MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

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In Confidence

Office of the Minister of Immigration

Chair, Cabinet Economic Development Committee

Mass Arrivals Amendment Bill: Proposed Additional Safeguards

Proposal

1. This paper seeks Cabinet agreement to a set of explicit safeguards for the *Immigration (Mass Arrivals) Amendment Bill* (the Bill), in order that they can be proposed to Select Committee for its consideration and, if agreed, incorporation into the Bill for debate following its report back to the House.

Summary

2. The *Immigration Act 2009* (the Act) includes provisions to enable members of a mass arrival group (31 or more people arriving irregularly) to be detained on a Group Warrant of Commitment if this is necessary to manage them effectively. The Bill, among other things, enables members of a mass arrival group to be detained without warrant for a longer period of time than the current 96-hour maximum. This is so they can obtain and brief legal representation, and their counsel can then make representations on their behalf to the court before the Judge decides the application for the Group Warrant of Commitment. The new period of time is up to seven days, or up to a maximum of 28 days if the Judge considers that necessary.

3. The Bill has received 315 submissions, which are overwhelmingly opposed to it but which generally indicate that submitters do not recognise existing human rights protections, and in particular existing protections against arbitrary detention. In particular, submitters considered that this Bill, and the existing provisions, would enable officials to arbitrarily imprison people who were fleeing persecution. I seek Cabinet's agreement to four new explicit safeguards which could be proposed to Select Committee and, if the Committee agrees, incorporated into the Bill before it is reported back to the House on 31 July 2023. They are:

    3.1. add a new clause to establish that, prior to a warrant of commitment being issued, a member of a mass arrival group may be detained in premises approved by the Chief Executive (under Section 330 of the Act), *except in a prison or police station*;

    3.2. add a new clause to require an immigration officer to establish, in making an application for a Group Warrant of Commitment:

        3.2.1. why the proposed detention is necessary;

        3.2.2. that the detention sought is for the least amount of time and is the least restrictive necessary to achieve the outcomes of detention;

        3.2.3. how the proposed location of detention meets the government's obligations under the New Zealand Bill of Rights Act 1990 (BORA); and

        3.2.4. how the proposed location of detention meets New Zealand's obligations under the 1951 Convention on the Status of Refugees (the 1951 Refugee Convention) and other relevant international obligations;

3.2.5. add a new clause to require an immigration officer to report to the court weekly (unless varied by a Judge) during a period of warrantless detention of a mass arrival group; and

3.2.6. add a new clause to establish that a Judge may order that the location specified in an application for a Group Warrant of Commitment be varied on his or her own motion, or upon application by a party.

Background

4. The Act has since 2013 contained a set of provisions designed to enable the government to effectively manage a mass arrival (31 or more people arriving irregularly), should one occur, and make sure that the human rights of the people entering are respected. These provisions enable Group Warrants of Commitment to be obtained, under which the migrants can be detained, for the minimum amount of time and at the least level of detention, while their identity is established, processing occurs, health and welfare services (including the assessment and monitoring of health risks) are provided, and security risks are assessed.

5. The Bill is intended to ensure that the provisions work as intended by Parliament and, in particular, to provide the District Court with more time to consider an application for a Group Warrant of Commitment, and specifically to ensure that the migrants' views can be taken into account by the Judge. The Bill also clarifies both that it is the responsibility of members of a mass arrival group to apply for entry permission and a visa, and (through a change to the definition of "passenger") that members of a mass arrival group cannot hold a deemed visa and entry permission on arrival.

6. The Bill was introduced, had its first reading, and was referred to Select Committee on Tuesday 28 March 2023, and is due to be reported back to the House by 31 July.

Planning for a mass arrival event has never included prison

7. The final decision with regard to where a mass arrival group or groups might be housed would be made at the time of an event. The range of potential options under a Group Warrant of Commitment includes military bases, MIQ-type housing, temporary accommodation providers, and Te Āhuru Mōwai o Aotearoa (also known as the Māngere Refugee Resettlement Centre), as well as our proposed Community Management regime. It has never included prison, but this has not been well communicated to the public.

