

18 March 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Immigration (COVID-19 Response) Amendment Bill

Purpose

1. We have considered whether the Immigration (COVID-19 Response) Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 23562/2.2). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act, and engages s 19 (freedom from discrimination) and s 27(1) (the right to justice) in the same way as the Immigration (COVID-19 Response) Amendment Act 2020.

The Bill

4. The Bill amends the Immigration Act 2009 (the principal Act) to continue and, in one respect, modify, emergency powers granted under the Immigration (COVID-19 Response) Amendment Act 2020 (the previous amendment Act).
5. The previous amendment Act granted a number of time-limited powers to assist the immigration system to respond appropriately and efficiently to the COVID-19 pandemic, while ensuring the safety of New Zealanders and migrants who are currently in New Zealand.
6. Specifically, the previous amendment Act enabled, for a period of 12 months after its commencement:
 - a. the imposition, variation, or cancellation of conditions for classes of temporary entry class visa holders (see ss 52 and 53 of the principal Act);
 - b. the variation or cancellation of conditions for classes of resident visa class holders (s 50);
 - c. the extension of the expiry dates of visas for classes of people (s 78A);
 - d. the granting of visas to individuals and classes of people in the absence of an application (s 61A);
 - e. the waiver of any regulatory requirements for certain classes of application (s 57);

- f. the waiver of the requirement to obtain a transit visa in an individual case or the suspension of a transit visa waiver made by regulations in any individual case (s 86);
 - g. the suspension, by regulation and for a period not exceeding 3 months at a time, of the ability of all or any class of persons to apply for a particular type of visa or to submit an expression of interest in obtaining an invitation to do so (s 401A); and
 - h. the revocation, in accordance with certified immigration instructions, of the entry permission of a person who has been deemed by regulations to hold a visa and to have been granted entry permission (s 113A).
7. The Bill extends the repeal date of the new powers by a further 2 years, to 16 May 2023, and allows for regulations suspending visa applications or expressions of interest to be renewed at 6-monthly rather than 3-monthly intervals.

Consistency of the Bill with the Bill of Rights Act

Section 19 – Freedom from discrimination and section 27(1) – Right to justice

8. Our advice on the consistency of the previous amendment Act with the Bill of Rights Act found that some of the new powers engaged s 19 (freedom from discrimination) and s 27(1) (the right to justice).¹ The right to freedom from discrimination was engaged where the Minister was given discretion to classify individuals according to their nationality in the course of exercising some of the powers. The right to justice was engaged where powers could be exercised by special direction of the Minister, which denied visa holders the right to be heard regarding these decisions before they came into effect.
9. However, our assessment was that any limitations on these rights were justified in terms of s 5 of the Bill of Rights Act, given the safeguards applicable to the use of the powers and the extraordinary context of the COVID-19 pandemic. One important safeguard was the automatic repeal of the provisions granting the new powers 12 months after their commencement, which ensured that these measures were properly viewed as extraordinary measures necessitated by the COVID-19 situation.
10. The current Bill extends the repeal date of the provisions granting the new powers by a further 2 years, and consequently engages the same rights. Nevertheless, we consider that the range of other safeguards that remain applicable to the use of the powers ensure that they remain rationally connected and proportionate to the objective of enabling timely and appropriate solutions to immigration issues related to COVID-19. In particular, the principal Act requires the decision-maker to be satisfied before exercising most of the powers that their use is reasonably necessary to manage the effects and deal with the consequences of the outbreak of COVID-19 or measures taken to contain or mitigate the outbreak of COVID-19.
11. Additionally, we do not consider that extending the renewal period for regulations suspending visa applications or expressions of interest renders the regulation-making power disproportionate. Allowing the renewal period to be set at 6 months will reduce the

¹ See the Attorney-General's advice on the consistency of the Immigration (COVID-19 Response) Amendment Bill 2020 at <https://www.justice.govt.nz/assets/Documents/Publications/Immigration-COVID-19-Measures-Amendment-Bill.pdf>

compliance burden and manage public expectations connected to the border reopening. The Minister may choose at any time to revoke the suspension when conditions allow.

Conclusion

12. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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