IMMIGRATION ACT REVIEW

SUMMARY OF SUBMISSIONS

NOVEMBER 2006

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SECTION 1: EXECUTIVE SUMMARY

Introduction

This report summarises the submissions made in response to the discussion paper on the review of the Immigration Act 1987 (the 1987 Act) that was released by the Minister of Immigration in April 2006. In total, 360 unique submissions were received, representing the interests of 3,985 individuals and organisations.

Section 3: Purpose and Principles

Just under half the organisations and approximately 75 percent of individual submitters who commented on the purpose of New Zealand's immigration legislation indicated that they agree with the purpose suggested in the discussion paper. Many submitters considered that other interests should also be reflected in the purpose statement including: a commitment to human rights and meeting New Zealand's international obligations, recognition of the Treaty of Waitangi, the importance of the principles of natural justice, fairness and transparency, the benefits of immigration, the importance of settlement, family interests, the well-being of children and recognition of New Zealand's special relationship with Pacific Island nations. Some submitters considered that the purpose of the legislation should simply be to regulate the entry of non-citizens. Others referred to protecting the interests of New Zealanders and the New Zealand way of life.

Similar comments were made in respect of the discussion paper's statement of New Zealand's immigration-related interests. Approximately 60 percent of organisations and 70 percent of individual submitters agreed with the interests as stated. Some submitters expressed concern that the emphasis on issues of security was at the expense of other interests. Submitters made a number of suggestions on the wording of these interests. Some submitters considered that New Zealand's population interests should also be included. Approximately 90 percent of submitters supported the inclusion of a purpose statement in the legislation.

Approximately half the organisations and 75 percent of individual submitters who commented on the principles that should underpin immigration legislation indicated that they agree with the principles outlined in the discussion paper. Submitters expressed particularly strong support for the principle of fairness. Submitters suggested a number of other principles to underpin immigration legislation and some submitters advocated taking a human rights approach. Some submitters considered that the principles should be set out in the legislation. A number of submitters commented that section 149D of the 1987 Act, which restricts the Human Rights Commission from becoming involved in immigration matters, is inconsistent with the principles of fairness and transparency and should be repealed.

Approximately 80 percent of submitters agreed that the Immigration Act should be framework legislation, regulating the broader immigration system. Some submitters considered that the Immigration Act should require that immigration policy meet the principles of the legislation. Some submitters commented that the Immigration Act should require, or provide for, consultation on immigration policy.

Section 4: The Visa and Permit System

There was strong support for the use of the single term "visa" for all travel, entry and stay authorisation granted to non-citizens. Approximately 80 percent of organisations and 65 percent of individual submitters agreed with this proposal, noting that it would simplify the system and make it easier to understand. Submitters commented that the changes need to be well-communicated to stakeholders, including employers and staff in government departments that administer access to social services.

Approximately 75 percent of submitters considered that the system should continue to allow for exceptions to the standard requirement for authorisation to travel to, enter and remain in New Zealand. There were a range of views on which visa and permit exemptions should be maintained. Many submitters supported retention of visa-free arrangements, although airlines noted that they would not be opposed to all persons being required to hold a visa, and some submitters considered that there should be a review of the countries that have visa-free status.

A number of submitters expressed concern about the possible removal of exemptions for crew of sea-going vessels in order to deter asylum seekers. Submitters considered this would be contrary to the spirit of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (the Refugee Convention). Concerns were also expressed that the Advance Passenger Processing system makes it difficult for genuine refugees to travel to New Zealand and that the use of such tools should be transparent and observe the principles of natural justice.

Airlines expressed concern about the possible removal of the exemption of commercial aircraft crew from completing arrival and departure cards. Others considered that all persons should be required to provide arrival and departure information.

Section 5: Decision-making

Approximately two thirds of submitters that addressed this issue considered that the power to make positive exceptions to residence policy should be delegated to selected senior immigration officials. Many submitters commented on the need for consistency, transparency and accountability of decision-making. Some submitters considered that these requirements could be met by requiring immigration officers to consider an exception to residence policy and to give reasons for decisions, and by making guidelines for decision-making publicly available. Those who oppose the proposal considered that only the Minister of Immigration should have the power to make exceptions to residence policy. Many submitters commented that, if the power is delegated, the Minister of Immigration should retain a residual discretion to make exceptions to policy.

Most submitters considered that decision-makers should provide potentially prejudicial information and reasons for decisions to both onshore and offshore applicants in the interests of fairness and natural justice. Likewise, most submitters considered that classified information should not be used to decline an application unless it is disclosed to the applicant and s/he is given an opportunity to comment on that information.

Approximately 75 percent of organisations and just over half the individual submitters expressed support for the legislation enabling decisions to be made electronically in the future. The main concerns were around ensuring that electronic decisions are limited to low-risk approval decisions that do not require an individual judgement to be made and putting in place adequate mechanisms to ensure transparency and accountability of decision-making. Approximately 15 percent of organisations and 35 percent of individual submitters were opposed to the proposal. Most of these submitters considered that an immigration officer needs to be involved in making the final decision.

There was a mixed response to the possibility of third party decision-making: organisations were evenly split between those who support and those who oppose making provision in the legislation for third parties to make some immigration decisions in the future; approximately 35 percent of individuals indicated support for this option and just over half expressed opposition. Business and employer representatives were among those who support the option but a number of industry groups also expressed reservations. The main concerns were around developing robust accreditation criteria and strict monitoring and audit requirements to ensure the accountability of third parties. Some submitters considered that the costs involved in developing these processes would outweigh any advantages of enabling third parties to make immigration decisions. Other submitters were strongly of the view that the decision-making role should be retained by the Minister of Immigration and delegated officials.

Section 6: Exclusion and Expulsion

Exclusion

There was a mixed response from organisations to the proposal that failure to meet health and character requirements be included as grounds for exclusion in the new legislation: just under half agreed and approximately 40 percent disagreed with the proposal. Almost 70 percent of individual submitters expressed support for the proposal. The main concerns, from both submitters who support the proposal and submitters who oppose the proposal, were that the proposal could unfairly exclude families because of ill-health or disability of one family member, or may prevent the entry of refugees and their family members. Some submitters expressed concern that the proposed inclusion of a health ground may discriminate against persons with disabilities. Submitters considered that provision for waiving the health and character grounds needs to be included in the legislation, with some submitters suggesting that a specific exemption be made for refugees.

Submitters also considered that character requirements need to be well-defined. Some submitters expressed concern that the inclusion of a ground relating to “glorification of terrorism” may conflict with the right to freedom of expression, and suggested that any such provision be consistent with the Terrorism Suppression Act 2002. Concerns were also expressed about the use of classified security information and the possible exclusion of a person who poses a risk to New Zealand’s reputation. A number of submitters considered that health and character requirements should remain in immigration policy.

Expulsion

There was a mixed response to the proposed extension of automatic liability for expulsion from unlawful stay in New Zealand to all grounds for expulsion. Those who support the proposal commented on the need to take decisive action and avoid lengthy delays. Those who oppose the proposal did not support placing the onus of rebutting liability for expulsion on individuals. Submitters expressed concern that people may not have sufficient time or information to mount an effective challenge and considered that the proposal would adversely affect vulnerable groups such as refugees and trafficked persons. A number of submitters commented on the need for people to be provided with notice of their liability for expulsion and to be given an opportunity to respond. Some submitters also expressed concern that the proposal would lower the status of permanent residence and could send a destabilising message to migrant communities.

Of those who responded to the proposed use of the single term “expulsion”, approximately 55 percent agreed that this would help to create more understandable legislation, although some submitters preferred the use of the term “deportation”. Approximately a quarter of submitters considered that a distinction should be maintained in the terms used to describe expulsion of temporary entrants and expulsion of residents.

There was a mixed response to the Minister of Immigration having a reduced role in expulsion decisions. Some submitters considered that Ministerial decision-making is not required, although many submitters expressed the view that Ministerial oversight of decision-making is essential and the Minister should retain the ability to intervene. Other submitters considered that the Minister should continue to have a decision-making role because migrant communities have greater confidence in decisions made by the Minister and the Minister is accountable to the people.

Submitters expressed strong support for differentiated penalties following expulsion. Some submitters suggested amendments to the proposed ban periods on returning to New Zealand. A number of submitters commented on the need for flexibility when imposing a ban period and some submitters expressed the view that a person should not be automatically excluded from re-entry on character grounds once the ban period has expired.

Section 7: Access to Review and Appeal

Review and appeal of temporary entry and residence decisions

Most submitters did not support the proposal to only provide residence applicants with the right of independent appeal if they are onshore or have a New Zealand sponsor. Over 60 percent of submitters who addressed this issue considered that all residence applicants should have access to independent appeal. They considered that independent appeal is necessary for all applicants in order to ensure that the law is applied correctly, provide for transparent and accountable decision-making, support the principles of fairness and natural justice and provide confidence in the immigration system.

Approximately 70 percent of submitters agreed that, in the normal circumstances, a person should exhaust all formal avenues of appeal before making a request to the Minister of

Immigration. However, some submitters considered that flexibility is required in order to respond to individual circumstances, particularly urgent circumstances, and others commented that a legislative response is not necessary to implement this proposal.

Over 70 percent of submitters agreed that the Residence Review Board (or equivalent independent authority) should refer possible exceptions to residence policy back to the Minister of Immigration. A number of submitters considered that the appeal authority should be able make the exception to policy, at least in some cases, without having to refer the case to the Minister. One submitter suggested that the Board also have the authority to allow an appeal or refer a case to the Minister where it is in the interests of a child or the wellbeing of the family.

Appeals against expulsion

Approximately 55 percent of submitters responding to this issue agreed that persons should only have one opportunity to contest liability for expulsion on the facts. However, a number of submitters were of the view that an independent authority should consider appeals on the facts from both temporary and permanent residents, and expressed concern about the Department of Labour fulfilling this role for temporary entrants. Approximately a third of submitters considered that providing only one opportunity to contest liability for expulsion on the facts would be unfair to applicants.

Most submitters considered that all persons liable for expulsion should have access to independent humanitarian appeal, with approximately 70 percent of submitters who responded to this issue indicating support for this option. Submitters generally considered that providing all persons with the opportunity for an independent humanitarian appeal is necessary to ensure New Zealand meets its international obligations and protects vulnerable people such as trafficked persons. A number of submitters commented that the appeal right should extend to people unlawfully in the country.

Approximately half the organisations and 75 percent of individual submitters considered that persons who obtain residence through fraud should be treated as overstayers rather than as residents for the purpose of establishing access to humanitarian appeal. A number of submitters commented that overstayers and residents should have the same rights to independent humanitarian appeal.

There was considerable interest in the proposed humanitarian test against expulsion. Most submitters agreed that there be a single test but many submitters, particularly organisations, disagreed with the nature of the test proposed in the discussion paper. They generally commented that it set too high a threshold. A number of submitters opposed the public interest element of the test and considered that the Canadian test that refers to hardship that is “unusual, excessive or undeserved and the result of circumstances beyond their control” would be more appropriate. Others expressed concern that the humanitarian circumstances would need to be exceptional. Some submitters commented that the test should be consistent with New Zealand’s international obligations, and that express reference be made to these obligations.

A number of submitters were of the view that there should be different humanitarian tests for residents and for non-residents in recognition of the different interests at stake.

Section 8: The Independent Appeal Bodies

Approximately 70 percent of organisations that responded to these proposals supported the establishment of a single immigration and refugee tribunal. Individuals expressed mixed views, with just under half indicating support for the proposal and approximately 40 percent indicating opposition. While submitters considered that a single tribunal would be more efficient, concerns were expressed about the potential for losing the expertise of the Refugee Status Appeals Authority and failing to recognise the special legal issues associated with refugee cases. Most of those who opposed the proposal considered that there should continue to be a separate refugee tribunal.

There were mixed views on whether appeals on the facts and humanitarian appeals for exclusion cases should be heard separately or together in exclusion cases.

Submitters made a range of comments on the legislative and administrative provisions that should be put in place for the independent appeals tribunal or tribunals. Most comment related to the proposed single immigration and refugee appeal tribunal. Submitters expressed mixed views on its membership, with some commenting that specialist and impartial expertise is necessary and others suggesting that a range of interests be represented. A number of submitters suggested that the tribunal have inquisitorial powers like the Refugee Status Appeals Authority and that applicants have the opportunity to be heard in person.

Some submitters commented on the need to ensure applicants have adequate time to make their appeal and/or that there be flexibility to allow for special cases. Adequate resourcing of the tribunal and timeliness of decision-making were emphasised by a number of submitters. Some submitters commented on legal aid, with a number suggesting that legal aid should be available for those making a humanitarian appeal.

There was strong support for the Ministry of Justice being responsible for servicing the immigration and refugee appeals bodies: almost 80 percent of submitters indicated support for this proposal. Submitters favoured a clear separation from the Department of Labour as initial decision-makers and commented that it would enhance public confidence in the independence and integrity of the appeals bodies.

Section 9: The Use of Classified Information

Submitters expressed mixed views to the proposals relating to the use of classified information. Many submitters indicated their support for all three proposals, with the strongest level of support for the use of classified security information in immigration decision-making (approximately 55 percent of those responding to this section). There was slightly less support for the use of other classified information in immigration decision-making (approximately half of all submitters). The response to the use of classified information in refugee/protection cases was more even, with approximately 45 percent indicating support and approximately 40 percent indicating opposition.

There were clear differences between individual responses and responses from organisations. Individuals were much more likely to support the proposals than oppose them. For all three questions, there were more organisations that opposed the use of classified information than supported it.

Those that support the proposals and those that oppose the proposals raised some similar concerns. Many submitters considered that decision-making and review processes need to be transparent, that applicants should have access to special counsel, that applicants should be provided with at least a summary of the information to enable them to challenge that information, and that reviews be undertaken by an independent body rather than by the Inspector-General of Intelligence and Security or a member of the proposed new immigration and refugee tribunal acting alone. Concerns were also expressed about the accuracy of classified information, particularly in the case of refugee/protection applications where the country from whom the applicant is seeking protection may be a source of classified information.

Many submitters indicated strong opposition to the proposals on the grounds that they contravene a person's right to a fair hearing and the principles of administrative and natural justice. These submitters were of the view that all prejudicial information should be fully disclosed to applicants if it is to be used in decision-making. While some submitters noted that the additional safeguards discussed above would help to alleviate their concerns, others were opposed to any use of classified information in immigration or refugee decision-making. A number of submitters questioned whether special counsel would be able to play an effective role because they would be unable to discuss the classified information with their client.

Section 10: Compliance and Enforcement

There was a reasonably high level of support for immigration officers having the power to require information to assist with investigations of people who may be liable for expulsion. Approximately 70 percent of submitters who responded to this issue indicated support for the proposal. Submitters considered that there should be strict controls on the use of the power, including clear definition of what information may be requested and under what circumstances, and provisions on the conduct of immigration officers. Submitters also commented that the power should be consistent with privacy and human rights legislation. Approximately 15 percent of submitters did not support the proposal, and commented that it is unnecessary or unwarranted.

Approximately 65 percent of submitters indicated support for extending the list of organisations that may be required to provide information to include broader industry groups. Many submitters agreed that health and education providers should not be included on the list. Some submitters made other suggestions about which groups should or should not be included on the list.

There was a mixed response to the proposal that immigration officers be able to detain people liable for detention for immigration purposes for up to four hours until the Police

arrive. While approximately 70 percent of individual submitters expressed support for the proposal, only about half the organisations did; approximately 40 percent of organisations that made submissions on this issue were strongly opposed to immigration officers having a power to detain. Submitters commented on the need for specialist training in detention and attention to the rights of detainees, with many submitters expressing the view that the Police were best placed to undertake this role. Concerns were also expressed about the lack of an independent accountability mechanism, akin to the Police Complaints Authority, for dealing with complaints about the exercise of immigration powers. A number of submitters expressed concern about possible misuse of powers.

There was not a high level of support for immigration officers having the same powers of entry and search as Customs and Police have in the immigration context. Only 40 percent of submitters who addressed this issue supported the proposal. Many submitters considered that immigration officers should continue to work with the Police and Customs because these agencies have expertise in exercising powers of entry and search and there are mechanisms to ensure their accountability. Some submitters expressed concern that immigration officers may not use such powers fairly and that insufficient attention would be given to individual human rights. Submitters commented that in-depth training and comprehensive monitoring would be required if the proposal goes ahead.

Organisations that made submissions expressed strong support for the Minister of Immigration and delegated officials continuing to have the ability to grant permits to people in New Zealand unlawfully: approximately 90 percent agreed with the proposal. The response from individual submitters was mixed, with approximately 55 percent indicating support and approximately 40 percent indicating opposition to the proposal. Submitters who oppose the proposal considered that once a person is determined to be in New Zealand unlawfully, they should be required to leave regardless of the circumstances.

There was very strong support for the introduction of permit extensions for people whose permits expire while their application for a further permit is being considered: approximately 90 percent of submitters indicated support for this proposal. Submitters noted benefits for applicants and for employers.

Section 11: The Use of Biometrics

Approximately 60 percent of submitters who commented on this section agreed that immigration officers should be able to require, use and store certain types of biometric information and request the voluntary provision of other types of biometric information. Approximately 20 percent of submitters did not indicate a clear preference for or against the proposal but commented on the legislative provisions that would need to be in place.

Submitters commented that the legislation should lay out the broad principles for the use of biometric information, with the detail of particular technologies included in regulations, and that the use of biometric information should be consistent with internationally-agreed standards and with New Zealand's privacy and human rights legislation. Submitters commented on the need for adequate safeguards to be put in place, and some submitters expressed the view that a detailed privacy impact assessment should be undertaken.

The main concerns were with the proposed power to request the voluntary provision of biometric information such as DNA testing. Some submitters considered that this would be intrusive and expressed concern that people would feel compelled to provide the information to avoid a negative inference being drawn by immigration officers. Some submitters opposed this part of the proposal while others commented on the safeguards that should be put in place.

Section 12: Detention

Submitter response to the proposals to extend detention periods was mixed. These proposals included:

- extending the initial detention period without a warrant of commitment to a maximum of 96 hours in expulsion cases
- giving the judge discretion to extend the period for review of a warrant of commitment to a maximum of 28 days, and
- enabling the maximum detention period to be extended to up to six months where administrative delays outside the control of the Department of Labour prevent earlier removal.

In all three cases, approximately 40 to 45 percent of submitters indicated support for the proposals and between 35 and 45 percent were opposed. Submitters commented that these proposals could constitute arbitrary detention and that administrative convenience is an insufficient ground for infringing the detainee's human rights. Many submitters expressed the view that detention should always be for the minimum period possible and that detainees should have early access to the courts, and regular review, to assess the continuing need for their detention. Submitters also commented that detainees should have access to legal representation.

Approximately 60 percent of submitters agreed that the court should be able to waive the requirement to renew a warrant of commitment to detain a person who has been refused entry to New Zealand and is serving a prison sentence for criminal behaviour. Some submitters commented that the requirement should only be waived while the person is in prison, with a review taking place before the person is released.

There was a mixed response from submitters to the proposal that refugee status claimants who are high-risk may be detained, regardless of when they made their claim for refugee status: organisations were fairly evenly divided between those who support and those who oppose the proposal; approximately two thirds of the individual submitters expressed support for the proposal and approximately 20 percent were opposed. The main concerns were that the proposal could be contrary to the Refugee Convention requirement that detention only be undertaken when necessary and that it could constitute arbitrary detention. A number of submitters commented that detention needs to be consistent with the guidelines of the United Nations High Commissioner for Refugees. Some submitters commented that, in line with the Refugee Convention, refugees should not be punished for

the use of false documents. Others commented on the need for clear and robust information on the reasons for detention in any given case.

Most submitters agreed that people detained for immigration purposes should not be detained alongside remand prisoners and convicted criminals. Approximately 55 percent of submitters considered that immigration officers should be able to undertake secure detention. However, a number of submitters considered that this power should not be vested in immigration officers given the specific training requirements for this role. Other submitters expressed concern that the proposal could lead to increased use of detention.

Section 13: The Role of Third Parties

Information-sharing

Approximately 65 percent of submitters who responded to this issue indicated support for enabling immigration status to be disclosed to third parties in order to determine eligibility for publicly-funded services. These submitters considered disclosure to be necessary to ensure that only those who are eligible for publicly-funded services can access them. The main concerns with the proposal were around ensuring the privacy of individual persons and providing adequate safeguards and restrictions around what information may be disclosed and the use of that information. Submitters also expressed concerns that the proposal could disadvantage the children of those unlawfully in the country as their parents may be reluctant to approach service providers out of fear of potential immigration consequences.

Sponsors

Over 70 percent of submitters commenting on sponsor obligations indicated support for establishing a stronger legislative basis for sponsorship, and approximately 60 percent supported the use of specific immigration consequences for sponsors who fail to meet their obligations. There were mixed views about the both the detail of the sponsorship provisions and the consequences that should be applied. Many submitters opposed the use of bonds in sponsorship and argued that it would be a significant burden to both families and organisations and may act as a deterrent to sponsorship.

Employers

Approximately 65 percent of organisations and 80 percent of individual submitters responding to this section indicated support for providing a stronger legislative basis for employer responsibilities. However, there were some concerns about enabling additional responsibilities to be imposed through government immigration policy and some submitters felt that the proposed legislative reminder of employment obligations is unnecessary.

Most comment was made on the possibility of employers being required to check that a prospective employee is entitled to work for that employer. While around two thirds of all submitters supported this option, there was strong opposition from business and employer groups, and some migrant groups. The main concerns were the additional compliance costs for employers, practical difficulties in verifying immigration status and the possibility that it would deter employers from employing migrants and/or lead to discrimination. Those who opposed the option considered that the “reasonable excuse” is indeed reasonable. Many

submitters commented that if this option were to be enacted, effective tools would be required to enable employers to easily and quickly check immigration status. Education of employers was another common suggestion for helping to ensure that employers meet their obligations.

Education providers

There was strong support for including reference to the Ministry of Education's Code of Practice for Pastoral Care of International Students in immigration legislation: over 80 percent of submitters who responded to this question indicated their agreement. Submitters commented on the need to protect both international students and New Zealand's reputation. There was also reasonably high support for giving immigration officers the power to require information from education providers and for the introduction of a flexible penalties regime, with approximately 75 percent support for both proposals. In relation to the power to require information, concerns were expressed about the potential compliance costs for education providers and the need to ensure the privacy of individual students. Compliance costs were also raised as a concern in relation to the possible use of an instant fines regime, and a number of submitters argued that flexibility is required to allow for individual circumstances and that education providers should be provided with an opportunity to respond to any issues of non-compliance.

Carriers

Approximately 70 percent of submitters who addressed this issue supported the proposed minor amendments to carrier obligations. However, the airline representatives who responded argued that it is no longer appropriate to require carriers to check evidence of onward travel or sufficient funds given that people may not carry physical evidence of these things. They also sought clarification of the other proposed amendments. There was less support for an instant fines regime, with only around 45 percent of submitters indicating agreement to this option. The airline representatives noted that the level of non-compliance is already very low and argued that an instant fines regime would simply increase compliance costs without addressing the underlying cause of non-compliance. Human rights groups and refugee and migrant groups expressed concern that an instant fines regime would adversely affect asylum seekers. They noted the United Nations High Commissioner for Refugees view that airlines should not be penalised for transporting people seeking protection from persecution.

Section 14: New Zealand's Role as an International Citizen

Submitters expressed strong support for the proposal that new immigration legislation include New Zealand's international commitments to protect persons facing torture, arbitrary deprivation of life, or cruel, inhuman or degrading treatment or punishment. Approximately 85 percent of submitters that addressed this issue indicated support for the proposal. Some submitters considered that other human rights instruments should also be included in the legislation, including the United Nations Convention on the Rights of the Child and the International Covenant on Civil and Political Rights (ICCPR).

There was also a high level of support for determining claims under the Refugee Convention, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment (the Convention Against Torture) and articles 6 and 7 of the ICCPR in a single procedure, with a single right of appeal. Approximately 80 percent of organisations and 70 percent of individual submitters agreed with this proposal. Submitters emphasised the need for people seeking protection to have the same rights and procedural protections as refugee status claimants currently have, and for protected persons to have the same immigration status. Submitters also commented that refugee status/protection officers and members of the appeals tribunal would require additional training to ensure they are well-versed in all of New Zealand's international obligations.

Approximately 85 percent of organisations that made submissions agreed that immigration legislation should recognise refugees selected offshore. Approximately half the individual submitters supported the proposal and just over a quarter were opposed. The reasons for their opposition were not clear but appeared to relate to a concern about extending protection to a further group of people.

Submitters expressed mixed views on the proposed obligations of refugee status/protection claimants and the proposed offences for failing to meet these obligations. Many submitters considered that claimants should not be prosecuted for providing false documents or for failing to provide information. Submitters considered that the prospect of having a claim declined should be incentive enough for people to provide information.

Approximately 75 percent of organisations and 60 percent of individual submitters considered that subsequent claims should be allowed on the basis of a change in personal circumstances, with a number of submitters commenting that to not do so would breach New Zealand's obligations under the Refugee Convention. Approximately 70 percent of organisations and 85 percent of individual submitters agreed that there is no need for legislative change to deal with manifestly unfounded claims, persons coming from or via "safe countries" or mass arrivals. Submitters considered that the merits of each claim need to be considered on a case-by-case basis in order to protect individual human rights.

Individual submitters expressed strong support for clarifying when refugees or persons in need of international protection may be expelled: almost 90 percent of those who addressed this issue agreed with the proposal. Of the organisations that responded, approximately 60 percent agreed, 10 percent disagreed and 30 percent either were unsure or did not express a clear preference either way. The main concerns were around ensuring that the legislative provisions and language are consistent with the Refugee Convention, the Convention Against Torture and articles 6 and 7 of the ICCPR.

There was a reasonably high level of support for New Zealand becoming party to the 1954 Convention Relating to the Status of Stateless Persons (the Stateless Persons Convention). Approximately 75 percent of organisations and 65 percent of individual submitters expressed support for this option.

Section 15: Other Issues

Some submitters proposed that an Immigration Commissioner be established to oversee the exercise of powers by immigration officers. Such a commissioner would fulfil a similar role to

other specialist statutory commissioners, and would focus on removal and detention issues, complaints of misconduct or unfairness against departmental officers and others exercising delegated powers, and other urgent issues for which no immediate remedy exists.

A number of submitters proposed that volunteering be excluded from the definition of employment in immigration legislation so that organisations with volunteers do not find themselves unexpectedly regarded as employers under the 1987 Act.

Some submitters suggested that consideration be given to the government agency that is responsible for the administration of immigration legislation. One submitter suggested that the family, humanitarian and refugee aspects of immigration policy be transferred to another agency such as the Ministry of Justice. Another suggested that responsibility for all immigration policy be shifted to an agency with a stronger focus on maximising the benefits of immigration.

Many submitters took the opportunity to comment on specific aspects of immigration policy. Over 3,500 individuals signed submissions seeking greater access to New Zealand for Pacific peoples. Comments were also made on the processing of immigration applications by immigration officers and the need for greater attention to various settlement and post-migration issues.

SECTION 2: INTRODUCTION

In April 2006 the Minister of Immigration released a discussion paper on a review of the 1987 Act. The discussion paper set out the Government's objectives for the review and presented options and proposals for legislative change. The Minister invited interested members of the public to make submissions on the proposals and to participate in stakeholder meetings, which were held over the following two months.

This document summarises the submissions that were made. In total, 360 unique submissions were received from individuals and organisations representing a range of interests including:

- immigration consultants
- ethnic councils
- refugee and migrant communities
- human rights groups
- law societies
- community law centres
- other community groups
- employers and businesses
- business and industry representatives
- unions
- airlines
- the education sector
- local authorities, and
- political parties.

A number of submissions were signed by many individuals, particularly submissions received from New Zealand's Pacific communities. In total, 3,985 people signed a submission either on behalf of an organisation or as a private individual. Views expressed at the 19 public meetings, attended by over 650 people in May and June 2006, are also reflected in this report.

The following sections of this report provide a brief summary of the proposals, indicate the approximate level of support for each proposal or option, and set out the range of comments made in response to each of the questions asked in the discussion paper. For ease of reference, the numbering of sections is consistent with the numbering used in the discussion paper. Further information on the consultation process is set out in Appendix A. Information on the analysis of submissions is set out in Appendix B. A list of submitters is attached as Appendix C.

In addition to public consultation, a number of government agencies have been involved in the development of the review, including: The Ministries of Justice, and Foreign Affairs and Trade, the Department of Prime Minister and Cabinet, the Department of Internal Affairs, the New Zealand Customs Service, and the New Zealand Police.

SECTION 3: PURPOSE AND PRINCIPLES

Overview

Just under half the organisations and approximately 75 percent of individual submitters who commented on the purpose of New Zealand's immigration legislation indicated that they agree with the purpose suggested in the discussion paper. Many submitters considered that other interests should also be reflected in the purpose statement including: a commitment to human rights and meeting New Zealand's international obligations, recognition of the Treaty of Waitangi, the importance of the principles of natural justice, fairness and transparency, the benefits of immigration, the importance of settlement, family interests, the well-being of children and recognition of New Zealand's special relationship with Pacific Island nations. Some submitters considered that the purpose of the legislation should simply be to regulate the entry of non-citizens. Others referred to protecting the interests of New Zealanders and the New Zealand way of life.

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Approximately half the organisations and 75 percent of individual submitters who commented on the principles that should underpin immigration legislation indicated that they agree with the principles outlined in the discussion paper. Submitters expressed particularly strong support for the principle of fairness. Submitters suggested a number of other principles to underpin immigration legislation and some submitters advocated taking a human rights approach. Some submitters considered that the principles should be set out in the legislation. A number of submitters commented that section 149D of the 1987 Act, which restricts the Human Rights Commission from becoming involved in immigration matters, is inconsistent with the principles of fairness and transparency and should be repealed.

Approximately 80 percent of submitters agreed that the Immigration Act should be framework legislation, regulating the broader immigration system. Some submitters considered that the Immigration Act should require that immigration policy meet the principles of the legislation. Some submitters commented that the Immigration Act should require, or provide for, consultation on immigration policy.

3.1: What is the purpose of New Zealand's immigration legislation?

Summary of proposals

The discussion paper suggests that the purpose of immigration legislation be:

- to regulate the entry, stay and removal of non-New Zealand citizens, in a manner that is in New Zealand's interests, and
- to provide for integrity in the immigration system.
- New Zealand's interests are described as:
- maintaining the safety and security of New Zealand
- generating sustainable economic growth
- establishing strong communities
- fulfilling New Zealand's role as a good international citizen, and
- promoting international cooperation.

The discussion paper proposes the inclusion of a carefully drafted purpose statement in the legislation.

Key questions
1. Do you agree with the suggested purpose of New Zealand's immigration legislation? 2. Do you agree that New Zealand's immigration-related interests are those suggested? 3. Should a purpose statement be included in the legislation?

Submitter response

One hundred and twenty five submitters responded to one or more of these questions: 72 submitters responded on behalf of an organisation and 53 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, business and industry representatives, airline representatives, union representatives, territorial authorities, government agencies, the Families Commission and two political parties.

Comments on question one

Just under half the organisations and approximately 75 percent of individual submitters who commented on the purpose of New Zealand's immigration legislation indicated that they agreed with the proposed purpose statement. Many submitters, particularly organisations, commented on the suggested purpose of the immigration legislation without expressing a clear yes or no response to the question asked. Approximately 10 percent of submitters indicated that they did not agree with the suggested purpose.

Many submitters considered that the suggested purpose statement is too narrow and does not reflect all of New Zealand's interests. To some extent, submitter comments on this question overlapped with comments on the statement of New Zealand's immigration-related interests (question two) and the principles that should underpin immigration legislation (section 3.2).

A number of submitters commented that the discussion of the purpose of immigration legislation places too much emphasis on border security and that sovereignty issues need to be balanced against individual human rights. Submitters considered that the purpose statement should refer to upholding the human rights of migrants and/or giving effect to

New Zealand's obligations under international human rights conventions. One submitter noted that protection is the primary purpose for refugees.

