

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.

16 March 2021

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Part One: General Policy Statement

Parliament passed the Immigration (COVID-19 Response) Amendment Act 2020 in May 2020, which amended the Immigration Act 2009 by giving the Government eight time-limited powers to enable the immigration system to respond flexibly to challenges raised by the COVID-19 outbreak. In the order they appear in the Immigration Act 2009, they are the power to:

1. vary or cancel conditions for classes of resident visa holders
2. impose, vary or cancel conditions for classes of temporary entry class visa holders
3. waive any regulatory requirements for certain classes of application (that is, waive any prescribed requirements to make an application)
4. grant visas to individuals and classes of people in the absence of an application
5. extend the expiry dates of visas for classes of people
6. 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
7. 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
8. through regulations, suspend the ability to make applications for visas or submit expressions of interest in applying for visas by classes of people.

These powers 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 of further visa applications from those needing to remain in New Zealand to be staggered), stop people overseas from making applications while it is not possible to travel to New Zealand due to border restrictions, and enable the revocation of entry permission of people with deemed entry permission while border restrictions are in place.

These powers are subject to a range of safeguards, one of which is amended by this Bill. That safeguard is that all powers are automatically repealed one year after entering force. However, 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 holders both onshore and offshore. The arguments for continuing to maintain flexibility in control over applications for temporary entry class visas and to maintain an ability to amend visa settings for whole classes of visa holders will remain until border restrictions are lifted.

Part 1 of the Bill (Temporary powers relating to visas) extends the repeal date of the powers by a further two years, to the close of 15 May 2023.

It also amends, to six months, the maximum duration of a suspension or extension of the Regulations which suspend the ability of certain offshore persons to make temporary entry class visa applications. At present the suspension can last for a maximum of three months at a time. The change is made because the regulations have had to be renewed for a longer period of time that was envisaged, and the frequency of renewal is burdensome. In addition it may be giving intending visa applicants the impression that the border will open soon, when that is not the case.

The other major safeguards will continue. Firstly, the majority of the powers need to be exercised by special directions which are disallowable instruments, tabled with the House of Representatives, while one (the ability to suspend applications) requires an Order in Council. Secondly, the decision maker must be satisfied in most cases that the exercise of the power (such as the making of the special direction) is reasonably necessary to manage the effects, or deal with the consequences, of: the outbreak of COVID-19, or measures under enactments to contain or mitigate the outbreak of COVID-19 or its effects, or other measures (in New Zealand or elsewhere) to contain or mitigate the outbreak of COVID-19 or its effects.

Finally, the majority of the powers can only be exercised to benefit (or at minimum not disadvantage) visa holders. The major exception to this, the power to suspend the ability of certain offshore persons from making temporary entry class visa applications, has a further safeguard, in that the power must be exercised through regulations.

Part 2 of the Bill (Modifications of principal Act in connection with temporary powers) extends the repeal date of a series of modifications made to the Act in light of the temporary powers relating to visas, by a further two years, to the close of 15 May 2023.

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 the proposal to extend the expiry of powers under the Immigration (COVID-19 Response) Amendment Bill is exempt from the requirement to provide a Regulatory Impact Statement, on the basis that it is intended to temporarily defer or extend legislative deadlines.	

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
<p>While a full impact analysis is not available, most of the powers have been exercised during the almost 12 months that they have been in existence. (The ability to revoke the entry permission of a person deemed to hold entry permission has not been exercised). For example, the Minister has exercised his class special direction powers 18 times (to February 2021). One of these uses benefitted around 20,000 people by extending temporary entry class visas held by certain employer-assisted workers and their family members. Other examples of use have included</p> <ul style="list-style-type: none">• waiving the requirement to provide a Chest X-Ray Certificate for certain RSE Limited Visa Applications, to streamline the process for applicants travelling from Samoa, Tonga or Vanuatu (around 1900 workers)• waiving fee and levy charges for RSE workers making further limited visa applications when onshore (around 1600 workers), and• varying travel conditions on resident visas to extend the time available for offshore resident visa holders with expired travel conditions to travel to New Zealand (around 6500 people). <p>The power under s61A(1) of the Act, which enables the grant of visas to individuals in the absence of an application, and which is delegated to senior INZ staff, has been used to make very quick decisions in individual emergency situations which were complicated further by border restrictions and other COVID-19-related issues. These have included where Restricted Temporary Entry Instructions (an exception to which</p>	

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
cannot be made by an Immigration Officer, in accordance with s76(3) of the Immigration Act 2009) were in play or where Immigration New Zealand branches or Visa Application Centres have been closed.	

