



## COVERSHEET

<b>Minister</b>	Hon Andrew Little	<b>Portfolio</b>	Immigration
<b>Title of Cabinet paper</b>	Response to Review of Out of Hours Immigration Compliance Activity	<b>Date to be published</b>	31 October 2023

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
September 2023	Response to Review of Out of Hours Immigration Compliance Activity	Office of the Minister of Immigration
18 September 2023	Response to Review of Out of Hours Immigration Compliance Activity CAB-23-MIN-0441 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.

## **In Confidence**

Office of the Minister of Immigration

Cabinet Economic Development Committee

## **Response to Review of Out of Hours Immigration Compliance Activity**

### **Proposal**

- 1 This paper seeks to update Cabinet on the Ministry of Business, Innovation and Employment response to a review into out-of-hours immigration compliance activity, and to direct officials to investigate legislative change to limit the ways in which this activity can be undertaken.

### **Relation to government priorities**

- 2 The proposals in this paper support our commitments made in August 2021 with the apology for the Dawn Raids period of the 1970s.

### **Executive Summary**

- 3 In April 2023, an Auckland-based Immigration Compliance team visited the home of a Tongan national in the early morning with the intention of serving and executing a deportation order (the “incident case”). The incident was characterised as a dawn raid and inconsistent with the underlying sentiments of the 2021 apology. This led to claims that the Dawn Raids apology that the government made in 2021 was meaningless.
- 4 Following the strong community reaction to this out of hours compliance visit by an immigration officer in April, the Ministry of Business, Innovation and Employment (MBIE) commissioned Michael Heron KC to undertake a review into their practices. The review found that no work had been undertaken to revisit Immigration New Zealand (INZ) practice in light of the Dawn Raids Apology.
- 5 The review made five recommendations – four operational recommendations for INZ practice, and one for Government to consider with regard to legislative change. MBIE has accepted all of the operational recommendations and are currently implementing these.
- 6 It is important that changes are made, and communicated clearly to the public, in order to restore public confidence in Immigration NZ and ensure they maintain their social licence for undertaking the important work that they do.
- 7 I have looked at the options for legislative change. While the operational recommendations, when implemented, will deal with the issues of out of hours compliance activity there are questions for us about whether we can add additional safeguards. I consider that we can do so by requiring immigration officers to seek a judicial warrant if undertaking out of hours compliance activity.

- 8 I recommend that we direct officials to commence work on what a legislative option would look like with regard to out of hours compliance activity, to be progressed through a stand-alone bill, and to report back with a specific proposal to the Minister of Immigration by 30 November, 2023.

## Background

- 9 On 1 August 2021 the then Prime Minister, on behalf of the government, apologised to Pacific people for the harm caused to them by the Dawn Raids period of the 1970s. The Dawn Raids occurred in the mid-1970s, and involved the state deliberately targeting the Pacific community alone for immigration compliance activity (although significant numbers of overstayers were from Europe or North America). This activity extended to the Police being instructed to raid the homes of Pacific families in the early hours to look for proof of a person’s right to be in New Zealand. Following the apology, the Pasifika community believed that there would be meaningful change to immigration compliance activity, and that nothing reminiscent of the Dawn Raids would ever be carried out again.
- 10 Before and after the 2021 apology, INZ had from time to time conducted what is called “out of hours compliance activity”, which meant visiting the homes of some persons unlawfully in New Zealand in the early morning, usually around 6am, to deport them. This was done when there was no reasonable way to being able to do this in daytime hours. The Immigration Act 2009 (the “Act”) allowed for such activity<sup>1</sup> and no change was made to the law or INZ policy as a consequence of the apology.
- 11 From July 2015 to May 2023 there were a total of 11,715 deportations. Of these, 101 (0.9%) were effected through out of hours visits. In recent years the vast majority of those deported through out of hours compliance activity were Chinese nationals (46 out of a total of 57 individuals in the period from July 2019), due to a focus on compliance actively targeted at migrant workers within the building industry. The number of visits to Pacific peoples were low by comparison (six visits, resulting in three deportations over the same period).
- 12 On 19 April 2023, an Auckland-based compliance team visited the home of a Tongan national with the intention of serving and executing a deportation order (the “incident case”). News of the visit spread through the Pacific community. The incident was characterised as a dawn raid and inconsistent with the underlying sentiments of the 2021 apology.
- 13 MBIE initiated a pause on all out of hours compliance activity and commissioned a review by Michael Heron KC into INZ’s ongoing out of hours compliance activity<sup>2</sup>.