> *We think the purpose statement should include "in a manner that is consistent with International Covenants & Conventions on Human Rights." Stating categorically NZ's stand on this basic issue we are a champion for, will allay the concerns of many that under certain circumstances, it will not be thrown to the wind. Security concerns should not push human rights and natural justice to the background.* (Ora Limited)

Union representatives also emphasised the rights of migrants, as well as the need to protect the interests of New Zealand workers.

> *The CTU believes that any stated purpose in the Immigration Act, and any underlying definition of New Zealand's immigration-related interests, needs to be broadened to avoid use of immigration as a proxy for domestic training and skills development, to acknowledge the importance of a rights-based approach to migration and to recognise a wider range of international instruments (such as ILO conventions) in the area of migration.* (Council of Trade Unions)

Some submitters considered that the purpose statement should state New Zealand's commitment to fairness, transparency and natural justice within the administration of the new immigration system. One submitter commented that one purpose of the legislation should be to encourage respect for the immigration system. Some submitters considered that reference should also be made to the Treaty of Waitangi and to the New Zealand Bill of Rights Act 1990.

Some submitters considered that the purpose statement should be more proactive and refer to generating economic growth, competing for potential migrants and/or maximising the benefits of immigration. One submitter suggested that the purpose of the legislation should be to facilitate the entry of people New Zealand wants rather than simply regulating it. Other submitters suggested that the purpose statement make reference to the economic, social and cultural benefits of immigration, alongside other considerations.

> *We disagree with the purpose statement as proposed. The purpose should instead be "to maximise the social, cultural and economic benefits of immigration."* (Wellington Chamber of Commerce)

> *We are particularly keen to see consideration of "generating sustainable economic growth" as this is an aim which will impact on employment. This aim would also cover not only the talent we are endeavouring to secure for New Zealand employers but also the families that are associated with that talent.* (Recruitment and Consulting Services Association)

A number of submitters commented that the purpose statement should affirm the importance of successful settlement in fostering development and growth. Some submitters

suggested that support for strong and diverse communities, and/or maintenance of social harmony across communities be reflected in the purpose statement. Some submitters considered that reference be made to the importance of the family and/the well-being of children.

> *I think there should be a specific purpose on family well-being or family interests; there should be a wide definition of family used. Specifically with regard to international obligations - there should be a specific mention of humanitarian principles. There should also be a specific obligation to recognise the well being of children.* (Individual submitter)

Some submitters suggested that the purpose statement include reference to the special relationship between New Zealand and Pacific Island nations. Some submitters suggested that reference be made to cultural diversity, multiculturalism and/or the rights of migrants to assert their cultural identity.

One submitter emphasised freedom of movement and suggested that the purpose of immigration legislation be "to facilitate freedom of movement to New Zealand, subject to the country's capacity to cope with visitors and immigrants without undue environmental, social or economic strain". Other submitters commented that the primary purpose of the legislation should be protecting the interests of the incumbent population and the "New Zealand way of life".

A number of submitters considered that the purpose statement should be kept brief. One submitter suggested that New Zealand follow the Canadian approach with a simple statement that "This is an Act in respect of immigration to New Zealand", and that the purpose is also in respect of granting refugee protection to people who are displaced, persecuted or in danger. The submitter considered that the Immigration Act should go on to list a number of objectives similar to Canada's Immigration and Refugee Protection Act 2001. Another submitter, on the other hand, considered that the purpose statement should be confined to regulation of the entry, stay and removal of non-New Zealand citizens alone, without any reference to New Zealand's immigration-related interests.

Comments on question two

Approximately 60 percent of organisations and 70 percent of individual submitters agreed that New Zealand's immigration-related interests are those suggested in the discussion paper. Almost 20 percent of submitters indicated partial agreement; less than 10 percent of submitters disagreed with the statement of New Zealand's immigration-related interests. A number of submitters expressed concern at the weighting given to New Zealand's immigration-related interests. Some submitters considered that too strong an emphasis is placed on maintaining the safety and security of New Zealand. Other submitters commented that the discussion focuses on the balance between maintaining national security and generating economic growth, at the expense of the other objectives.

> *There is far too much emphasis placed on notions of "national security" when, in fact, there is little evidence that migrants pose any national security threat at all.* (Individual submitter)

> *Despite identifying five broad areas of interest (safety and security, economic growth, strong communities, being a good international citizen and promoting international cooperation) the discussion paper marginalises the other three and reduces the primary issue to a trade-off between New Zealand's border security and national economic growth.* (NZ Meat Workers and Related Trades Union)

Some submitters considered that "generating sustainable economic growth" is too narrow and that this interest should include promotion of social and cultural benefits as well. Submitters commented on the need to recognise the contribution of "non-economic" migrants.

> *The non-economic contribution of providing child care, releasing parents to work and provide stability is seldom factored in. The labour market is too narrow a focus.* (Hutt Valley Community Law Centre)

A number of submitters commented on the interest of "establishing strong communities." Submitters expressed support for this objective and made various suggestions to expand it, including:

- changing the wording to "establish, maintain and enhance strong communities" or "establish, enrich and maintain strong communities"
- referring to "strong and inclusive communities"
- aiming to maintain the health of those communities
- reflecting the values of integration and family reunification, and
- making reference to diversity, for example by referring to "strong diverse communities" or "strong ethnically diverse communities", or by adding "demonstrating the value of diversity" as a specific interest.

Some submitters commented on the importance of social cohesion in establishing strong communities and promoting successful settlement. Some submitters suggested the addition of an additional interest along the lines of "contributing to social cohesion and national identity".

Other submitters expressed concern that the reference to strong communities is too broad. One submitter suggested that establishing strong communities should be conditional upon not imposing costs on other New Zealanders (through access to benefits and other social services). Another expressed concern that establishing strong ethnic communities may conflict with good settlement outcomes and integration into New Zealand society.

A number of submitters commented that "fulfilling New Zealand's role as a good international citizen" is too vague and should either include, or be replaced by, a reference

to New Zealand's compliance with international human rights obligations and norms. As with the purpose statement, some submitters considered that express reference should be made to individual human rights. One submitter commented that "promoting international cooperation" should include international cooperation to promote, fulfil and uphold rights.

Some submitters expressed concern about the discussion paper's focus on New Zealand's interests and commented that the interests of others should also be a consideration, particularly in relation to human rights.

> *The discussion paper captures well New Zealand's immigration interests. However, the language is still skewed towards what is in New Zealand's interests, which shows itself up in the context of refugees. The refugee system should be more about offering protection to the displaced and persecuted than maintaining New Zealand's good international reputation. This is quite a different emphasis and the language of protection should have more prominence. It is also suggested that more emphasis be placed on the importance of family reunification of refugees. As with other sectors of the community, strong and stable refugee families are more able to contribute positively to social development of the wider community.* (Wellington Community Law Centre)

A number of submitters considered that reference should be made to New Zealand's population interests. Some submitters considered that protection of the environment and ensuring that New Zealand does not accept more people than it can absorb should be key aims. Another suggested that age may become a more important consideration in the future.

> *There is no reference in the list to the need to serve what might be generally described as New Zealand's population control interests. For example, the age of potential migrants may become an increasingly important factor in immigration policy as New Zealand, and the rest of the developing world, faces the demands of an aging population. Goals of generating sustainable economic growth and establishing strong communities are not sufficiently broad enough to describe New Zealand's interest in endeavouring to ensure that there are sufficient numbers of working-age persons in the population.* (New Zealand Association for Migration and Investment)

One submitter suggested that the statement of New Zealand's interests include "promoting and protecting New Zealand's special relationship with Pacific Island nations."

Comments on question three

Approximately 90 percent of submitters supported the inclusion of a purpose statement in the legislation. Submitters considered that a purpose statement would provide greater clarity on New Zealand's approach to immigration and assist in the interpretation of detailed legislative provisions and policy. Some submitters commented a purpose statement is

particularly important in an area like immigration where there are significant human rights issues and a number of competing interests to be balanced.

> *A purpose statement is important in legislation as it can be used as a reference point for interpreting the provisions, regulations, and policy directives that follow. In the context of immigration, this is especially important as the legislation is balancing several competing factors: New Zealand's sovereign interests, international commitments, and the interests of migrants and refugees to whom the legislation is directed.* (Wellington Community Law Centre)

A number of submitters commented that the purpose statement should be written in plain English and be easy to understand.

Some submitters considered that the purpose statement should be a high level statement, drafted as clearly and concisely as possible so that it is less likely to be subject to challenge. Other submitters considered that, while the purpose statement needs to be carefully drafted, it should be comprehensive in order to ensure Parliament's intent is clearly stated.

> *Legislative purpose and parliamentary intent should be transparent, accessible and not hidden from legal challenge. Legitimate legal challenge provides a fundamental balance and is a positive means of ensuring the integrity of the immigration system. It is a positive not a negative as seems to be suggested by some. If the various elements of the purpose of immigration legislation for New Zealand are carefully developed and defined they will not change. By stating these key elements, and so making its intention clear, Parliament arguably limits the opportunities for challenge provided by a more general statement.* (New Zealand Law Society)

Less than five percent of submitters were opposed to the inclusion of a purpose statement in new immigration legislation. One submitter expressed concern that a purpose statement could reduce the effectiveness of the legislation and commented that the purpose should be inherent in legislative provisions and policies. Another considered that the purpose could change over time.

3.2: What principles should underpin immigration legislation?

Summary of proposal

The discussion paper proposes that the following principles underpin the development of new immigration legislation:

- a fair immigration system
- effective decision-making
- efficient processes, and
- understandable and accessible legislation.

Key question
1. Do you agree that the principles as outlined should underpin the development of our immigration legislation?

Submitter response

Eighty seven submitters commented on the principles that should underpin immigration legislation. These included 48 submitters commenting on behalf of an organisation and 39 commenting as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, industry representatives, airline representatives, union representatives, government agencies, the Families Commission and one political party.

Approximately half the organisations and 75 percent of individual submitters who commented on the principles that should underpin immigration legislation indicated that they agreed with the principles set out in the discussion paper. A further 10 percent of organisations and individuals indicated partial agreement to the principles. Many submitters, particularly organisations, commented on the principles that should underpin immigration legislation without expressing a clear yes or no response to the question asked. Less than five percent of submitters indicated that they did not agree with the proposed principles.

Many submitters expressed strong support for the principle of fairness underpinning the development of immigration legislation, with a number commenting that fairness should be the overriding principle and the basis of all immigration decision-making. Some submitters suggested that the principle should be expressed as "fairness to all" or "fairness and transparency".

Some submitters considered that there could be a tension between "fairness" and "effective decision-making" and commented that effective decision-making should not be about limiting avenues of appeal and review. Some submitters suggested that there be more emphasis on improving the quality of immigration decision-making.

> *There is a discrepancy in the Review material between the principle of "a fair immigration system", which is explained rather weakly as being liable to change in different circumstances, and the principle of "effective decision-making" which is explained as processes which do not allow for ongoing review and appeal. Our own understanding of a fair immigration system is one which has clearly defined rights of appeal and access to effective legal remedies. Equity - fairness - must be a significant principle.* (Caritas Aotearoa New Zealand)

> *There ought to be concern at the manner in which effective decision-making is described at para 65 of the discussion paper. The emphasis appears to be on the making of decisions that are less susceptible to review and appeal. It would be more appropriate to describe effective decision-making in positive terms. Such decision-making should be consistent, well-reasoned, in*

> *accordance with established principles of natural justice, and decision makers should be fully accountable for their performance.* (New Zealand Association for Migration and Investment)

A number of submitters commented that third parties such as businesses, employers, and airlines all have an interest in "efficient processes" and timely decision-making.

> *Carriers also want decisions to be made in a timely manner – particularly where these may involve a turnaround and the potential to delay the departure of the aircraft.* (Board of Airline Representatives New Zealand)

One submitter commented on the principle of "understandable and accessible legislation", noting that it must also be readily implemented.

Some submitters suggested additional principles to underpin the development of immigration legislation. These included:

- the principles of natural justice
- the best interests of the child
- transparent operations
- consistency
- objectivity
- freedom from discrimination
- the value of diversity
- humanitarianism and the desire to be seen as principled global citizen
- commitment to the rights of individuals, and
- keeping the family unit together.

Education New Zealand commented that the principle of comparative advantage in immigration settings should underpin immigration legislation. It noted that immigration policy affects the international education industry by limiting the pool of prospective students and affecting the attractiveness of New Zealand as a study destination.

> *There is no doubt that immigration policy is one of the most important considerations in deciding where to undertake study in a particular country. Issues such as facilitating entry into the country, compliance costs and enforcement are all important factors. As is the political tone towards immigration. This also extends to work rights while in the country and pathways from study to permanent residency.* (Education New Zealand)

Some submitters considered that the legislation should be based on a human rights approach. Submitters commented that this includes complying with relevant international standards, not discriminating on the grounds prohibited by the Human Rights Act 1993, ensuring applicants are treated with dignity and respect at every stage of the immigration process, observing the principles of natural justice and providing migrants with adequate protection.

Some submitters commented that the principles should be reflected throughout the legislation and its implementation. A number of submitters considered that principles should be stated in the legislation in order to maintain the "spirit" of the Immigration Act and guide immigration policy.

> *Inclusion of robust principles in the Act would ensure actual policy is protected from short term populist influences that tend to be reactionary.* (Auckland City Council)

3.3: What level of detail should be in the primary legislation?

Summary of proposal

The discussion paper proposes that the new Immigration Act be largely framework legislation but that it be more detailed and prescriptive in some areas, particularly those areas that impact on individual rights.

Key question
1. Do you agree that the Immigration Act should be largely framework legislation with some prescription, particularly where this impacts on individual rights?

Submitter response

Ninety two submitters responded to this question: 46 submitters responded on behalf of an organisation and 46 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, industry representatives, a territorial authority, government agencies and the Families Commission.

Approximately 80 percent of submitters agreed that the Immigration Act should be largely framework legislation. Submitters considered that the legislation needs to be sufficiently flexible to accommodate future changes in immigration policy and that prescription should be restricted to areas that are absolutely fundamental and unlikely to change over time. Many submitters commented that the legislation should set out clear principles and provide for the protection of individual human rights. Some submitters commented that immigration policy should be subject to the same principles as the primary legislation.

> *One model would be to establish a purpose statement, a statement of guiding principles and interests (including principles of interpretation where relevant), prescriptive provisions where necessary and formulae or guidelines setting the parameters for policy-making where discretion is allowed and policy is to be developed.* (New Zealand Law Society)

> *It is recommended that the decision making framework set out in operational immigration policy needs to be set against a cornerstone of sacrosanct principles included in the Act.* (Auckland City Council)

One submitter expressed the view that any provisions that impact on human rights that are not dealt with in legislation should be set out in regulations rather than in immigration policy so they are subject to Parliamentary scrutiny through the Regulations Review Committee. A number of submitters considered that the legislation should either require or provide for consultation on immigration policy.

> *CASI suggests that the Immigration Act should contain a requirement that executive government have an open process for setting policy, e.g. consultation with interested parties or public submissions on draft policy.* (Churches' Agency on Social Issues)

> *There should also be a provision in the Act that the Minister may consult with the communities in New Zealand on immigration and refugee protection policies and programmes, in order to facilitate cooperation and to take into consideration the effect that the implementation of the Act may have on New Zealand's communities.* (Grey Lynn Neighbourhood Law Office)

Some submitters commented that other areas of the legislation may benefit from some prescription. One submitter gave the example of an applicant's need for certainty when s/he lodges an immigration application.

> *Persons applying for residence ought to know that policy and regulatory requirements relating to their application will not be changed by the Government after they have applied and paid an application fee. Retrospective changes in policy, particularly where they affect residence applications, can impact negatively on New Zealand's reputation in other countries. If there is to be certainty and transparency in the immigration system, there ought to be prescription as to matters such as the fixing of policy at the time an application is made.* (New Zealand Association for Migration and Investment)

Other submitters commented that some of the proposals in the discussion paper are overly prescriptive. Some submitters commented that full consultation would be required on proposed areas of prescription in the new legislation.

Approximately five percent of submitters did not agree that immigration legislation should be framework legislation. One submitter commented that detailed provisions would provide greater certainty, transparency and clarity.

One submitter suggested that separate immigration and refugee law could be developed, and commented that practitioners already operate as if there are two discrete pieces of legislation in place.

3.4: General comments and other issues raised by submitters

A number of submitters commented that the purpose and principles of the legislation should reflect New Zealand's commitment to human rights and compliance with its international

obligations. Some submitters expressed the view that the legislation should include a requirement that the legislation and policy be construed in a way that is consistent with New Zealand's international human rights obligations.

> *We believe that human rights must be referred to in the designated purposes for the legislation, along with recognition of the place of the Treaty of Waitangi. In addition, or at least, the legislation should include a requirement that the legislation is construed and applied in compliance with all of the international instruments to which New Zealand is a signatory.* (Human Rights Foundation)

One submitter suggested that a similar requirement be enacted in relation to the family.

> *From the very beginning, we would suggest that it is essential to cement into the basic building blocks of this proposed legislation, the recognition of the family as the fundamental unit of society and the Act should instruct any government to apply immigration policy in a way which will serve to strengthen and support families.* (Auckland Refugees as Survivors Centre)

A number of submitters commented on the need for the legislation to be consistent with the purpose and principles. Some submitters expressed concern that some of the proposals in the discussion paper would undermine the proposed purpose and principles, in particular proposals relating to review and appeal (section 7) and the use of classified information (section 9).

> *The Foundation is concerned that priority three, "establishing strong communities" will not be fulfilled if the proposals in the Discussion Paper become legislation. Removing individual rights without justification does not increase national security – it undermines it. Fear and anxiety in immigrant communities will be increased by proposed measures such as immigration officers being given powers to search and enter, the restrictions on appeal rights and the increased use of classified information in all levels of decision making - which could particularly impact on family reunification.* (Human Rights Foundation)

Some submitters considered that the discussion paper does not give adequate attention to settlement. Some submitters considered that the legislation should make reference to the National Settlement Strategy. One submitter suggested that the legislation require the Department of Labour to develop information resources for new migrants, including information on New Zealand laws, in consultation with non-government organisations. Other submitters expressed the view that New Zealand's interest in strong communities requires that resources be directed to the community to ensure there are adequate services to support successful integration.

Another submitter expressed concern that the discussion paper does not include any proposals to contribute to economic growth.

> *We note that the discussion paper refers to "generating sustainable economic growth", however, we see no provisions in the proposed legislation that would actually contribute to this objective. To avoid such a disconnect between our suggested revision of the Act's purpose and the rest of the act there will need to be a major revision of the contents of the Act.*
>
> *As it stands the proposed contents of the Act are weighted far too heavily on enforcement. The re-write should be focussed on facilitation and positive net migration flows sufficient for New Zealand to meet its economic growth target of getting back into the top half of the OECD per capita GDP table.* (Wellington Chamber of Commerce)

A number of submitters commented on the restriction on the Human Rights Commission becoming involved in immigration matters under section 149D of the 1987 Act. Submitters expressed the view that this restriction is inconsistent with the principles of fairness and transparency, sends the wrong message about the importance of human rights, and should be repealed. Submitters also considered that the restriction is unnecessary.

> *The Commission has no wish to become involved in providing a further immigration appeal process. As section 80(3)(d) of the Human Rights Act allows the Commission to decline to act on a complaint if "in all the circumstances there is an adequate remedy or right of appeal", the mechanism exists independent of s.149 to ensure this does not happen. However, the Commission can play a valuable role in ensuring immigration legislation and policy are administered in a way which ensures a fair balance between the interests of the state and those of individuals affected by the exercise of the powers and has therefore recommended the repeal of s.149D.* (Human Rights Commission)

SECTION 4: THE VISA AND PERMIT SYSTEM

Overview

There was strong support for the use of the single term "visa" for all travel, entry and stay authorisation granted to non-citizens. Approximately 80 percent of organisations and 65 percent of individual submitters agreed with this proposal, noting that it would simplify the system and make it easier to understand. Submitters commented that the changes need to be well-communicated to stakeholders, including employers and staff in government departments that administer access to social services.

Approximately 75 percent of submitters considered that the system should continue to allow for exceptions to the standard requirement for authorisation to travel to, enter and remain in New Zealand. There were a range of views on which visa and permit exemptions should be maintained. Many submitters supported retention of visa-free arrangements, although airlines noted that they would not be opposed to all persons being required to hold a visa, and some submitters considered that there should be a review of the countries that have visa-free status.

A number of submitters expressed concern about the possible removal of exemptions for crew of sea-going vessels in order to deter asylum seekers. Submitters considered this would be contrary to the spirit of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (the Refugee Convention). Concerns were also expressed that the Advance Passenger Processing system makes it difficult for genuine refugees to travel to New Zealand and that the use of such tools should be transparent and observe the principles of natural justice.

Airlines expressed concern about the possible removal of the exemption of commercial aircraft crew from completing arrival and departure cards. Others considered that all persons should be required to provide arrival and departure information.

4.1: Does the visa, permit and exemption framework meet current and future needs?

Summary of proposal

The discussion paper proposes a single integrated visa framework that would:

- use the single term "visa" for all documents that provide the authority for non-citizens to travel to and stay in New Zealand
- enable exemptions from certain requirements to be made for groups of non-citizens or individuals (for example, the requirement to hold a visa to travel to New Zealand)
- specify the generic types of visa available (for example, permanent or temporary)
- specify the general conditions of each visa type and empower the imposition of specific conditions on individuals, and
- specify, or enable regulations to specify, the physical state a visa may take.

Key questions

1. Should the single term "visa" be used for all travel, entry and stay authorisation granted to non-citizens?
2. Should the system continue to allow for exceptions to the standard requirement to have authorisation to travel to, enter and remain in New Zealand (for example, through the equivalent of visa-free arrangements or permit exemptions)?

Submitter response

One hundred and eleven submitters responded to one or both of these questions: 66 submitters responded on behalf of an organisation and 45 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, business and industry representatives, airline representatives, education sector representatives, a territorial authority, government agencies and two political parties.

Comments on question one

Approximately 80 percent of organisations and 65 percent of individual submitters agreed that the single term "visa" should be used for all travel, entry and stay authorisations granted to non-citizens. Approximately five percent of organisations and 15 percent of individual submitters disagreed with the proposal. Approximately 15 percent of all submitters were unsure or did not express a clear preference.

Most submitters considered that the use of a single term would simplify the system and make it easier for applicants, employers and the general public to understand. A number of submitters commented that there is currently some confusion between the terms "visa" and "permit" and that many people already refer to both visa and permits as visas anyway. Participants at public stakeholder meetings noted that the term "visa" is more common internationally.

> *Fragomen New Zealand strongly supports the idea of removing the distinct terminology of visa and permit, and using only the term visa going forward. In our experience the terms visa and permit are very confusing for both employers and employees, with most people referring to both as visas.* (Fragomen New Zealand)

> *We recommend that the single term 'visa' should be used. This would make it easier for our people, and would hopefully prevent the confusion with the two terms.* (Pacific Islanders Presbyterian Church)

A number of submitters commented that the proposal would have practical benefits for travellers by reducing the number of pages taken up by visa and permit labels and, potentially, ink stamps at the border. Airline representatives commented that the proposal may also enable a move to automated border processing, similar to Australia.

Some submitters acknowledged that there would be additional administrative costs associated with implementation of the new framework but considered that costs were likely to reduce over time. Airline representatives commented that care would need to be taken not to undermine the investment that has already gone into systems and processes to support the existing visa and permit framework.

> *Such a move would represent an improvement on the current system. While changing to a more integrated system would have some initial costs (as flagged in paragraph 128), a simplified system should actually be cheaper to run over time.* (Business New Zealand)

> *We have no problem with the principle behind this. In fact we see it could be a step towards a system akin to the Australian system and is in line with the overall objective of simplification. What would be of great concern is if changes would be needed to be made by airlines to the current APP system.* (Board of Airline Representatives New Zealand)

Some submitters commented that the changes to the visa and permit framework would need to be well communicated to stakeholders to avoid further confusion. Education New Zealand submitted that at least 12 months notice should be provided to enable education providers to update their advice on immigration requirements to prospective international students.

> *Education New Zealand supports the proposed simplification, however, we request that any changes should be signalled at least 12 months in advance of implementation. This is because educational institutions are required under the compulsory Code of Practice to outline a range of immigration information to prospective international students, including visa and permit costs and procedures. If institutions do not undertake this, they will be in breach of the Code of Practice, and potentially liable to be struck off the Code (and unable to recruit further students). (*Education New Zealand)

A number of submitters commented on visa conditions. Some submitters commented that people should have the right to travel in and out of New Zealand during the period of their visa, and not have to reapply for a new visa each time - particularly work visa holders. Other submitters commented that the conditions of the visa need to be clearly set out so that employers can identify whether the visa-holder is entitled to work in New Zealand.

> *We recommend that any "work" visa should be clearly distinguished from other visas such as a "travel" visa so that employers aren't misled into the type of visa being produced by the person.* (Recruitment and Consulting Services Association)

Some submitters suggested aligning the timeframes that visas and permits are issued for in order to avoid confusion about how long a person may remain in New Zealand and reduce overstaying.

> *There should be a greater alignment between visa and permit allowances, that is, if a visa is granted e.g. visitors visa, the visa and permit times should be the same as it saves later confusion and potential for overstaying a permit due to lack of understanding of the various parties.* (Penina Health Trust)

Some submitters disagreed that the framework should enable specific conditions to be imposed on individuals and commented that the same requirements should apply equally to all migrants and temporary entrants.

Those who oppose the use of the single term visa considered that the current system works well and that there is no need for change. Some submitters who were undecided expressed the view that the proposed system may be just as confusing as the present arrangements.

One submitter commented that the proposal would have implications for government departments that administer access to social services, as the trigger for many benefits and other services is the sighting of a residence permit. The submitter emphasised the need to ensure that staff in other departments are made fully aware of the changes so that entitlements are not delayed or withheld.

Comments on question two

Approximately 75 percent of submitters considered that the system should continue to allow for exceptions to the standard requirement for authorisation to travel to, enter and remain in New Zealand. One submitter commented that exceptions should be based on clear guidelines that are aligned with the purpose and principles of the legislation. Another commented that they should be regularly reviewed.

The remaining 25 percent of submitters were evenly split between those who partially agreed with the proposal, those who disagreed and those who either were unsure or did not indicate a clear preference either way.

One submitter expressed the view that all persons should be required to hold a visa and commented that standardisation and fairness should be a key principle. Airline representatives indicated that they would not be opposed to requiring all persons to hold a visa because it would facilitate border processing and reduce the number of passengers from visa-free countries that are turned around at the border. However, they acknowledged that such an approach would have implications for New Zealand's international relations.

> *Airlines see the advantage of a full visa application, however we appreciate that this is a policy matter with international relations implications. In terms of border processing however it does simplify matters and is more compatible with the APP system than are the current arrangements.* (Board of Airline Representatives New Zealand)

A number of submitters expressed views on specific exceptions that should or should not be made. These comments are reflected in section 4.2.

4.2: Which of the current visa and permit exemptions should be re-examined?

Summary of proposal

The discussion paper proposes that current visa and permit exemptions be reassessed to ensure appropriate risk management of both air and sea borders and to improve the efficiency of the system.

Key question
1. Are all the current permit exemptions justified?

Submitter response

Eighty one submitters responded to this question: 41 submitters responded on behalf of an organisation and 40 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, representatives from the airline, tourism and education sectors, and one political party.

The submitter response was mixed: approximately 45 percent of submitters considered that current permit exemptions are justified, approximately 20 percent did not, and approximately 35 percent either were unsure or did not indicate a clear view either way.

Many supporters expressed support for the continuation of visa-free arrangements in order to facilitate the travel of tourists and business people. One submitter commented on how these arrangements enable New Zealand to be seen as more welcoming, particularly compared to Australia. Some submitters considered that there should be a review of which countries have visa-free status.

> *It would seem that a "review" is long over due for some countries that currently have Visa Free Status. This should cover areas such as potential and actual forgery of travel documents used by those travellers.* (Fingerprint & Forensic Services Limited)

One submitter expressed the view that people from Pacific countries that have a strong connection to New Zealand, including Samoa, Tonga, Tuvalu and Fiji, should have visa-free access to New Zealand for up to three months. The submitter commented that this would enable people to travel to New Zealand for short periods to attend family weddings and funerals and undertake church, business and other activities without having to go through an expensive and time-consuming visa application process. The Tongan community suggested that visa-free access be provided to those who are aged 60 and over to enable New Zealand citizens and residents to maintain contact with their elderly relatives.

One submitter considered that people from all countries should have visa-free access to New Zealand.

One submitter considered that students from visa-free countries should be exempt from the requirement to hold a student visa if they are studying in New Zealand for less than six months.

> *This would make study abroad in NZ a more attractive and hassle-free option for Study Abroad and Exchange students without significantly increasing the risks to national security. Canada and the UK already offer this arrangement to students from many 'low-risk' countries (including New Zealand), while Australia allows Study Abroad students to apply online from their home country (allowing faster turnaround time).* (New Zealand Vice Chancellors' Committee)

A submitter commented on the special arrangements that New Zealand has with Australia and noted that not all Australian citizens and residents are low-risk. Another expressed the view that British citizens should be treated in the same way as Australian citizens.

Some submitters expressed concern about the proposed ability to vary visa exemptions on a case-by-case basis because it could be used to restrict the entry of people from countries that are normally visa-free who are seeking to leave because of political unrest, war or other humanitarian circumstances. Other submitters, on the other hand, commented on the need to be able to impose visas in response to developing circumstances.

A number of submitters expressed concern about the possible removal of the visa and permit exemption for the crew of sea-going vessels. Submitters commented that the proposal appears to be designed to deter asylum seekers, which is contrary to the spirit of the Refugee Convention. Likewise, a number of submitters commented on the effect of Advance Passenger Processing (APP) in making it difficult for genuine refugees to travel to New Zealand. Submitters considered that the use of tools such as APP needs to be transparent to ensure that New Zealand meets its international obligations and observes the principles of natural justice.

> *Advanced Passenger Screening (interdiction) could conflict with upholding the right of asylum-seekers to seek refuge, if the process is not transparent and observe the principles of natural justice. Moreover, proposing to remove exemptions for the crew of docking vessels is not only impractical, but appears to be an attempt to deter ship-jumping asylum-seekers, which also contravenes the principles of the 1951 Geneva Convention on Refugees.* (Individual submitter)

Other submitters commented that the exemption for crew of sea-going vessels should be reconsidered. One submitter commented on the need to undertake checks of people before they enter the country.

> *Consideration could be given to the tightening of exemptions particularly as improvements in technology lead to efficiencies in processing travellers at the border. There is some justification in the present global environment for*

> *checks on any non-citizen entering the country.* (New Zealand Association for Migration and Investment)

Some submitters considered that all people should be required to complete arrival and departure cards. One submitter commented on the usefulness of the data that is generated for the tourism industry. However, airlines did not support removing the exemption for commercial aircraft crew from completing arrival and departure cards. They commented that the increasing use of technology to provide information on passenger and crew should reduce the need for arrival and departure cards.

> *We would also suggest that an overall aim of the framework, made possible through increasingly sophisticated technological solutions, should be to remove the need for physical arrival and departure cards for all persons crossing the border.* (Air New Zealand)

A number of submitters expressed the view that further consultation should be undertaken if the existing visa and permit exemptions are reassessed. One submitter commented that there are operational and policy difficulties with the exemptions that may not be possible to address through legislative amendment alone.

4.3: General comments and other issues raised by submitters

One submitter commented that the legislation should make explicit the types of visas and/or permits that are available and the general rights and obligations associated with each visa type. The submitter considered that while the specific criteria relating to each type of visa should be left to regulation or policy, any criteria that have human rights implications should be set out in regulations, and thus be subject to scrutiny by the Regulations Review Committee.

Some submitters considered that the legislation should clearly define the date on which a visa expires.

