



COVERSHEET

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

List of documents that have been proactively released

Date	Title	Author
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
Chair, Cabinet Legislation Committee

Immigration (COVID-19 Response) Amendment Bill 2021: Approval for Introduction

Proposal

- 1 This paper seeks Cabinet's approval to introduce the Immigration (COVID-19 Response) Amendment Bill 2021 (the Bill). The Bill amends the Immigration Act 2009 (the Act) to:
 - extend the expiry dates of the eight powers introduced in 2020 by a further two years; and
 - extend the duration of regulations, made under the power to suspend the ability to make applications for visas by classes of people, from three months to six months

Policy

Background

- 2 In May 2020, the Parliament passed the Immigration (COVID-19 Response) Amendment Act 2020 (the Amendment Act), which provided additional flexibility in the immigration system by introducing eight powers exercisable by the Minister of Immigration (or, where permitted, a delegate). In the order in which they appear in the Immigration Act 2009, they are the power to:
 - vary or cancel certain types of conditions for classes of resident class visa holders, by special direction
 - impose, vary or cancel conditions for classes of temporary class visa holders, by special direction
 - waive any regulatory requirements for certain classes of application (that is, waive any prescribed requirements to make an application), by special direction
 - grant visas to individuals and classes of people in the absence of an application, by special direction
 - extend the expiry dates of visas for classes of people, by special direction

- waive the requirement to obtain a transit visa in an individual case or suspend a transit visa waiver provided by regulations in any individual case, by special direction
 - certify immigration instructions under which an immigration officer may revoke the entry permission of a person who has been deemed under regulations made under the Act to have been granted entry permission; and
 - 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.
- 3 These powers were subject to a number of safeguards, including that most can only be exercised by the Minister through a special direction that is a disallowable instrument, required to be tabled in the House of Representatives, or by making regulations; that the decision maker must be satisfied that the exercise of the power was reasonably necessary to deal with the outbreak of COVID-19; and that the powers can only be exercised to benefit (or not disadvantage) individuals or classes of visa holders.
- 4 The Bill gives effect to a decision by Cabinet on 1 March 2021, to extend the expiry dates of these powers by a further two years to enable the Government to continue to respond to the COVID-19 pandemic [DEV-21-MIN-0016 and CAB-21-MIN-0034].
- 5 The Bill also seeks to extend the duration of regulations that can be made under one of the powers from three to six months (the power to suspend applications from offshore, which requires an Order in Council), as its frequent renewal is causing excessive operational costs and inadvertently signalling (incorrectly) that the border may reopen imminently.
- 6 The administrative powers proposed to be rolled over are intended to be generally exercised to the benefit of the foreign national (visa holder or visa applicant). In order to exercise the powers, the majority are required to, at minimum, not materially disadvantage visa holders. They enable, for example, the Minister of Immigration to grant work or study rights to classes of people who are stranded in New Zealand without requiring them to individually apply (and pay prescribed fees) for those benefits, or to extend the duration of visas held by classes of people.
- 7 In the course of discussing the paper seeking these policy decisions, Ministers invited the Minister of Immigration to report back to DEV 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 and the implications for the provision of any social welfare support provided by the Ministry for Social Development. I intend to bring proposals before Cabinet later this year.

Why a Bill is required

- 8 The powers under the Amendment Act are currently due to be repealed at the end of 15 May 2021.
- 9 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 visa and applicants, 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. 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.

Impact analysis

- 10 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.

Compliance

- 11 The Immigration (COVID-19 Response) Amendment Bill complies with each of the following:
 - the principles of the Treaty of Waitangi;
 - the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 (see paragraphs 9-13 below);
 - the disclosure statement requirements (a disclosure statement has been prepared and is attached to this paper);
 - the principles and guidelines set out in the Privacy Act 1993;
 - relevant international standards and obligations;
 - the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

New Zealand Bill of Rights Act 1990

- 12 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). This relates in particular to special directions, which are made at the discretion of the Minister of Immigration.
- 13 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.