---

<sup>1</sup> Section 286 of the Act allows an immigration officer to “enter and search at any reasonable time by day or night any building or premises in which the officer believes on reasonable grounds” that a person named in a deportation liability notice, or deportation order, is present.

<sup>2</sup> The review is available at: <https://www.mbie.govt.nz/dmsdocument/26981-mhkc-inz-out-of-hours-final-report-29-june-2023>

## Analysis

What did the review look at?

- 14 The purpose of the review was to assess the current state of INZ's out of hours compliance activity and recommend changes to the process where required. The reviewers were asked to review the adequacy of INZ's current immigration settings, including legislative settings and Standard Operating Procedures (SOPs), to determine if they need to change:
  - 14.1 With regard to their cultural appropriateness (in light of the government's apology and the Minister of Immigration's (the Minister) clearly stated position on the practice).
  - 14.2 To ensure any decision to undertake out of hours compliance activity is reasonable, proportionate, and justifiable in the circumstances, and that they take into account relevant considerations such as the possible impact or harm on others (including children), the health and safety of the attending officers and whether other alternatives may be available.
  - 14.3 The level at which sign-off of out of hours visits occurs.

What is "out of hours compliance activity"?

- 15 Out of hours compliance activity referred to immigration work undertaken outside of the hours of 7am to 9pm. This timeframe was established in the early 2000s, following previous publicity, to give guidance to compliance officers as to what was considered a "reasonable time". Subsequent to the incident mentioned in paragraph 12 above, the definition of out of hours activity was revised to being outside the hours of 8am to 6pm.
- 16 This activity takes place under two sets of immigration SOPs. The SOPs outline the process and considerations needed to make a decision about whether to deport someone. The development of a site visit plan and risk assessment contribute to this, in helping to think of the timing and location of any visit. Out of hours compliance activity is intended to be an action of last resort and any proposed visits must be signed off by the National Manager, Compliance.
- 17 From July 2015 to May 2023 there were a total of 11,715 deportations. 101 of these were effected through out of hours visits (ie. 0.9%). In recent years the vast majority of those deported through out of hours compliance activity were Chinese nationals (46 out of a total of 57 individuals in the period from July 2019).

Michael Heron KC made five recommendations

- 18 A key finding of the review was that neither the Minister, MBIE nor INZ management had made any changes to out of hours compliance activity as a result of the apology. The context at the time with the pandemic meant there was limited deportation activity going on, and most of the feedback that INZ received following the apology related to proposals for an amnesty.

- 19 The report made five recommendations:
- 19.1 The Government should consider amending the Immigration Act 2009 to specify the criteria for out of hours compliance visits and whether those involving residential addresses be stopped entirely, or limited to specific situations.
  - 19.2 SOPs and guidelines for compliance officers should be updated to reinforce that out of hours compliance visits are a matter of last resort and reasonable alternatives should have been considered beforehand. SOPs should also be updated to reflect policy about when and how these kinds of visits should occur. Given the lack of legislative time available this could be given priority.
  - 19.3 Any assessment of out of hours visits should consider the impact on anyone else who may be present, in particular children, but also the elderly or other vulnerable individuals, as well as New Zealand citizens or residents. The way in which the operation is carried out should take into account relevant cultural factors.
  - 19.4 Any decision to undertake an out of hours compliance visit should also include an assessment of reasonableness, proportionality and public interest.
  - 19.5 Any out of hours compliance activity should be authorised by the relevant compliance manager and the national manager before it can occur, although it is acknowledged there are arguments for elevating authorisation further.
- 20 The first of the five recommendations relates to changing existing legislation, and this paper canvasses the options for this change and seeks Cabinet agreement to a direction of travel. The latter four options are operational and this paper sets out how MBIE is responding to them.