> *If the permit system is to be retained then the legislation should clearly define the date/time at which the permit actually expires. At present there can be a number of "expiry dates" depending on whether the permit is issued to a particular date (say 20 June) or a particular period (say 3 months) and/or whether the expiry date falls on a public holiday or weekend. Interestingly current practice is for the permit to expire at midnight on the day before the expiry date on the permit label, i.e. permit expiry 20 June - permit actually expires midnight 19 June - very very confusing and not well publicised.* (Pathways to New Zealand Ltd)

A number of submitters commented on the situation for asylum seekers who are not issued with a permit while they are waiting for their refugee status claim to be determined. Submitters expressed the view that they should be entitled to a permit, such as a “legal presence permit” to enable them to work and access social services during this period. As

discussed in section 14, one submitter suggested that such a permit could also be used for those granted refugee status or protection in New Zealand.

> *There should be available to all asylum claimants who have been refused a permit but are still waiting for their refugee claim to be determined, some form of limited permit granting them lawful status in NZ during the pendency of their claims. This should include the situation where refugee status has been refused and an appeal is pending to the Removal Review Authority. At present, these people are in a state of limbo while their claims are being considered. On the one hand they are lawfully entitled to remain in NZ until their claims/appeals have been determined yet on the other they cannot receive any benefit assistance or work to support themselves. This seems inconsistent with the UN Refugee Convention and the UN Convention on Civil and Political Rights, both Conventions that NZ is a signatory to.* (Refugee Council of New Zealand)

Some submitters suggested that provision be made for a "retirees visa" to enable retired persons who can support themselves to reside in New Zealand. Some submitters suggested a separate visa type for people to enter New Zealand as a visitor with the intention of looking for work.

One submitter noted that existing visa types do not adequately cover those who come to New Zealand on athletic scholarships.

> *There is no clear category within the current Immigration Act that accommodates these individuals. They are given Work Visas, but are not allowed to work. They do not earn a living but have their accommodation and board and other expenses paid for them through their scholarship.* (International Association of Athletics Federations (IAAF) High Performance Training Centre – Oceania)

The submitter noted that such people have been issued with work visa or student visas, with varying visa conditions, depending on the time that the application was made and the visa office that considered the application. The submitter suggested that an additional visa type, such as a sporting visa, be included in the legislation to cover these situations.

A number of submitters commented for the need for greater flexibility of visa conditions in certain circumstances. These comments were more relevant to immigration policy than the legislation. Suggestions included:

- exempting visitors from the requirement to hold a work visa if they wish to spend time on an organic farm in New Zealand (for example, through World Wide Opportunities in Organic Farms) or undertake other unpaid short-term work where the work is incidental to the main reason for their trip

- relaxing work permit requirements in special circumstances such as short-term fisheries (e.g. squid) where it is uneconomic for New Zealand companies to made the required capital investment, and
- providing flexibility for student visa holders to transition into full-time work in New Zealand at the end of their course.

Some submitters expressed concerns about the requirements for returning resident's visas, with one submitter suggesting that residents should not require a returning resident's visa at all.

One submitter commented that people should not be allowed to change visa type in New Zealand.

SECTION 5: DECISION-MAKING

Overview

Approximately two thirds of submitters that addressed this issue considered that the power to make positive exceptions to residence policy should be delegated to selected senior immigration officials. Many submitters commented on the need for consistency, transparency and accountability of decision-making. Some submitters considered that these requirements could be met by requiring immigration officers to consider an exception to residence policy and to give reasons for decisions, and by making guidelines for decision-making publicly available. Those who oppose the proposal considered that only the Minister of Immigration should have the power to make exceptions to residence policy. Many submitters commented that, if the power is delegated, the Minister of Immigration should retain a residual discretion to make exceptions to policy.

Most submitters considered that decision-makers should provide potentially prejudicial information and reasons for decisions to both onshore and offshore applicants in the interests of fairness and natural justice. Likewise, most submitters considered that classified information should not be used to decline an application unless it is disclosed to the applicant and s/he is given an opportunity to comment on that information. Submitter views on the use of classified information are discussed further in section 9.

Approximately 75 percent of organisations and just over half the individual submitters expressed support for the legislation enabling decisions to be made electronically in the future. The main concerns were around ensuring that electronic decisions are limited to low-risk approval decisions that do not require an individual judgement to be made and putting in place adequate mechanisms to ensure transparency and accountability of decision-making. Approximately 15 percent of organisations and 35 percent of individual submitters were opposed to the proposal. Most of these submitters considered that an immigration officer needs to be involved in making the final decision.

There was a mixed response to the possibility of third party decision-making: organisations were evenly split between those who support and those who oppose making provision in the legislation for third parties to make some immigration decisions in the future; approximately 35 percent of individuals indicated support for this option and just over half expressed opposition. Business and employer representatives were among those who support the option but a number of industry groups also expressed reservations. The main concerns were around developing robust accreditation criteria and strict monitoring and audit requirements to ensure the accountability of third parties. Some submitters considered that the costs involved in developing these processes would outweigh any advantages of enabling third parties to make immigration decisions. Other submitters were strongly of the view that the decision-making role should be retained by the Minister of Immigration and delegated officials.

5.1: Who should make individual immigration decisions?

Summary of proposals

The discussion paper proposes that the legislation enable the Minister of Immigration to delegate his or her power to approve an application as an exception to residence policy to selected senior immigration officials. Guidelines for when the Department of Labour could make exceptions to residence policy would be agreed with the Minister of Immigration.

The discussion paper indicates that administrative improvements could also be made to limit the volume and nature of personal representations considered by the Minister of Immigration.

Key question
1. Should the power to make positive exceptions to residence policy be delegable to selected senior immigration officials?

Submitter response

One hundred and seven submitters responded to this question: 61 submitters responded on behalf of an organisation and 46 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, law societies, community law centres, other community groups, businesses, business and industry representatives, a territorial authority, government agencies and the Ombudsmen.

Approximately 65 percent of submitters that addressed this issue considered that the power to make positive exceptions to residence policy should be delegated to selected senior immigration officials. A number of submitters commented that the proposal would enable exceptions to be made more quickly.

> *We believe that decisions relating to exceptions to policy where this would clearly benefit New Zealand should be made without unnecessary delay. For that reason we would support enabling delegated senior immigration officials to make positive exceptions to residence policy.* (Institute of Professional Engineers New Zealand)

Many submitters expressed qualified support for the proposal, emphasising the need for:

- consistency in decision-making
- transparency in the process used to determine whether an exception will be made
- accountability for decisions, and
- ability to appeal or seek review of decisions.

A number of submitters commented that decision-making guidelines should be publicly available and that immigration officers should be required to provide reasons for decisions. Submitters considered that these requirements would be essential to provide for consistency and transparency of decision-making, and to enable decisions to be reviewed. Some

submitters considered that immigration officials should also have an obligation to consider an exception to policy.

> *In my view, for the system to have fairness and integrity at least brief reasoning should be given for both positive and negative decisions. It will not be difficult in this situation, given that ministerial guidelines will be provided to officers and they will have full knowledge of Government Residence policy and other past precedents.* (Individual submitter)

> *The obligations to consider exceptions to policy and to give reasons for not approving an exception would not remove flexibility and discretion, but simply make transparent the reasons for exercising these principles in a given case, thus maintaining the essential elements of fairness and natural justice.* (New Zealand Law Society)

> *If officials are given the power to make such decisions without restrictions, there is a risk that their actions may be perceived as being arbitrary, capricious or corrupt. There is also a risk that they may be perceived as being motivated by bias or some form of discrimination.* (New Zealand Association for Migration and Investment)

Other suggestions were that two officials be required to approve an application as an exception to policy, and that exceptions be considered by a specially trained team. Some submitters considered that there should be internal monitoring and review of such decisions; others considered that applicants should be able to seek independent review.

A number of submitters commented on the situations in which senior immigration officials might approve an application as an exception to policy. Most of these submitters made reference to the applicant having skills sought by employers. Some submitters commented that other factors such as family stability could also constitute a benefit to New Zealand. One submitter expressed the view that senior officials should only be permitted to make exceptions in the Skills/Business stream.

Many submitters commented that the Minister of Immigration should retain a residual discretion to make exceptions to policy and that applicants should continue to be able to approach the Minister directly. Some submitters considered that the Minister should be involved in decision-making only as an avenue of last resort; others considered that applicants should be able to seek Ministerial intervention at any time. One submitter suggested that all Ministerial appeals should be made via a Member of Parliament.

Some submitters expressed concern about large numbers of cases being considered by the Minister because of the lack of transparency about how decisions are made. One submitter suggested that the Minister be required to report to Parliament each year on the use of Ministerial discretion, including reasons for the exceptions made.

Approximately 20 percent of organisations and a third of individual submitters did not support the delegation of the power to make exceptions to residence policy to senior immigration officials. These submitters expressed concerns about a lack of transparency about how decisions are made, inconsistency of decision-making, reduced accountability and a risk of bias and discrimination. Some submitters commented that communities do not trust immigration officials to make fair decisions. A number of submitters commented that the Minister of Immigration is accountable to the electorate for his or her decisions, unlike officials.

> *The Forum is aware that delegating responsibility to senior officials would reduce the Minister's workload and could lead to more immediate decisions being made. However, this streamlining could reduce the transparency of the process as well as reducing the responsibility and accountability that should be associated with decisions of this type.* (Road Transport Forum New Zealand)

> *Increasing delegation to immigration officials is problematic considering the perception from constituents that unfair decisions are often made. The credibility of the system would need to considerably improve before this could become a viable option.* (Asia New Zealand Foundation)

A number of business and industry representatives commented that people who appeal to the Minister should not get any special treatment or advantage over those who follow normal immigration procedures.

> *Business New Zealand does not consider that direct appeals to the Minister should receive any special treatment. Appellants should not be penalised for following the proper process.* (Business New Zealand)

One individual submitter expressed the view that there should be no exceptions to policy at all.

Not all submitters expressed a clear preference for or against the proposal. These submitters generally commented on the need for transparency and consistency of decision-making and the various safeguards proposed by submitters who support the proposal. Some submitters commented that senior immigration officials need to be properly resourced and trained. One submitter expressed the view that specific training should be provided around questions of disability and it should be a guiding principle that decisions are consistent with the New Zealand Disability Strategy. The Ombudsmen noted that the proposal could lead to increased complaints to the Ombudsmen.

5.2: In which cases should potentially prejudicial information and reasons for decisions be given to immigration applicants?

Summary of proposals

The discussion paper presents two options for consideration:

A. Give potentially prejudicial information and reasons for decisions to onshore applicants only, with the exception of classified information, or
B. Give potentially prejudicial information and reasons for decisions to onshore and offshore applicants, with the exception of classified information.

The discussion paper indicates that, under both options, onshore applicants declined on the basis of classified information would have an avenue to have the decision reviewed. This is discussed further in section 9 on the use of classified information.

Key questions

1. Should decision-makers give potentially prejudicial information and reasons for decisions to:
    a. onshore applicants only, or
    b. onshore and offshore applicants?
2. Do you agree that an application should be able to be declined on the basis of classified information without disclosing the classified information to the applicant?

Submitter response

One hundred and seven submitters responded to one or both of these questions: 55 submitters responded on behalf of an organisation and 52 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, a territorial authority, government agencies, the Ombudsmen and one political party.

Comments on question one

There was strong support for decision-makers being required to provide potentially prejudicial information and reasons for their decisions to both onshore and offshore applicants. Approximately 75 percent of organisations and almost 90 percent of individual submitters indicated support for this option. Approximately 10 percent of submitters considered that potentially prejudicial information and reasons for decisions should only be provided to onshore applicants. One submitter expressed the view that this information should be provided to onshore applicants and onshore applicants who have an identifiable connection to New Zealand (such as having family here).

Most submitters were strongly of the view that it is in the interests of fairness and natural justice to provide all applicants with potentially prejudicial information and reasons for decisions. Submitters commented that there is no justification for distinguishing between onshore and offshore applicants. Some submitters disagreed that onshore applicants are more likely to have a connection to New Zealand, noting that many offshore applicants have family, property or business interests here.

> *We note that the current practice is for reasons to be given for decline decisions to all applicants, including offshore applicants "in the interests of the administrative law principles of fairness and natural justice". We believe that these principles are fundamental to a fair and just society which upholds the*

> *rule of law and strongly oppose any departure from these principles.* (Waitakere Community Law Centre)

> *TANI believes that potentially prejudicial information and reasons for decisions should be given to both on-shore and off-shore applicants. Given the importance of fairness and transparency, discriminating between the two groups does not seem appropriate.* (The Asian Network Inc)

Some submitters commented that providing potentially prejudicial information to applicants enables this information to be challenged and any flaws in the initial application to be easily corrected. Some submitters considered that this is particularly important in the case of offshore applications where there is greater potential for inaccurate or malicious information and/or subjective decision-making.

> *In offshore decision-making, as much if not more than in on-shore decision-making, there exists the potential for decisions to be made based upon unfounded and/or flawed suspicions which are subjective in nature. Unless applicants are given sufficient opportunity to address such suspicions, there is no way of ensuring a just and accountable system.* (New Zealand Law Society)

Some submitters commented that providing reasons for decisions would provide transparency and consistency of decision-making, and help applicants to decide on the merits of pursuing a further application.

A number of submitters expressed the view that failure to provide some applicants with potentially prejudicial information and reasons for decisions could give rise to a perception that New Zealand's immigration system is arbitrary and unfair. Submitters commented that this could undermine New Zealand's efforts to attract potential migrants. One submitter commented that the administrative costs associated with providing applicants with potentially prejudicial information and reasons for decisions are outweighed by the benefits of being seen to be fair.

> *The strong global reputation that New Zealand's administrative system enjoys, rests on the fairness of its practises. Reducing that level of fairness would be out of step with the stated aims of the Act to attract high quality and consistent levels of immigration.* (Individual submitter)

The Ombudsmen raised practical difficulties with the option of only providing information to onshore applicants, noting that the Official Information Act 1982 (the OIA) would enable a person in New Zealand to obtain information relating to an overseas applicant on their behalf.

> *Quite apart from questions of natural justice that this raises regarding distinctions based on the location of an applicant, it is unclear how these proposals are seen to be compatible with the operation of the Official Information Act 1982 (or, in due course, the Privacy Act 1993, which we*

> *understand is to be amended so as to apply to all individuals wherever they may be). As you will be aware, official information requests may be made by anyone in New Zealand. Consequently, the professional adviser of an overseas applicant may request relevant information about a client to enable advice to be given.* (Office of the Ombudsmen)

A participant at a public stakeholder meeting commented that limiting the provision of potentially prejudicial information to onshore applicants could act as a disincentive for people unlawfully in New Zealand to move offshore to regularise their status.

Some submitters considered that information should be withheld in cases involving national security. One submitter commented that disclosure of information should not compromise the safety and integrity of others and gave the example of a third party reporting on a person who is in New Zealand unlawfully.

Comments on question two

There was not a high level of support for declining an application on the basis of classified information without disclosing that information to the applicant. Just over 20 percent of the submitters who addressed this issue indicated support for this approach. One submitter commented that New Zealand's interests should always take precedence over an applicant's interests. Other submitters expressed qualified support for the proposal, commenting that:

- classified information needs to be well-defined
- the proposal should only apply to classified security information
- the classified information and the source of the information must be reliable
- information should only be withheld where disclosure would be detrimental to the safety of the people providing the information, and/or
- there should be appropriate safeguards including the right to appeal a decision, controls on the acquisition, use and storage of classified information and provision of the information to the applicant's legal representative.

Approximately two thirds of submitters were opposed to the use of classified information to decline an application without disclosing that information to the applicant. Submitters considered that the proposal is contrary to the principles of natural justice and the right to a fair hearing. A number of submitters suggested that the proposal would be inconsistent with section 27 of the New Zealand Bill of Rights Act 1990. Submitters commented that applicants are entitled to know all of the information held against them and to test the reliability of that information. Some submitters considered that the proposal would reduce confidence in the immigration system.

> *This is contrary to the principles of natural justice and the right to a fair hearing. It also weakens the integrity of information used in decision-making, and trust in immigration systems.* (Individual submitter)

> *Making decisions on the basis of secret information with no disclosure is inimical to the standards our society claims to represent.* (Individual submitter)
>
> *Migrants are entitled to know why their application has been rejected, even if it is classified information.* (Tauranga Regional Ethnic Council)

Some submitters considered that applicants should be provided with the classified information but not the source of the information. Other submitters commented that applicants should at least receive a summary of the classified information. One submitter suggested that classified information be disclosed to an applicant subject to confidentiality requirements.

Some submitters commented that the legislation should not attempt to restrict the availability of information under the OIA and the Privacy Act 1993 (the Privacy Act). The Ombudsmen noted that "the concept of restricting the availability of information on the basis of 'class' is inconsistent with the purposes of the OIA."

Submitter views on the use of classified information in immigration decision-making are discussed further in section 9, which summarises comments on the more detailed proposals set out in section 9 of the discussion paper.

5.3: What additional tools are required for effective decision-making?

Summary of proposals

The discussion paper proposes that new immigration legislation enable decisions to be made electronically. This would be an enabling provision for the future rather than a mechanism to be implemented immediately. The discussion paper notes that, in practice, the use of electronic decision-making would be restricted to low-risk application types and any decision to decline a decision would be referred to an immigration officer.

The discussion paper also presents the possibility of enabling decision-making by third parties (such as education providers and employers) in the future.

Key questions
1. Should legislation provide for decisions to be made electronically in the future? 2. Should legislation enable some decisions to be made by third parties such as employers and education providers?

Submitter response

One hundred and seven submitters responded to one or both of these questions: 60 submitters responded on behalf of an organisation and 47 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, business and industry representatives, union

representatives, airline representatives, education sector representatives, a territorial authority, government agencies, the Ombudsmen and one political party.

Comments on question one

Approximately 75 percent of organisations and just over half the individual submitters that addressed this question agreed that the legislation should enable decisions to be made electronically in the future. A number of submitters commented that New Zealand needs to move with the times and make use of technologies that can help streamline application processes. Airline representatives noted that Australia is introducing automated border processing.

Some submitters expressed qualified support for the proposal, commenting that:

- only positive decisions should be made this way
- it should only be used for low-risk applications and/or low-risk countries
- the right technology is required
- fairness and transparency should be maintained
- the quality of decision-making should not be compromised
- New Zealand's international obligations need to be respected
- there should be careful monitoring and review of decisions, and/or
- there should be an avenue for personal representations.

> *For low risk cases, e.g. student visa renewals. We need to up to date by using technology of this day and age.* (Individual submitter)

> *So long as there are easy appeal options or the ability to move from electronic application to dealing with a immigration officer if it appears the application is not appropriate for an electronic assessment or there is something unusual in the application.* (Individual submitter)

> *TANI agrees that provision should be made to "future-proof" the legislation and to consider how electronic technologies might hasten the process. However, it is imperative safeguards are implemented in any use of such technologies to ensure that fairness and transparency are preserved and that human rights requirements are respected.* (The Asian Network Inc)

Approximately 15 percent of organisations and 35 percent of individual submitters were opposed to the proposal. Submitters expressed concerns about the potential for error, the possibility that not all information would be taken into account, the lack of accountability for decisions and the impersonal nature of electronic decision-making. Most of these submitters considered that an immigration officer needs to be involved in making the final decision.

> *Allowing for decisions to be made electronically increases the risk of errors being made and not all relevant information being taken into account. We submit that all immigration decisions should be made by real people to ensure transparency, consistency and accountability and so that positive exceptions*

to policy may be made where appropriate. (Waitakere Community Law Centre)

Identifiable human decision makers are essential to ensure the accountability of the system. (Individual submitter)

One submitter considered that electronic decision-making would favour applicants from some countries and commented that there should be one process for all applicants. Some submitters expressed concern that electronic decision-making may make it easier for people to enter New Zealand to undertake illegal activities.

Comments on question two

The submitter response to the possibility of third party decision-making was mixed. Of the organisations that addressed this question, approximately 45 percent expressed support for the legislation enabling some decisions to be made by third parties and approximately 45 percent expressed opposition. Of the individual submitters that responded, approximately 35 percent indicated support and just over half were opposed to the legislation enabling third party decision-making.

Business and employer representatives were among those who indicated support for this option. A number of submitters noted its potential to benefit employers through timely decisions and improved ability to secure skilled workers.

There would be flow-on benefits to third parties if immigration decisions could be made more quickly, as attracting and recruiting highly sought after talent requires such responsiveness. (New Zealand Retailers Association)

Education New Zealand and Business New Zealand both expressed strong support for enabling some decisions to be made by third parties.

Business New Zealand supports wholeheartedly the development of this proposal. Employers could choose to participate and in return would have to meet accreditation and accountability requirements. We believe many businesses would enthusiastically join such a scheme. Indeed, organizations such as the Employers and Manufacturers Association (Northern) have been calling for something similar for a number of years. (Business New Zealand)

Education New Zealand strongly supports this proposal. If implemented this proposal would match a scheme that the Australian Department of Immigration introduced several years ago of "Pre-Qualified Institutions". Our understanding is that this scheme has worked well, and there is little reason why responsible educational institutions in New Zealand cannot enjoy the same level of trust/responsibility from the NZ Department of Labour. (Education New Zealand)

Other submitters expressed more cautious support for the proposal, commenting on the need for robust accreditation criteria to ensure that third parties have the integrity and capability to make immigration decisions consistent with immigration policy requirements. Submitters also commented on the need for strict monitoring and audit requirements to ensure that third parties are held accountable for their decisions. Some submitters commented that care would need to be taken that these processes did not become so onerous that they outweigh the benefits of enabling third parties to make immigration decisions.

> *The process would presumably need to be introduced with careful management and monitoring, and substantial training for relevant third parties, which if not balanced correctly will make the overall task of obtaining Talent visas for companies the same or more onerous than the current requirements. For example, if the monitoring and/or auditing requirements are so involved and resource-intensive for employers, then they may choose to take the current option, i.e. having an INZ officer make the decision.* (Fragomen New Zealand)

Some submitters commented that small businesses would be unlikely to meet accreditation requirements. One submitter suggested that industry or employer groups could be accredited to make decisions on their behalf.

Submitters who oppose the proposal expressed concern that third parties would further their own interests without due regard to the wider national interest. A number of submitters commented on the potential for abuse and expressed concerns about being able to hold third parties to account for their decisions.

> *Border control is a sovereign power to be exercised by the Government. Such a power should not be delegated to non-government third parties. Were this to occur, there is a risk that third parties would seek to benefit themselves or others without due regard to the national interest, and without the same constraints and accountabilities applied through legislation to immigration officers.* (New Zealand Law Society)

> *These third parties may not be as accountable to the public as the government agencies. Such decision making ability may encourage them to misuse, over-use and/or abuse the legislation.* (Bangladesh New Zealand Friendship Society)

Some submitters expressed concerns that third parties would not comply with human rights requirements and the principles of administrative justice and fairness. Some submitters considered that it would be difficult to effectively monitor the decisions being made, with a number commenting that the additional audit costs would outweigh any advantages of third party decision-making.

Some submitters considered that there is no need for the legislation to enable third parties to make immigration decisions given that the Department of Labour has no immediate plans to implement third party decision-making.

A number of submitters commented that third parties should be able to contribute to immigration decisions by providing a recommendation or advice, but considered that the actual decision-making should be retained by the Minister of Immigration and delegated officials. Some submitters commented that improvements to decision-making processes can be achieved in other ways.

> *Problems with efficiency and timeliness of decision-making ought to be addressed by applying more resource to the making of immigration decisions, not by abdicating the role to third parties.* (New Zealand Association for Migration and Investment)

Some submitters did not indicate a clear preference for or against the legislation enabling third parties to make immigration decisions. These submitters noted the risks associated with third party decision-making and commented on the need for robust accreditation and accountability requirements. The Ombudsmen noted that "accountability for immigration decisions should be the same, irrespective of whether the decision-maker is an official or a third party."

5.4: General comments and other issues raised by submitters

A number of submitters made general comments about the need for fairness and transparency in the decision-making process. Submitters also commented that decisions need to be made promptly.

> *My experience in New Zealand and in the UK indicates that speedy, fair decision-making, which aims to "get it right first time" is the greatest positive attribute to aim for immigration decision making systems, both at first instance and on appeal. The whole system must always look towards achieving this.* (Individual submitter)

> *The RCSA is concerned to see that any decision made as it pertains to employment are made in a fair and equitable manner – not only from the immigrant's perspective but also from the employer's view. … We recommend that any decision-making framework needs to be fast, effective and it must have transparency.* (Recruitment and Consulting Services Association)

Some submitters expressed the view that the legislation should specify timeframes for the processing of immigration applications by Immigration New Zealand. One submitter suggested that the legislation state that the onus is always on the applicant to demonstrate their bona fides and credentials.

Some submitters commented on operational practices. One submitter commented that decision-making needs to take place at a higher level for applications from high-risk

countries. Other submitters, on the other hand, commented that it is unfair that visa applications from certain countries are treated differently. Some submitters considered that visa decisions should not be made by offshore visa officers.

The National Collective of Independent Women's Refuges suggested that protocols be developed for handling cases involving migrant women seeking to leave violent relationships. It commented that refuges should be able to refer such cases to immigration officers that have a specialist knowledge of domestic violence.

A number of submitters proposed that an independent immigration commissioner be appointed to oversee the exercise of powers by immigration officers. Among other things, an immigration commissioner would be empowered to handle complaints of misconduct or unfairness by immigration officers in exercising their decision-making powers. This proposal is discussed further in section 15.

SECTION 6: EXCLUSION AND EXPULSION

Overview

Exclusion

There was a mixed response from organisations to the proposal that failure to meet health and character requirements be included as grounds for exclusion in the new legislation: just under half agreed and approximately 40 percent disagreed with the proposal. Almost 70 percent of individual submitters expressed support for the proposal. The main concerns, from both submitters who support the proposal and submitters who oppose the proposal, were that the proposal could unfairly exclude families because of ill-health or disability of one family member, or may prevent the entry of refugees and their family members. Some submitters expressed concern that the proposed inclusion of a health ground may discriminate against persons with disabilities. Submitters considered that provision for waiving the health and character grounds needs to be included in the legislation, with some submitters suggesting that a specific exemption be made for refugees.

Submitters also considered that character requirements need to be well-defined. Some submitters expressed concern that the inclusion of a ground relating to "glorification of terrorism" may conflict with the right to freedom of expression, and suggested that any such provision be consistent with the Terrorism Suppression Act 2002. Concerns were also expressed about the use of classified security information and the possible exclusion of a person who poses a risk to New Zealand's reputation. A number of submitters considered that health and character requirements should remain in immigration policy.

Expulsion

There was a mixed response to the proposed extension of automatic liability for expulsion from unlawful stay in New Zealand to all grounds for expulsion. Those who support the proposal commented on the need to take decisive action and avoid lengthy delays. Those who oppose the proposal did not support placing the onus of rebutting liability for expulsion on individuals. Submitters expressed concern that people may not have sufficient time or information to mount an effective challenge and considered that the proposal would adversely affect vulnerable groups such as refugees and trafficked persons. A number of submitters commented on the need for people to be provided with notice of their liability for expulsion and to be given an opportunity to respond. Some submitters also expressed concern that the proposal would lower the status of permanent residence and could send a destabilising message to migrant communities.

Of those who responded to the proposed use of the single term "expulsion", approximately 55 precent agreed that this would help to create more understandable legislation, although some submitters preferred the use of the term "deportation". Approximately a quarter of submitters considered that a distinction should be maintained in the terms used to describe expulsion of temporary entrants and expulsion of residents.

There was a mixed response to the Minister of Immigration having a reduced role in expulsion decisions. Some submitters considered that Ministerial decision-making is not required, although many submitters expressed the view that Ministerial oversight of decision-making is essential and the Minister should retain the ability to intervene. Other submitters considered that the Minister should continue to have a decision-making role because migrant communities have greater confidence in decisions made by the Minister and the Minister is accountable to the people.

Submitters expressed strong support for differentiated penalties following expulsion. Some submitters suggested amendments to the proposed ban periods on returning to New Zealand. A number of submitters commented on the need for flexibility when imposing a ban period and some submitters expressed the view that a person should not be automatically excluded from re-entry on character grounds once the ban period has expired.

6.1: What legislative provisions are required for exclusion from entry to New Zealand?

Summary of proposal

The discussion paper proposes that the existing legislative grounds for refusing entry in section 7 of the 1987 Act be strengthened by the inclusion of health and character requirements. Generic statements such as "must be of acceptable standard of health and good character" would be included in the legislation, and would be supported by further detail in policy. There would be provision for the Minister of Immigration (or a delegated official) to make exceptions.

Key question
1. Do you agree that health and character grounds for exclusion should be included in legislation?

Submitter response

One hundred and twenty one submitters commented on the grounds for exclusion. These included 62 submitters commenting on behalf of organisations and 59 private individuals. Organisations that made submissions on this issue included immigration consultants, refugee and migrant groups, ethnic councils, human rights groups, community law societies, law societies, other community groups, businesses, unions, industry representatives, government agencies and the United Nations High Commissioner for Refugees.

There was a difference in response between organisations and individuals. The response from organisations was mixed, with just under half the organisations that addressed this issue indicating support for the proposal and approximately 40 percent indicating opposition. Of the individual submitters that addressed this issue, almost 70 percent agreed that health and character grounds for exclusion should be included in legislation and approximately 20 percent disagreed.

Comments of submitters who support the proposal

A number of submitters who support the inclusion of health and character grounds for exclusion in the legislation commented on the need to protect New Zealand and New Zealanders from potential health or character risks, or to minimise the cost to the taxpayer.

> *This would be supported by carriers. Both health and character are factors which impact on fellow travellers and crew.* (Board of Airline Representatives New Zealand)

> *Ex-overseas criminals, potential terrorists, non-refugees jumping the queue, diseased and those likely to require NZ taxpayers to support them should be excluded from entry and immediately despatched back to their last point of origin.* (Individual submitter)

Some submitters expressed the view that placing health and character grounds in the legislation would give the requirements more importance. One submitter commented that it would flag all possible grounds for exclusion.

Some submitters commented that the grounds need to be well-defined in the legislation, including the use of the phrase “acceptable standard of health and good character”. Other submitters were of the view that only character requirements should be detailed in the legislation so that people would be able to determine whether any convictions would exclude them from entry. They considered that a generic statement would be appropriate for health grounds for exclusion, with detailed requirements set out in policy.

Some submitters expressed qualified support for the proposal. A number of submitters expressed the view that provision for waiving the health and character grounds should be included in the legislation. Submitters made particular reference to the need to ensure that the requirements do not prevent refugees from entering New Zealand and noted that the requirements need to be consistent with New Zealand’s international obligations. Some submitters commented on the need for the legislation to enable broader humanitarian circumstances to be taken into account, such as family wellbeing.

> *The caveat I would have to this issue is where there are overwhelming family well-being or humanitarian (other than refugee) concerns that warrant this exclusion to be overridden.* (Individual submitter)

A number of submitters expressed reservations about the inclusion of health grounds in the legislation. Submitters considered that care needed to be taken not to discriminate against people with disabilities and to recognise that those with health problems may still contribute to New Zealand. Some submitters considered that only those with serious communicable diseases should be excluded. Other submitters considered that the use of health insurance would provide an acceptable alternative in some cases, although one submitter commented on the practical difficulties in ensuring that the insurance was not cancelled after arrival in New Zealand.

Some submitters raised concerns with the existing grounds for exclusion set out in section 7 of the 1987 Act. One suggested that people should not be excluded on the basis of convictions for offences that would not be considered a crime in New Zealand. Another noted that people sentenced to a suspended term of imprisonment of 12 months or more would be excluded on the basis of section 7(1)(b) and commented that, in many cases, these sentences were used as a deterrent rather than as a reflection of serious offending (before being abolished by the Sentencing Act 2000). The submitter commented that the intention of section 7 is to exclude those convicted of serious offending and suggested there be discretion to look into the cases of persons who received suspended sentences, but were never imprisoned.

The New Zealand Law Society commented that the legislation also needs to set out the circumstances in which a person who is inadmissible on character grounds may become eligible for a visa or permit. The Society suggested a provision similar to the Canadian legislation, which enables entry after a certain period of time.

> *Provision of a "prescribed period of ineligibility" and the creation of "prescribed classes" of persons who will be deemed to have been rehabilitated is a sensible option. Applicants should be given the benefit of New Zealand's "Clean Slate" legislation.* (New Zealand Law Society)

Some submitters considered that people should be able to appeal exclusion on health or character grounds.