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 Departmental Disclosure Statement (DDS) for the Immigration (COVID-19 Response) Amendment Act 2020 set out the potential costs and benefits identified with regard to the provisions as implemented. It can be found at http://disclosure.legislation.govt.nz/bill/government/2020/243</p> <p>New Zealand's borders remain substantively closed, and there is a risk that a more infectious and more serious variant of COVID-19 could develop, again stranding large numbers of visa holders inside or outside New Zealand, with office and third party provider closures again impacting on Immigration New Zealand's capacity to receive and process visa applications.</p> <p>To respond to the ongoing risks and challenges posed by COVID-19, the Government needs to continue to be as efficient and flexible as possible, within the safeguards provided by the provisions. The Bill aims to ensure that the Government continues to have the ability to respond appropriately and efficiently to the COVID-19 outbreak by continuing additional, constrained, 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:	NO
(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?	NO
<p>The Ministry of Business, Innovation and Employment undertook targeted discussions with key external stakeholders on the policy underlying the 2020 Amendment Act. During the year that the powers have existed, considerable feedback has been received on their use (that feedback has generally been favourable towards the deployment of the powers, with stakeholders asking that the Minister of Immigration's powers to amend or cancel visa conditions for classes of visa holders be exercised more often).</p> <p>As this Bill is not changing the powers or provisions of the 2020 Amendment Act, apart from extending the maximum duration of the regulations which can be made, no further external consultation has been undertaken.</p>	

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 were tested in 2020 through consultation with agencies. They have been retested in 2021, via consultation with the following departments and agencies:</p> <ul style="list-style-type: none">• Ministry of Education• Education New Zealand• Ministry of Social Development• The Treasury• Ministry of Foreign Affairs and Trade• New Zealand Customs Service• 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

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?	NO
<p>This Bill continues eight decision-making powers which were created in 2020, for a limited period (to the close of 15 May 2023). It does not amend them substantively: it extends their life for two years, and it takes the maximum duration that the regulations may be recommended to be made for, or their duration extended, from three to six months,</p> <p>The DDS for the Immigration (COVID-19 Response) Amendment Act 2020 set out the original decision making powers in detail. It can be found at http://disclosure.legislation.govt.nz/bill/government/2020/243</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?	NO
<p>This Bill continues a power to make regulations to suspend the ability to apply for, or submit an expression of interest in applying for, a temporary entry class visa. This is discussed in the DDS for the Immigration (COVID-19 Response) Amendment Act 2020, which can be found at http://disclosure.legislation.govt.nz/bill/government/2020/243</p> <p>The Bill extends the maximum period of a suspension from three to six months (this continues to be subject to extension by making further regulations). This extension is proposed because the regulations have had to be renewed for a longer period of time that was envisaged, and the frequency of renewal is burdensome. In addition it may be giving intending visa applicants the impression that the border will open soon, when that is not the case.</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 reasonably necessary to manage the effects, or deal with the consequences, of the outbreak of COVID-19, or measures under enactments to contain or mitigate the outbreak of COVID-19 or its effects, or other measures (in New Zealand or elsewhere) 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?	NO
<p>The DDS for the Immigration (COVID-19 Response) Amendment Act 2020 set out the (unchanged) decision making powers in detail, including the power to make special directions affecting a class of visa holders or persons. These particular special directions are disallowable instruments, but not legislative instruments, for the purposes of the Legislation Act 2012 and therefore may be considered "delegated legislation".</p> <p>That DDS can be found at http://disclosure.legislation.govt.nz/bill/government/2020/243</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>The amendments will cease to apply from the close of 15 May 2023, three years after originally entering into force. This is maintained as a safeguard on the powers introduced in the 2020 Amendment Act.</p>	