### **Implementation of the operational recommendations**

MBIE is on track to implement the four operational recommendations

- 21 Following receipt of the report, MBIE is urgently updating its approach to out of hours immigration compliance activity, as per the report's recommendations. MBIE is updating me each week on its progress.
- 22 While the update is underway the pause on out of hours compliance activity will continue. Currently out of hours compliance activity can only be approved by a Deputy-Secretary, and in only very limited circumstances (such as visiting a prison to pick up a person to escort them to the airport).
- 23 As part of the approach to updating the SOPs MBIE is working closely with immigration customer groups to ensure procedures are culturally appropriate, reflecting the needs of the diverse range of ethnicities that INZ compliance interacts with. This will reflect that culture is not homogenous, and that what is culturally appropriate for one group may not be the same for others.

- 24 MBIE expects the first phase of this to be complete by the end of October, with revised SOPs approved. Following this, compliance staff training will be undertaken, with staff operationally ready by early 2024.

### **Choices for legislative change**

Amending the Immigration Act 2009 provides stronger safeguards around the use of entry powers

- 25 While MBIE is giving effect to the operational recommendations in the report, there is an outstanding question Cabinet needs to consider. As noted above, the report recommended that the Government consider changing the Immigration Act to address the out of hours activity.
- 26 The work that MBIE is doing to implement the operational recommendations is crucial to change culture and address the risks of disproportionate immigration enforcement activities. Legislative change alone is not a sufficient safeguard to prevent future issues arising, including the risks of out of hours compliance activity. However, legislative guidance will ensure that future SOPs and decision-making (including the decisions of officials and warrant-issuers) are consistent with our intent into the future.
- 27 Therefore, while it is likely that MBIE's current activity will have a positive impact on the issue, legislative intervention could embed additional safeguards and in doing so provide greater reassurance about the probity of the immigration enforcement system.
- 28 A key question in assessing any such possible safeguards will be the design of such safeguards and the effect they may have, both on the protection of those subject to the enforcement activity and on the administrative burden for MBIE in undertaking any enforcement activity.
- 29 There are broadly two categories of safeguards that could be built into the legislation. As noted, currently the law enables immigration officers to enter a person's residential address with little limitation to undertake an enforcement activity.
- 30 Additional safeguards could be built in by:
- 30.1 Prohibiting certain types of activities (eg. entry into residential premises out of hours) in some circumstances (eg. such as when it is known that there may be children present); or
  - 30.2 Subjecting such decisions to oversight by a third party (for example, by requiring immigration officers to obtain a judicial warrant before entering residential property).
- 31 I have identified four options that could be effected through legislative change, subject to policy decisions. These options are not mutually exclusive. As noted, additional safeguards may increase the administrative complexity with enforcement, and could increase the higher risk that legitimate enforcement activity is frustrated (and litigated).

32 I have set out below my initial views on the options that have been identified.

### *Prohibit out of hours activity when children are present*

33 This would involve including a limitation to the existing power, such that no entry into residential premises for enforcement activities is permitted between certain times, where immigration officers are satisfied that children may be present.

34 This would provide greater assurance that this is not going to result in harm, but would be likely to generate significant litigation (particularly how INZ is required to be satisfied about presence of children, and therefore whether any specific entry was unlawful, and subject to Bill of Rights Act damages for unlawful search). The more specific the power is, the more likely it is that it will mean that INZ activities would not likely be effective in some circumstances.

35 I do not favour this option. I consider that out of hours visits can be justified as a last resort when no other sort of contact or enforcement action has enabled contact with the target individuals. In this circumstance, the presence of children (and the potential effect on them) should be a factor for a warrant-issuer to consider.