- 14 However, I consider that these limitations are demonstrably justified to ensure that the Government can continue to respond appropriately to the COVID-19 pandemic. Special directions allow the Minister of Immigration to make decisions regarding COVID-19 and its effects in an efficient manner, which is necessary given the rapidly changing nature of the pandemic and the issues arising as a result of it.
- 15 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.
- 16 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 Act, or other measures taken under other acts, or otherwise to contain or mitigate the outbreak of COVID-19.

Human Rights Act 1993

- 17 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

Confidential advice to Government



- 19 The following agencies have been consulted on the proposed amendments to the Immigration Act during the development of this paper, and 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

- 20 This Bill will be binding on the Crown.

Creating new agencies or amending law relating to existing agencies.

- 21 Not applicable.

Allocation of decision making powers

- 22 The Bill seeks to continue decision-making powers granted to the Minister of Immigration in 2020. These powers grant the Minister of Immigration (or an immigration officer where the power is able to be delegated) the power to:
- vary or cancel certain types of conditions for classes of resident class visa holders, by special direction
 - impose, vary or cancel conditions for classes of temporary class visa holders, by special direction
 - waive any regulatory requirements for certain classes of application (that is, waive any prescribed requirements to make an application), by special direction
 - grant visas to individuals and classes of people in the absence of an application, by special direction
 - extend the expiry dates of visas for classes of people, by special direction
 - waive the requirement to obtain a transit visa in an individual case or suspend a transit visa waiver provided by regulations in any individual case, by special direction
 - certify immigration instructions under which an immigration officer may revoke the entry permission of a person who has been deemed under regulations made under the Act to have been granted entry permission; and
 - 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.
- 23 The Bill also seeks to continue a new decision making power already granted 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

- 24 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. That power has been exercised three times and the current regulations will expire on 7 May 2021.
- 25 In addition to extending the period of time during which the regulations can be made (to 15 May 2023), the Bill also seeks to extend the maximum duration of the regulations from three to six months.

Other instruments

- 26 The Bill includes provisions granting the Minister of Immigration a number of powers to be exercised by special direction. Where one of these powers is exercised by the Minister of Immigration, through a special direction that applies to a class of people, 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

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

Commencement of legislation

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

Parliamentary stages

- 29 I plan to introduce the Bill on 30 March 2021, and will move for first reading on 8 April 2021. The Bill should be passed by 14 May 2021 at the latest.
- 30 I propose that the Bill should be referred to the Education and Workforce Select Committee for a period of three weeks.

Publicity

- 31 I intend to issue a press release when the Bill is introduced. This will be accompanied by the proactive release of relevant Cabinet papers. As noted above, officials will also contact key stakeholders on introduction to draw the Bill's existence to their attention.

Proactive Release

- 32 I intend to proactively release this paper, and the associated policy paper, at the point that the Bill is introduced, subject to any redactions consistent with the Official Information Act 1982.

Recommendations

- 33 The Minister of Immigration recommends that the Committee:
- 1 **note** that the Immigration (COVID-19 Response) Amendment Bill holds a category 2 priority on the 2021 Legislation Programme and must be passed before 15 May 2021 or the relevant existing provisions will be repealed;
 - 2 **note** that the Bill seeks to extend by two years the date of repeal of the powers granted to the Minister of Immigration under the Immigration (COVID-19 Response) Amendment Act 2020, to continue to enable the Government to respond to the COVID-19 pandemic and its effects;
 - 3 **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;
 - 4 **agree** that
 - 4.1 the Minister of Immigration may approve further changes to the Bill consistent with the policy intent, prior to introduction;
 - 4.2 the Parliamentary Counsel Office can make minor proofreading and editorial changes to the Bill prior to introduction;
 - 5 **agree** that the Bill be introduced on 30 March 2021;
 - 6 **agree** that the government propose that the Bill be:
 - 6.1 referred to the Education and Workforce committee for consideration; and
 - 6.2 enacted by 14 May 2021.

Authorised for lodgement

Hon Kris Faafoi
Minister of Immigration