



COVERSHEET

Minister	Hon Michael Wood	Portfolio	Immigration
Title of Cabinet paper	Immigration (Mass Arrivals) Amendment Bill	Date to be published	28 March 2023

List of documents that have been proactively released

Date	Title	Author
June 2022	Addressing legal risks to the safe and effective management of a mass arrival	Office of the Minister of Immigration
1 June 2022	Addressing legal risks to the safe and effective management of a mass arrival DEV-22-MIN-0125 Minute	Cabinet Office
June 2022	Regulatory Impact Statement: Warrant of commitment	Ministry of Business, Innovation and Employment
December 2022	Immigration (Mass Arrivals) Amendment Bill	Office of the Minister of Immigration
8 December 2022	Immigration (Mass Arrivals) Amendment Bill LEG-22-MIN-0228 Minute	Cabinet Office

Information redacted

YES / **NO**

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 reasons of maintenance of the law, national security or defence, international relations, legal professional privilege, and confidential advice to government.

Restricted

Office of the Minister of Immigration
Chair, Cabinet Legislation Committee


Immigration (Mass Arrivals) Amendment Bill

Proposal

1. This paper seeks Cabinet's approval to introduce the Immigration (Mass Arrivals) Amendment Bill (the Bill). The Bill amends the *Immigration Act 2009* (the Act) to:
 - 1.1. Provide more time for the Courts to consider an application for a mass arrival warrant of commitment and allow for migrants to be detained while applications are determined by the Courts;
 - 1.2. Make it clear that members of an irregular maritime arrival group are responsible for applying for entry permission and a visa, and deem them to have done so if they fail to do so; and
 - 1.3. Remove any possibility that members of an irregular maritime arrival group are deemed to hold a visa on arrival.

Policy

Background

2. The Act defines a mass arrival group as a group of more than 30 people who arrive irregularly in New Zealand on one or more craft. We need to ensure that we can manage a maritime mass arrival, should one occur, in an orderly and safe manner, and that in doing so we protect the rights of those involved. Following a review of our arrangements for a mass arrival response, the following risks were identified:
 - 2.1. current provisions in the Act require warrants of commitment for detention to be obtained within 96 hours of the initial detention. It is very unlikely that warrants could be obtained in this timeframe unless they were considered and granted ex parte (without legal representation for the people affected). This does not meet natural justice principles Maintenance of the law

 - 2.2. the Act's entry provisions mean it is not certain whether members of an irregular maritime arrival group can apply for entry permission on arrival. This creates uncertainty around our legal ability to process them effectively (including to consider them for the grant of a visa or immigration detention) and also reduces our ability to provide care; and

- 2.3. members of a mass arrival group who were rescued at sea by a cargo vessel (or a cruise vessel, if they held Electronic Travel Authorities) and were brought to New Zealand would be deemed, under Schedule 3 of the *Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010* (the Visa Regulations), to hold a visa on arrival. This would mean that they would fall outside the provisions of the existing legislation for managing members of a mass arrival, as they would already hold a lawful status in New Zealand.

Decisions

3. In May 2022, Cabinet considered the paper *Addressing legal risks to the safe and effective management of a mass arrival* and agreed to amend the Act to address those risks [DEV-22-MIN-0125] through:

Providing more time for the Courts to consider an application for a mass arrival warrant of commitment and allow for migrants to be detained while applications are determined by the Courts

4. Under the amendment agreed by Cabinet, the current 96-hour deadline for deciding an application will instead become a deadline for an application to be submitted, providing time for individual members of a mass arrival group to be afforded their rights to obtain legal representation and for a formal hearing of the warrant application.
5. To minimise the risk of prolonged detention while this process occurs, ^{Maintenance of the law} [REDACTED], the hearing of the application will be prioritised and time-limited (within seven days at most, with the final decision made no later than 28 days from the date of the application), members of the mass arrival group will be able to access legal aid as soon as possible and this detention will be under the supervision of the Courts. The Ministry of Business, Innovation and Employment will ensure that mass arrival group members receive medical care and are safely accommodated during this process.

Removing any doubt in legislation that members of an irregular maritime arrival group are responsible for applying for entry permission and a visa.

6. The agreed amendment will clarify that members of such a group are required to apply for entry permission upon arrival, and will enable them to apply for a visa. An application for entry permission and a visa is important for the management of the group, because it enables an immigration officer to require the person to undertake an interview, provide further information, and undergo a medical examination, and provides a decision-making process most consistent with New Zealand's international obligations.
7. The medical examination will both mean the migrants can be provided with the medical treatment they require and also manage any public health risks.