Comments of submitters who oppose the proposal

Most submitters who oppose the proposal expressed concern that it is inconsistent with New Zealand's international obligations and/or domestic human rights legislation. Submitters were particularly concerned with the proposed inclusion of health grounds in the legislation. They considered that it is unfair to exclude a family based on the health status of one family member and commented that this could constitute discrimination on the basis of disability. Many comments reflected the submission of the Human Rights Commission.

> *The intention to include requirements permitting exclusion if a person is not of an "acceptable standard of health" in legislation is concerning – particularly if this means a family is refused entry because of the health status of a child or dependent family member. Although the proposal contemplates exceptions to the exclusion rule, there is no guarantee that a person with a disability who meets all the other requirements for entry will be permitted to enter the country. This may constitute indirect discrimination on the ground of disability and contravene both Art.2 ICCPR and s.19 NZBORA.* (Human Rights Commission)

A number of submitters commented that a person with a medical condition may be able to make a significant contribution to New Zealand that outweighs any medical costs and/or that they may be able to cover these costs themselves. Submitters also commented that it should not be assumed that a person with disabilities is of ill-health or that they are unable

to contribute to New Zealand. These submitters argued that a more robust assessment of individual cases is required.

> *In the case of health, there needs to be provision for discretion on humanitarian grounds for considering long term benefit. For example, in the case of a family wishing to migrate with a disabled child. Not all health conditions are disabling - and many people with disabilities can and do make considerable contributions to the community and to society.* (Wellington Chinese Association)

> *Those who have health issues including those who are disabled should not be automatically excluded. There should an ability to take out private health insurance or a bond to cover all cost so as to ensure no burden on the public health system.* (Refugee and Immigration Committee, Wellington District Law Society)

> *DPA recommends that the concept of cost-benefit needs to be more adequately reframed to recognise that upfront costs may well represent an investment in future contribution.* (DPA)

Some submitters commented that a clear distinction needs to be made between health and character grounds to reflect the different nature of the grounds and ensure that there is no question of a person of ill-health or with disabilities being assumed to be of poor character.

A number of submitters commented that the character grounds for exclusion need to be transparent and clearly defined in the legislation. Many submitters expressed particular concern with the possibility of including "glorification of terrorism" among the character grounds for exclusion on the basis that it could undermine the right to freedom of expression. As with concerns on the proposed health requirement, comments tended to reflect the submission of the Human Rights Commission.

> *While there are genuine reasons for excluding people who support terrorism, doing so because of "glorification" of terrorism raises issues of freedom of expression in terms of Art.19 ICCPR and s.14 NZBORA. The use of "glorification" has been controversial in the UK (where it originates) and the provisions should be modified to align them with the wording in the Terrorism Suppression Act 2002.* (Human Rights Commission)

Some submitters expressed concern that people could be excluded on the basis of classified security information because of the lack of access to that information. One submitter also raised concerns with the possible exclusion of a person who could pose a risk to New Zealand's international reputation. A participant at a public stakeholder meeting commented that a person could be excluded if they have been imprisoned for political or other crimes that may not constitute a crime in New Zealand.

> *Of particular concern is elevating any character requirements to the level of exclusion on the basis of classified security information. Applicants would truly be "fighting windmills" in these circumstances.* (Wellington Community Law Centre)

> *While the Foundation would support the exclusion of someone who has committed a war crime, a crime against humanity or gross human rights abuses, the description "risk to New Zealand's reputation" is too vague and open to abuse. The basis for exclusion should be limited to the examples given.* (Human Rights Foundation)

Some submitters made particular reference to refugees and expressed concern that the proposal would prevent the entry of refugees and/or their family members through family reunification policies. A number of submitters commented that the legislation should include a specific exemption for refugees.

> *We do not support the inclusion of health and character grounds for exclusion in legislation, but wish to see them remain in policy where there is more scope for discretion. However, if included in legislation, we wish to see a specific exemption to allow New Zealand to continue to accept refugees with health needs. Our concern is particularly for those who have suffered injury or trauma as a result of the experience which led them to become refugees and cannot receive adequate medical treatment without resettlement to a third country.* (Caritas Aotearoa New Zealand)

The United Nations High Commissioner for Refugees noted that Article 1F of the Refugee Convention provides the sole basis for the exclusion of refugees. It commented that "health and character are not grounds for exclusion contemplated within the framework of Article 1F, as they do not constitute heinous criminal acts, or crimes."

Some submitters were of the view that the proposal is unnecessary because there are already sufficient health and character requirements in immigration policy. Some submitters commented that including these requirements in legislation does not fit with the proposal that the legislation be framework legislation. One submitter expressed concern that the inclusion of health and character grounds in legislation would give the impression that additional requirements were being imposed and deter international students from coming to New Zealand.

> *The inclusion of health requirements in legislation may unnecessarily create the perception of an additional barrier to study in New Zealand without demonstrable benefit.* (New Zealand Vice Chancellors' Committee)

Some submitters commented that including the requirements in legislation would increase the onus on applicants to make their case for an exception. These submitters generally considered that retaining the requirements in immigration policy would provide more room

for discretion. However, one submitter suggested that, where a requirement involves human rights, it should be in regulations and thus subject to parliamentary scrutiny.

6.2: What grounds and processes for expulsion should be established in the legislation?

Summary of proposals

The discussion paper proposes establishing a single provision clearly setting out the grounds for expelling a non-citizen from New Zealand, along with a single term – "expulsion" – which would apply to temporary and residence permit holders. A non-citizen would become automatically liable for expulsion if they met any one of the grounds for expulsion.

Under the proposal, the existing initial step of permit revocation would be removed, with permits being automatically revoked on departure once all avenues of review and appeal have been exhausted. (Options for review or appeal of expulsion decisions are discussed in section 7.)

The discussion paper indicates that there would not be any requirement for the Minister of Immigration to be involved in expulsion cases but s/he would retain the ability to intervene. The discussion paper suggests that it could be appropriate for the Minister of Immigration to retain involvement in cases involving threats to national security.

Key questions

1. Do you agree that expulsion provisions should be streamlined by extending automatic liability for expulsion from unlawful stay in New Zealand to all grounds for expulsion?
2. Would a single term "expulsion" help create more understandable legislation?
3. Under the preferred option, the Minister of Immigration would have a reduced role in making expulsion decisions. Do you agree with this approach?

Submitter response

Ninety five submitters responded to one or more of these questions: 47 submitters responded on behalf of an organisation and 48 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, law societies, community law centres, human rights groups, other community groups, businesses, the United Nations High Commissioner for Refugees, one political party and a government agency.

Comments on question one

There was a mixed response to this question. Approximately a third of the organisations and 55 percent of individual submitters indicated support for extending automatic liability for expulsion to all grounds for expulsion. Conversely, approximately a half of the organisations and approximately 30 percent of individual submitters were opposed to the proposal.

Most submitters who support the proposal did not elaborate on their views. Those who did generally commented on the need to take decisive action and prevent long delays in removing people from New Zealand.

> *The suggested "expulsion" grounds and processes set out between paragraphs 289 and 302 are pragmatic and sensible. The current confused situation in New Zealand and most other countries is a significant impediment to public confidence and often requires significant judicial time and effort to resolve. I consider the approach suggested will be welcomed by the judiciary. The current debacle in the UK following the long-term failure to deport aliens who are convicted criminals is a classic example of the problems that result from a failure to deal with all the issues in the one Court at the same time.* (Individual submitter)

Submitters who oppose the proposal expressed concern that automatic liability for expulsion would not allow individual circumstances to be taken into account before the appropriateness of expulsion is determined. Concern was also expressed that people would not have adequate time to prepare their case. Many submitters commented that placing the onus of rebutting liability for expulsion on individuals would adversely affect vulnerable groups such as refugees and trafficked persons who may not be in a position to effectively challenge the decision.

> *We would not support the automatic expulsion of a refugee for fraud or misrepresentation, if this related to the circumstances of their becoming a refugee (for example, use of a false travel document because it was not safe to seek a genuine document). The situation of refugees is complex, and community accusations of fraud are reasonably common and not easily rebutted in circumstances where documentary evidence can be impossible to obtain.* (Caritas Aotearoa New Zealand)

The United Nations High Commissioner for Refugees noted that the expulsion of refugees is governed by Articles 32 and 33(2) of the Refugee Convention. This issue is discussed further in section 14.3.

A number of submitters commented that people should be provided with notice of their possible expulsion and be given an opportunity to seek review of a decision in the interests of fairness and natural justice. Submitters made particular reference to the need for individuals to know about, and be able to challenge, any expulsion based on administrative findings; for example, a finding that a permit was obtained by fraud or misrepresentation or that permit conditions had been breached. Concern was also expressed that the proposed “national security” ground was too vague and open to abuse. One submitter emphasised the need for people to have access to legal advice.

> *The notification to a person who prima facie is in the country legally, that they are considered to be liable for expulsion, is an important procedural safeguard of immigrants' legitimate interests in a fair process. Automatic liability is undesirable also because it would give rise to punitive measures such as detention without warrant.* (Immigration and Refugee Law Committee, Auckland District Law Society)

> *For reasons of fairness and natural justice and in the absence of legal aid or other meaningful access to legal advice and advocacy, we do not support the proposal (at paragraph 295) to reverse the onus on rebutting the presumption of expulsion onto the person themselves. This centre has acted for vulnerable people in situations of domestic violence and other abuse where the Department has incomplete knowledge of the facts, provides no access to counsel upon arrest and pushes through a rapid removal process, typically over the weekend when lawyers are not available, without the opportunity for the person in question to obtain information needed to support their claims. It is the safeguards, not the Department's powers which need to be strengthened in these situations.* (Hutt Valley Community Law Centre)

A number of submitters expressed concern that the proposal would lower the status of permanent residence, by treating residents in the same way as temporary entrants and overstayers. Some submitters commented that this would send a destabilising message to settled migrant communities.

> *As the review paper rightly suggests in other areas, people present in NZ have differing levels of interests of remaining in NZ, and this should be reflected in any expulsion mechanism. Conflating these does not indicate fairness as the review claims; administrative convenience seems to take priority over fairness. The review paper seeks to assure readers that well-founded divisions in circumstances will be taken into account, but this simply begs the question as to why these divisions should be collapsed into one administrative category. The Review does not adequately justify the necessity or fairness of this option. This option potentially reduces the sense of security of permanent residents, which plays an important role in maintaining family stability and harmony.* (Wellington Community Law Centre)

A number of submitters commented that there should be flexibility to issue a permit in cases where a person has a good case to stay and/or has work skills that are valuable to the New Zealand community.

Comments on question two

Approximately 55 percent of submitters that responded to this question agreed that the single term "expulsion" would help to create more understandable legislation. A further five percent were of the view that the term "deportation" would be preferable. These submitters commented that deportation is more commonly used and internationally understood.

> *A single word would be more helpful however the proposed new word should be "deportation" as people in the community frequently refer to "removal" as deportation when these two words have different implications. Deportation is the preferred word and most commonly used.* (Grey Lynn Neighbourhood Law Office)

Approximately a quarter of submitters that responded to this question did not support the proposal. Most of these submitters considered that a distinction should be maintained between the expulsion of residents and the expulsion of temporary entrants. Some submitters expressed the concern that using the term expulsion to cover all circumstances could adversely affect people when seeking to enter another country.

> *A distinction between removing a person in New Zealand unlawfully or following the revocation of a temporary permit on the one hand and removing a person who has held a residence permit on the other hand should be maintained. Loss of a permanent right to reside should be recognised as more serious than loss of a temporary right. Grouping all removals and deportations under the term "exclusion" might blur the distinction and that is not desirable.* (New Zealand Association for Migration and Investment)

> *It seems that the efficiency that may be gained by replacing all the different terms relating to differing types of removal with 'expulsion' may result in unfairness. While New Zealand officials will understand the different nuances of removal, using 'expulsion' may be confusing for overseas immigration authorities. This means that people who overstay for a brief period of time may be treated in the same way as people who seriously violate New Zealand immigration law. This is unfair, and may have unpleasant repercussions for undeserving people. Due to these reasons, the all-encompassing term 'expulsion' should not be used.* (Individual submitter)

One submitter suggested using the term "administrative removal" instead of removal alone in order to make the difference between removal for staying after the expiry of a permit and expulsion for criminal offending and other serious matters clearer.

Comments on question three

Responses to this question were mixed: approximately 45 percent of submitters agreed that a reduced role for the Minister would be appropriate in expulsion decisions, approximately 40 percent disagreed and the remaining 15 percent either were unsure or did not indicate a clear view either way.

Some submitters who agreed with the proposal commented that there is no need for the Minister to be involved in expulsion cases. However, many submitters considered that the Minister should still be able to intervene and that ministerial oversight is necessary, along with robust review and appeal rights.

> *In only exceptional cases should he be approached. He is a very busy person with other portfolios to manage without his office being used as a further delaying tactic. He is there to serve us, not every newcomer who will use every trick to stay.* (Individual submitter)

> *The Committee agrees that the Minister's role in decision-making could be reduced, subject to appeal rights being maintained. It is important that in*

> *addition to the Minister's continued ability to intervene in this process there must be a robust avenue of review.* (Immigration and Refugee Law Committee, Auckland District Law Society)

Submitters who oppose the proposal considered it essential that the Minister act as the final arbiter on expulsion decisions. A number of submitters commented on the role of the Minister as the representative of the people and the greater confidence that migrant communities have in decisions made by the Minister. Many submitters also made reference to the Minister being accountable for decisions.

> *The safeguard of Ministerial discretion is no safeguard for the individual if there is no right of appeal to the Minister. This means that a case deserving discretionary intervention only will come to notice through a 'trial by media' requiring political response, which runs counter to the principles of administrative fairness and equal access to appeal for individuals.* (Individual submitter)

> *There are many complex and varied situations leading to expulsion. The Minister of Immigration's input into the decision will help to ensure the case is treated fairly. The Minister of Immigration is also accountable for this decision, which is extremely important.* (Global Immigration Group)

> *Whilst TANI understands that the Minister would prefer to reduce workload in this regard, TANI believes that it is imperative that the Minister remains engaged in such actions due to the significant consequences of expulsions. TANI believes that reducing the role of the Minister would reduce the confidence of Asian communities in the process of adjudicating expulsions.* (The Asian Network Inc)

One submitter commented that providing for an immigration commissioner would reduce the workload of the Minister. Submitters' proposal for an immigration commissioner is discussed further in section 15.

6.3: What penalties should apply following expulsion?

Summary of proposal

The discussion paper proposes a new system of differentiated bans that would align with the grounds for expulsion and apply penalties that vary in proportion to the seriousness of the wrong-doing:

No ban

- Voluntary departure after any period of unlawful stay in New Zealand.

Two-year ban

- Expulsion after staying in New Zealand unlawfully for one year or less, for the first time.

Five-year ban

- Expulsion after staying in New Zealand unlawfully for one year or less, on a second or subsequent occasion.
- Expulsion after staying in New Zealand unlawfully for longer than one year.
- Expulsion on the basis of not meeting temporary or residence permit conditions.

Permanent ban

- Expulsion on the basis of criminal offending, permit or identity fraud, or being a security threat.

Key question
1. Do you agree that there should be differentiated penalties for expulsion as outlined, depending on the seriousness of the reason for expulsion?

Submitter response

Sixty seven submitters responded to this question: 33 submitters responded on behalf of organisations and 44 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, law societies, community law centres, businesses and other community groups.

There was strong support for differentiated penalties following expulsion, with approximately 85 percent of submitters indicating agreement with the proposal. Only around five percent of submitters indicated that they did not agree with the proposal as outlined.

Some submitters suggested some amendments to the proposed differentiated bans. One submitter was strongly of the view that there should be some ban period for those who leave New Zealand voluntarily so as to deter people from overstaying for a number of years before finally leaving voluntarily. The submitter considered that a ban period should apply to those who have been in New Zealand unlawfully for 28 days or more, and should be for a lesser period than for those who are expelled from New Zealand.

Some submitters questioned whether failure to meet permit conditions warrants a five-year ban in all cases. One submitter suggested that this could be unduly harsh and affect employers in the case of work permit holders. The submitter gave the example of a work permit holder moving to a new role within an organisation.

> *It is very rare for an employee to remain in the same role, with no promotion, for a full three year period (which could be the validity of the work permit). Under the proposed penalty regime this worker would be subject to a five year ban from returning to NZ and the employer left to fill a role that presumably has been vacated by a very capable and knowledgeable person.* (Fragomen New Zealand)

One submitter suggested that a three-year ban would be more humane, other than for those who have been repeatedly expelled from New Zealand. Another submitter considered that it

does not make sense to treat overstayers who have spent one or two days longer in New Zealand differently from other overstayers. This submitter suggested instead applying a minimum ban period such as one year, and adding on a period of time in proportion to the length of time overstayed (for example five times the number of days spent unlawfully in New Zealand).

Some submitters made general comments that the penalties should be more severe, particularly for those convicted of a crime in New Zealand. One submitter, on the other hand, commented that penalties should not be increased and that the least possible penalty should be imposed. One submitter expressed the view that failed refugee claimants should not be penalised for entering New Zealand if they firmly believed that they were genuine refugees. Some submitters suggested fines for overstaying or a prohibition on further sponsorship as additional or alternative penalties.

A number of submitters commented on the need for flexibility and provision for consideration of mitigating circumstances before imposing a ban period. One submitter suggested that if the Minister delegated this power to officials, there would need to be a right to seek review of the decision, and legal aid. Another submitter proposed that an immigration commissioner be able to refer cases to the proposed new immigration and refugee appeals tribunal to consider a reduction in the ban period. One submitter suggested that the expulsion be discussed with approved community groups before penalties are imposed. Another commented on the need for a transparent and consistent approach to dealing with partners of New Zealand citizens and residents to enable them to return earlier.

A number of submitters commented on the longer term consequences of being expelled from New Zealand. These submitters considered that a person should not be automatically excluded from re-entering New Zealand on the basis of character once the ban period has expired.

> *In order for there to be a real incentive for people to depart voluntarily, there should be reciprocal provisions relating to re-entry. That is, a presumption in law that a period of illegal stay will not act as a bar to re-entry beyond the period of time prescribed by law.* (New Zealand Law Society)

6.4: General comments and other issues raised by submitters

Some submitters emphasised the need for transparency in provisions on exclusion and expulsion.

> *A high degree of transparency is required in the area of exclusion and expulsion. It is therefore highly desirable that, as far as possible, the relevant grounds are outlined in legislation, reserving to policy only those matters where flexibility is needed.* (New Zealand Law Society)

> *It is submitted that as a preamble to this section there is a need to spell out the principles to be applied in resolving the potential tension between New Zealand's sovereignty, as expressed in its professed intention to determine*

> *who it will allow within its borders, and its international obligations, both as a 'good' international citizen and, specifically as a signatory to various covenants and conventions.* (Refugee and Immigration Committee, Wellington District Law Society)

Most other comments related to expulsion. A number of individual submitters favoured immediate expulsion of any person who arrives without the proper documentation, commits a crime while in New Zealand and/or is found to be here unlawfully.

> *It is my very strong belief that: non-residents committing a serious offence should be expelled immediately; and resident immigrants and immigrants who have been granted NZ citizenship should also have their residency or citizenship revoked immediately and face expulsion if found guilty of a serious crime (e.g. rape, murder, armed offences, or other offences for which the sentence is more than a minimal jail term).* (Individual submitter)

> *Travellers without appropriate documentation should be immediately turned around at point of entry on the first available flight to wherever they came from. No ifs, no buts – out!!!* (Individual submitter)

> *Any found not to be here legally for whatever reason (including their children) should be 'booted out'. In so doing the Government will demonstrate that there is no room for dishonesty, and deceit in the area of Immigration.* (Individual submitter)

A number of submitters commented on the length of time that it takes to expel a person and expressed the view that it should be done more quickly. Representatives of the fishing industry commented that there should be provision to fast track the expulsion of certain categories of people including ship deserters. These submitters also suggested that the costs of repatriating ship deserters be recovered from those who have benefited from them remaining in the country.

> *While the industry accepts its responsibility for the costs of repatriating crew who have deserted from their vessels, we are concerned that sometimes this can be a number of years after desertion. Industry believes that [the Department of Labour] should have the ability to recover repatriation costs from any monies or assets an illegal worker may have gained while working illegally. Sanford believes that repatriation costs should be placed in the first instance on the overstayer, in the second instance on the employer who has employed the overstayer illegally, and only upon the original [approval in principle] applicant as a matter of last resort.* (Sanford Limited)

One submitter considered that the needs and rights of trafficked persons had not been adequately considered in the discussion paper. The submitter commented that trafficked persons could meet some of the grounds for expulsion, and need appropriate protection and support.

> *The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention Against Trans-national Organised Crime to which New Zealand is a party, outlines protocols on how states should treat trafficked workers. Article 6(3) provides that trafficked persons should be provided "assistance and protection". This includes, under article 6(3): appropriate housing; counselling and information; medical, psychological and material assistance; and employment, educational and training opportunities.* (Federation of Islamic Associations of New Zealand)

One submitter commented that a person should not be expelled to a place where they are liable for a more oppressive punishment that they would receive under New Zealand law.

SECTION 7: ACCESS TO REVIEW AND APPEAL

Overview

Review and appeal of temporary entry and residence decisions

Most submitters did not support the proposal to only provide residence applicants with the right of independent appeal if they are onshore or have a New Zealand sponsor. Over 60 percent of submitters who addressed this issue considered that all residence applicants should have access to independent appeal. They considered that independent appeal is necessary for all applicants in order to ensure that the law is applied correctly, provide for transparent and accountable decision-making, support the principles of fairness and natural justice and provide confidence in the immigration system.

Approximately 70 percent of submitters agreed that, in the normal circumstances, a person should exhaust all formal avenues of appeal before making a request to the Minister of Immigration. However, some submitters considered that flexibility is required in order to respond to individual circumstances, particularly urgent circumstances, and others commented that a legislative response is not necessary to implement this proposal.

Over 70 percent of submitters agreed that the Residence Review Board (or equivalent independent authority) should refer possible exceptions to residence policy back to the Minister of Immigration. A number of submitters considered that the appeal authority should be able make the exception to policy, at least in some cases, without having to refer the case to the Minister. One submitter suggested that the Board also have the authority to allow an appeal or refer a case to the Minister where it is in the interests of a child or the wellbeing of the family.

Appeals against expulsion

Approximately 55 percent of submitters responding to this issue agreed that persons should only have one opportunity to contest liability for expulsion on the facts. However, a number of submitters were of the view that an independent authority should consider appeals on the facts from both temporary and permanent residents, and expressed concern about the Department of Labour fulfilling this role for temporary entrants. Approximately a third of submitters considered that providing only one opportunity to contest liability for expulsion on the facts would be unfair to applicants.

Most submitters considered that all persons liable for expulsion should have access to independent humanitarian appeal: approximately 70 percent of submitters who responded to this issue indicated support for this option. Submitters generally considered that providing all persons with the opportunity for an independent humanitarian appeal is necessary to ensure New Zealand meets its international obligations and protects vulnerable people such as trafficked persons. A number of submitters commented that the appeal right should extend to people unlawfully in the country.

Approximately half the organisations and 75 percent of individual submitters considered that persons who obtain residence through fraud should be treated as overstayers rather than as residents for the purpose of establishing access to humanitarian appeal. A number of submitters commented that overstayers and residents should have the same rights to independent humanitarian appeal.

There was considerable interest in the proposed humanitarian test against expulsion. Most submitters agreed that there be a single test but many submitters, particularly organisations, disagreed with the nature of the test proposed in the discussion paper. They generally commented that it set too high a threshold. A number of submitters opposed the public interest element of the test and considered that the Canadian test that refers to hardship that is "unusual, excessive or undeserved and the result of circumstances beyond their control" would be more appropriate. Others expressed concern that the humanitarian circumstances would need to be exceptional. Some submitters commented that the test should be consistent with New Zealand's international obligations, and that express reference be made to these obligations.

A number of submitters were of the view that there should be different humanitarian tests for residents and for non-residents in recognition of the different interests at stake.

7.1: What avenues of review or appeal should there be for decisions on temporary entry or residence?

Summary of proposals

The discussion paper proposes that internal review (but no independent appeal) be available for declined residence applicants who are offshore with no New Zealand sponsor. Independent appeal would be available for:

- declined residence applicants onshore, and
- declined residence applicants offshore where the appeal was lodged by the applicant's proposed employer or family sponsor.

Continuing to provide all residence applicants with the right to independent appeal, or providing for internal review (but no independent appeal) of all residence decisions are presented as alternative options for residence applicants. Under all options, applicants for temporary entry would continue to be able to seek internal review of decisions if they are onshore.

Key questions

1. Which residence applicants should have access to independent appeal?
    a. All?
    b. None?
    c. Onshore applicants and offshore applicants with a New Zealand sponsor?
2. Do you agree that, in the normal circumstances, a person should exhaust all formal avenues of appeal before making a request to the Minister of Immigration?

Submitter response

One hundred and one submitters responded to one or both of these questions. This included 53 submitters responding on behalf of an organisation and 48 private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, business representatives, the Ombudsmen, the Families Commission and one government agency.

Comments on question one

Most submitters considered that all residence applicants should have access to independent appeal, with just over 60 percent of organisations and individuals favouring this option. Approximately 20 percent of submitters were in favour of onshore applicants and offshore applicants with a New Zealand sponsor having access to independent appeal. Approximately 15 percent of individual submitters were of the view that no residence applicants should have independent appeal rights, and a few submitters considered that only onshore applicants (two submitters) or only sponsored applicants (one submitter) should have access to independent appeal.

Submitters who considered that all residence applicants should have access to independent appeal commented that independent review is necessary to:

- ensure that the law is applied correctly
- provide for transparent and accountable decision-making
- support the principles of fairness and natural justice, and/or
- provide confidence in the immigration system.

> *It is the role of the judiciary, and in this case the relevant independent authority, to ensure that such decisions made by the government are in fact lawful. This is especially important where the law or policy is opaque, increasing the need for an independent appeal process that is necessarily transparent.* (Wellington Community Law Centre)

> *Review and appeal provide important mechanisms for ensuring that government is held accountable for decisions it makes and the quality of those decisions. It is preferred that all residence applicants should have access to independent appeal because this upholds the principle of the legislation to provide a fair immigration system.* (Asia New Zealand Foundation)

A number of submitters commented on the degree of error in initial decision-making and expressed concern about the ability of an internal review process to rectify these errors.

> *While a system of internal review within the Immigration Service may have some merit my experience in viewing the results of such internal reviews, in several countries, over a period of many years, has been that there are still very many poor decisions made, which are not in accordance with policy, and are only picked up at the time of independent appeal.* (Individual submitter)

Submitters who favoured all residence applicants having access to independent appeal considered that there was no reason to distinguish between onshore and offshore applicants, or applicants who do or do not have a New Zealand sponsor. A number of submitters commented that many offshore applicants have the potential to make a significant contribution to New Zealand despite not having a strong existing connection to New Zealand. Others noted that section 27 of the New Zealand Bill of Rights Act 1990 requires all applicants to have access to justice, with one submitter commenting that section 27 does not make a distinction between citizens and non-citizens.

Some participants at the public stakeholder meetings commented on the possible effects of making a distinction between onshore and offshore applications. One commented that restricting independent appeal to onshore applicants could encourage people offshore to travel to New Zealand to lodge their application. Another expressed concern that it could impact on immigration officer decision-making and lead to less consistency among offshore officers (whose decisions would not be subject to appeal).

On the other hand, some submitters expressed concern about the time and cost associated with independent appeals and considered that only those with particular interests at stake should have a right to independent appeal. As noted above, approximately a quarter of submitters favoured onshore applicants and offshore applicants with a New Zealand sponsor having independent appeal, while a small number of submitters considered that only onshore or sponsored applicants should have this right.

Some submitters raised particular concerns about the family members of refugees and noted that a declined residence application is particularly devastating for these people, given limited options for family reunification under current policy settings. They considered it essential that appeal rights are maintained for this group.

Some submitters considered that in some cases access to independent appeal should be provided to applicants for temporary entry. Examples given were work permit applicants and partnership cases.

> *This point has assumed wider significance as a consequence of the large number of applications under the partnership policy category that are now treated in the first instance as applications for temporary visas and permits. They should be treated in the same manner as on-shore applications for residence. Because of the highly subjective and inconsistent criteria applied in the determination of a 'stable and genuine relationship' it is essential that the right of appeal to an independent authority be preserved in all cases involving a New Zealand resident or citizen as a sponsor, or partner, whether such cases involve applications for temporary or permanent permits.* (Refugee and Immigration Committee, Wellington District Law Society)

One submitter commented that temporary entrants should be able to access internal review if their permit is valid at the time they lodge their application for a further permit. One

submitter commented that it is essential that all review and appeal rights are set out in the legislation.

Comments on question two

Approximately 70 percent of submitters who addressed this issue agreed that, in the normal circumstances, a person should exhaust all formal avenues of appeal before making a request to the Minister of Immigration. Many submitters expressed qualified support for the proposal, commenting that:

- there needs to be flexibility to enable people to approach the Minister directly in exceptional cases, particularly where time is of the essence
- the Minister of Immigration should retain the ability to intervene in cases, and/or
- applicants need to be better informed about what formal avenues of appeal exist.

> *The NZAMI agrees that it is desirable that, in normal circumstances, a person should exhaust all formal avenues of appeal before making a request to the Minister of Immigration. However, under the present system there are such lengthy delays in exercising avenues of appeal that denying access to the Minister is unfair and undesirable.* (New Zealand Association for Migration and Investment)

Submitters who oppose the proposal raised similar concerns, expressing the view that flexibility is required to respond to individual circumstances.

A number of submitters commented that a legislative response is not necessary to implement this proposal. Some submitters commented that a legislative restriction on approaching the Minister before exhausting all other appeal avenues would not be desirable in some cases.

> *Managing Ministerial workload and correspondence is a matter for policy, not legislation. The Minister currently does not consider appeals until all other avenues have been exhausted; communicating this to communities does not demand a legislative response. This proposal runs contrary to the purpose of the Act as framework legislation.* (Individual submitter)

> *We have no objection to there being a policy that in normal circumstances the Minister intervenes only after all formal avenues of appeal have been exhausted. However, we are concerned that if the Immigration Act was amended to restrict the current right of applicants to request the intervention of the Minister at any time, this could cause unnecessary hardship for applicants who require the intervention of the Minister because of urgent circumstances.* (Waitakere Community Law Service)

Other comments made by submitters were as follows:

- having an immigration commissioner would reduce the number of cases that need to be considered by the Minister
- the Minister should delegate decision-making to those with professional expertise
- greater clarity is required around what is meant by having "exhausted" all formal avenues of appeal, and
- not all applicants can afford the expense of a formal appeal.

7.1.1: What role should an independent appeal authority have in regard to appeals against residence decisions?

Summary of proposal

The discussion paper proposes that the Residence Review Board (or equivalent independent authority) continue to have the power to reverse an incorrect decision, refer a decision back to the Department of Labour for reconsideration if due process has not been followed or recommend consideration by the Minister of Immigration as an exception to policy.

Key question
1. With respect to residence appeals, do you agree that the Residence Review Board (or equivalent independent authority) should refer possible exceptions to residence policy back to the Minister of Immigration?

Submitter response

Seventy eight submitters responded to this question: 35 submitters responded on behalf of an organisation and 43 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, law societies, community law centres, other community groups, businesses, the Families Commission and one government agency.

Over seventy percent of submitters agreed that the Residence Review Board (or equivalent independent authority) should refer possible exceptions to residence policy back to the Minister of Immigration. Most submitters did not elaborate on their views. One submitter suggested that the Board also have the authority to allow an appeal or refer a case to the Minister where it is in the interests of a child or the wellbeing of the family.

