

Departmental Disclosure Statement

Immigration (COVID-19 Response) Amendment Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

4 May 2020

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Part One: General Policy Statement

The Immigration Act 2009 (the Act) is predicated on individual applications managed on an individual basis. The Act, as currently drafted, has very limited ability to deal with applicants as a class or group of individuals. In emergency situations, this creates challenges, and constrains the government's ability to respond flexibly, where, for example, large numbers of visas need to be changed or extended at once.

The Act already envisages that an outbreak would create challenges, and has a small number of emergency provisions which can be triggered once the Prime Minister has issued an epidemic notice and epidemic management notice. Valid visas held by people in New Zealand which would otherwise be due to expire are automatically extended so they will expire 3 months after the day on which the epidemic management notice expires, and adjustments can be made to detention on immigration grounds. These emergency epidemic management settings were, however, introduced in 2006 when New Zealand had much lower numbers of temporary migrants. The Act has now been demonstrated to not be fit-for-purpose to respond to the pressing practical challenges introduced by the COVID-19 outbreak.

The New Zealand immigration system is facing the unprecedented challenge of managing a large numbers of migrants who practically are unable to leave New Zealand due to the COVID-19 outbreak. Ordinarily, temporary migrants are required to submit individual applications for a new visa or to vary its conditions where circumstances change and, for example, they need to be redeployed by their employer into a different role or a different region, or seek to find another job after being made redundant. Applications are also ordinarily subject to regulatory requirements which include the provision of fees, passport photos and travel documents. At a time where government needs to be as flexible and efficient as possible, waiving requirements on an individual basis is not practicable, and individually processing thousands of applications at once is time-consuming and expensive, and provides little certainty for affected applicants.

This Bill aims to ensure that the government can respond appropriately and efficiently to the COVID-19 outbreak by providing additional flexibility in the immigration system. It does so by introducing eight time-limited powers:

1. the power to impose, vary or cancel conditions for classes of temporary entry class visa holders
2. the power to vary or cancel conditions for classes of resident visa class holders
3. the power to extend the expiry dates of visas for classes of people
4. the power to grant visas to individuals and classes of people in the absence of an application
5. the power to waive any regulatory requirements for certain classes of application
6. the power to waive the requirement to obtain a transit visa in an individual case
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, and
8. the power to revoke the entry permission of a person who has been deemed by Regulations to hold a visa and to have been granted entry permission.

These powers will enable the government to amend visa conditions for large groups of people, extend visas of large groups of people for varying periods of time (enabling processing to be staggered), stop people overseas from making applications while it is not possible to travel to New Zealand due to border restrictions, and refuse entry to people with deemed entry permission from entering New Zealand while border restrictions are in place.

These powers are wide-reaching; they could potentially affect large numbers of people. The Bill recognises this and accordingly subjects these powers to a range of safeguards. The majority need to be exercised by special direction, and one (the ability to suspend applications) requires an Order in Council. Some can only be exercised by the Minister of Immigration. All the powers are also time-limited and will be automatically revoked one year after entering force.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	NO

