

24 April 2020

Hon David Parker, Attorney-General

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

### **Purpose**

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1. We have considered whether the Immigration (COVID-19 Measures) 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 22892/4.0). We will provide you with further advice if the final version of the Bill 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. In reaching that conclusion we have considered the consistency of the Bill with s 19 (freedom from discrimination) and s 27(1) (the right to justice). Our analysis is set out below.

### **The Bill**

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4. The Bill amends the Immigration Act 2009 ('the principal Act') to increase flexibility in immigration settings to ensure that the Government can respond appropriately and efficiently to the COVID-19 pandemic whilst ensuring the safety of New Zealanders and migrants who are currently in New Zealand. The Bill gives the Minister increased powers to allow for more efficient decision-making where large numbers of immigration situations require similar resolution due to unexpected changes necessitated by COVID-19 measures in New Zealand and internationally.
5. Specifically, the Bill gives the Minister power to:
  - a) impose, vary or cancel conditions of visas for classes of temporary entry class visa holders by special direction;
  - b) extend the expiry dates of visas for classes of people by special direction;
  - c) grant visas to individuals in the absence of an application, or delegate this power to a representative, by special direction;
  - d) grant visas to classes of people in the absence of an application by special direction;

- e) waive any regulatory requirements for certain classes of applications by special direction;
- f) waive the requirement to obtain a transit visa in an individual case, or delegate this power to a representative by special direction;
- g) suspend the ability to make applications for visas or to submit expressions of interest in applying for visas by classes of people, by Order in Council; and,
- h) revoke the entry permission of a person who has been deemed by Regulation to have been granted entry permission, or delegate this power to an immigration officer.

## **Consistency of the Bill with the Bill of Rights Act**

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### **Section 19- freedom from discrimination**

- 6. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds of discrimination set out in the Human Rights Act 1993 ('the Human Rights Act').
- 7. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:
  - a) does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act and, if so,
  - b) does the distinction involve disadvantage to one or more classes of individuals.<sup>1</sup>
- 8. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.<sup>2</sup>
- 9. The Bill gives the Minister discretion to apply a number of powers to classes of persons, and provides that nationality may be one of the characteristics used to classify individuals in exercising the powers. This classification is enabled with regards to the Minister's power to:
  - a) impose, vary or cancel conditions of visas (clause 5);

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See, for example, *Atkinson v Minister of Health and others* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

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See, for example, *Child Poverty Action Group v Attorney-General* above n 1 at [179]; and *McAlister v Air New Zealand* above n 1 at [40] per Elias CJ, Blanchard and Wilson JJ.

- b) waive any regulatory requirements for certain classes of applications (clause 8);
  - c) grant visas to individuals without an application, or delegate this power to a representative, or grant visas to classes of people without an application (clause 9); and,
  - d) extend the expiry dates of visas for classes of people (clause 10).
10. Giving the Minister the discretion to differentiate on the basis of nationality in the use of these powers *prima facie* engages the right to be free from discrimination. Nationality is a prohibited ground of discrimination under s 21 of the Human Rights Act.
11. Under s 5 of the Bill of Rights Act, a limit on a right may be justifiable where the limit serves an important objective, and where the limits on the right are rationally connected to achieving that objective and proportional to its importance.
12. The new powers given to the Minister to impose, vary or cancel certain conditions of visas, extend visas, issue visas without application, and waive processing requirements for visas support the Bill's aim of enabling timely solutions to immigration issues relating to visa holders as a result of unexpected issues caused by COVID-19. We consider this to be an important objective.
13. There is a rational connection between the Bill's objective and drawing distinctions based on nationality. Both visa holders' travel circumstances and the conditions of their visas may differ by nationality, so it is logical to differentiate on this basis to address the particular issues faced by such groups.
14. We consider that the use of nationality-based powers is proportionate to the goal of supporting visa holders in the context of the extraordinary COVID-19 constraints on immigration. The listed powers all act to the benefit of the visa holder, with the exception of the power allowing the Minister to impose new conditions on an extant visa. We have been informed that this power will only be used to require visa holders to comply with the direction of public health professionals. These powers are also limited to use in situations where the Minister is satisfied that doing so is necessary or desirable to support measures taken to contain or mitigate the outbreak of COVID-19 or its effects.
15. For these reasons we consider that any limits within the Bill on the right to be free from discrimination are justified under s 5 of the Bill of Rights Act.

### **Section 27(1)- Right to justice**

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16. Section 27(1) of the Bill of Rights Act affirms that everyone has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law. Natural justice rights include the right to be heard on a determination of a matter that affects your rights or interests.

17. The Bill provides for a number of the newly created powers that can be exercised by special direction from the Minister or a delegated representative. These special directions may come into force immediately and there is no obligation on the decision-maker to inquire into the individual circumstances of the person, or to give any reasons for the decision.
18. Special directions *prima facie* engage the right to justice in making visa holders subject to directions without the right to be heard these decisions. The powers within the Bill exercised by special direction are the powers to impose, vary or cancel visa conditions, extend the expiry dates of visas, grant visas to individuals or classes of people without an application, waive regulatory requirements for certain classes of applications and waive the requirement to obtain a transit visa.
19. However, we consider that the limitations these special directions impose on the right to justice are justified and proportionate in the context of the objectives of the Bill.
20. As in the discussion of discrimination above, we note that the listed powers all act to the benefit of the visa holder, with the exception of allowing the Minister to impose a visa condition to require visa holders to follow public health directives. We consider the power to impose this condition to be rationally connected and proportionate to the objective of protecting public health.
21. Where the effect of a determination adds rather than takes from the rights of an individual visa holder it is of far less importance that they are given the right to be heard in relation to its passage.
22. The powers which may be exercised by special direction are also subject to the scrutiny of Parliament and the public. The Bill requires decisions to be published in the Gazette and on MBIE's website with an explanation of the special direction's effects, makes them disallowable instruments for the purposes of the Legislation Act 2012, and requires them to be tabled in the House of Representatives. Finally, we note that all provisions of the Bill have a sunset provision of 12 months, ensuring that they remain extraordinary measures which may only be used in the context of COVID-19 necessities unless re-enacted by Parliament.
23. For these reasons, we consider that any limitations on the right to justice within the Bill to be justified according to s 5 of the Bill of Rights Act.

## **Conclusion**

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



**LEGAL ADVICE**

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Jeff Orr  
**Chief Legal Counsel**  
**Office of Legal Counsel**