8. The decision for any group or groups would depend on a range of considerations, including the size of the group, their health status, their personal characteristics, and the location at which they arrived. Any restriction of liberties on any member of a mass arrival group would be justifiable and proportionate to the level of risk that individual may present at the time, with the default position being no restriction at all.

Making existing safeguards explicit may assist messaging

9. The Bill received a total of 315 submissions, 281 individuals and 34 organisations;161 of the individual submissions were based on a template drafted by Amnesty International. The Committee heard from 22 oral submitters. Of the 315 submissions, 304 were opposed to the Bill, four were in favour, and seven did not indicate whether they supported or opposed the provisions.

10. The submissions overall indicate significant misunderstandings about the purpose of the legislation: for example, many people asserted that the upper limit of 28 days in detention amounted to arbitrary detention in prison, which is emphatically not the case. Some people assumed that the changes had been made to prevent refugee claims from being made by members of a mass arrival group. This is also not the case.

11. Submitters also expressed scepticism about the protections available to people awaiting a decision on a Group Warrant of Commitment, or detained subject to a Group Warrant of Commitment, and some incorrectly asserted that New Zealand is not compliant with the UNHCR 2012 Detention Guidelines[1]. I consider that it could smooth the passage of the Bill if implicit and additional safeguards are made explicit in the legislation. I have identified four proposals which I consider:

    11.1. fall within the Bill's purpose statement

    11.2. would not unduly constrain judicial decision making, and

    11.3. could make the BORA protections more obvious, without raising doubts as to whether other aspects of immigration detention are also covered by BORA.

12. The proposals are:

    12.1. add a new clause to establish that prior to a warrant of commitment being issued a member of a mass arrival group may be detained in premises approved by the Chief Executive (under Section 330 of the Act), except in a prison or police station;

    12.2. add a new clause to require an immigration officer to establish, in making an application for a Group Warrant of Commitment:

        12.2.1.1. why the proposed detention is necessary;

        12.2.1.2. that the detention sought is for the least amount of time and is the least restrictive necessary to achieve the outcomes of detention;

        12.2.1.3. how the proposed location of detention meets obligations under the BORA; and

        12.2.1.4. how the proposed location of detention meets New Zealand's obligations under the 1951 Refugee Convention and our other relevant international obligations;

    12.3. add a new clause to require an immigration officer to report to the court weekly (unless varied by a Judge) during a period of warrantless detention of a mass arrival group; and

    12.4. add a new clause to establish that a Judge may order that the location specified in an application for a Group Warrant of Commitment be varied on his or her own motion, or upon application by a party.

Analysis

Establishing that, prior to a warrant of commitment being issued, a member of a mass arrival group cannot be detained in a prison

13. This directly addresses concerns raised by a number of submitters to the Bill. Many submitters were concerned that the powers in this Bill would amount to a licence for arbitrary detention in a prison.

14. I do not consider arbitrary detention, and particularly detention in prison, to be a risk. The Act already contains numerous safeguards (see below), and as noted above, planning for a mass arrival event has never envisaged that group members would be held in prison. With regard to individual asylum seekers, I noted that the Ministry of Business, Innovation

[1] United Nations High Commissioner for Refugees *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* 2012

and Employment (MBIE) has made significant progress towards implementing the recommendations to better our system outlined in the Review of Immigration New Zealand by Victoria Casey KC (the Casey Review) in 2022[2].

15. With regard to the safeguards that currently exist in the Act, I note that the first three are specific to a Group Warrant of Commitment while the last applies to everyone under the age of 18:

    15.1. section 317B(2)(b) requires a District Court Judge to be satisfied that the detention is necessary;

    15.2. section 317B(1)(b) enables the Judge to issue the warrant for a shorter period than sought;

    15.3. section 324A enables an immigration officer to seek a variation of the warrant at any stage; and

    15.4. sections 331 and 332 of the Act establish that a minor cannot be included in an individual or Group Warrant of Commitment.