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	NO
The Treasury has determined that this proposal is a direct Covid-19 response and has suspended the RIA requirements in accordance with Cabinet decision [CAB-20-MIN-0138].	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>The COVID-19 outbreak has put unprecedented pressure on the New Zealand immigration system's ability to manage a large number of migrants who may not be able to leave New Zealand for some time.</p> <p>As at 27 April 2020, there were approximately 350,000 temporary visa holders onshore:</p> <ul style="list-style-type: none"> • 200,400 have work visas whose visa employment conditions may need to be varied as we respond to the effects of COVID-19. • 74,800 are student visa holders whose visa conditions may need to be relaxed, to enable them to change their course or work extra hours until education providers are able to reopen. • 56,500 are on visitor visas, who may need to have the expiry date extended, if commercial flights out of New Zealand continue to be unavailable. <p>More than 80,000 of those temporary visas were extended through the Epidemic Management Notice, and will all expire on 26 September 2020.</p> <p>As at 27 April 2020, over 20,000 skilled migrant resident visa holders were onshore (where their residence start date was on or after 27 April 2018).</p> <p>Between 3 February (when border restrictions started) and 20 April 2020, Immigration New Zealand received over 63,000 offshore applications for temporary visas. Roughly half of those applications were for visitor visas. While the current border restrictions remain in place, it won't be possible for temporary migrants (unless they qualify for an exemption) to travel to New Zealand.</p> <p>While the Immigration Act 2009 does have some emergency powers which become available in an epidemic, these are not fit-for-purpose for addressing the practical challenges the immigration system is currently facing.</p> <p>The Act, for example, does not currently allow the Government to amend visa conditions for large groups of people or to extend visas for large groups of people for varying periods of time, as it requires applications and variations of conditions to be dealt with on an individual, case-by-case basis.</p> <p>To respond to COVID-19, the Government needs to be as efficient and flexible as possible. Waiving requirements on an individual basis, and individually processing thousands of applications is time-consuming, expensive, and provides little certainty for affected applicants. It is also not practical, as Immigration New Zealand's capacity for processing visas has been heavily impacted by the COVID-19 outbreak.</p> <p>The Bill aims to ensure that the Government has the ability to respond appropriately and efficiently to the COVID-19 outbreak by providing additional flexibility in the immigration system.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

The policy in the Bill is consistent with New Zealand's international obligations.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Bill does not specifically impact rights and interests of Māori protected by the Treaty of Waitangi, and in the case of customary interests, also protected at common law.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/>

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

NO

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

NO

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?

NO

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?

YES

The Ministry of Business, Innovation and Employment has undertaken targeted discussions with key external stakeholders on the policy underlying the Bill.

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>The policy details to be given effect by this Bill have been tested via consultation with the following departments and agencies:</p> <ul style="list-style-type: none">• Ministry of Education• Ministry of Social Development• Department of Internal Affairs• The Treasury• Ministry of Foreign Affairs and Trade• Department of Prime Minister and Cabinet• Parliamentary Counsel Office.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

<p>4.6. Does this Bill create or amend a decision-making power to make a determination about a person’s rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</p>	<p>YES</p>
<p>This Bill introduces eight decision-making powers:</p> <ol style="list-style-type: none"> 1. the power to vary or cancel conditions for classes of resident visa class holders (clause 5) 2. the power to impose, vary or cancel conditions for classes of temporary entry class visa holders (clauses 6 and 7) 3. the power to waive any regulatory requirements for certain classes of application (clause 8) 4. the power to grant visas to individuals and classes of people in the absence of an application (clause 9) 5. the power to extend the expiry dates of visas for classes of people (clause 11) 6. the power to waive the requirement to obtain a transit visa in an individual case (clause 12) 7. the power to revoke the entry permission of a person who has been deemed by Regulations to hold a visa or to have been granted entry permission (clause 13), and 8. the power to suspend the ability to make applications for visas or submit Expressions of Interest in applying for visas by classes of people (clause 16). <p>Some of these powers impact classes of visa holders or people. They are wide-reaching and could have a significant impact on the interests of temporary migrants in New Zealand, and (in the case of Powers 7 and 8) the interests of persons offshore wishing to enter New Zealand.</p> <p>In recognition of their wide-reaching effects, these powers are subject to a number of safeguards, described below.</p> <p><i>The majority of powers may only be exercised by special direction, and one by Order in Council</i></p> <p>Power 8 may only be exercised by Order in Council (noted again at 4.8 below). All but one of the remaining powers (Power 7) may only be exercised by special direction. Power 7 is minor and administrative and therefore does not require this safeguard.</p> <p><i>Powers with potential to affect large numbers of people are non-delegable</i></p> <p>The powers with potential to affect large numbers of people may only be exercised by the Minister of Immigration, and cannot be delegated to an immigration officer (Powers 1, 2, 3, and 4 (where affecting classes of people), 5 and 8). Other powers (Powers 4 (where affecting individuals), 6 and 7) are more administrative in nature, affecting individuals rather the groups of people, and are therefore able to be delegated to an immigration officer.</p> <p><i>Public and parliamentary scrutiny of powers exercised by special direction is permitted</i></p> <p>Decisions made by special direction that affect classes of visa holders or people must be published in the Gazette, on the Department’s website with an explanation of the effect of the special direction, and are disallowable instruments for the purposes of the Legislation Act 2012, which must be presented to the House of Representatives in accordance with section 41 of that Act.</p> <p><i>The majority of the powers may only be used to respond to COVID-19</i></p> <p>The Bill restricts the use of all but one of the powers to responding to the current COVID-19 situation. It requires the Minister of Immigration (or delegate where applicable) to be satisfied that exercising the power is necessary or desirable to manage COVID-19-related measures or effects. In respect of Power 7, this requirement is to be given effect in immigration instructions.</p>	