> *It may be appropriate for the appeal body to recommend a course of action to the Minister, where a determination is made that the decision is contrary to the best interests of the child or where the wellbeing of the family will be severely impacted. We also support the Canadian example provided in the discussion paper where the appeal body may allow an appeal where it is in the best interests of a child – thus extending the groups upon the appeal may be made. This is consistent with the spirit and intent of UNCROC. We also support extending this criterion to include the wellbeing of the family.* (Families Commission)

Most submitters who oppose the proposal considered that the appeal authority should be able to make an exception to policy without referring the case back to the Minister. One

submitter commented that this would reduce the workload of the Minister and expedite outcomes for applicants. Another commented that the Minister may, however, wish to retain discretion in some instances and could communicate that to the appeal authority.

> *If the review board can see fit to make exception to policy, the Minister usually accepts the recommendation. There is no need to refer the matter back to the Minister. It is time and labour saving to enable the board to grant such exceptions.* (New Zealand Chinese Association (Auckland Branch) Inc)

7.2: What avenues of review of appeal should there be for expulsion decisions?

Summary of proposals

The discussion paper proposes that a person be allowed only one appeal on the facts, whether this be to the Department of Labour, an independent appeal authority or the courts.

The discussion paper presents two options for appeals on humanitarian grounds:

A. Enable any person liable for expulsion to appeal to an independent authority on humanitarian grounds, or
B. Enable all residents liable for expulsion to access independent humanitarian appeal as well as temporary entrants who had been living lawfully in New Zealand for two years or more at the point they become unlawful, or whose appeal is lodged by a New Zealand sponsor.

Under either option, an appeal to an independent authority could only be made once and would need to be made within a prescribed timeframe. There would be a departmental assessment of New Zealand's international obligations prior to expulsion for those who may not or do not access independent humanitarian appeal.

Key questions
1. Do you agree that persons should only have one opportunity to contest liability for expulsion on the facts? 2. Should all persons liable for expulsion have access to an independent humanitarian appeal, or should it be restricted to residents and sponsored temporary entrants? 3. Should persons who obtained residence through fraud be treated as residents or overstayers for establishing access to humanitarian appeals?

Submitter response

Ninety four submitters responded to one or more of these questions. These included 43 submitters responding on behalf of an organisation and 51 private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, law societies, community law centres, human rights groups, other community groups, businesses and the Families Commission.

Comments on question one

Approximately 55 percent of submitters who addressed this question agreed that persons should only have one opportunity to contest liability for expulsion on the facts. Some submitters made reference to the cost of multiple appeals. One submitter commented that any appeals should be at the person's own expense.

> *To do otherwise only plays into the hands of those who would make an industry of appeals. It also very unfairly drags out the removing of the person, usually at quite a considerable cost to the taxpayer.* (Individual submitter)

Many submitters expressed qualified support for the proposal, commenting that:

- the appeal should be heard by a competent authority
- there should be greater clarity around how facts are identified and allowance for changes in the facts
- this should include cases in which poor processes have had a bearing on the facts
- appellants should have full access to the facts, be represented and have a reasonable time to prepare
- legal aid should be available in appropriate cases, and/or
- the person should have the right to appear before the authority.

A number of submitters expressed the view that an independent authority should consider appeals on the facts from both temporary and permanent residents. They did not consider it appropriate for the Department of Labour to fulfil this role in the case of temporary entrants.

> *The Committee agrees that there should be a single opportunity to appeal liability for expulsion on the facts, provided this is an independent appeal. There is a concern that the review envisages some departmental findings of fact being open only to internal review by the Department.* (Immigration and Refugee Law committee, Auckland District Law Society)

One submitter considered that review should be allowed on both the facts and the law.

> *The legal overview will be required particularly to ensure the planned compliance with various provisions of the ICCPR, CAT and UNCROC. The decision to expel will need to take into account New Zealand's domestic law in this regard but also should endeavour to give consistency in the interpretation of international obligations.* (Individual submitter)

Approximately 35 percent of submitters opposed the proposal to provide only one opportunity to contest liability for expulsion on the facts. Submitters considered that this would be unfair to applicants and that greater flexibility is required to provide for individual circumstances.

> *Circumstances change and other mitigating factors need to be taken into account.* (Penina Health Trust)

> *Reducing avenues for appeal reduces fairness to the individual in favour of convenience for officials, which does not necessarily result in either efficient or effective processes.* (Individual submitter)

Comments on question two

Many submitters considered that all persons liable for expulsion should have access to independent humanitarian appeal. Approximately 70 percent of all submitters who responded to the issue indicated support for this option. The level of support was higher among organisations than individuals: approximately 80 percent of organisations were of the view that all persons should be able to access independent humanitarian appeal compared to around 60 percent of individuals.

These submitters generally considered that providing all persons with access to independent humanitarian appeal is necessary to ensure New Zealand meets its international obligations and protects vulnerable people such as trafficked persons. Some submitters also commented on the need to maintain New Zealand's reputation for fairness.

> *The nature of humanitarian appeals is such that there are wide ranging and often unforeseen circumstances which could apply to any person in New Zealand that is being threatened with expulsion. On this basis it concerns us that any people were excluded from being able to access an appeal on humanitarian grounds this could result in a breach of New Zealand's obligations under international conventions.* (Waitakere Community Law Service)

> *Presumably we do not want to be seen as a soft target and that our borders will be protected. On the other hand, does New Zealand want to be seen as providing a fair and transparent system when dealing with people whatever their status.* (Individual submitter)

One submitter commented that narrowing appeal rights would be likely to result in increased numbers of applications for judicial review and/or requests to the Minister.

A number of submitters commented on the current lack of an appeal right for people unlawfully in the country and expressed the view that they should also have access to independent humanitarian appeal. The Auckland Refugee Council proposed that asylum seekers who are not issued with a work permit be granted a limited purpose permit, and that this permit provide permission to work and "a carefully restricted right to appeal against removal, with the leave of the Removal Review Authority".

Some submitters also commented on the procedural safeguards that should be in place for applicants. One submitter commented that people should have adequate time to prepare their case. Another expressed the view that people should be able to make personal representations and not have to rely on a lawyer or immigration consultant.

One submitter expressed the view that any person who has lodged an appeal against removal should be issued with a visa to allow them to continue working or studying until the appeal is decided.

Almost 30 percent of individual submitters were of the view that independent humanitarian appeal should only be available to residents and sponsored temporary entrants. Approximately 15 percent of organisations indicated support for this option. Most of these submitters did not elaborate on their views. Those who did generally commented on the need to shorten the appeals process. One submitter commented that the objective is to enhance existing communities and not take on the cases of individuals who do not have any connection to these communities.

One individual submitter expressed the view that no-one should have access to independent humanitarian appeal. Some participants at the public stakeholder meetings considered that some form of vetting of appeals is required to reduce the number of frivolous appeals.

Comments on question three

Approximately half the organisations and 75 percent of individual submitters considered that persons who obtain residence through fraud should be treated as overstayers for the purpose of establishing access to humanitarian appeals. Approximately a quarter of organisations and 10 percent of individuals considered that persons who obtain residence through fraud should be treated as residents.

Some submitters expressed the view that treating people who obtain residence through fraud as overstayers was the logical consequence of their actions. A number of these submitters also emphasised the seriousness with which fraud should be treated.

> *As overstayers they would not have been granted residency without the criminal act of fraud. Therefore they are technically overstayers, not residents and should be treated as such.* (Individual submitter)

The New Zealand Association for Migration and Investment, on the other hand, argued that it is necessary to treat such people as residents in order to recognise the seriousness of the offence.

> *Obtaining residence by fraud should be recognised as a serious offence and appropriate weight must be given. The nature of the fraud may affect the public interest consideration and that could not be adequately recognised if perpetrators were automatically treated as overstayers.* (New Zealand Association of Migration and Investment)

Other submitters commented that individual circumstances need be taken into account because a person may not have been aware of the fraud.

> *Some persons who will have obtained residence through fraud will have done so because they have been trafficked, and have had very little control over the*

> *migration process. There are also issues for women experiencing domestic violence, who may not have been in control of, or had any idea about, how their residency applications have been made.* (National Collective of Independent Women's Refuges)

Some submitters felt that the issue is not relevant given their view that all persons should have access to independent humanitarian appeal. They considered that overstayers and residents should be treated on the same basis. One submitter commented that the issue only arises if there are different humanitarian tests for residents and overstayers. This issue is discussed in 7.2.1 below.

7.2.1: What test should an independent appeal authority apply when considering an appeal against expulsion?

Summary of proposal

The discussion paper proposes the development of a single test for independent humanitarian appeals against expulsion that would require the humanitarian circumstances to be exceptional, and weighed up against the public interest. The onus would be on the person to justify their continued stay by establishing any exceptional humanitarian circumstances that outweighed the public interest in their expulsion.

Key question
1. Do you agree that there should be a single humanitarian test against expulsion that asks: a. are there exceptional circumstances of a humanitarian nature, and b. is it contrary to the public interest to allow the person to remain?

Submitter response

Eighty five submitters responded to this question: 39 submitters responded on behalf of organisations and 46 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, law societies, community law centres, human rights groups, other community groups, businesses, the United Nations High Commissioner for Refugees, a territorial authority, the Families Commission and one political party.

There was a marked difference in response between individuals and organisations. Approximately 80 percent of individual submitters agreed that there should be a single humanitarian test against expulsion as proposed in the discussion paper. Just under half the organisations supported the proposal and approximately 35 percent were opposed to the single humanitarian test proposed.

Some submitters expressed qualified support for the proposal, commenting that:

- there needs to be safeguards such as in Canada
- refugee matters should be treated separately
- it needs to be fair

- weight should be placed on the benefits to New Zealand of keeping people with strong family bonds here, and/or
- the public interest should be paramount.

One submitter proposed specifying what the public interest is, and suggested that appellants be required to demonstrate that they can support themselves and their family and make a positive contribution to New Zealand. The submitter also expressed the view that the test should require that the exceptional humanitarian circumstances may only be resolved by remaining in New Zealand.

Many submitters that opposed the proposal expressed support for having a single humanitarian test against expulsion but did not agree with the nature of the humanitarian test proposed. These submitters generally considered that the test set too high a threshold for appellants.

Some submitters opposed the public interest element of the test. A number of submitters considered that a test that refers to circumstances beyond the individual's control, along the lines of the Canadian approach, would be preferable.

> *The proposal places a significant burden on the applicant to demonstrate not only the exceptional circumstances, but the interface of those circumstances with New Zealand's public interest. This is a significant departure from the test currently employed by the Removal Review Authority. It could be argued that the creation of this reverse onus provision contravenes the principle of natural justice articulated in s.27 of the NZBORA by placing an unfair, and perhaps insurmountable burden.* (Federation of Islamic Associations of New Zealand)

> *To appeal a decision on humanitarian grounds the applicant will need to demonstrate exceptional circumstances and that those circumstances outweigh the public interest in expulsion. A test similar to that used in Canada – which allows humanitarian access to people who can prove that they are suffering hardship that is "unusual, excessive or undeserved and the result of circumstances beyond their control" – would be more appropriate.* (Human Rights Commission)

> *This is a higher threshold than currently employed. The onus of a public interest test should lie with the Crown to show that there are public interests that outweigh the interests of an applicant, more in line with the test employed by Canada.* (Wellington Community Law Centre)

Other submitters expressed concern that the humanitarian circumstances would need to be exceptional. These submitters suggested changing the wording to "humanitarian circumstances" or "special humanitarian circumstances", while retaining the public interest element of the test.

> *This strikes a better balance and more clearly reflects the many reasons why applicants may appropriately be permitted to remain in the country. The concept of "special circumstances" already exists in s18D(1)(f) of the current Act.* (New Zealand Law Society)

Some submitters commented that the test should be consistent with New Zealand's international obligations, with one submitter suggesting a move away from an exceptional circumstances approach.

> *It is also essential that New Zealand's humanitarian test is consistent with New Zealand's international human rights obligations and that the test complies with international human rights instruments to which New Zealand is a signatory. In particular, the International Covenant on Civil and Political Rights and the Convention of the Rights of the Child. We submit that these international human rights instruments be incorporated in the legislation as schedules.* (Grey Lynn Neighbourhood Law Office)

> *While the "exceptional circumstances weighed against the public interest" is a pragmatic and established test in New Zealand I question whether it is actually necessary at all and suggest that domestic and international obligations in reaching and reviewing expulsion decisions could be adequately, and more satisfactorily, covered by a requirement to refer to internationally applied proportionality or balancing tests used to determine whether a country is meeting its international obligations under such treaties. (There is extensive international and European jurisprudence on this topic which could be a useful source of guidance and assistance to New Zealand decision makers.) Thus, in the New Zealand situation, a decision maker or judge reviewing an expulsion decision would be required to take into account all relevant issues and would place emphasis on ascertaining whether there had been compliance with the provisions of the Refugee Convention, CAT, Articles 6,7,23 and 24 of the ICCPR, relevant provisions in UNCROC, and in addition, recognizing domestic immigration policies and the "closeness" or otherwise of an appellant to those validly constituted immigration policies.*
>
> *This approach would allow New Zealand to benefit from international jurisprudence on the subject rather than relying on the overtones of domestic "humanitarian policies" which, over time, could be far more variable, subjective and inconsistent in their application. It will achieve better clarity and less incentive to those wishing to abuse the system and those who may seek to delay or extend their overstaying in the hope of manufacturing a "humanitarian claim".* (Individual submitter)

A number of submitters considered that there should be different humanitarian tests for residents and for non-residents in recognition of the different interests at stake. One submitter suggested that residents should only be required to demonstrate to "humanitarian circumstances" and non-residents should be required to demonstrate "exceptional

humanitarian circumstances". One submitter considered that the appeals body should have discretion to allow appeals that are deserving but would not otherwise meet the test.

One submitter expressed the view that legal aid should be available in some cases and that people should have the right to appear before the tribunal. The submitter commented that "these safeguards are fundamental to a meaningful right of appeal and will pay for themselves in reduced Ministerial appeals and applications for judicial review."[1]

7.3: General comments and other issues raised by submitters

A number of submitters expressed general concern about possible changes to review and appeal provisions, particularly in the context of other proposed changes to immigration legislation.

> *The proposals to reduce appeal and review rights are alarming – particularly in light of the proposed increases in enforcement powers and rights of imprisonment.* (Individual submitter)

> *The combination of a single right of appeal, single appeals tribunal, and increased security is dangerous as the most likely result is a small number of decision-makers making secret decisions. This acts against the claim of ensuring fairness and transparency.* (Individual submitter)

One submitter commented that the review should start from the assumption that every decision and process should be transparent and reviewable, at every level, and then carefully consider whether there are some justified circumstances for limiting those rights. The submitter commented that giving people wide access to the courts would improve decision-making and should not be considered vexatious.

> *I was Minister prior to the 1987 Act at a time when some of the more important natural justice cases were determined in New Zealand courts. That is, I was the Minster whose decisions were found lacking. In each case, there was not a touch of malice in my heart towards the applicant whom I wronged, but that was not the issue – the issue was whether the process I had followed was proper. Each time the court found it had not been, the Immigration Division (as it then was) and I scratched our heads in wonderment at how we were going to be able to efficiently do our jobs in the face of what we saw as "interference from the courts". On every occasion, we found we could do so, and our decision-making carried on as efficiently as before, but became better, fairer, decision-making because of the courts intervention. Courts do not intervene when processes are proper; litigants, on the whole, know that, and do not seek intervention unless they believe they have a case. Making the immigration decision-making process transparent and reviewable does not represent any threat; it represents an opportunity for us to "get it right" for the first time in 20 years.* (Individual submitter)

[1] Hutt Valley Community Law Centre

One submitter commented that rights of review and appeal are especially important where children and families are involved. The submitter also suggested that the community could play a role in these cases by providing input and references.

Timeliness was another general issue raised by submitters. Some submitters commented on the effect that lengthy appeal processes have on applicants. Others were interested in minimising the cost to the New Zealand taxpayer and ensuring that New Zealand is not perceived as a "soft touch".

> *No applicant should have to endure waiting more than 6 months for a response to an appeal, as is our case, we have been waiting for a year and a half and still no answer. This puts undue strain on the applicants and causes stress which at the end of the day negatively affect potential migrants who only come here because they want to contribute to this country. What the NZ immigration service currently does is not by any means humanitarian, quite the contrary.* (Individual submitter)

> *If you can do one thing for me it would be to go over your proposed legislation with a fine tooth comb and make doubly sure there are no loopholes for smart alec lawyers to drive a bus through like there seems to be with the present laws. These constant and expensive appeals they are allowed to take make the process of removal far too high for the taxpayer and are unfair to us who pay the taxes. In my view if these overstayers want to appeal they should have to bear the costs themselves. It is totally wrong that we should have to pay for their illegal activities and breaches of our laws when they don't contribute a red cent towards our society. Nor should we have to keep them on a benefit just because they try to break our laws. I, like a lot of citizens believe that if people come here with false papers or none at all then they should not have a right of appeal but should be put on the next plane out with no argument and no lawyers or media to take their part. So long as we show such people kindness they will perceive it as a weakness to exploit and tell all their friends to try it on too. We as a nation cannot be all things to all men and cannot solve the world's problems by bringing them here, especially when they do so illegally.* (Individual submitter)

A number of participants in the stakeholder meetings expressed the view that legal aid should not be available to non-residents or that it should be subject to a "chance of success" test. Some submitters, on the other hand, considered that legal aid should be available to applicants on a case-by-case basis.

> *It is significant that there is no legal aid available for immigration matters. In particular when there is a case of humanitarian nature, costs may be prohibitive to a person being able to effectively challenge an immigration decision. This includes having adequate representation and the cost of application fees. It is proposed that legal aid be made available on an*

individual case-by-case basis for immigration cases. (Grey Lynn Neighbourhood Law Office)

The Ombudsmen commented that removing appeal rights, among other proposals, may have the effect of increasing the number of complaints that are made to the Ombudsmen.

> *The removal of appeal rights and the delegation of ministerial powers to officials would mean that decisions previously the prerogative of the Minister or that were appealable could, quite properly, be made the subject of a complaint to an Ombudsman. This is entirely appropriate and in keeping with the purpose of an Ombudsman's functions under the Ombudsmen Act 1975. However, should that lead to an increasing number of Ombudsmen Act complaints this may result in resource implications not only for this Office, but also for the Department.*

Some submitters proposed that an Immigration Commissioner be appointed to provide independent oversight of immigration decision-making. Submitters commented that providing an avenue for people to complain about unfair treatment would increase accountability and could reduce the number of personal representations being made to the Minister. The proposed role and powers of an Immigration Commissioner are discussed further in section 15.

SECTION 8: THE INDEPENDENT APPEAL BODIES

Overview

Approximately 70 percent of organisations that responded to these proposals supported the establishment of a single immigration and refugee tribunal. Individuals expressed mixed views, with just under half indicating support for the proposal and approximately 40 percent indicating opposition. While submitters considered that a single tribunal would be more efficient, concerns were expressed about the potential for losing the expertise of the Refugee Status Appeals Authority and failing to recognise the special legal issues associated with refugee cases. Most of those who opposed the proposal considered that there should continue to be a separate refugee tribunal.

There were mixed views on whether appeals on the facts and humanitarian appeals for exclusion cases should be heard separately or together in exclusion cases.

Submitters made a range of comments on the legislative and administrative provisions that should be put in place for the independent appeals tribunal or tribunals. Most comment related to the proposed single immigration and refugee appeal tribunal. Submitters expressed mixed views on its membership, with some commenting that specialist and impartial expertise is necessary and others suggesting that a range of interests be represented. A number of submitters suggested that the tribunal have inquisitorial powers like the Refugee Status Appeals Authority and that applicants have the opportunity to be heard in person.

Some submitters commented on the need to ensure applicants have adequate time to make their appeal and/or that there be flexibility to allow for special cases. Adequate resourcing of the tribunal and timeliness of decision-making were emphasised by a number of submitters. Some submitters commented on legal aid, with a number suggesting that legal aid should be available for those making a humanitarian appeal.

There was strong support for the Ministry of Justice being responsible for servicing the immigration and refugee appeals bodies: almost 80 percent of submitters indicated support for this proposal. Submitters favoured a clear separation from the Department of Labour as initial decision-makers and commented that it would enhance public confidence in the independence and integrity of the appeals bodies.

8.1: How should the independent appeal bodies be structured?

Summary of proposals

The discussion paper proposes establishing a single immigration and refugee appeals tribunal. The tribunal would hear appeals against:

- residence declines (if applicable)
- refugee/protection declines
- liability for expulsion on the facts, and

- expulsion on humanitarian grounds.

Two options for a single tribunal are presented, which differ only in the treatment of appeals against expulsion (other than for refugee status or protection cases):

A. Appeals against liability for expulsion (on the facts) and humanitarian appeals against expulsion would be heard separately, or
B. Appeals on the facts and humanitarian appeals would be heard together.

Under both options, appeals against a decision to decline residence would consider both the facts and the merits of the case being recommended to the Minister as an exception to policy. For refugee status/protection cases, appeals against a decision to decline protection would always be heard separately from any humanitarian appeal against expulsion.

Key questions

1. Do you agree that there should be a single immigration and refugee appeals tribunal?
2. In the case of appeals against expulsion, how should appeals on the facts and humanitarian appeals be heard?
    a. separately
    b. together
3. Do you have any views on the detail of the legislative provisions for the independent appeal authority/authorities?

Submitter response

One hundred and ten submitters responded to one or more of these questions. These included 58 submitters responding on behalf of organisations and 52 private individuals. Organisations that made submissions included immigration consultants, refugee and migrant groups, ethnic councils, human rights groups, community law centres, law societies, other community groups, businesses, government agencies, the Families Commission and two political parties.

Comments on question one

There was a difference in response between organisations and individuals to this question. Approximately 70 percent of organisations who made submissions on this issue agreed that there should be a single immigration and refugee appeals tribunal; approximately 15 percent of organisations opposed the proposal. The response from individual submitters, on the other hand, was mixed with just under half the submitters supporting the proposal and approximately 40 percent indicating opposition to the proposal.

A number of submitters who support the establishment of a single immigration and refugee appeals tribunal commented that it would result in greater efficiency and promote greater consistency in decision-making. The Families Commission commented on the potential effect of streamlining appeals process on appellants and their families.

> *We believe there is huge potential for a more streamlined appeal process. The current backlogs (which we understand are being cleared) cause tremendous*

> *uncertainty and stress for many applicants. We are aware of cases where appellants wait for a result for many months and sometimes years. This causes tremendous strain on families.* (Families Commission)

Some submitters emphasised the need to ensure that the appeals tribunal understands the different legal issues associated with immigration and refugee cases, and to ensure that the specialist expertise of the Refugee Status Appeals Authority is not lost. Some submitters commented on the need for adequate training of tribunal members; others advocated having a specialised refugee and protection appeal division within the new tribunal.

> *If domestic immigration law is confused with international protection law by the decision makers the propensity for flawed decision-making and appeals is substantial. Accordingly, in the establishment of this new regime it is important that extensive training is carried out to ensure decision-makers and judges are applying the right approach, or "wearing the right hat" at each step in the decision-making. My experience has shown that this probably the largest problem within the UK "one-stop shop" approach and leads to a very significant number of appeals and the application of substantial expensive judicial time and effort. I cannot over stress the necessity to get this right at the start.* (Individual submitter)

Those who oppose the proposal also expressed concerns about the potential for losing the expertise of the Refugee Status Appeals Authority and the need to distinguish between the different circumstances of immigration and refugee cases. Most of these submitters considered that there should be two appeals tribunals: one to consider immigration cases and one to consider refugee cases.

> *While residence, removal and deportation appeal bodies/tribunals should be merged, refugee matters should be kept separate. Refugee matters are not immigration matters – they have their own international jurisprudence (based on the 1951 Convention) and should not be confused with immigration issues.* (Individual submitter)

> *It is vital that the wealth of experience and knowledge of refugee issues gained over the period of the RSAA's existence not be diluted by incorporating its functions into that of a broader review body. The avenue to claim refugee status is a part of NZ's immigration system that serves a different function from the other areas of immigration policy – it is a mechanism that emphasises the right of the individual and relegates that state's security responsibility to a second place for a specific decision. This crucial distinction means that the nature of the expertise and awareness needed to make high quality decisions differs significantly from that requirement form other immigration issues – any body judging the validity of a refugee appeal must have a broad awareness of a variety of issues ranging from the state of the applicant's home country to the fluctuations and reasons for refugee applications worldwide.* (Individual submitter)

A number of submitters commented on the status of the Refugee Status Appeals Authority as a Commission of Inquiry, which enables it to hold de novo hearings and seek further information to gain a full understanding of the applicant's situation. These submitters expressed concern that these powers could be lost if the Authority is merged into a wider appeals body.

Other comments made by submitters who oppose the proposal were that:

- it could be viewed as a dilution of New Zealand's commitment to the Refugee Convention
- it would reduce opportunities for reviewing decisions
- it risks prioritising efficiency over integrity of process
- there would be a huge backlog of cases, and/or
- the Removal Review Authority should also be a standalone body as it hears a number of appeals that challenge refugee status determinations.

Another submitter supported the establishment of a single tribunal but suggested that an alternative option would be to establish an immigration division of the District Court.

> *The possibility of establishing an Immigration Division of the District Court requires serious consideration. Such a division would consider refugee, humanitarian and residence appeals. In these cases it might proceed along the lines of the Environment Division of the Court, with the inclusion of independent assessors to assist the Judge. The Division would also deal with the immigration matters that currently come before the District Court. Such a system would significantly simplify and facilitate the appeal system. At this stage this proposition is submitted as a further option for consideration, rather than as a firm proposal.* (Refugee and Immigration Committee, Wellington District Law Society)

A number of submitters made comments on the legislative provisions and administrative practices that should be in place for a new immigration and refugee appeals tribunal or tribunals. These are summarised with the comments on question three below.

Comments on question two

There was a mixed response to this question. Approximately 45 percent of organisations considered that appeals on the facts and humanitarian appeals should be heard separately in expulsion cases; 40 percent considered that they should be heard together. Of the individuals that addressed this question, approximately 30 percent considered that the appeals should be heard separately and approximately 60 percent considered that they should be heard together.

Submitters who considered that appeals on the facts and humanitarian appeals should be heard separately gave various reasons for this view. These included the following:

- it would strengthen individual rights
- different people with different expertise would need to hear the two appeals
- appeal being heard by more than one person creates greater accountability
- it is necessary to maintain impartiality and objectivity
- humanitarian appeals need to be heard separately so the focus is on humanitarian issues, and/or
- it would increase the chances of all the relevant facts and reasons being heard.

Submitters who considered that appeals on the facts and humanitarian appeals should be heard together also expressed a range of views:

- it would enable all the facts and reasons to be heard together and therefore provide a better overall picture
- it is important to weigh everything up and come to a balanced decision, and/or
- hearing appeals together would be in the interests of justice and expediency.

The New Zealand Law Society noted different views amongst its members:

> *One view is that only those subject to deportation orders have a right to be heard in person while overstayers should have to seek leave to take part in an oral hearing for a limited period of between two to four hours. This approach is aimed at promoting efficiency in the appeal process. There should be specific criteria outlined to allow appellants to seek leave, with the opportunity to request a fee waiver under certain circumstances also. In general, appeals on the facts should be heard on the papers and humanitarian appeals should be open to oral hearings.*
>
> *The other view is that all appeals against expulsion including elements both of fact and humanitarian appeals should be heard orally. This provides a transparent and accessible system which allows the appellant to respond to any credibility concerns that may be raised. While in the short-term requiring more resources, the long-term benefit is robust and transparent decisions, encouraging respect for the system.*

Some submitters considered that both options could be offered to applicants, or that there be a presumption in favour of appeals being heard either separately or together, but discretion for the other approach to be taken in special circumstances.

Comments on question three

Many submitters who commented on the proposed single immigration and refugee appeals tribunal were of the view that it should be completely independent from Immigration New Zealand and supported the proposal that the Chair and Deputy Chair be appointed as District Court judges.

> *The appeal authorities should be independent of NZIS, such as the judiciary.* (Individual submitter)

> *It would be an advantage for the Chair and Deputy Chair to be given the status of District Court Judges. This encourages confidence in the system and reinforces the independence of the appeal body.* (New Zealand Law Society)

Some submitters envisaged the tribunal as more of a panel representing a number of interests including those of Immigration New Zealand and refugee and migrant communities. Other submitters were of the view that the tribunal should comprise specialist members with relevant experience. A number of submitters commented on the need to maintain the existing calibre of membership, with particular reference to the Refugee Status Appeal Authority. One submitter considered that the legislation should require that the Board include at least one member who has experienced disability. Others suggested that at least one member of the public or a human rights organisation be included on the tribunal.

> *It is recommended that membership of any new 'combined appeal' authority should also allow for the appointment of experienced people from a range of appropriate background and that it not be exclusively the preserve of lawyers.* (RMS Refugee Resettlement)

Submitters who supported the retention of a separate refugee appeals tribunal considered it essential that the tribunal retain the Refugee Status Appeal Authority's inquisitorial powers. Some submitters considered that the tribunal should also have greater independence than at present.

> *Asylum seekers appearing before the RSAA are in a particularly acute situation and it is imperative that the RSAA has the appropriate status to enable a full questioning of the appellant in order to develop a full understanding of their situation.* (Human Rights Foundation)

> *End the quasi-judicial status of the RSAA, make it fully independent. Making the chair and deputy chair judges would put it within the ambit of the Judicature Act 1908.* (Individual submitter)

A number of submitters considered that a single immigration and refugee appeals tribunal should also have inquisitorial powers, at least in relation to protection cases and expulsion matters. Many submitters expressed the view that applicants should have the right to be heard in person, rather than appeals being heard on the papers.

> *A system akin to that presently operated by the Refugee Status Appeals Authority would be appropriate, ie one that is inquisitorial rather than adversarial with the opportunity to make submissions in writing and to appear in person before the authority.* (New Zealand Association for Migration and Investment)

> *With a right of appearance in all onshore cases and perhaps by video in others. This is a reasonable exchange for reduced appeal rights.* (Hutt Valley Community Law Centre)

> *Our preference is for oral appeals rather than appeals on papers only. We suggest applicants are given the option of providing oral submissions in support of their papers.* (Churches' Agency on Social Issues)

One submitter suggested that the tribunal make use of subject matter experts to ensure that the interests of parties are properly represented.

Some submitters considered that appeals should be heard by at least two members to provide for greater accountability in decision-making. Another commented that appeals should be heard by five members, with the support of at least four members being required before an appeal may be allowed.

One submitter commented that the tribunal should be a court of record, with decisions reviewable to the District Court. Other submitters considered that there should be an avenue of appeal to the High Court on points of law.

Some submitters commented on the timeframes for appeal. One submitter considered that the existing 42 day period should be maintained because there are sometimes delays in getting the applicant's full file from Immigration New Zealand. Another advocated flexibility in the timeframes to allow for special cases.

> *With realistic exceptions to appeal periods. Those experiencing domestic violence or other abuse do not count off 42 days on their calendar! The Tribunal should have a similar ability to the employment relations authority to hear out of time appeals in special cases and Immigration Commissioner should be able to refer cases that would otherwise be out of time in the same way that other commissioners currently refer to the Human Rights Review Tribunal after investigation.* (Hutt Valley Community Law Centre)

Timeliness of decision-making was raised as an important issue by a number of submitters. Submitters considered that the tribunal needs to be adequately resourced to enable decisions on appeals to be made within a reasonable timeframe.

> *REC emphasises the need for this tribunal to be accessible, affordable and to deliver robust decisions within a reasonable timeframe.* (Rotorua Ethnic Council)

> *NCIWR would like to draw attention to how important timeliness of robust decision-making is for the women we are working with. While waiting for residency decisions, women escaping violence typically have no way of supporting themselves until they are provisionally accepted for Residency, when a Special Work Permit may be issued. For some women this situation may continue for many months, which, because they have left their relationships and therefore most often their access to community support,*

makes women very vulnerable. (National Collective of Independent Women's Refuges)

A number of submitters commented on the availability of legal aid. Some submitters considered that legal aid should be available to applicants making a humanitarian appeal, subject to means testing and/or a merits test. One submitter expressed the view that legal aid should only be available to residents and for protection cases. Some submitters considered that there should also be provision to waive appeal fees.