### *Seek a judicial warrant before proceeding*

36 This option would minimise the administrative burden but could increase the risk that applications for warrants are not approved (due to the case not being strong enough). This could have the outcome of requiring INZ to take different action or, on the positive side, improving its case.

37 To some extent the discretion can be scoped so as to limit judicial discretion. Alternatively, we may want to require an immigration officer to satisfy a judicial officer that entry to a residential property is justified, proportionate, and necessary in all the circumstances of the case (which introduces a high level of judicial discretion around whether the case has been made out), noting this would increase the risk that a warrant application would not be granted.

38 This is a relatively low-risk option, as such activities are often in planning for some time, meaning any case that has been built up should be relatively strong. This should ensure that powers are not used disproportionately. It should also lower the risk of litigation, given that the ex-ante judicial involvement will have placed a check on the decision-making. Further, MBIE has advised me that this option will not create any timing pressures for any compliance activity.

### *Have Ministers set the criteria for deportations through Immigration Instructions*

39 Ministers have considerable decision-making powers under the Immigration Act (including in respect of deportation decisions). That said, whilst Ministers have decision-making powers on individuals, they do not generally have a say in how their decisions are implemented/operationalised (e.g. how a visa is granted, how a person is actually located and deported).

40 Under the Immigration Act 2009, the Minister can issue immigration instructions to MBIE that include information about:

- 40.1 The rules and criteria that people must meet to be granted a visa
  - 40.2 The evidence that people must provide to show they meet the criteria
  - 40.3 The processes MBIE follows to assess and verify visa applications.
- 41 These immigration instructions are regulatory instruments that can be used to give effect to Government policy. Currently, immigration instructions cannot be used to inform enforcement action by MBIE.
- 42 A further option I considered is potentially broadening the scope for immigration instructions to allow me to set criteria around how compliance activity should be undertaken. This would provide more authority for the Minister to set parameters for MBIE about how compliance activity can be undertaken. This provides Ministerial oversight of MBIE's compliance function, while enabling MBIE sufficient flexibility to undertake enforcement activity in the manner it considers most appropriate.
- 43 I do not consider it appropriate for enforcement action to be subject to ministerial approval, as such an arrangement would be inconsistent with constitutional principles separating law enforcement decisions from ministerial purview.

I consider that having officers seek a judicial warrant is the most appropriate legislative response

- 44 Overall, at this stage I recommend that we should proceed down the path of seeking a judicial warrant when serving a deportation notice.
- 45 There are broadly two options for giving effect to any change:
- 45.1 Either through a stand-alone bill that is progressed early in the next term of parliament; or
  - 45.2 As part of the broader review of the Immigration Act that is currently programmed.
- 46 The broader review of the Immigration Act will be aimed at better managing risk within the immigration system. Officials have identified a number of areas for review, including how delegations within the immigration system are managed, and detention settings in light of the findings of the review undertaken by Victoria Casey KC. Including the changes with regard to entry powers within this review would ensure that related changes are considered together, minimising the risks of unintended consequences occurring.
- 47 The trade-off of including this within the broader review is timeliness of certainty. I consider that this certainty is paramount, and as such recommend progressing a stand-alone bill with urgency. This will provide the safeguards needed to ensure that this aspect of immigration compliance activity is in line with our intents of the 2021 apology.
- 48 I recommend that we direct officials to commence work on what a legislative option would look like with regard to out of hours compliance activity, to be progressed



through a stand-alone bill, and to report back with a specific proposal to the Minister of Immigration by 30 November, 2023.

### **Cost-of-living Implications**

49 There are no cost-of-living implications from the proposals in this paper.

### **Financial Implications**

50 There are no financial implications from the proposals in this paper.

### **Legislative Implications**

51 The operational recommendations that MBIE is currently implementing do not require legislative change. If Cabinet agrees, officials will work on possible legislative options to manage the risks identified with regard to out of hours compliance activity. This could be progressed as a standalone Bill or within the scope of a broader review of the Act, which in either case would have legislative programme priority in the next term.