Removing any possibility that members of an irregular maritime arrival group are deemed to hold a visa on arrival.

8. The Act currently provides that a passenger, in relation to a craft, means a person, other than a member of the crew, who is carried in or on the craft with the consent of the carrier, or the person in charge, of the craft. Schedule 3 of the Visa Regulations provides that cruise ship¹ passengers and cargo ship passengers are generally deemed to hold a temporary visa on arrival in New Zealand, meaning as above that they would not be required (or able) to make an application for a visa or entry permission.
9. This means that members of a mass arrival group who are, for example, rescued at sea, could be deemed to hold a visa and entry permission on arrival. The agreed amendment addresses this risk.

Why a Bill is required

10. The changes agreed by Cabinet require legislative change for implementation. While no mass arrival ventures have arrived in New Zealand to date, the risk of such ventures is real (demonstrated by the MV Sun Sea which arrived in Vancouver in August 2010 after a three-month voyage carrying 492 passengers). It is important that New Zealand is well-prepared in the event of such an arrival, including through ensuring that we can manage it in an orderly and safe manner, and that in doing so we protect the rights of those involved.

Impact analysis

11. A Regulatory Impact Summary which considers the substantive proposal - requiring the application for a group warrant of commitment to be made within 96 hours but allowing for continued detention beyond 96 hours where an application for an irregular arrival warrant is before the courts – has been prepared and reviewed by MBIE's Regulatory Impact Analysis Review Panel in the context of the policy decisions.
12. The Panel noted that limited consultation meant that the Regulatory Impact Summary does not fully meet the Regulatory Impact Analysis criteria. However the Panel noted the urgency of the proposed changes in order to ensure consistency with NZBORA from a natural justice perspective, enable all members of a mass arrival group to be appropriately housed and provided with medical care, and prevent the release of potentially high risk members of a mass arrival group.
13. On this basis, the Panel considered that the information and analysis summarised in the Regulatory Impact Summary partially met the criteria necessary for Ministers to make informed decisions on the proposals.

¹ Noting that cruise ship passengers must also hold an Electronic Travel Authority to be deemed on arrival to hold a visa and entry permission.

Compliance

14. The *Immigration (Mass Arrivals) Amendment Bill* complies with each of the following:
 - 14.1. the principles of the Treaty of Waitangi;
 - 14.2. the rights and freedoms contained in the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993* (see from paragraph 15 below);
 - 14.3. the disclosure statement requirements (a disclosure statement has been prepared and is attached to this paper);
 - 14.4. the principles and guidelines set out in the *Privacy Act 1993*;
 - 14.5. relevant international standards and obligations;
 - 14.6. the Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee.

New Zealand Bill of Rights Act 1990 (NZBORA)

15. The substantive proposal – requiring the application for a group warrant of commitment to be made within 96 hours but allowing for continued detention beyond 96 hours where an application for an irregular arrival warrant is before the courts – engages Section 22 of the NZBORA, which affirms the right of everyone to be free from arbitrary detention.
16. Section 22 recognises that there are circumstances in which it will be necessary for the state to detain individuals but that there are limits on the legitimate use of state power for that purpose. The detention of an individual by the state must:
 - 16.1. have a valid purpose specified in law;
 - 16.2. be necessary to achieve that purpose (and proportionate and reasonable in all the circumstances); and
 - 16.3. continue no longer than necessary to achieve that purpose (i.e. a person must be released when the purpose for the detention ends).
17. The purpose of allowing detention without warrant beyond the current 96 hours is to enable the people detained (the members of a mass arrival group) to engage and instruct legal counsel. Compared with the status quo, this proposal provides for a more rights-enhancing process, enabling natural justice to be met, while ensuring the effective management of the mass arrival group and any threat or risk to security or to the public arising from members of the group.
18. Officials would still be required to make the application prior to the current 96-hour deadline under the Act. It would however give the Court the flexibility to consider an application beyond this time, enabling an on-notice process and time for legal representations to be heard, should the Judge consider it appropriate.