4.6. Does this Bill create or amend a decision-making power to make a determination about a person’s rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>The exception is the power to grant an individual a visa in the absence of an application (part of Power 4). This power is not tied to managing COVID-19 to allow the Government the ability to manage the immigration status of individuals in other emergency situations that may arise during the COVID-19 outbreak (e.g. natural disasters that may result in individuals being hospitalised and unable to submit a visa application).</p> <p><i>The amendments will expire 12 months after entering force</i></p> <p>As a further safeguard on these powers, the Bill provides that the amendments it introduces will expire after a period of 12 months.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p><i>Powers exercised by special direction are “disallowable instruments” for the purposes of the Legislation Act 2012</i></p> <p>The Bill makes the powers exercised by special direction described above a disallowable instrument, but not a legislative instrument, for the purposes of the Legislation Act 2012, and therefore may be considered “delegated legislation”. Special directions must be presented to the House of Representatives in accordance with section 41 of the Legislation Act 2012.</p> <p>Some of the special direction powers described above grant an exemption from existing standards in the Act and Regulations, specifically the power to grant visas in the absence of an application, the power to waive regulatory requirements for certain classes of application, and the power to waive the requirement to obtain a transit visa. These powers are necessary to enable the Government to respond flexibly and efficiently during the COVID-19 outbreak. The safeguards which will be in place are described in 4.6 above.</p> <p><i>The Bill creates a power to make regulations to suspend the ability to apply for, or submit an express of interest in applying for, a visa</i></p> <p>In addition the Bill grants the Minister of Immigration the power to suspend, by Order in Council, the ability to make applications for visas, or to submit Expressions of Interest in applying for visas, by classes of people (clause 16). Regulations made using this power may provide for different periods of suspension for different classes of people and different classes and types of visa, and classify persons by reference to, for example, the country or place from which they are travelling or have travelled. A suspension may only be for a period not exceeding 3 months (subject to extension by making further regulations).</p> <p>By requiring this delegated legislation to be made by Order in Council, the Bill ensures that the power is exercised under Cabinet’s scrutiny. Before recommending making regulations to Cabinet, the Minister of Immigration must be satisfied that they are necessary to manage the effects, or deal with the consequences, of measures taken under the Immigration Act, or any other enactment or otherwise, to contain or mitigate the outbreak of COVID-19 or its effects.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>As noted above in 4.7, special directions affecting a class of visa holders or persons are disallowable instruments, but a legislative instrument, for the purposes of the Legislation Act 2012 and therefore may be considered “delegated legislation”.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p>As noted above, the amendments will cease to apply 12 months after entering force. This is included as a safeguard on the powers introduced in this Bill.</p> <p>The Bill also introduces the power to revoke the entry permission of a person who has been deemed by Regulations to hold a visa or to have been granted entry permission (clause 13). This power will allow an immigration officer the ability, for example, to deny entry to private aircraft crew who are not complying with PPE requirements in place to manage the health risks associated with COVID-19.</p>	