assisted workers
5	2 September 2020	78A	Extend temporary visitor visas to enable people whose visas would otherwise expire to remain lawfully in New Zealand
6	3 September 2020	57(3)	Waive prescribed fees and levy charges to persons associated with Antarctic Treaty programme
7	11 September 2020	50(4A) and 50(4C)	Vary travel conditions on resident visas to extend the time available for offshore resident visa holders with expired travel conditions to travel to New Zealand
8	11 September 2020	61A(2)	Grant resident visas to offshore persons whose resident visas are no longer valid to extend the time available for their travel to New Zealand
9	11 September 2020	52(4A)(b) and 53(4A)(b)	Vary the conditions of visitor visa holders in New Zealand to allow the holders to study or to attend school for up to six months in a year
10	11 September 2020	52(4A)(a)	Impose a condition on temporary entry class visa holders to comply with COVID-19 health regulatory requirements (note: this is the only non-beneficial special direction, and relates to s.52(4B)(ii))
11	11 September 2020	78A	Extend visas held by certain employer-assisted workers, and by the partners and dependants of work visa holders, to enable them to remain lawfully in New Zealand (and to work, study, or visit as appropriate)
12	1 October 2020	61A(2) and 61A(5)	Grant supplementary seasonal employment visas to onshore persons whose visas are expiring to enable them to remain lawfully in New Zealand and work in seasonal industries
13	1 October 2020	61A(2) and 61A(5)	Grant new RSE limited visas to persons who were previously granted limited visas as stranded RSE workers
14	17 December 2020	78A	Extend working holiday visas, and ease work restrictions, to persons in New Zealand on working holiday visas which are expiring
15	17 December 2020	78A	Extend the visas of some employer-assisted work visa holders and of their partners and dependants to enable them to remain lawfully in New Zealand (and work, study, or visit as appropriate).
16	17 December 2020	57(3) and 57(5)	Waive the requirement to provide a Chest X-Ray Certificate for certain RSE limited visa applications, to streamline the process for applicants travelling from Samoa, Tonga or Vanuatu who are arriving before 30 March 2021
17	17 December 2020	57(3)	Waive the requirement to pay the prescribed fee and any levy for certain RSE limited visa applications during COVID-19 Travel Restrictions, to remove a barrier to the movement of RSE workers to where the greatest workforce need is and remove a cost normally borne by the RSE worker; noting this also benefits RSE workers who are already onshore and continue to be affected by COVID-19 measures offshore, primarily affecting their repatriation.