16. Despite these protections, submitters and members of the Select Committee remain concerned. This change therefore explicitly allays concerns around abuses of the power to put people into detention. It is in line with a number of our domestic and international commitments to upholding human rights, including the right to be free from arbitrary detention under BORA, as well the right to be detained for as short a time as possible, and in the least restrictive conditions necessary, established under the 1951 Refugee Convention and the UNHCR 2012 Detention Guidelines.

17. It would be consistent with our domestic and international obligations to detain a mass arrival group in minimally-restrictive detention for a variety of purposes, including for the purposes of protecting public order, initial identity and security verification, to record initial interviews to assist asylum claims in line with international best practice, and the protection of public health. However, the focus would be on peeling people off from the Group Warrant of Detention as, for example, their identities were confirmed.

Providing for the requirement that an immigration officer must establish their considerations in making an application for a Group Warrant of Commitment

18. This change places the onus on an immigration officer to establish why any proposed detention for a mass arrival group is necessary, that the detention sought is for the least amount of time and is the least restrictive necessary to achieve the outcomes of detention, and how the proposed location of detention meets obligations under both the BORA and the 1951 Refugee Convention.

19. It addresses concerns raised by the Select Committee during its consideration of the Bill, particularly around avoiding asylum seekers being held in prison or police cells, and is in line with Casey's recommendations. The proposal means a Judge will be able to make the most informed decision possible regarding an application for a Group Warrant of Commitment. It will aid the Judge in determining whether the proposed detention is justifiable, proportionate, and the most appropriate solution, and will provide for a focus on the requirement that detention must be to the least degree, and for the shortest amount of time possible.

20. Including a provision to direct a Judge towards considering BORA in their decision-making, while already implicit in the Act, also responds to concerns raised in the Casey Review

[2] Report to Deputy Chief Executive (Immigration) of the Ministry of Business, Innovation and Employment – Restriction of movement of asylum claimants

around the consistency with the BORA of decisions around the detention of asylum seekers in prison.

21. The addition of the requirement to consider any applicable international guidelines and Conventions to which New Zealand is a signatory addresses concerns raised in the Casey Review that MBIE's Immigration New Zealand was acting in a manner contrary to the UNHCR 2012 Detention Guidelines, by detaining asylum seekers for extended periods of time.

22. Incorporating both one of New Zealand's foundational pieces of human rights legislation and New Zealand's international obligations explicitly into a Judge's decision-making will bring New Zealand in-line with international best practice and will ensure that the human rights of members of the mass arrival group are upheld.

Requiring regular reporting to the court while the application for a Group Warrant of Commitment is under consideration

23. The third proposal (establishing a requirement to report regularly to the court while members of the mass arrival group are detained without warrant) is additional. It however echoes the requirement established under Section 317D of the Act (*District Court may impose reporting requirements*), by which a District Court Judge may require an immigration officer to report regularly to the court during the period that a Group Warrant of Commitment in in force.

24. The report is likely to be provided to the Judge who is making the decision and will not in itself trigger a hearing. Changes to a Group Warrant of Commitment (such as removing a person or persons from the application for the Group Warrant of Commitment application because their identities had been confirmed) would be done through standard administrative means (counsel informing the court officers of the request).

Enabling a Judge or party to order a variation of the location of a Group Warrant of Commitment

25. This change directly addresses issues raised in the Casey Review; one of the key issues reflected in the Casey Review was that Judges felt hamstrung when deciding a warrant of commitment. Judges felt that they had no choice but to approve an application for a warrant of commitment made by an immigration officer.

26. For example, as outlined in the Casey Review, if an immigration officer was of the opinion that a migrant was a security risk and proposed detention in a prison, even if a Judge did not agree that detention in a prison was justifiable and proportionate, given the risk to the public Judges generally decided not to release the person in question into the community.

27. Enabling a Judge or party to a warrant hearing to order a variation of the location of an application for a warrant would eliminate the risk that the Judge feels they have no option but to grant a warrant of commitment, irrespective of how appropriate they consider the location of detention to be.