> *We raise the issue of legal advice and representation for appeals, which is not considered in this paper. It may be appropriate to consider whether appellants who are appealing on humanitarian grounds or the best interests of the child and/or wellbeing of the family should have access to legal aid. This may provide a perverse incentive for lodging an appeal on such grounds to access eligibility for legal aid; however there are existing mechanisms to protect against frivolous claims. The need to ensure that those most vulnerable are afforded access to legal representation to put forward their case is fundamental to ensuring access to justice.* (Families Commission)

One submitter commented that careful consideration needs to be given to the confidentiality of information imparted in a refugee claim and referred to section 129T(3)(b) of the 1987 Act.

Some submitters commented on the lack of detail in the discussion paper about the statutory provisions for the proposed immigration and refugee appeals tribunal, with one submitter commenting that further consultation is necessary on these provisions.

8.2: Which government department should service the immigration and refugee appeals bodies?

Summary of proposal

The discussion paper proposes that the new tribunal (or tribunals) be serviced by the Ministry of Justice. The Department of Labour is presented as an alternative option.

Key question
1. Which government department should service the immigration and refugee appeals bodies? a. Ministry of Justice b. Department of Labour

Submitter response

Ninety five submitters responded to this question: 52 submitters responded on behalf of an organisation and 43 responded as private individuals. Organisations that made submissions included immigration consultants, refugee and migrant groups, ethnic councils, human rights groups, community law centres, law societies, other community groups, businesses and one political party.

There was strong support for the Ministry of Justice being responsible for servicing the immigration and refugee appeals bodies. Almost 80 percent of those who addressed this issue indicated support for the proposal. Support was slightly higher among organisations, but was still strong among individuals at approximately 70 percent.

The main reasons given for supporting the proposal were that it provides a clear separation from the initial decision-makers and enhances public confidence in the independence and integrity of the appeals bodies.

> *The Federation proposes that the Ministry of Justice should administer the appeals process. This ensures a clear separation of the decision makers and allows for transparency and robust decisions to be made in a timely manner.* (New Zealand Federation of Ethnic Councils)

> *This provides for truly independent decision-making at the appeal stages and assists the public perception of independence from Immigration New Zealand. Currently, even though the Refugee Status Appeals Authority and the Removal Review Authority are independent of Immigration New Zealand there is still this perception that both these Authorities are part of and accountable to Immigration New Zealand.* (New Zealand Law Society)

> *I think that that the Ministry of Justice is the most appropriate government department to service the immigration and refugee appeals authorities. By becoming part of the Ministry of Justice, the processes around immigrant and refugee determination will likely be seen by the public as being fairer, and perhaps demystify the process somewhat.* (Individual submitter)

A number of submitters indicated a preference for the Department of Labour being responsible for servicing the immigration and refugee appeals bodies. Other submitters considered that both the Ministry of Justice and the Department of Labour should fulfil this role and one submitter suggested the Department of Internal Affairs as an alternative. These submitters generally did not elaborate on their views.

SECTION 9: THE USE OF CLASSIFIED INFORMATION

Overview

Submitters expressed mixed views to the proposals relating to the use of classified information. Many submitters indicated their support for all three proposals, with the strongest level of support for the use of classified security information in immigration decision-making (approximately 55 percent of those responding to this section). There was slightly less support for the use of other classified information in immigration decision-making (approximately half of all submitters). The response to the use of classified information in refugee/protection cases was more even, with approximately 45 percent indicating support and approximately 40 percent indicating opposition.

There were clear differences between individual responses and responses from organisations. Individuals were much more likely to support the proposals than oppose them. For all three questions, there were more organisations that opposed the use of classified information than supported it.

Those that support the proposals and those that oppose the proposals raised some similar concerns. Many submitters considered that decision-making and review processes need to be transparent, that applicants should have access to special counsel, that applicants should be provided with at least a summary of the information to enable them to challenge that information, and that reviews be undertaken by an independent body rather than by the Inspector-General of Intelligence and Security or a member of the proposed new immigration and refugee tribunal acting alone. Concerns were also expressed about the accuracy of classified information, particularly in the case of refugee/protection applications where the country from whom the applicant is seeking protection may be a source of classified information.

Many submitters indicated strong opposition to the proposals on the grounds that they contravene a person's right to a fair hearing and the principles of administrative and natural justice. These submitters were of the view that all prejudicial information should be fully disclosed to applicants if it is to be used in decision-making. While some submitters noted that the additional safeguards discussed above would help to alleviate their concerns, others were opposed to any use of classified information in immigration or refugee decision-making. A number of submitters questioned whether special counsel would be able to play an effective role because they would be unable to discuss the classified information with their client.

9.1: How should classified security information be used in immigration decision-making?

Summary of proposal

The discussion paper proposes that the Minister of Immigration be able to decline an application for a residence or temporary visa based on a recommendation from the New Zealand Security Intelligence Service (NZSIS) that the applicant is not of good character.

Under this proposal, the NZSIS would fully disclose the classified security information that formed the basis of the recommendation to the Minister and brief him or her on the recommendation.

The discussion paper indicates that where the Minister decides to decline an application based on the classified security information, the person would be able to seek a review of the NZSIS recommendation by the Inspector-General of Security and Intelligence under the Inspector-General of Intelligence and Security Act 1986. The person would have no right of appeal to the immigration and refugee tribunal, unless the Inspector-General found that the NZSIS recommendation was unfounded and the Minister declined the application for other reasons.

Key question
1. Do you agree that the Minister of Immigration should be able to decline a temporary or residence application on the basis of a recommendation by the NZSIS on security grounds, with review provided by the Inspector-General of Intelligence and Security?

Submitter response

One hundred and twelve submitters responded to one or all of the proposals in section 9. This included 61 submitters responding on behalf of organisations and 51 private individuals. Organisations that made submissions included immigration consultants, refugee and migrant groups, ethnic councils, law societies, community law centres, human rights groups, other community groups, businesses, government agencies, local government and one political party.

Approximately 55 percent of submitters indicated their support for use of classified security information in immigration decision-making. Approximately 35 percent expressed strong opposition and other submitters either were unsure or did not indicate a clear view either way. There was a difference between the views of organisations and individuals: approximately 65 percent of individuals expressed their support for the proposal, whereas approximately 45 percent of the organisations support and approximately 45 percent were opposed to the use of classified security information.

A number of submitters made general comments on the use of classified information, which covered this proposal as well as the proposals discussed in sections 9.2 and 9.3. For the most part, these submitters were opposed to the use of any classified information in immigration or refugee decision-making. The comments made by these submitters are reflected here and discussed further in section 9.4.

Comments of submitters who support the proposal

Those who expressed support for the use of classified security information in immigration decision-making generally did not elaborate on their views. Some submitters expressed qualified support for the proposal. They indicated that the Minister of Immigration should be able to decline a visa application on the basis of classified security information, provided that:

- the Minister receives full information on which to base the decision
- the information is correct
- the information is crucial to the decision and is not publicly available
- the process is transparent, and/or
- the reasons for the application being declined are provided to the applicant.

A number of submitters expressed concerns about the proposed review process, suggesting that a review panel of at least three people would be preferable to review by the Inspector-General of Intelligence and Security alone.

> *In order for classified security information to be seen to be fairly used, it must come under a robust review process. Review by the Inspector-General of Intelligence and Security is not an adequate safeguard in the use of classified security information. Classified security information used in decision making must be subject to review or appeal by a tribunal made up of no less than three people. The members of the tribunal should include an expert on immigration and an expert on classified information.* (Individual submitter)

One submitter suggested establishing a court or tribunal closely allied to the proposed immigration and refugee tribunal to provide for greater transparency and independence of the review process. The submitter proposed that, in cases involving classified security information, the specialist court include the Inspector-General of Intelligence and Security along with the chairperson or deputy of the new immigration and refugee tribunal and another High Court or District Court judge. The submitter recommended the use of a panel of three judges due to the complexity and precedent-setting nature of the cases that will come before it, and that the specialist court/tribunal be established as a court of record to ensure that it has all the powers of a High Court judge.

Other suggestions for improving the review process were:

- enabling or requiring the Inspector-General to interview the applicant in order to gain any information that may be relevant to the applicant's defence, and
- the use of an advocate, who may access the classified security information, to represent the applicant's interests.

Comments of submitters who oppose the proposal

Submitters who oppose the proposal expressed concern that it contravenes a person's right to a fair hearing and the principles of administrative and natural justice. Submitters considered that all information should be disclosed to applicants to enable them to challenge that information.

> *It is fundamental to a fair system that individuals have the right to respond to potentially prejudicial information. There is no reason to distinguish between potentially prejudicial information, whether classified or unclassified. For this reason, classified information should remain as a "trigger" for the location of open source information only.* (New Zealand Law Society)

> *Without an opportunity to respond to or rebut classified information, there is no possibility of a fair hearing.* (Caritas Aotearoa New Zealand)

Some submitters noted a recent High Court ruling that, even in security matters, applicants have a right to a meaningful summary of the classified information and a real opportunity to rebut any prejudicial allegations. One submitter commented that it would be preferable for a "sanitised" version of the entire information to be made available to applicants, with information that identifies individuals omitted.

Submitters also expressed concern about the accuracy of classified information, including classified security information, and the risks associated with using it.

> *Just because there may be more information in existence doesn't mean that it should be able to be used in immigration processes if it infringes natural justice rights (e.g. current evidentiary rules, BORA, ICCPR), nor does it mean that there will be greater accuracy or appropriateness in the decision if it is used. In fact, classified information is notoriously inaccurate and relying on it will lead inevitably to less accurate decisions.* (Human Rights Foundation)

A number of submitters commented on the need to use classified security information in immigration decision-making. Some submitters considered that the discussion paper had not made a compelling case for change. One submitter noted that the NZSIS is able to give a recommendation based on open-source information that can be disclosed to applicants. Others expressed the view that sufficient provisions already exist for dealing with people who pose a security risk to New Zealand, such as Part 4A of the 1987 Act and the Terrorism Suppression Act 2002.

> *It is submitted that the status quo should remain regarding the use of classified security information in immigration decision-making. If classified security information were not of sufficient weight to warrant the arrest and removal of the individual from New Zealand then one would have to seriously question its relevance to an application for a visa or permit.* (Refugee and Immigration Committee, Wellington District Law Society)

Concerns were also raised about the proposed process for reviewing decisions made on the basis of classified security information. A number of submitters expressed the view that the Inspector-General of Intelligence and Security is not sufficiently independent to provide for a fair review. Others considered that it is inadequate for the review to be undertaken by a single person. Concerns were also expressed that the Inspector-General lacks the resources necessary to consider these appeals, which means that there is potential for significant delays in decision-making.

Submitters suggested various alternatives including:

- independent scrutiny by a High Court judge

- review by a panel of independent experts, potentially along the lines of the Special Immigration Appeals Authority in the United Kingdom, and
- review by the Chair or Deputy Chair of the Refugee Status Appeals Authority in combination with a High Court judge.

Some submitters suggested that another important protection for applicants would be the use of security-cleared special counsel to advocate on the applicant's behalf. However, other submitters expressed concerns about the ability of special counsel to play an effective role because they would not be able to disclose the information being used against the applicant. The use of special counsel is discussed further in section 9.2.

9.2: How should classified information, other than classified security information, be used in immigration decision-making?

Summary of proposals

The discussion paper proposes that the Minister of Immigration be able to use classified information from a source other than the NZSIS to inform a decision on a visa application. The information would only be used where open-source (unclassified) information was not available and the Minister would be briefed by the agency that provided the information.

In such cases, the applicant would be advised that their application had been declined on the basis of classified information that could not be disclosed and would have the right to appeal the decision to the independent immigration and refugee tribunal. Only a member of the tribunal who is a judge could hear the appeal.

The discussion paper indicates that the tribunal could establish a role for "special counsel" who could access the classified information and represent the person.

Key question
1. Do you support the proposal to allow the use of classified information from sources other than the NZSIS in immigration decision-making, with appeals to be heard by a judge of the independent immigration and refugee tribunal?

Submitter response

Approximately half of the submitters who addressed this question expressed their support for the use of classified information, other than classified security information, in immigration decision-making. Approximately 35 percent were opposed to the proposal, while other submitters either were unsure or did not indicate a clear view either way. As with the proposed use of classified security information, there was a difference in response between organisations and individuals: almost 60 percent of individuals supported the proposal compared to approximately 40 percent of organisations.

Comments of submitters who support the proposal

Some submitters expressed unqualified support for this proposal. One submitter commented that decision-makers should have all relevant information at hand in making immigration

decisions. Another expressed the view that the cost of any appeal should be met by the applicant.

Other submitters qualified their support, commenting that:

- applicants should be represented by security-cleared special counsel
- applicants should be informed of the information, but not necessarily the source
- applicants should have an opportunity to respond before decisions are made
- the information must be correct, and/or
- extensive consultation is required on this part of the legislation.

Some submitters commented on the proposed review process. As with classified security information (discussed in section 9.1 above), one submitter recommended the use of a panel of three judges in these cases due to the complexity and precedent- setting nature of the cases that will come before it. The submitter suggested that the panel be chaired by the Chairperson of the immigration and refugee tribunal or another District Court judge, with the remainder of the panel being comprised of the Deputy Chairpersons or District Court judges.

> *I support the proposal to allow classified information that is not classified security information to be used in immigration decisions, but it should be appealed to a team of experts rather than a sole person, with at least one member from the independent immigration and refugee tribunal. Also, while the possibility of judicial challenges to the new procedure is seen as a cost, this type of activity need not be seen as negative. New procedures need to come under a high level of scrutiny in order to become fairer, and clearer.* (Individual submitter)

Comments of submitters who oppose the proposal

Submitters who oppose the proposal raised similar concerns to the concerns discussed in relation to the use of classified security information. These submitters generally considered that using classified information without disclosing that information to the applicant would be contrary to the principles of fairness and natural justice. Submitters considered that both the nature of the information and the source of the information should be disclosed to the individual.

> *It is important that the applicant be provided with the classified information or a full summary of the information. Again, it is important that natural justice and fairness be followed and that New Zealand's international human rights obligations are complied with and not circumvented.* (Grey Lynn Neighbourhood Law Office)

Submitters also expressed concerns about the accuracy and reliability of classified information. Some submitters were more strongly opposed to the use of classified (non-security) information than they were to the use of classified security information.

> *While perhaps there is a rationale for using classified information in narrowly defined security cases, this is not accepted in general immigration matters. The concerns about the potential unreliability of classified information weigh most heavily against its use – especially when the person concerned is unable to test the validity of the information which is being used against them.* (Immigration and Refugee law Committee, Auckland District Law Society)

Some submitters considered that the definition of classified information is too wide and would cover information provided by an aggrieved ex-partner or others with a personal grudge against the applicant. One submitter commented that the examples provided in the discussion paper relate to security-based classified information rather than non-security classified information.

Views were also expressed about the proposed process for reviewing the use of classified information in immigration decision-making. One submitter considered that appeals should be heard in the High Court to ensure access to the appropriate level of experience, skill and authority. Others suggested that the review process should involve a panel of at least three experts. One suggested the inclusion of a security-cleared layperson from the refugee community on the immigration and refugee tribunal. Another submitter, on the other hand, expressed the view that there is no place for independent appeal authorities in immigration matters.

A number of submitters commented on the possible role for special counsel. Some submitters considered that the use of special counsel would provide an additional safeguard for applicants and could, depending on the provisions put in place, alleviate their concerns about a perceived lack of natural justice. Some submitters suggested that the process would be more robust if applicants were provided with a summary of the information. One submitter considered that applicants should be offered a choice of security-cleared counsel.

Other submitters expressed the view that special counsel would be unable to adequately represent the applicant because they would not be able to disclose the classified information being used against the applicant. A number of submitters noted that this would be contrary to the Rules of Professional Conduct for Barristers and Solicitors. Some submitters commented that the use of special counsel has not worked well in the United Kingdom and noted that a number of special counsel have publicly resigned there because they felt unable to adequately represent their clients.

9.3: How should classified information (security or otherwise) be used in refugee/protection decision-making?

Summary of proposals

The discussion paper proposes that a senior refugee/protection officer who has been security-cleared be able to rely on classified information to decide a refugee/protection claim, without disclosing the information to the claimant. The information would only be used where open-source (unclassified) information was not available and the officer could be briefed by the agency that provided the information.

If a decision is made on the basis of classified information, the claimant could appeal to the independent immigration and refugee tribunal. Only a member of the tribunal who is a judge could hear the appeal, and special counsel could be used in the process.

Key question
1. Do you support the proposal to allow the use of classified information in refugee/protection determinations, with appeals heard by a judge of the independent immigration and refugee tribunal?

Submitter response

As with the other proposals relating to classified information, there was a mixed response from submitters regarding the use of classified information (security or otherwise) in refugee/protection decision-making. However, the response to this proposal was more even, with just over 45 percent of submitters expressing support for the proposal and approximately 40 percent indicating opposition to the proposal. The difference in response by individuals and organisations was more pronounced for this proposal, with approximately 60 percent of individuals indicating their support compared to only 35 percent of organisations.

Comments of submitters who support the proposal

Submitters made similar comments to this proposal as to the proposal relating to the use of classified (non-security) information in immigration decision-making. Some submitters expressed unqualified support for the proposals. One submitter commented that decision-makers should have all relevant information at hand in order to reach an informed decision. Another expressed the view that the cost of any appeal should be met by the applicant.

Some submitters expressed qualified support for the proposal, commenting that:

- applicants must know what information is used so they can respond to any allegations, and/or
- special counsel are required to ensure that refugees have access to a process that is as fair as possible.

  Classified information may be used in declining refugee or protection status, BUT applicants must know what information is used in order to answer allegations. This would only be natural justice. (Wellington Chinese Association)

Comments of submitters who oppose the proposal

As with the other proposals in this section, many submitters were strongly opposed to the use of classified information in refugee/protection decision-making. The primary concern expressed by submitters was that the proposal contravenes the right to a fair hearing and the principles of natural justice. Submitters were generally of the view that people seeking refugee status or protection in New Zealand should have the opportunity to see and respond

to any information that may be used against them. The United Nations High Commissioner for Refugees (UNHCR) was amongst those opposed to the proposal.

> *UNHCR is of the view that classified information can be used in refugee status determination (RSD) only if the asylum-seeker is duly informed of it. RSD should be a fair and transparent process which ensures that asylum claims are determined in accordance with natural justice principles, i.e. an applicant should be informed of information being used against him and be given a reasonable opportunity to present his side and/or provide further information or evidence. In asylum systems which are adversarial in nature, due process means that authorities should not rely on or use classified information, otherwise it places asylum-seekers at an unfair disadvantage.* (United Nations High Commissioner for Refugees)

Some submitters commented that providing applicants with an opportunity to challenge prejudicial information is particularly important in this context because of the risk of "contaminated" information being provided to New Zealand by the countries from whom claimants are seeking asylum or protection. The risk of returning a person to persecution was identified as another reason for taking particular care to ensure that refugee/protection applicants know of, and can rebut, any allegations made against them. One submitter expressed the view that classified information should only be the starting point for locating open-source information in this context.

> *The issue as identified suggests that in assessing a person's claim for refugee status classified information can be obtained about the person. Presumably this is obtained from some foreign country. Collecting such information is contrary to the concept of providing safety to the refugee. Such information should not be gathered and should not be used.* (New Zealand Law Society)

Some submitters questioned the need for the proposal. One submitter commented that it is already very difficult to meet the legal requirements for refugee status and the use of classified information is an unnecessary additional hurdle for applicants to meet given the quality of the system in place. Another noted that there are already grounds for refusing access to information in the OIA. Comments made in relation to the OIA are discussed further in section 9.4.

A number of submitters expressed the view that, if the proposal is to proceed, a number of protections are required to ensure the applicant is fairly treated. Suggestions included the following:

- providing applicants with a summary of the classified information, or a "sanitised" version of the information that removes identifying information
- giving applicants the opportunity to respond to any prejudicial information
- allowing security-cleared special counsel to advocate on behalf of the applicant
- providing for decisions to be reviewed by a panel rather than a single person, and/or
- enabling applicants to access legal aid.

While some submitters considered that the use of special counsel would be an important safeguard, others expressed reservations about the ability of special counsel to play an effective role. The concerns discussed in section 9.2 were reiterated here.

One submitter suggested the United Kingdom's Special Immigration Appeals Commission as a model for the review process, although noted that the Commission had been subject to some criticism in the United Kingdom. Another commented that judicial challenge of decisions was likely.

9.4: General comments and other issues raised by submitters

As discussed above, many submitters expressed strong opposition to all three of the proposals in this area. The following comments from the Auckland District Law Society's Immigration and Refugee Law Committee summarise the main areas of concern.

> *The Committee is concerned that the proposals in this section challenge a basic premise of our law: the right of any person to know, in detail, about any information that is prejudicial to them.*
>
> *In matters where decisions are taken by official agencies of state this constitutional right has perhaps even more importance. Without it, the individual is confronted with an all-powerful state which decides the fate of individuals without having to provide the information upon which an adverse finding against that individual was made.*
>
> *As a result of the proposals, classified information, which is a controversial tool in security cases, is to be imported into the decision making in immigration and refugee cases. This is of concern because sources of classified information cannot be tested by the individual affected by it. Thus credibility, reliability and honesty cannot be independently assessed in a manner that meets the standards expected under the rule of law.*
>
> *The High Court ruled in the Zaoui matter that even in security cases applicants have the right to have a meaningful summary of the classified information and a real opportunity to rebut any prejudicial allegations.* (Immigration and Refugee Law Committee, Auckland District Law Society)

Some submitters also expressed concern that the proposals would lead to public distrust and a lack of credibility in immigration processes. A number of submitters were concerned that the use of classified information would affect New Zealand's reputation for fairness and undermine efforts to attract visitors, international students and skilled migrants to New Zealand. Some submitters suggested that the Canadian approach would be preferable.

However, there were also many submitters who indicated support for the proposals. Some of these submitters made reference to the need to protect New Zealand.

> *At all times, the security and protection of New Zealand from persons who present a security or other criminal, character, identify or credibility risk, whether real or perceived, is paramount. Where doubt exists, the interests of New Zealand must always prevail. Legislation should make specific reference to this to guide judges, appeal authorities, immigration officers and other agents of the State.* (Individual submitter)

The public meetings with stakeholders identified that a number of participants considered that a distinction should be made between classified security information and other classified information. To some extent, this view was also reflected in the submissions, with greater concern being expressed about the use of non-security classified information in decision-making.

A number of submitters made comments about the definition and nature of classified information. Some submitters, including the Ombudsmen, expressed concern about introducing a new class of information that could be withheld without any consideration of the degree of harm that might result from its disclosure.

> *One of the purposes of the Official Information Act is "to protect official information to the extent consistent with the public interest". The proposal suggests that this is not being achieved and yet we are unaware of evidence to identify a problem that might require such a class exemption to be created.*
>
> *The history of the Official Information Act since 1982 demonstrates no case of which we are aware in which information that has been recommended to be released, has resulted in any detriment to the public interest. The information subject to the Official Information Act includes matters that would likely have far greater repercussions on the public interest if wrongly released, than the material here in question for which an exemption appears to be contemplated.*
>
> *The use of a class approach to secrecy of information should at least identify some prejudice against which such secrecy is intended to protect. To do otherwise is the antithesis of the Official Information Act approach, which requires that disclosure or non-disclosure of official information be tested against any resulting prejudice of disclosure.* (Office of the Ombudsmen)

Other concerns related to the accuracy of classified information, with many submitters questioning its reliability. One submitter commented that classified information can come from many sources, some of which are very accurate and others of which are questionable. The submitter suggested that a fair review of the information may require expert comment before a judge. A participant in one of the public meetings suggested that two independent reports should be required before classified information is used.

One submitter commented that other factors such as an individual's contribution to the community should be taken into account alongside any classified information.

SECTION 10: COMPLIANCE AND ENFORCEMENT

Overview

There was a reasonably high level of support for immigration officers having the power to require information to assist with investigations of people who may be liable for expulsion. Approximately 70 percent of submitters who responded to this issue indicated support for the proposal. Submitters considered that there should be strict controls on the use of the power, including clear definition of what information may be requested and under what circumstances, and provisions on the conduct of immigration officers. Submitters also commented that the power should be consistent with privacy and human rights legislation. Approximately 15 percent of submitters did not support the proposal, and commented that it is unnecessary or unwarranted.

Approximately 65 percent of submitters indicated support for extending the list of organisations that may be required to provide information to include broader industry groups. Many submitters agreed that health and education providers should not be included on the list. Some submitters made other suggestions about which groups should or should not be included on the list.

There was a mixed response to the proposal that immigration officers be able to detain people liable for detention for immigration purposes for up to four hours until the Police arrive. While approximately 70 percent of individual submitters expressed support for the proposal, only about half the organisations did; approximately 40 percent of organisations that made submissions on this issue were strongly opposed to immigration officers having a power to detain. Submitters commented on the need for specialist training in detention and attention to the rights of detainees, with many submitters expressing the view that the Police were best placed to undertake this role. Concerns were also expressed about the lack of an independent accountability mechanism, akin to the Police Complaints Authority, for dealing with complaints about the exercise of immigration powers. A number of submitters expressed concern about possible misuse of powers.

There was not a high level of support for immigration officers having the same powers of entry and search as Customs and Police have in the immigration context. Only 40 percent of submitters who addressed this issue supported the proposal. Many submitters considered that immigration officers should continue to work with the Police and Customs because these agencies have expertise in exercising powers of entry and search and there are mechanisms to ensure their accountability. Some submitters expressed concern that immigration officers may not use such powers fairly and that insufficient attention would be given to individual human rights. Submitters commented that in-depth training and comprehensive monitoring would be required if the proposal goes ahead.

Organisations that made submissions expressed strong support for the Minister of Immigration and delegated officials continuing to have the ability to grant permits to people in New Zealand unlawfully: approximately 90 percent agreed with the proposal. The response from individual submitters was mixed, with approximately 55 percent indicating

support and approximately 40 percent indicating opposition to the proposal. Submitters who oppose the proposal considered that once a person is determined to be in New Zealand unlawfully, they should be required to leave regardless of the circumstances.

There was very strong support for the introduction of permit extensions for people whose permits expire while their application for a further permit is being considered: approximately 90 percent of submitters indicated support for this proposal. Submitters noted benefits for applicants and for employers.

10.1: What powers do immigration officers need to monitor and enforce compliance with the Immigration Act?

The discussion paper considers three questions relating to the monitoring and enforcement powers of immigration officers:

1. What provision should there be for requiring organisations to provide information to assist with an immigration investigation?
2. Should immigration and customs officers have the power to temporarily detain a person pending the arrival of the Police?
3. Should immigration officers have the same powers of entry and search as Customs and Police have in the immigration context?

10.1.1: What provision should there be for requiring organisations to provide information to assist with an immigration investigation?

Summary of proposals

The discussion paper proposes that immigration officers have the power to require address information, or information on non-compliance with visa conditions, to locate and investigate people who may be liable for expulsion because they:

- have stayed in New Zealand beyond the expiry of their permit
- are breaching permit conditions (such as working on a visitor permit), or
- may have obtained their refugee status or permit through fraud or misrepresentation.

The discussion paper also proposes that the organisations that may be asked to provide this information be specified as industry groups rather than as companies (for example "telecommunications providers" rather than Telecom) and that additional industry groups be listed such as "finance and banking providers" and "insurance providers".

Key questions

1. Should officers be able to require information to assist with investigations regarding those who:
    a. have stayed in New Zealand beyond the expiry of their permit
    b. are breaching permit conditions (such as working on a visitor permit), or
    c. may have obtained their refugee status or permit through fraud or misrepresentation?
2. Do you agree with the proposal to extend the list of organisations (to broader

industry groups) that may be required to provide information?

Submitter response

Ninety four submitters responded to one or both of these questions: 51 submitters responded on behalf of organisations and 43 submitters responded as private individuals. Organisations that made submissions included immigration consultants, refugee and migrant groups, ethnic councils, human rights groups, community law centres, law societies, businesses, industry representatives, government agencies and one political party.

Comments on question one

Approximately 70 percent of submitters that addressed this question agreed that immigration officers should be able to require information to assist with the sorts of investigations outlined above.

Many submitters expressed qualified support for the proposal. They considered that there should be strict controls on the use of the proposed power including:

- a requirement that there be reasonable grounds for the investigation
- a clear definition of the information that may be requested
- provisions on how the power may be exercised by immigration officers
- provision for a code of conduct (similar to the Social Security Act 1964)
- a statement on how long the information may be retained
- reference to the Privacy Act, and/or
- consistency with the New Zealand Bill or Rights Act 1990.

Some submitters commented that comprehensive training of immigration officers would be required to ensure the power is exercised appropriately.

> *The NZAMI supports this proposal but only if strict controls are imposed and officers receive far more comprehensive training in this area than is presently the case. Exercise of these powers must be done in a manner that complies with human rights norms and privacy legislation.* (New Zealand Association for Migration and Investment)

> *As in existing legislation, the information that can be requested should be clearly prescribed.* (Churches' Agency on Social Issues)

Some submitters proposed that an immigration commissioner be appointed to oversee the exercise of powers by immigration officers. This proposal is discussed further in section 15.

A number of submitters did not express a clear preference for or against the proposed power to require information. These submitters also emphasised the need for strict controls on the use of any such power and consistency with privacy and human rights legislation. One submitter considered that there should be a strengthened right for migrants to respond to any potentially prejudicial information. Another commented that the accountability of

immigration officers should be increased to match the increased accountability of immigration consultants.

Approximately 15 percent of submitters did not support the proposal. A number of submitters considered that it is not necessary to extend immigration officers' powers to require information. One submitter expressed concern that the proposal could decrease the ability of organisations to obtain information from individuals due to reduced trust. Another submitter expressed the view that it should be necessary for visitors and students to sign a declaration permitting Immigration New Zealand to solicit information from other organisations.

> *This sounds more like Big Brother and an unnecessary expansion of bureaucracy. And adds to the lack of natural justice. Most people involved with immigrants are usually willing to help without extra laws to enforce it.* (New Zealand Burma Support Group)

Some submitters commented that they oppose any further increase in the powers of immigration officers in the absence of rigorous judicial safeguards. They did not elaborate on what these safeguards should be. Other submitters expressed the view that information should only be required after a District Court judge has considered whether the information is needed.

Comments on question two

Approximately 65 percent of submitters agreed that the list of organisations that may be required to provide information should be extended to broader industry groups. Support for the proposal was slightly higher from individual submitters at almost 75 percent. Approximately 20 percent of all submitters did not support the proposal, and approximately 15 percent either were unsure or did not indicate a clear view either way.

One submitter commented that careful consideration should to given to which industry groups are included on the list and that further consultation with these industries would be necessary. Another considered that the Privacy Commissioner should undertake a privacy impact assessment before extending the list to include further industry groups or organisations.

Many submitters agreed that health and education providers should not be among the organisations that could be required to provide information because of the risk that people would deprive themselves and their children of health and education services. However, one submitter commented that further consideration should be given to the inclusion of education providers because of the need to obtain as much information as possible on international students suspected of not fulfilling their immigration responsibilities. Another submitter commented that the proposal should not preclude health providers sharing information if they choose to (for example, if they consider a person has provided false medical tests).

Some submitters suggested some additional organisations or industries be added to the list in Schedule One of the 1987 Act, including:

- the Ministry of Justice (including the courts) and the Department of Corrections
- the farming sector and the taxi and prostitution industries with respect to employment, and
- finance, banking and insurance providers, including companies that provide finance for car purchases.
- Some submitters considered that some organisations should be excluded from the list:
- immigration consultants, lawyers, representatives and agents, and
- community organisations.

Some submitters expressed the view that the Department of Labour already has sufficient access to employer records. Local Government New Zealand noted that local authorities are already included in Schedule One but do not need to be because information on names and addresses they hold can be obtained through rating databases as a matter of public record.

A submitter who did not support the proposal commented that organisations should be defined rather than specified as broad industry groups, and that this information should be gazetted and made available through public notices. Another submitter considered that the current list of organisations is sufficient.