### **Impact Analysis**

#### **Regulatory Impact Statement**

52 Further work will be done on legislative options with regard to out of hours compliance activities. If this work results in policy proposals for legislative change, a Regulatory Impact Analysis will be undertaken and presented to Cabinet with those proposals.

#### **Climate Implications of Policy Assessment**

53 There are no climate implications from the proposals in this paper.

### **Population Implications**

54 The number of people who have been impacted by out of hours visits has been very low (65 over the last four years, resulting in 57 deportations). The overwhelming majority of these were Chinese nationals, due to a focus on compliance by migrant workers within the building industry (50 visits, resulting in 46 deportations). The number of Pacific peoples has been very low (six visits, resulting in three deportations over the same period).

55 However, while the figures of out of hours visits have been low, I acknowledge there are particular impacts for Pacific peoples due to the historic experiences with the Dawn Raids of the 1970s. Further, the negative perception held by Pacific communities may be compounded by the fact that INZ did not make any changes to the out of hours compliance visits following the Government apology in August 2021.

56 While the absolute numbers indicate that the impact of legislative change will be low, the perceptions held by migrant communities of the immigration system will be positively impacted. A greater focus on the values of the immigration system, including the development of culturally appropriate approaches, will lead to greater confidence (and, hopefully, compliance) among migrant communities.

## **Human Rights**

- 57 If one or more legislative options for out of hours compliance activities are pursued a human rights analysis will be undertaken. This is most likely to be human-rights positive, as it will provide further legislative safeguards to individuals when restrictions upon their liberty are contemplated by the Crown.

## **Use of External Resources**

- 58 The total cost of the review was just over \$97,500. The cost covered the reviewers undertaking a number of interviews with leaders and members of the Pacific, Indian and Chinese communities, immigration lawyers and advisers, members of the Immigration Reference Group, representatives of the Ministry for Pacific Peoples and the Ministry for Ethnic Communities and over 20 Ministry of Business, Innovation & Employment (MBIE) employees and managers. There were also six online fono for the wider Pacific, Indian, Chinese and Latin American communities. About 100 responses were also received to an online survey established so members of the public who were unable to attend the fono could also make contributions.

## **Consultation**

- 59 For the development of this paper my officials have consulted with the Ministry for Pacific Peoples, Ministry for Ethnic Communities, Ministry of Foreign Affairs and Trade and Ministry of Justice. Department of Prime Minister and Cabinet were informed.

## **Communications**

- 60 I intend to announce the decisions from this paper as part of a package of immigration announcements following this meeting.

## **Proactive Release**

- 61 This paper will be proactively released in line with the Cabinet Office circular Proactive Release of Cabinet Material: Updated Requirements [CO (18) 4].

## **Recommendations**

The Minister of Immigration recommends that the Committee:

- 1 note that on 1 August 2021 the then Prime Minister apologised to Pacific people for the harm caused to them by the Dawn Raids period of the 1970s
- 2 note that following “out of hours” compliance activity in April 2023 by Immigration New Zealand, the Ministry of Business, Innovation and Employment commissioned Michael Heron KC to undertake a review of that activity and to make recommendations, if warranted;
- 3 note that Michael Heron KC’s review found that no change had been made to the settings for out of hours compliance activity to align with the apology;

- 4 note that Michael Heron KC's review made four recommendations to change operational practice and one recommendation for the government to consider legislative change to limit the scope of this activity;
- 5 note that officials are implementing the four recommendations to change operational practice;
- 6 agree that the Immigration Act 2009 should be amended, to require a judicial warrant to be sought for out-of-hours compliance activity, and this change should be progressed through a stand-alone bill, to be passed as soon as possible in the next term; and
- 7 direct officials to commence work on developing this legislative change, and to report back to the Minister of Immigration by 30 November 2023, with specific recommendations for progressing the proposed amendment legislation.

Authorised for lodgement

Hon Andrew Little

Minister for Immigration