19. The proposal also manages the risk that the detention of members of a mass arrival group while awaiting the Court's decision might become arbitrary, in terms of s 22 of the NZBORA. This is because there would be a final deadline by which the Judge would be required to determine the application, and because any detention following the initial hearing of the application would be under the Court's supervision. Additional safeguards in this system include:
 - 19.1. the time that members of a mass arrival group are detained without a warrant could be minimised by streamlining legal aid processes and increasing the legal aid resources available, to ensure that decisions can be made as quickly as possible;
 - 19.2. the Judge could make a decision to release some or all of the irregular migrants with conditions at any time, meaning that the risk of the proposal resulting in arbitrary detention is low; and
 - 19.3. once an application was made and heard, any continued detention would be supervised by the Court.
20. Officials would also ensure that, in addition to these legislative amendments, the mitigations set out below would increase the likelihood of the initial application being granted, **Maintenance of the law** and demonstrate the Government's commitment to upholding human rights and the rule of law. These mitigations include:
 - 20.1. upon the triggering of a mass arrival response, arranging a meeting between the Solicitor-General and Chief District Court Judge to discuss a procedure for considering applications for multiple mass arrival warrants;
 - 20.2. requesting the District Court to appoint an amicus or counsel to assist the Court, with a brief to act as contradictor² for the initial applications for mass arrival warrants on behalf of the migrants;
 - 20.3. ensuring that the detention applied for is at a level that is appropriate to address the purposes of detention set out in the Act, with regard for the particular features of each migrant. **Maintenance of the law**
 - 20.4. **Maintenance of the law**
 - 20.5. **Maintenance of the law**

² A "contradictor" is appointed by the court to take the role of a party not or no longer involved in the litigation to challenge legal arguments and ensure a full argument is made. A contradictor can be seen as a specialised type of amicus that allows the court to proceed with a hearing to decide a particular issue.

Maintenance of the law

Consultation

21. The following agencies were consulted on the proposed amendments to the Immigration Act during the development of the policy paper, and their feedback was incorporated into it: the Ministries of Foreign Affairs and Trade and Justice, the Department of Prime Minister and Cabinet, the New Zealand Customs Service, the New Zealand Police, the Treasury, the Crown Law Office and the New Zealand Defence Force.

Binding on the Crown

22. This Bill will be binding on the Crown.

Creating new agencies or amending law relating to existing agencies.

23. Not applicable.

Allocation of decision making powers

24. Not applicable.

Associated regulations

25. Regulations are not needed to bring the Bill into operation generally, or to administer these changes.

Other instruments

26. Not applicable.

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 Wednesday 14 December 2022, with the first reading undertaken in February 2023. I am currently undertaking consultations which will determine the Select Committee to which the Bill will be referred, as there are arguments for both the Education and Workforce Committee and the Foreign Affairs, Defence and Trade Committee. As the Bill should be passed by the end of July 2023 at the latest, a truncated Select Committee consideration period will be necessary and I therefore propose that the Bill should be referred for a period of four months.

30. It is important that this legislative amendment is made to ensure that New Zealand is well-positioned to respond in the event of a maritime mass arrival. The substantive provisions (enabling group warrants of commitment in the event of a mass arrival) were fully examined by Select Committee and Parliament when the *Immigration Amendment Act 2013* was passed and I am confident that, as a relatively small and rights-enhancing change, this proposal could be adequately dealt with by Select Committee in a lesser amount of time. Four months' consideration would enable the Amendment Act to comfortably receive Assent before the House rises for the 2023 election.

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.

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 (Mass Arrivals) Amendment Bill holds a category 2 priority on the 2023 Legislation Programme and must be passed before the House rises for the 2023 election;
 - 2 **note** that, as agreed by Cabinet in May 2022 [DEV-22-MIN-0125], the Bill seeks to make minor changes to the existing Mass Arrivals provisions of the Immigration Act 2009, to
 - 2.1 provide more time for the Courts to consider an application for a mass arrival warrant of commitment and allow for migrants to be detained while applications are determined by the Courts;
 - 2.2 make it clear that members of an irregular maritime arrival group are responsible for applying for entry permission and a visa, and deem them to have done so if they fail to do so; and
 - 2.3 remove any possibility that members of an irregular maritime arrival group are deemed to hold a visa on arrival;
 - 3 **approve** the Immigration (Mass Arrivals) 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 14 December 2022;
- 6 **note** that the Minister of Immigration is undertaking consultations which will determine the appropriate Select Committee for consideration of the Bill;
- 7 **agree** that the government propose that the Bill be:
 - 7.1 referred to either the Foreign Affairs, Defence and Trade Committee or the Employment and Workforce Committee for consideration; and
 - 7.2 enacted by the end of July 2023.

Authorised for lodgement

Hon Michael Wood
Minister of Immigration