> *The organisations already listed are extensive. Most immigrants, for example, receive mail via New Zealand Post. In addition, the Department of Labour can obtain information from employers as quite a number of people who are in New Zealand unlawfully are working. It is difficult to see how including insurance companies in organisations that the Immigration Service can obtain information from can make any difference in locating people who are here unlawfully.* (Immigration Committee, Tongan community)

10.1.2: Should immigration and customs officers have the power to temporarily detain a person pending arrival of Police?

Summary of proposal

The discussion paper proposes that, in cases where it has been determined that a person needs to be detained for immigration purposes, certain immigration officers and customs officers have the power to detain the person until the Police can arrive, for a maximum of four hours. The discussion paper indicates that only delegated officers with appropriate training would be able to exercise the power and that procedural guidelines would establish the situations in which the power could be used.

Key question
1. Should delegated immigration and Customs officers be able to detain people liable for detention and/or arrest for immigration purposes until Police can become involved (for a maximum of four hours)?

Submitter response

One hundred submitters responded to this question: 56 submitters responded on behalf of organisations and 44 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, airline representatives, the Police, a territorial authority, the Ombudsmen and one political party.

There was a difference in response from organisations and individuals. The response from organisations was mixed: of the organisations that addressed this issue, approximately half supported immigration officers having a limited power of detention and approximately 40 percent opposed the proposal. Approximately 70 percent of individual submitters indicated support for the proposal and approximately 25 percent were opposed.

Some submitters considered that providing delegated immigration and customs officers with the power to detain people liable for detention for immigration purposes for up to four hours until the Police arrive would assist in dealing with immigration breaches or security risks.

> *Airlines support this change as being another link in the chain of efficient handling of breaches and suspected breaches.* (Board of Airline Representatives New Zealand)
>
> *With hugely increased security risks, this is essential. This is also important in portraying New Zealand as a much stronger hand in security matters.* (Individual submitter)

Many submitters who support the proposal expressed qualified support, commenting that:

- the power should only be used in exceptional circumstances and where there are sufficient grounds to warrant detention
- the power should only be used within defined areas such as airports and ports
- immigration and customs officers should receive appropriate training to the same standard as the Police
- the safeguards considered in the discussion paper need to be in place, and/or
- there should be sanctions for any misuse of powers.

> *NCWNZ understands that there are times when Immigration Officers need the power to detain people in the absence of the police. We would see this clause being used only in exceptional circumstances and that it is used only when there are 'reasonable grounds' and when the health and safety aspects were in place. We agree that special training need to be given to those empowered to detain.* (National Council of Women New Zealand)

Submitters who oppose the proposal raised similar issues about the need for specialist training and appropriate safeguards. However, they were strongly of the view that immigration and customs officers should not have the power to detain a person under any

circumstances. Many submitters commented that the Police have substantial training and expertise in exercising powers of detention and are accountable for their actions to the Police Complaints Authority. One submitter commented that immigration officers do not command the same trust as police officers, especially in migrant communities.

> *Detention should be the preserve of police officers - who are trained to do this task and are subject to statute and independent regulation (by the Police Complaints Authority).* (Individual submitter)

> *There is no basis for allowing any personnel other than the Police to exercise these powers and doing so would undermine the safeguards required for a fair and transparent system.* (New Zealand Law Society)

A number of submitters considered that the discussion paper had not made a compelling case for change and that a shortage of police officers was insufficient grounds for giving a power of detention to immigration officers. Some submitters suggested that it would be preferable to deal with this issue administratively.

> *The grounds given for this (Paragraphs 653-656) are based on expediency and are not compelling. They certainly do not reflect the seriousness of extending to a wider group of officials powers to interfere with the fundamental liberties of the person.* (Human Rights Foundation*)*

> *It seems far more appropriate to invest in better coordination between immigration officers and the police so the police do their job effectively, rather than training another tier of immigration officials to carry out police work.* (Individual submitter)

Many submitters commented on the potential for misuse of powers. A number of submitters considered that monitoring systems would need to be put in place to ensure that powers are being used appropriately. Submitters suggested a number of possible safeguards including:

- the right to appeal or seek review of a decision to detain
- access to counsel and legal aid
- supervision of the exercise of powers by an independent commissioner, and/or
- monitoring by the Human Rights Commission.

A number of submitters also commented on the need for comprehensive training, including training on the New Zealand Bill of Rights Act and the principle of natural justice.

> *If there is to be such a power, there should be access to a lawyer. People should have the right to have access to a lawyer without delay and in private. This should funded by the Government and an appropriate list of lawyers should be available. This consistent with section 23 of the New Zealand Bill of Rights Act. (Grey Lynn Neighbourhood Law Office)*

The Committee also wishes to emphasise generally that appeal rights (including habeas corpus) must be available and explained to a person in a language that they fully understand. (Immigration and Refugee Law Committee, Auckland District Law Society)

If new powers are conferred on immigration officers, an independent review and hearings panel needs to be established to ensure accountability and transparency in the use of these powers. (Auckland City Council)

In the event that this does go ahead, there must be strict training requirements for all officers and they must be instructed in their obligations and responsibilities under the Bill of Rights. Such measures should be used sparingly and only as a very last resort. (Global Immigration Group)

Some submitters, on the other hand, commented that the additional resources required to given effect to the various monitoring and training requirements would mean that the use of immigration officers would not be a cost-effective option.

Other comments made by submitters were that four hours is too long a period for detention by immigration officers and that adequate facilities would need to be provided. The Ombudsmen noted that the proposal could increase the number of complaints they receive, which would have resource implications for the Department and the Ombudsmen's office.

10.1.3: Should immigration officers have the same powers of entry and search as Customs and Police have in the immigration context?

Summary of proposal

The discussion paper proposes that immigration officers be able to exercise the powers of entry and search currently available to Police and Customs in carrying out specific immigration duties, which would enable them to:

- enter and search premises to serve a removal order, or
- enter and search aircraft or ships to detect an immigration offence or prevent it being committed.

The discussion paper indicates that, in both circumstances, the immigration officer would need reasonable grounds for exercising the power.

Key question
1. Should the existing powers of entry and search that Police and Customs have in the immigration context be conferred on immigration officers?

Submitter response

Ninety five submitters responded to this question: 55 submitters responded on behalf of organisations and 40 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups,

human rights groups, law societies, community law centres, other community groups, businesses, airline representatives, an employers association, the Police, the Ombudsmen and one political party.

There was not a high level of support for this proposal. Overall, approximately 40 percent of submitters agreed that immigration officers should have the same powers of entry and search that Police and Customs have in an immigration context, and just over half disagreed. There was a difference in response between individuals and organisations: the response from individuals was split fairly evenly between those who favour the proposal and those who do not; approximately 35 percent of organisations indicated support for the proposal and just over half were opposed.

Submitters who support the proposal generally did not elaborate on their views. A number of submitters expressed qualified support, commenting on the need for adequate safeguards such as guidelines, training and sanctions for any misuse of powers.

Submitters who oppose the proposal raised similar concerns as were expressed in relation to the proposed limited power to detain. Submitters considered that immigration officers should continue to work with the Police and Customs because these agencies have expertise in exercising powers of entry and search and there are mechanisms to ensure their accountability. A number of submitters expressed concern that immigration officers may not use such powers fairly and that insufficient attention would be given to individual human rights. Some submitters commented that the proposal is unnecessary and any issues can be dealt with administratively.

> *There is a need to maintain constraints on these powers and it is both unnecessary and inappropriate for immigration officers to be making decisions and exercising these powers. There is a concern that even in terms of the status quo, there is inadequate protection of civil liberties and immigrants' human rights. There is currently no authority able urgently to investigate detention, entry and search, revocation of temporary permits and other complaints.* (New Zealand Law Society)

> *TANI does not believe that this is warranted and is concerned about the abuse of such powers. Furthermore, TANI feels that immigration officers do not command the same trust that police officers do, especially in migrant communities. If any such delegation is enacted, it is important that the use of such powers is stringently monitored to ensure that particular communities are not unfairly targeted.* (The Asian Network Inc)

> *The only reasons advanced in support of giving immigration officers powers of entry and search seem to be based upon the possibility of inefficiencies existing in the current system, which are better resolved by enhanced coordination and cooperation between government agencies.* (Waitakere Community Law Service)

One submitter raised concerns about the possible health and safety implications for employers if immigration officers were to become injured while pursuing a person in a place of work. The submitter also commented that the Police and Customs are easily recognisable because they wear a uniform, unlike immigration officers, who should be required to produce verifiable identification before attempting to enter any place of work.

Some submitters considered that any powers of entry and search should be restricted to certain places. One submitter considered that immigration officers should not have the power to enter and search a place of work without being accompanied by a uniformed member of the Police or Customs, or having a warrant from the court. Another submitter suggested that there should be similar restrictions on private homes.

> *We submit that should Option B proceed for 10.1.3, that the power of immigration officers to enter and search premises should be limited to ships, aircraft, and ports of embarkation and disembarkation. Should immigration officers wish to enter places of work or dwelling houses they should have present a uniformed member of Police or Customs. Alternatively, they should obtain a warrant issued by a judge or appropriate court official to enter and search a place of work.* (Refugee and Immigration Committee, Wellington District Law Society)

As with the proposed limited power to detain, some submitters commented that in-depth training and comprehensive monitoring would be required and that resources would need to be made available to support this. A number of submitters commented that the exercise of powers would need to be consistent with the New Zealand Bill of Rights Act. The Ombudsmen noted the possible resource implications if the proposal were to lead to an increase in complaints to the Ombudsmen.

One submitter suggested that officers should be familiar with other languages and cultures to enable clear and appropriate explanation of what is happening and why.

10.2: What provisions are required to deal with the immigration status of a person who is in New Zealand unlawfully?

Summary of proposals

The discussion paper proposes retaining the discretionary ability to grant a permit to any person unlawfully in New Zealand on a case-by-case basis.

The discussion paper also proposes that provision be made for permits to be extended in situations where a person lodges an application for a further permit before the expiry of their current permit. The extension would last until the date that the new application is decided.

Key questions
1. Do you agree that the Minister of Immigration and delegated officials should continue to be able to grant permits to people in New Zealand unlawfully?

2. Should permit extensions be introduced for people whose permits expire while their application for a further permit is being considered?

Submitter response

Ninety one submitters responded to one or both of these questions: 52 submitters responded on behalf of an organisation and 39 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, law societies, community law centres, businesses, business and employer representatives, government agencies and one political party.

Comments on question one

There was a difference in response from organisations and individuals to this question. Organisations expressed strong support for the Minister of Immigration and delegated officials continuing to have the ability to grant permits to people in New Zealand unlawfully, with approximately 90 percent of organisations indicating agreement to the proposal. The response from individual submitters was mixed, with approximately 55 percent indicating support for the proposal and approximately 40 percent indicating opposition.

Submitters who support the proposal noted that there are a wide range of circumstances in which a person may be in New Zealand unlawfully and commented that it is desirable to consider the grant of a permit on a case-by-case basis. Some submitters commented that people may be in New Zealand unlawfully for genuine reasons or for circumstances beyond their control. A number of submitters considered that many of these people have the potential to benefit New Zealand and it is therefore in New Zealand's interests to allow them to stay.

> *There are a wide range of reasons why people become unlawful in New Zealand and/or cannot return to their countries of origin and many of these people have the potential to benefit New Zealand. It is therefore is entirely appropriate for the Minister of Immigration and delegated officials to have the discretion to deal with people unlawfully in New Zealand on a case by case basis.* (Waitakere Community Law Service)

> *Our members have extensive experience of these powers being utilised to expedite humane and common-sense decisions for those who, for example, inadvertently overstay. Retaining this part of the system is practical and desirable.* (New Zealand Association for Migration and Investment)

Some submitters considered that there should be checks and balances on the use of a discretionary power to ensure that it is being used fairly and appropriately. One submitter commented that whilst the decision to grant a permit should remain a matter of discretion, some policy guidelines would be useful to indicate the circumstances under which the power is to be exercised.

> *The discretionary power to the delegated officers should be monitored so that they are not being misused or biased towards any particular group or communities.* (Bangladesh New Zealand Friendship Society Inc)

Submitters who oppose the proposal considered that once a person is determined to be in New Zealand unlawfully, they should be required to leave regardless of the circumstances.

> *People who are overstaying are illegal immigrants and should be removed end of story. We need to get away from the soft touch of nice people in the immigration department overriding the system.* (Individual submitter)

> *I don't forget to pay the electricity or phone bill. With something as important as Immigration permits, a bad memory is no excuse.* (Individual submitter)

Comments on question two

Approximately 90 percent of submitters who addressed this question indicated their support for the introduction of permit extensions for people whose permits expire while their application for a further permit is being considered. A number of submitters commented that the proposal would remove a source of stress for applicants by ensuring that applicants do not become "unlawful" due to delays in application processing times.

> *This will remove a very real source of unnecessary stress and expense for migrants and should reduce the workload of visa officers who are currently having to consider repeated temporary permit applications whilst residence applications are under process.* (Access Immigration New Zealand Ltd)

> *If Immigration cannot make a decision before the applicants existing permit expires, it would be harsh and unfair for the applicant, at his/her own cost to leave the country and then have to come back again once immigration has made a decision.* (Individual submitter)

Submitters also noted that the proposal would have flow-on benefits for applicants by ensuring that they retain rights of review and appeal and are not disadvantaged in any future application for citizenship.

A number of submitters commented that the proposal would provide greater certainty to employers as well as permit holders. Some submitters commented that employers are often reluctant to employ migrants whose work permits are about to expire as they do not want to breach the 1987 Act. Another noted that many employers have people in New Zealand on specific projects, which are often extended at short notice, and it can be difficult for them to get new work permits arranged in sufficient time.

> *Currently, many employers are uneasy about continuing to employ people whose temporary work permits have or are about to have expired and who are awaiting the issue of a further permit as they do not wish to breach the provisions of the Immigration Act 1987. Anecdotally, some employers*

> *terminate the employment of such employees and rehire them if and when a further permit is eventually issued. This practice can cause disruption to business as well as uncertainty.* (Employers and Manufacturers Association (Central) Inc)

Some submitters expressed the view that permit extensions should be available to everyone rather than discretionary. One submitter considered that permit extensions should be automatic so time is not spent processing permit extension applications, thus further delaying the processing of the substantive permit application. Another submitter commented that high-risk applications could be prioritised by the Department of Labour.

Some submitters suggested that people should only benefit from permit extensions if applications for a further permit are made within a prescribed period of time. One submitter suggested applications should be lodged at least 30 days before the temporary permit is due to expire. Another submitter commented that concerns about frivolous applications could be addressed by requiring that the application for a further permit has met all the lodgement criteria.

> *If an applicant has what appears to be a genuine job offer, medicals and police clearances (or evidence of having applied for the police clearances some time ago) or in the case of a student, tuition fees fully paid, it is unlikely that the applicant has gone to those lengths if they are only needing to buy themselves some time.* (Fragomen New Zealand)

The few submitters who opposed the introduction of permit extensions did not elaborate on their views.

10.3: General comments and other issues raised by submitters

The Children's Commissioner commented that any increase in the powers of immigration officers should be accompanied by protocols and training to protect the rights of children and young people.

> *If Immigration Officers are afforded similar powers to those exercised by the Police, they should also be required to undertake specific training and have clear guidelines that protect the basic human rights of children and young people. In addition, appropriate procedures and protocols should be developed to ensure the correct and appropriate execution of those powers, which may include:*
>
> - *protocols for searching and detaining children and young people*
> - *information to raise awareness and increased understanding of children and young people's rights*
> - *complaints mechanisms for children and young people.* (Children's Commissioner)

One submitter raised an issue relating to people who are unlawfully in New Zealand but who are allowed to stay until their appeal rights are exhausted. The submitter expressed concern that such people have no means of supporting themselves and their families while they are waiting for their appeal to be heard and proposed that they be permitted to obtain an income and have access to health and education services during this period.

> *Typically these people are refugee status applicants who were granted work permits on arrival (however they could be any person who is lawfully in New Zealand whose permit expires or is revoked and who accesses a humanitarian appeal.) Their refugee status claims have been declined and although they are eligible to lodge a humanitarian appeal with the Removal Review Authority, their work permits are revoked.*
>
> *An appeal to the Removal Review Authority usually takes over one year to determine, and during that time, these people have no right to work and no access to benefits through Work and Income. Their children have no right to attend school. They are completely dependent on the good-will of charities. This is a deplorable situation and should not be allowed to continue.*
>
> *We urge that the Immigration Act be amended to ensure that anyone who is permitted to be in New Zealand pending the determination of an appeal be given access to the ability to obtain income, health and education. We strongly believe that this is a human rights issue and that in allowing a situation where people are deprived of the means of obtaining the basic necessities of life, such as food and shelter, New Zealand may well be in breach of its international obligations, particularly in relation to the welfare of children.* (Waitakere Community Law Service)

Submitters made a number of other suggestions for dealing with people unlawfully in New Zealand. These included:

- ensuring effective identification of people through the use of photographs and fingerprints
- penalising people who harbour a person who is unlawfully in New Zealand
- establishing a telephone “hotline” for people who want to report the whereabouts of people who are unlawfully in New Zealand, and/or
- publishing a bulletin with photographs and descriptions of those unlawfully in New Zealand in order to provide a deterrent to illegal migration.

SECTION 11: THE USE OF BIOMETRICS

Overview

Approximately 60 percent of submitters who commented on this section agreed that immigration officers should be able to require, use and store certain types of biometric information and request the voluntary provision of other types of biometric information. Approximately 20 percent of submitters did not indicate a clear preference for or against the proposal but commented on the legislative provisions that would need to be in place.

Submitters commented that the legislation should lay out the broad principles for the use of biometric information, with the detail of particular technologies included in regulations, and that the use of biometric information should be consistent with internationally-agreed standards and with New Zealand's privacy and human rights legislation. Submitters commented on the need for adequate safeguards to be put in place, and some submitters expressed the view that a detailed privacy impact assessment should be undertaken.

The main concerns were with the proposed power to request the voluntary provision of biometric information such as DNA testing. Some submitters considered that this would be intrusive and expressed concern that people would feel compelled to provide the information to avoid a negative inference being drawn by immigration officers. Some submitters opposed this part of the proposal while others commented on the safeguards that should be put in place.

11.1: Should immigration officers be able to require, use and store certain types of biometric information, and request the voluntary provision of other types of biometric information?

Summary of proposal

The discussion paper proposes that the legislation enable immigration officers to:

- require, use and store internationally-agreed standard types of biometric information (other than DNA), and
- request the voluntary provision of other types of biometric information, such as DNA and age verification tests.

Key question
1. Do you agree that the new legislation should create a two-tier power that enables immigration officers to: a. require, use and store internationally-agreed standard types of biometric information, and b. request the voluntary provision of other types of biometric information (as specified in regulations in each case)?

Submitter response

One hundred and two submitters responded to this issue: 56 submitters responded on behalf of an organisation and 46 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, representatives of the airline and tourism industries, a union representative, the United Nations High Commissioner for Refugees, government agencies and two political parties.

Overall, approximately 60 percent of submitters who addressed this issue agreed that the new legislation should include provisions enabling immigration officers to require, use and store biometric information. Approximately 20 percent were opposed to proposal and approximately 20 percent of submitters either were unsure or did not express a clear preference either way. There was a difference in response between organisations and individuals, with just under half the organisations indicating clear support for the proposal compared to approximately 70 percent of individual submitters. Approximately a third of the organisations that addressed this issue did not indicate support or opposition to the proposal.

A number of submitters commented on the increasing use of biometric information internationally and the need for New Zealand to keep up to date with developments and make appropriate legislative provision for the use of biometric information in immigration processes. Some submitters noted the potential for biometric information to serve the dual purpose of enhancing border security and facilitating the entry of low-risk travellers. Many submitters emphasised the need for the use of biometric information to be consistent with internationally-agreed standards, in particular the standards of the International Civil Aviation Organisation (ICAO).

> *The NZAMI recognises that more extensive and sophisticated use of biometric information is going to become a standard for international travel in the future. It is appropriate that the government take the opportunity presented by its Immigration Act review to introduce legislation that deals with the acquisition, use and storage of internationally-agreed standard types of biometric information.* (New Zealand Association for Migration and Investment)

> *Developments in technology since 1987 provide many opportunities to adopt new approaches to managing the border, enhancing security while at the same time providing efficient and effective facilitation of legitimate travellers. Biometric technology is one development which has the potential to achieve this two-fold purpose and it is important that the legislative framework provides the opportunity to take advantage of this development.* (Air New Zealand)

Some submitters commented that the legislation should lay out the broad principles for the use of biometric information, with the detail of particular technologies in regulations. They

noted that biometrics is a rapidly changing field of science and the legislation needs to be sufficiently flexible to permit the use of new technologies in the future.

Many submitters commented on the safeguards that need to be addressed in the legislation. Submitters commented that the legislation should be consistent with privacy and human rights legislation, and include provisions on:

- the uses to which the information must be put
- the length of time that information be stored and the means by which it must be stored
- the circumstances under which information may be shared with other governments and other government departments
- the means by which individuals can access and, if necessary, correct their personal information, and
- a process for reviewing the handling and use of biometric information.

> *It will be important to put in place a thorough review process so that the process for handling biometric information is not only under review but that it is scrutinised thoroughly to prevent misuse or inappropriate use of the personal information that is gathered.* (Immigration and Refugee Law Committee, Auckland District Law Society)

A number of submitters considered that a detailed privacy impact assessment should be undertaken to ensure that the appropriate safeguards are put in place. Submitters considered that this assessment should be undertaken by the Privacy Commissioner or another independent body.

> *Given the significant privacy implications, it is submitted that a comprehensive privacy impact assessment should be undertaken as soon as possible, and certainly before any legislative references to biometrics are introduced into Parliament.* (Human Rights Foundation)

The United Nations High Commissioner for Refugees commented on the safeguards required to prevent adverse consequences for people seeking protection in New Zealand and expressed the view that there should be restrictions on the sharing of biometric information with other countries in such cases.

> *In regard to the principles of privacy and confidentiality, UNHCR is of the view that the proposed legislation should specify that when information on biometric testing of certain individuals is to be shared with another country (notably in the context of ascertaining whether a person had sought protection in another country), such information-sharing should be the subject of specific agreements. These agreements should include, inter alia, restrictions on the parties who would be privy to this information, and prohibitions on the dissemination of this information to any party that is not specifically included in the agreement. It should also be clearly stated that this information should*

> *not be shared, under any circumstances, with the authorities of the country of origin of the individual concerned or of the foreign country in respect of which the application or claim is made.* (United Nations High Commissioner for Refugees)

A number of submitters commented on the reliability of the technology used to collect biometric information. One submitter commented that facial recognition technology had been found to be inaccurate in some countries. Another noted that DNA testing requires a sufficient database of the background ethnic population, which may not always be possible in the immigration context. Others commented that reliability issues need to be addressed in the legislation.

> *Legislation in this area needs to specify the reliability of any biometric testing used and the evidentiary weight to be applied to each test. This is important for situations where documentary and other evidence conflict with the results of a test.* (Wellington Community Law Centre)

Some submitters questioned who would meet the costs of the use of biometric information. Airlines cautioned against any expectation that they be required to re-equip with new technology at the border. A number of submitters expressed the view that applicants should not bear the cost, particularly refugee applicants who are offered DNA testing in order to establish family relationships.

While most submitters accepted the use of internationally-agreed standards types of biometric information in immigration processing, many expressed concerns about giving immigration officers the power to request voluntary provision of other biometric information. Some submitters considered that immigration officers should not have this power on the grounds that DNA testing and age recognition tests are intrusive and applicants may feel compelled to provide the information. One submitter commented that the proposal fails to take account of the impact of such intrusion on particular ethnic, cultural and religious groups.

> *Officials should not have the ability to request the voluntary provision of other types of biometric information (such as DNA). The concern is that while it is framed as a voluntary submission, applicants may feel compelled to provide samples. Furthermore, if they refuse to provide samples there is a risk that it could prejudice their application, or there could be at least a perception of this risk. Provision of this type of information is intrusive and applicants may not adequately understand the nature of their rights. (Global Immigration Group)*
> *The second limb of the proposal is more problematic from a human rights perspective. The use of DNA tests and age verification tests, by definition are intrusive and involve the potential invasion of bodily integrity. This aspect could engage s 21 of the NZBORA, depending if such tests could be considered "reasonable".* (Federation of Islamic Associations of New Zealand)

Other submitters commented on the restrictions and safeguards that should be put in place. These included:

- ensuring that any DNA testing is used solely for the purpose of assessing immigration and refugee applications
- developing protocols on confidentiality and the consequence of "unexpected results"
- providing counselling, particularly to refugee applicants, and
- requiring that immigration officers do not make a negative inference if a person refuses to provide biometric information.

Some submitters considered that DNA testing should not be used as the sole basis for determining family relationships. A number of submitters, on the other hand, considered that DNA testing should be used more widely.

> *I believe that immigration officers should probably routinely demand biometric information, including the provision of DNA and if needed age verification tests. This should assist in avoiding deportation of the wrong person and assist to confirm the identity of those who may use several different names.* (Individual submitter)

Some submitters did not support any use of biometric information.

> *To allow for collection of biometric information such as fingerprints and iris scans from all people trying to enter New Zealand to detect some identity fraud or a few high-risk individuals will be a step too far. People attempting to enter a country should not be treated like criminals. If there is a need for the collection of biometric information to detect identity fraud and very high-risk individuals, then such collection should be limited to people considered as posing a risk*. (Immigration Committee, Tongan community)

SECTION 12: DETENTION

Overview

Submitter response to the proposals to extend detention periods was mixed. These proposals included:

- extending the initial detention period without a warrant of commitment to a maximum of 96 hours in expulsion cases
- giving the judge discretion to extend the period for review of a warrant of commitment to a maximum of 28 days, and
- enabling the maximum detention period to be extended to up to six months where administrative delays outside the control of the Department of Labour prevent earlier removal.

In all three cases, approximately 40 to 45 percent of submitters indicated support for the proposals and between 35 and 45 percent were opposed. Submitters commented that these proposals could constitute arbitrary detention and that administrative convenience is an insufficient ground for infringing the detainee's human rights. Many submitters expressed the view that detention should always be for the minimum period possible and that detainees should have early access to the courts, and regular review, to assess the continuing need for their detention. Submitters also commented that detainees should have access to legal representation.

Approximately 60 percent of submitters agreed that the court should be able to waive the requirement to renew a warrant of commitment to detain a person who has been refused entry to New Zealand and is serving a prison sentence for criminal behaviour. Some submitters commented that the requirement should only be waived while the person is in prison, with a review taking place before the person is released.

There was a mixed response from submitters to the proposal that refugee status claimants who are high-risk may be detained, regardless of when they made their claim for refugee status: organisations were fairly evenly divided between those who support and those who oppose the proposal; approximately two thirds of the individual submitters expressed support for the proposal and approximately 20 percent were opposed. The main concerns were that the proposal could be contrary to the Refugee Convention requirement that detention only be undertaken when necessary and that it could constitute arbitrary detention. A number of submitters commented that detention needs to be consistent with the guidelines of the United Nations High Commissioner for Refugees. Some submitters commented that, in line with the Refugee Convention, refugees should not be punished for the use of false documents. Others commented on the need for clear and robust information on the reasons for detention in any given case.

Most submitters agreed that people detained for immigration purposes should not be detained alongside remand prisoners and convicted criminals. Approximately 55 percent of submitters considered that immigration officers should be able to undertake secure

detention. However, a number of submitters considered that this power should not be vested in immigration officers given the specific training requirements for this role. Other submitters expressed concern that the proposal could lead to increased use of detention.

12.1: What is the appropriate maximum period for detention without a warrant in expulsion cases?

Summary of proposals

The discussion paper presents two options:

A. Maintain the status quo and continue to enable a person to be detained without a warrant of commitment for up to 48 hours in the case of deportation or up to 72 hours in the case of removal, or
B. Extend the maximum period of initial detention without a warrant of commitment in expulsion cases to up to 96 hours (four days).

The discussion paper indicates that there is no clear preference for either option at this stage.

Key question
1. Do you agree that the period of initial detention without a warrant of commitment prior to expulsion from New Zealand should be increased to a maximum of 96 hours (four days)?

Submitter response

Eighty seven submitters responded to this question: 49 submitters responded on behalf of an organisation and 38 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, airline representatives, government agencies and one political party.

The response from submitters was mixed. Approximately 45 percent of submitters who responded to this issue agreed that the maximum period of initial detention without a warrant of commitment should be increased to 96 hours in expulsion cases. Approximately 35 percent of submitters were opposed to this option, and the remainder either were unsure or did not express a clear preference either way.

Submitters who support the extension of the initial detention period generally did not elaborate on their views. The main concerns expressed about this option were that there do not appear to be strong reasons for extending the initial period of detention and that it could constitute arbitrary detention, contrary to section 22 of the New Zealand Bill of Rights Act 1990. A number of submitters commented that the initial detention should be for the minimum justifiable period, with access to legal advice and judicial consideration of the need for ongoing detention as soon as possible. Submitters also commented on the need for consistency with New Zealand's domestic and international human rights obligations.

> *Detention rights should always be kept to a minimum and there is no justification for extending the period of initial detention. Administrative expediency should not be a consideration when important human rights are at stake. (New Zealand Association for Migration and Investment)*
> *The reasons provided to support this proposal are not sufficient to outweigh the rights of detainees to have early access to the legal system to review the ongoing need for detention. The need to renew a warrant of commitment provides the individual with greatest access to the legal system, ensures that the need for continued detention is determined by the appropriate authority and enables the individual to seek assistance to appeal that decision where appropriate/necessary.* (New Zealand Law Society)

Some submitters acknowledged that there could be delays in removing a person on the next available flight but did not consider that these issues should or would be addressed by extending the initial detention period. Airline representatives confirmed the difficulties in ensuring persons liable for expulsion have the appropriate travel documentation but did not indicate a preference for or against extending the initial detention period.

> *To the list of factors influencing removal time given in Paragraph 803 we would add: unsafe country of origin or destination; and statelessness. Neither of these, nor the majority of reasons given in the list would be overcome by extending the period to 96 hours. Given this, such an extension could constitute arbitrary detention.* (Human Rights Foundation)

> *We endorse this identified difficultly and urge the Department to work to develop solutions. It is a major problem for airlines.* (Board of Airline Representatives New Zealand)

A number of submitters expressed the view that the status quo should be maintained, with a warrant being required in order to detain a person longer than 48 hours in the case of deportation or 72 hours in the case of removal. One submitter, however, considered that the maximum period should be 48 hours in both cases.

One submitter commented that 96-hour detention could be acceptable if the following pre-conditions were met:

- it follows the issue of a removal/expulsion order
- the detainee is given access to a lawyer for the purpose of challenging the detention
- the detainee is clearly informed of his or her rights in a language that s/he understands
- the detainee is given a meaningful opportunity and all necessary assistance to exercise these rights.

12.2: What is an appropriate review period for warrants of commitment?

Summary of proposal

The discussion paper proposes that judges have discretion to authorise detention, after the initial detention period, for up to 28 days at a time rather than review the renewal of a warrant of commitment every seven days as is currently required.

Key question
1. Do you agree that the review period for warrants of commitment for detention should be increased from every seven days to no more than every 28 days?

Submitter response

Eighty three submitters responded to this question: 45 submitters responded on behalf of an organisation and 38 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, a government agency and one political party.

The response from submitters was mixed. Approximately 40 percent of submitters who addressed this issue agreed that the review period for warrants of commitment for detention should be increased to no more than 28 days. Approximately 40 percent of submitters were opposed to the proposal, and the remainder either were unsure or did not indicate a clear preference either way.

A number of submitters expressed qualified support for the proposal, commenting that:

- every 14 days would be more appropriate
- there should be provision to allow the detainee to apply for conditional release during the period,
- legal aid should be available, and/or
- the detainee should be allowed to waive the weekly review period if they are represented by counsel other than the duty solicitor.

Some submitters commented on the need to emphasise the discretionary nature of the judge's power to order detention beyond seven days. A participant at a public stakeholder meeting suggested that the legislation include guidance about the factors a judge should take into account when determining the period of detention.

Many submitters expressed concern that the current system of weekly reviews is a "rubber stamping" exercise and should not be carried over into the new system.