These changes work together to mitigate foreseeable legal risks that may arise during the determination of a Group Warrant of Commitment

28. These changes will work in tandem to ensure that a Judge has all the tools available to them to make an informed decision that upholds the human rights of members of a mass arrival group, while managing their arrival in an orderly manner.

29. The first change establishes that detention may not be in a prison or police station.

30. The second change establishes what considerations an immigration officer must outline when making an application for a Group Warrant of Commitment. These things that an immigration officer must outline work in tandem with the next change to provide a Judge a

full picture of what form of detention, or lack thereof, may be appropriate for the group in question.

31. The third change establishes regular reporting on warrantless detention that is under consideration for a Group Warrant of Commitment. This will give a Judge an assurance that the rights of those migrants in question are being upheld, and will assist in determining what level of restriction is appropriate for a group.

32. The fourth changes enables a Judge to order a variation of location, having considered the information provided as a result of the previous proposed safeguards and the views of a party to a warrant hearing (if they are not satisfied the proposed detention is justifiable and appropriate).

Consultation

33. The Ministry of Justice and the Office of the Chief Justice were consulted in the development of these proposals were developed and their views are reflected in them. Members of the interdepartmental Mass Arrivals Coordination Group and the Parliamentary Counsel Office have been advised of the proposals.

Financial implications

34. The proposals in this paper raise no financial implications.

Legislative implications and Parliamentary stages

35. The *Immigration Act 2009* will need to be amended to give effect to the proposals outlined in this paper. The *Immigration (Mass Arrivals) Amendment Bill* is currently before the Foreign Affairs, Defence and Trade Select Committee, and is due to be reported back by 31 July 2023. I anticipate that it will be passed before the House rises. If Cabinet approves these changes, they will be incorporated into the Departmental Report as recommended amendments to the Bill; if the Committee decides to then adopt them they will be incorporated into the version of the Bill to be reported back to the House.

Impact analysis

36. The Treasury's Regulatory Impact Analysis team has determined that the proposed amendments are exempt from the requirement to provide a Regulatory Impact Statement, on the grounds that they have no or only minor impacts on businesses, individuals, and not-for-profit entities.

Publicity

37. The proposals in this paper will be incorporated into the Departmental Report for consideration by the Select Committee. They will not be publicised prior to the Bill's reportback to the House.

Proactive Release

38. MBIE will proactively release this paper, subject to any necessary redactions, following the Bill's reportback to the House.

Recommendations

The Minister of Immigration recommends that Cabinet:

1. **note** that the Immigration (Mass Arrivals) Amendment Bill (the Bill) is currently before Select Committee and that submissions indicate public scepticism about the protections available to people awaiting a decision on a Group Warrant of Commitment;

2. **note** that the Minister has identified four further proposals which could be included in the Bill and which fall within the purpose statement, would not unduly constrain judicial decision making, and could make New Zealand Bill of Rights Act 1990 (BORA) protections more obvious, without raising doubts as to whether other aspects of immigration detention are also covered by BORA;

Proposals

3. **agree** to the following changes to the Bill:

    3.1. establish that prior to a warrant of commitment being issued a member of a mass arrival group may be detained in premises approved by the Chief Executive (under Section 330 of the Act), except in a prison or police station;

    3.2. require an immigration officer to establish, in making an application for a Group Warrant of Commitment:

        3.2.1. why the proposed detention is necessary;

        3.2.2. that the detention sought is for the least amount of time and is the least restrictive necessary to achieve the outcomes of detention;

        3.2.3. how the proposed location of detention meets the government's obligations under the New Zealand Bill of Rights Act 1990; and

        3.2.4. how the proposed location of detention meets New Zealand's obligations under the 1951 Convention on the Status of Refugees and our other relevant international obligations;

    3.3. require an immigration officer to report to the court weekly (unless varied by a Judge) during a period of warrantless detention of a mass arrival group; and

    3.4. a Judge may order that the location specified in an application for a Group Warrant of Commitment be varied on his or her own motion, or upon application by a party; and

4. **direct** officials to include these proposals in the Departmental Report.

Authorised for lodgement

Hon Michael Wood
Minister of Immigration