> *The current 7-day review period is viewed by many as little more than a "rubber-stamp" procedure. If this practice was carried into a 28-day review period, it may impact on the right to not be arbitrarily detained unless the requirements of a fair trial are established.* (Wellington Community Law Centre)

Submitters who oppose the proposal considered that regular and frequent reviews are required to assess the ongoing need for detention and protect the human rights of detainees. Submitters commented that circumstances can change within a short period of time and detainees need to be able to present new information to the courts as soon as possible.

> *It is a fundamental right for a detained person to have the legality of their detention reviewed within a reasonable time. The present system allows for a regular independent assessment of whether such detention is justified.* (Amnesty International New Zealand)

As with the possible extension of the initial detention period, a number of submitters commented that extending the timeframe for review for reasons of administrative convenience could constitute arbitrary detention and/or contravene section 23 (1) of the New Zealand Bill of Rights Act, which includes the right to consult a lawyer without delay. Some submitters commented on the vulnerability of many detainees.

> *Any proposal to increase the amount of time a person may be held without a warrant of commitment, or seven-day extension thereof, should be resisted as in my experience the regular supervision entailed by the present system stops abuse. Many of the people thus held have poor, or no English, and limited understanding. Often they have had no access to any form of legal representation.* (Individual submitter)

The Auckland Refugee Council expressed the view that there should be a presumption against the detention of refugee status claimants and that, in such cases, the review period should be extended only if a person has been convicted of a crime. The Council also commented on the framework for the review of detention.

> *We also believe that there should be a statutory framework for frequent and regular reviews of decisions to detain, legal aid available for such reviews AND that the District Court should have 1. statutory discretion to release detainees; and 2. an obligation to release detainees where Immigration is unable to prove that there are well founded security or identity concerns in relation to such detainees.* (Auckland Refugee Council)

As with submitters who support the proposal, a number of submitters who oppose the proposal commented that 10 or 14 days would be a more appropriate period if the review period is to be extended. One submitter suggested the Canadian approach would be preferable, with the first review after seven days and a review every 30 days thereafter. Other submitters suggested that the review period should only be extended with the consent of the detainee, who would have to be represented by counsel to give such consent.

12.3: Is it ever necessary to detain a person for longer than three months while arranging their expulsion from New Zealand?

Summary of proposal

The discussion paper proposes that a third exception to the three-month maximum period of detention be included in the legislation. The discussion paper proposes that a judge may detain a person for up to six months in cases where the judge is satisfied that administrative requirements for the expulsion could not be finalised within the three-month period, through no fault of the Department of Labour. The onus would be on the Department of Labour to do everything possible to arrange removal within three months.

Key question
1. Should a third exception to the maximum three-month period of detention be introduced to allow detention for up to six months, where administrative delays outside the control of the Department of Labour occurred that prevented earlier removal?

Submitter response

Eighty submitters responded to this question: 42 submitters responded on behalf of an organisation and 38 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, a government agency and one political party.

As with the other proposals to extend statutory detention periods, the response from submitters was mixed. Approximately 45 percent of submitters agreed that detention be allowed for up to 6 months in cases where administrative delays beyond the control of the Department of Labour prevent earlier removal, and 45 percent disagreed.

A number of submitters expressed qualified support for the proposal, emphasising the need for the provision to be used in truly exceptional circumstances and only following consideration by the court.

> *RCNZ would not object to an extension of the maximum period during which a person slated to be removed from New Zealand may be detained, provided the onus is placed on the NZIS to satisfy the Court that, on a balance of probabilities, that without that extended period of detention, the removal could not be carried out.* (Refugee Council of New Zealand)

Submitters who oppose the proposal considered that the maximum detention period is already too long and that any extension could result in the detention being considered arbitrary under section 22 of the New Zealand Bill of Rights Act. A number of submitters commented that there is insufficient justification for the proposal, with some expressing concern that administrative processes could take more than three months.

This proposal met unanimous opposition. There seems no justification for extending already overlong periods of detention. (Immigration and Refugee Law Committee, Auckland District Law Society)

Despite the administrative justifications made for this proposal, such a move would encroach unacceptably on the rights of individual detainees and may be construed as an extra-judicial means of imposing a penal sentence. (New Zealand Law Society)

If the bureaucracy was efficient it would get its job done before the 3 months period was up. (Individual submitter)

One submitter expressed the view that, if there is to be an extension, it should only be in the circumstances proposed in the discussion paper and the person detained should have the right to access a lawyer without delay and in private, and that this should be funded by the Government.

12.4: Should warrants of commitment require a weekly renewal if a person is serving a prison sentence?

Summary of proposal

The discussion paper proposes that the legislation enable the court to waive the existing requirement to renew a warrant of commitment every seven days where a person has been refused entry to New Zealand and is serving a prison sentence for criminal behaviour. The discussion paper suggests that the requirement for judicial review of immigration detention be waived until seven days after the end of the criminal sentence.

Key question
1. Should the court be able to waive the requirement to renew a warrant of commitment to detain a person who: a. has been refused entry to New Zealand, and b. is serving a prison sentence for criminal behaviour?

Submitter response

Seventy submitters responded to this question: 33 submitters responded on behalf of an organisation and 37 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, law societies, community law centres, other community groups, businesses and a government agency.

Approximately 60 percent of submitters agreed that the court should be able to waive the requirement to renew a warrant of commitment to detain a person who has been refused entry to New Zealand and is serving a prison sentence for criminal behaviour. A number of submitters expressed qualified support for the proposal, commenting that:

- the application for the renewal requirement to be waived should made by the affected person
- the requirement should only be able to be waived while the person is in prison and not while they are on bail or following their release
- review of the warrant of commitment should take place before the scheduled release date
- detainees should have full access to review and appeal rights, and/or
- particular care should be taken in situations where a person is charged with passport fraud and is determined to be a refugee.

Approximately 20 percent of submitters opposed the proposal that the court should be able to waive the requirement to renew a warrant of commitment to detain a person who has been refused entry to New Zealand and is serving a prison sentence for criminal behaviour. Most of these submitters did not elaborate on their views. One submitter expressed the view that there should not be a warrant of commitment at all if a person is serving a prison sentence. Another commented that the proposal is open to abuse and could amount to arbitrary detention.

12.5: Should detention be available for immigration purposes at the border and onshore?

Summary of proposal

The discussion paper proposes that any refugee status claimant who meets the criteria for detention may be detained while their claim is being determined, regardless of whether they claimed refugee status at the border or after arrival in New Zealand. The discussion paper notes that, under the criteria for detention, a person could only be detained if they were refused entry at the border, were in New Zealand unlawfully or claimed refugee status under a different identity to that specified in their permit. In all circumstances, secure detention would be limited to very high-risk claimants where the risk could not be managed through open detention or release on conditions and where it was not appropriate to grant a permit. Detention would be subject to judicial review by the courts.

Key question
1. Should the gap in the current Immigration Act be closed to enable high-risk refugee status claimants to be detained, regardless of when the claim is made?

Submitter response

Seventy five submitters responded to this question: 42 submitters responded on behalf of an organisation and 33 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, the United Nations High Commissioner for Refugees, a government agency and one political party.

There was a difference in response from organisations and individuals. Of the organisations that responded to this issue, there was a fairly even split between those who support the

proposal and those who oppose it. Of the individual submitters, approximately two thirds indicated support for allowing all high-risk refugee status claimants to be detained, and approximately 20 percent were opposed to the proposal.

Most submitters who expressed support for the proposal did not elaborate on their views. One submitter commented that the ability to detain is essential to counter allegations that New Zealand is a "soft touch" and another expressed the view that all refugee status claimants should be detained in a similar way to Australia.

The United Nations High Commissioner for Refugees (UNHCR) expressed qualified support for the proposal.

> *UNHCR answers the question in the affirmative PROVIDED that the same strict criteria for detention as stated at Paragraph 896 of the Discussion Paper are applied and UNHCR's relevant Guidelines on Detention are duly taken into account.* (United Nations High Commissioner for Refugees)

The UNHCR also commented that detention of asylum seekers is undesirable and should only be undertaken where necessary, after having considered all possible alternatives.

Many submitters expressed concern that the proposal is contrary to the Refugee Convention. They commented that the purpose of the proposal appears to be to provide a deterrent to people claiming refugee status after arrival in New Zealand, rather than at the border, which does not meet the requirement that detention only be undertaken where necessary. Concerns were also expressed about the detention of people who use fraudulent documents given the Refugee Convention requirement that refugees not be punished for travelling on false documents.

> *Definitions of 'high risk' asylum seekers within the discussion paper includes those detainable on counts of identity fraud because of use of false documents, which contravenes the 1951 Geneva Convention right of refugees to not be punished for travelling on false documents. The purpose of this proposal to use detention as a deterrent to asylum-claims from within communities, amount to punishment of asylum-seekers, which is also unlawful under the Convention.* (Individual submitter)

Some submitters commented on why refugee status claimants travel on false documents.

> *Those making decisions on detention for those claiming refugee status must keep in mind the reasons why refugee status claimants enter the country on false documentation, which may include fear of government agencies, fear of reprisals from their home government, instructions from "people smugglers" and so on.* (New Zealand Law Society)

Others expressed concern that measures aimed at deterring people from unlawfully entering New Zealand to claim refugee status would adversely affect genuine refugees.

> *Increased deterrence measures are not likely to make any difference in this area, but will simply create additional barriers for genuine asylum seekers, who have little option but to use any means possible to escape persecution.* (Human Rights Foundation)

As with other proposals in this area, submitters expressed concern that this proposal could result in arbitrary detention and the infringement of individual rights. Some submitters considered that there should be a presumption against the detention of refugee status claimants given the Refugee Convention requirement that refugees only be detained "where necessary". Others emphasised the need to make decisions on a case-by-case basis, and for reasons other than the fact that a refugee status claim has been lodged.

> *We firmly believe that there should be a built in presumption against detention for refugee claimants explicit in legislation. We are conscious that a number of refugee claimants have ended up in prison pending removal. Those who make a subsequent application for refugee status are sometimes subject to many months of incarceration. We would like to have made available to such people a thorough investigation as to their humanitarian circumstances in order for bail or conditional release to be considered.* (Auckland Refugee Council)

> *Caritas considers that there is too frequent use of detention of refugees, and that the status quo at times already resembles a borderline situation of arbitrary detention. We believe there is a need for a re-examination of the approach taken in regard to people seeking refugee status in New Zealand who appear to be routinely detained in custody.* (Caritas Aotearoa New Zealand)

> *If a person has not been detained for some other lawful reason (e.g. breach of immigration law or an extradition request), we see no reason why the mere fact that a refugee claim has been lodged should make that person liable to detention.* (Immigration and Refugee Law Committee, Auckland District Law Society)

A number of submitters expressed the view that a decision to detain a refugee status claimant should only be made at the border. One submitter suggested that if a person has been in the community for some time with no evidence of risk, there is no basis for subsequently detaining that person. The submitter commented that there should be clear and robust information on why a person poses a security risk, and that information from a refugee status claimant's home country should not be considered conclusive.

12.6: Should the Immigration Act give practical support to the Chief Executive's power to designate a place of immigration detention?

Summary of proposal

The discussion paper proposes that immigration officers have the power to undertake immigration detention in places approved by the Chief Executive for that purpose. This would enable the Department of Labour to detain a person for immigration purposes in places other than Police or Corrections facilities.

Key question
1. Should the Immigration Act give effect to the Chief Executive of the Department of Labour's power to designate a place of immigration detention by enabling designated immigration officers to undertake secure detention?

Submitter response

Seventy eight submitters responded to this question: 45 submitters responded on behalf of an organisation and 33 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, airline representatives, the United Nations High Commissioner for Refugees, a government agency and one political party.

Most submitters agreed that people detained for immigration purposes should not be detained alongside remand prisoners and convicted criminals. However, submitters expressed different views about the appropriate response to this issue. Approximately 55 percent of submitters who addressed this issue indicated support for enabling immigration officers to undertake secure detention. Approximately 25 percent opposed the proposal and approximately 20 percent either were unsure or did not indicate a clear preference either way.

Submitters who support the proposal commented on the need for detention to take place in facilities that:

- meet international standards, including UNHCR guidelines
- are staffed by well-trained personnel, and/or
- are separate from facilities for Quota refugees, who are among New Zealand's most vulnerable residents.

Some submitters supported the use of separate facilities but expressed the view that immigration officers should not undertake secure detention.

> *Immigration detainees should certainly be treated differently from remand prisoners and convicted criminals, and should not be held in the same facilities as criminal offenders. The power to undertake secure detention is not a power to be extended to immigration officers who, in general, do not have sufficient qualifications, skill nor expertise. Those who undertake secure detention*

> *should have appropriate police/corrections experience balanced by an understanding of the human rights issues involved.* (New Zealand Law Society)

The UNHCR expressed the view that the legislation should clearly define which immigration officers would have the power and what is meant by "undertake" secure detention. The UNHCR also commented that any designation of a place of immigration detention by the Chief Executive should occur before detention takes place and not after its commencement.

Some submitters expressed support for the proposal but questioned why additional powers of detention are proposed in the absence of adequate facilities.

> *Since the Paper acknowledges that detention facilities are inadequate and clearly states that no new facilities are intended to be built, why does it seek so many extra powers of detention?* (Individual submitter)

A number of submitters reiterated their view that detention should always be a measure of last resort and only undertaken when absolutely necessary. Some of these submitters expressed concern that the designation of additional detention facilities may lead to increased use of detention and opposed the proposal on this basis.

> *This submission opposes the extension of powers to create new places of detention, as there is no guarantee that the 'limited' and 'temporary' nature of such places of detention as envisaged in the policy process, would remain so in practice, or that there will be any safeguards against abuse of the power.* (Individual submitter)

> *Detention for immigration purposes should only be used in extreme circumstances. Immigration detainees should be dealt with outside the prison system and preferably in non-custodial options. It follows that it is inappropriate to create new facilities. The aim should be to minimise the use of correction facilities, not create more.* (Human Rights Commission)

Some submitters commented that there is no need for this power, and one submitter suggested that consideration be given to home detention-type devices as an alternative.

12.7: General comments and other issues raised by submitters

A number of submitters made general comments expressing concern that the proposals relating to detention would breach human rights legislation and New Zealand's international obligations. Submitters commented that there was inadequate justification for these proposals.

> *BNZFS does not feel that any of these measures are warranted. These measures would breach human rights provisions and would breach New Zealand human rights legislation.* (Bangladesh New Zealand Friendship Society Inc)

> *Undoubtedly, other sections of our society, such as police, are also frustrated by the time and complexity of arguing before courts the merits of detaining particular individuals. However in general Caritas believes our justice system has developed an appropriate balance between collective security and individual human rights. We do not want to see any watering down of that balance for reasons of administrative expediency in immigration matters.* (Caritas Aotearoa New Zealand)

> *The proposed powers of detention without warrant or review, in particular, are unlikely to be politically or legally acceptable if they were ever sought in respect of citizens. There seems little justification, in our view, for imposing them on non-citizens - and especially on refugee applicants.* (Immigration and Refugee Law Committee, Auckland District Law Society)

As discussed in section 12.5, many submitters considered that refugee status claimants should not be detained unless there is a clear and well-defined risk to New Zealand. Some submitters commented that other vulnerable groups of people should not be detained, including:

- women with children
- children, and/or
- psychologically ill refugees and asylum seekers.
- Participants at public stakeholder meetings suggested that the community play a greater role in supporting people who might otherwise be detained.

> *The present legislation should be amended to prevent women with (and) children being held in detention all cases. Arrangements can be made for placement in the community.* (Individual submitter)

> *AINZ supports the introduction of provisions expressly disallowing the detention of minors and of psychologically ill refugees and asylum seekers.* (Amnesty International New Zealand)

A number of submitters commented on the safeguards that should be in place for the exercise of detention powers, including:

- clear definition of detention powers and their limits in the legislation
- a legislative principle that, in cases where a crime has not been committed, detention should only be used as a last resort
- access to legal representation for detainees
- availability of legal aid, and/or
- mechanisms for oversight of the use of detention powers, which could include an independent immigration commissioner.

> *Our key concerns here are the current lack of meaningful access to counsel and lack of effective oversight and redress as per our comments above regarding the need for an immigration commissioner. At present District Court oversight is weak and access to review haphazard due to lack of legal aid.* (Hutt Valley Community Law Centre)

> *Many of the areas in the Review raise oversight issues, revealing a gap in immigration not apparent in other departments. This review should therefore give consideration to the statutory appointment of an independent Immigration Commissioner. This is an important position given the context of strengthened powers of detention and expulsion being proposed. An independent Immigration Commissioner is considered a vital check on the powers exercised that affect the liberty and safety of persons entering and settling in New Zealand and on ensuring procedures maintain minimum standards of fairness and transparency.* (Wellington Community Law Centre)

Submitter comments on the role for an immigration commissioner are discussed further in section 15.

SECTION 13: THE ROLE OF THIRD PARTIES

Overview

Information-sharing

Approximately 65 percent of submitters who responded to this issue indicated support for enabling immigration status to be disclosed to third parties in order to determine eligibility for publicly-funded services. These submitters considered disclosure to be necessary to ensure that only those who are eligible for publicly-funded services can access them. The main concerns with the proposal were around ensuring the privacy of individual persons and providing adequate safeguards and restrictions around what information may be disclosed and the use of that information. Submitters also expressed concerns that the proposal could disadvantage the children of those unlawfully in the country as their parents may be reluctant to approach service providers out of fear of potential immigration consequences.

Sponsors

Over 70 percent of submitters commenting on sponsor obligations indicated support for establishing a stronger legislative basis for sponsorship, and approximately 60 percent supported the use of specific immigration consequences for sponsors who fail to meet their obligations. There were mixed views about the both the detail of the sponsorship provisions and the consequences that should be applied. Many submitters opposed the use of bonds in sponsorship and argued that it would be a significant burden to both families and organisations and may act as a deterrent to sponsorship.

Employers

Approximately 65 percent of organisations and 80 percent of individual submitters responding to this section indicated support for providing a stronger legislative basis for employer responsibilities. However, there were some concerns about enabling additional responsibilities to be imposed through government immigration policy and some submitters felt that the proposed legislative reminder of employment obligations is unnecessary.
Most comment was made on the possibility of employers being required to check that a prospective employee is entitled to work for that employer. While around two thirds of all submitters supported this option, there was strong opposition from business and employer groups, and some migrant groups. The main concerns were the additional compliance costs for employers, practical difficulties in verifying immigration status and the possibility that it would deter employers from employing migrants and/or lead to discrimination. Those who opposed the option considered that the “reasonable excuse” is indeed reasonable. Many submitters commented that if this option were to be enacted, effective tools would be required to enable employers to easily and quickly check immigration status. Education of employers was another common suggestion for helping to ensure that employers meet their obligations.

Education providers

There was strong support for including reference to the Ministry of Education’s Code of Practice for Pastoral Care of International Students in immigration legislation: over 80

percent of submitters who responded to this question indicated their agreement. Submitters commented on the need to protect both international students and New Zealand's reputation. There was also reasonably high support for giving immigration officers the power to require information from education providers and for the introduction of a flexible penalties regime, with approximately 75 percent support for both proposals. In relation to the power to require information, concerns were expressed about the potential compliance costs for education providers and the need to ensure the privacy of individual students. Compliance costs were also raised as a concern in relation to the possible use of an instant fines regime, and a number of submitters argued that flexibility is required to allow for individual circumstances and that education providers should be provided with an opportunity to respond to any issues of non-compliance.

Carriers

Approximately 70 percent of submitters who addressed this issue supported the proposed minor amendments to carrier obligations. However, the airline representatives who responded argued that it is no longer appropriate to require carriers to check evidence of onward travel or sufficient funds given that people may not carry physical evidence of these things. They also sought clarification of the other proposed amendments. There was less support for an instant fines regime, with only around 45 percent of submitters indicating agreement to this option. The airline representatives noted that the level of non-compliance is already very low and argued that an instant fines regime would simply increase compliance costs without addressing the underlying cause of non-compliance. Human rights groups and refugee and migrant groups expressed concern that an instant fines regime would adversely affect asylum seekers. They noted the United Nations High Commissioner for Refugees' view that airlines should not be penalised for transporting people seeking protection from persecution.

13.1: When should a person's immigration status be known to third parties delivering a publicly-funded service?

Summary of proposal

The discussion paper proposes that the legislation give authority for the Department of Labour to disclose information on immigration status where it is needed to:

- assess eligibility for publicly-funded services
- assess liability to repay the costs of a public service already used, and
- make an assessment under any other Act that requires an assessment of immigration status.

The discussion document indicates that safeguards would be put in place limiting the information that can be provided, ensuring access to information is restricted to those who need to know, informing people that information about them may be disclosed in certain circumstances and providing for them to know who has been making inquiries about their immigration status. The Department of Labour would not be able to use a request for information on immigration status as the basis for its own enquiries (for example,

attempting to locate a person unlawfully in New Zealand through the organisation making the request for information).

Key question
1. Do you agree that there should be legislative authority to disclose immigration status information to third parties that need to know in order to determine eligibility for publicly-funded services?

Submitter response

Ninety five submitters responded to this question: 54 submitters responded on behalf of organisations and 41 responded as private individuals. Organisations that made submissions on this proposal included immigration consultants, ethnic councils, migrant groups, community law centres, other community groups, the New Zealand Law Society, the Human Rights Commission, the Families Commission, the Children's Commissioner, one political party and representatives of local government, businesses, business representatives, and the airline and education industries.

Approximately 65 percent of submitters indicated support for the proposal, approximately 25 percent opposed or expressed concerns about the proposal and the remainder either were unsure or did not indicate a clear view either way.

Comments of submitters who support the proposal

Many of the submitters who support the proposal expressed the view that disclosing immigration status is necessary to ensure that health, welfare and other publicly-funded services are only provided to those who are eligible for these services. One submitter commented on the effect that those who illegally access services have on other visitors who do "play by the rules".

> *Information sharing between government agencies would assist in eliminating those very very rare cases where international students have been able to illegally gain access to public social services, health and education. These very rare cases have on occasion cast a shadow over the entire international student population – a shadow that is not only grossly inaccurate, but is unfair.* (Education New Zealand)

Some submitters expressed qualified support for the proposal, noting that:

- the safeguards noted in the discussion paper need to be included in the legislation
- privacy concerns need to be addressed and applicants adequately informed that information may be disclosed, and/or
- the permission of the individual should be sought.

Some submitters considered that disclosure of immigration status should be a last resort measure and that providers should be required to first seek information from the individual. A few submitters expressed the view that the legislation should provide for information-sharing for the purpose of identifying people whom New Zealand does not want in the

country. One submitter suggested greater information-sharing with other governments to enable the Advanced Passenger Processing system to stop such people before they come to New Zealand. Another submitter advocated data-matching with government agencies and service providers to identify those already here.

Comments of those who oppose or expressed concerns about the proposal

Many of those who oppose the proposal raised concerns about breaching the right to individual privacy. Some submitters expressed the view that the proposal is contrary to the Privacy Act and others commented that the Privacy Act should be adequate to deal with these situations. One submitter noted that a fundamental privacy principle is that personal information should be acquired from the individual first, and expressed concern that the discussion paper had not addressed this. Others considered that the discussion paper had not provided sufficient justification for the proposal, such as providing information on the extent to which people are illegally accessing publicly-funded services.

> *The discussion paper has not provided any specific evidence about the level at which people ineligible for these services are illegally accessing them, and as such, breaking down the individual's right to privacy as to their immigration status has not been adequately justified. (Individual submitter)*

One submitter commented that the proposed power is too far-reaching, and suggested limiting it by:
restricting disclosure of immigration status to answering a specific inquiry from a provider of a publicly-funded service, and
only disclosing information in cases where the provider is a government department responsible to a Minister of the Crown.
Submitters also raised concerns about the possible effect of the proposal on particular groups of people. Particular concern was expressed about the potential for children of people unlawfully in New Zealand to be disadvantaged because their parents may avoid seeking medical treatment or enrolling their children in education out of fear of information being passed to Immigration New Zealand. Trafficked workers were identified as another vulnerable group.

> *If the Department was able to share information with other agencies the privacy implications would need to be strictly monitored. In some cases people might be denied access to certain services, or be reluctant to access them, out of fear of compromising their immigration status. This could impact on children's right to education and health care. (Human Rights Commission)*

Some submitters commented that the proposal could lead to information being requested or used in a discriminatory way. One submitter noted that there is sometimes confusion about who is eligible for publicly-funded services and gave the examples of New Zealand-born children, and refugees who have not yet had their residence status confirmed.

13.2: What legislative provisions are required to facilitate sponsor benefits and enforce their responsibilities?

Summary of proposals

The discussion paper proposes making explicit legislative provision for sponsorship of both temporary and residence applicants. Under this proposal, the legislation would set out the responsibilities of sponsors and the minimum criteria for eligibility as a sponsor. Detailed sponsorship requirements and eligibility criteria would be set out in government immigration policy.

The discussion paper indicates that the types of responsibilities covered by the legislation are likely to include matters already covered by the 1987 Act such as accommodation, maintenance and removal, and could also include the costs of publicly-funded healthcare. Minimum eligibility criteria for individuals would include a requirement to be a New Zealand citizen or resident. The legislation could also provide for organisations and businesses to act as a sponsor.

The discussion paper proposes legislative measures for strengthening the incentives for sponsors to comply with their obligations, including:

- increased immigration sanctions (for example a prohibition on sponsoring other people while they have any outstanding sponsor obligation debts), and/or
- more explicitly providing for sponsors to be required to pay a bond, which would be forfeited if they fail to meet their responsibilities.

Key questions
1. Should the legislation provide a stronger basis for sponsorship benefits and responsibilities as outlined? 2. Should there be specific immigration consequences for failing to meet sponsor obligations as outlined?

Submitter response

Ninety two submitters responded to one or both of these questions. This included 51 submitters responding on behalf of organisations and 41 private individuals. Organisations that made submissions on this proposal included immigration consultants, employer and business representatives, unions, law societies, community law centres, migrant and refugee groups, ethnic councils, other community groups, businesses, the Families Commission and one government department.

Comments on question one

There was a high level of support for establishing a stronger legislative basis for sponsorship, with over 70 percent of submitters indicating support for this proposal. Some submitters commented that sponsors are not always aware of all their responsibilities.

Some submitters considered that legislative provisions should mirror the existing provision for sponsorship of temporary visitors to New Zealand. Others expressed the view that a

distinction needs to be maintained between sponsorship of temporary visitors and sponsorship of permanent residents. These submitters argued that it would be inappropriate to require sponsors of residence applicants to meet the costs of publicly-funded healthcare, given that applicants have met health requirements as part of their residence application.

> *RMS believes that clear distinctions must be made in legislation that recognise justifiable differences in appropriate responsibilities for sponsors of "temporary" and "permanent" entrants. RMS is strongly opposed to any suggestion that the costs of publicly-funded healthcare be added to the list of sponsorship obligations for permanent residents.* (RMS Refugee Resettlement)

Some submitters commented that a distinction should also be made between sponsorship by New Zealand residents who are former refugees and other sponsors. They noted that refugees often come to New Zealand without assets or savings and are frequently separated from key family members. These submitters suggested that exceptions to sponsorship requirements may need to be made to enable refugees to benefit from family reunification. One submitter commented that any exemptions should be set out in legislation.

A number of submitters expressed support for enabling organisations to act as sponsors. However, some submitters expressed concern about the proposal in the case of employers. These submitters considered that placing sponsorship obligations on employers could give employers greater leverage over migrant workers and lead to a situation of indenture.

Another submitter commented that the obligations and penalties for employers acting as sponsors should be clearly set out in the legislation. The submitter expressed concern that the use of sponsorship and bonds for employers could become the default position, and suggested that they only be used when a candidate is not otherwise eligible for a permit.

Some submitters expressed support for the proposed objective of sponsorship. One submitter, however, considered that reducing the financial risk to the government should not be included in any objective statement.

Some submitters suggested the use of health insurance as an alternative to including the costs of publicly-funded health services among sponsor obligations. One submitter commented that health costs are generally not affordable and so remain unpaid, which makes the sponsorship obligation meaningless.

A few submitters commented on sponsorship in the case of relationships in the nature of marriage. One submitter considered that the New Zealand sponsor should be able to withdraw their sponsorship at any time. Another expressed the view that sponsors should remain financially responsible for the person they have sponsored if the person leaves them because of domestic violence. This submitter argued that responsibility should continue up until the point where the sponsored person obtains residence in New Zealand to ensure that people are not penalised for escaping violence.

Some submitters commented on the use of sponsorship and expressed concern that only visitors from certain countries and those with limited financial resources are required to have a sponsor to visit New Zealand.

Some submitters made comments on the important role played by sponsors. One submitter expressed the view that sponsored applications should be given priority. Another commented that care needs to be taken that the Government does not abdicate from its ultimate decision-making role by placing too heavy a burden on sponsors. One submitter expressed the view that sponsorship should not preclude the state from also providing support for new migrants.

> *Allowing employers and businesses to sponsor is a realistic and effective way to help bring skilled migrants into the country. Sponsorship should be recognized as a key factor in applications, and applications with sponsorship must be given priority in processing. Sponsorship provides applicants with guaranteed support in New Zealand, and, importantly, support once they reach New Zealand.* (Global Immigration Group)

Approximately 10 percent of submitters indicated that they did not see the need for legislative change in this area.

Comments on question two

Many submitters considered that sponsors should be held accountable for failing to meet their responsibilities. However, there were mixed views about what the consequences should be. Some submitters considered that further work is required to determine effective and suitable consequences. Others were of the view that sponsors who fail to meet their obligations should not be able to sponsor a person again and should be held accountable for any expenses incurred. Approximately 60 percent of submitters gave clear support to the proposal.

The National Collective of Independent Women's Refuges (NCIWR) commented specifically on cases of violence by sponsors.

> *NCIWR believe that sponsors who are violent to the women they sponsor should not be eligible to sponsor another woman to enter New Zealand. We are aware of situations where the same man has serially sponsored several women, all of whom have sought support from Refuge when they have been trying to escape violence. Removing the right of these men to continue sponsoring is consistent with the treatment of domestic violence as a serious crime.* (National Collective of Independent Women's Refuges)

One submitter expressed the view that sponsors should be provided with the opportunity to explain the reasons for failure to meet their responsibilities, with the consequences being related to the failure. The submitter commented that "failure due to intent or negligence is

one thing but failure due to unforeseen circumstances is another."2 Another commented that the sponsored person should not be penalised for the failure of sponsors to honour their commitments.

A lot of comment was made on the possible use of bonds. Some submitters supported the use of bonds in sponsorship, with a number of submitters suggesting that interest be paid on bonds. However, many submitters opposed the use of bonds in sponsorship, noting that a bond would be a significant burden on families and may act as a barrier to sponsorship, particularly for refugees. One submitter commented that forfeiture of a bond would have the effect of punishing an entire family. Some submitters suggested that the cost of administering bonds could outweigh the benefits.

> *While we support sponsors living up to their responsibilities (particularly when they sponsor people who are essentially unemployable when they arrive), bonds are a clumsy and inefficient way of doing so. They largely presume guilt ahead of the fact and are essentially deadweight costs on good sponsors. They are also likely to deter some sponsors.* (Business New Zealand)

> *The use of bonds is of concern, potentially another significant financial hurdle that many applicants with a refugee background will be unable to surmount.* (Wellington Community Law Centre)

A number of submitters expressed the view that bonds would be an unnecessary cost for employers and commented that employers have little influence over whether an applicant complies with their permit conditions. Some submitters suggested that there be a cap on the bond amount as in Australia, which would enable employers to budget or insure against any default on the part of the person sponsored. Concerns were also expressed about the possibility of bonds encouraging less scrupulous employers to engage in unlawful activities such as withholding passports or physically restraining migrants from leaving their place of work or accommodation.

Approximately 20 percent of submitters did not support the use of any specific immigration sanctions. Submitters noted that circumstances vary and may change or be beyond the control of the sponsor. One submitter expressed the view that any sanctions should be set out in the legislation rather than in immigration policy.

13.3: What legislative provisions are required to facilitate employer benefits and enforce their responsibilities?

Summary of proposals

The discussion paper proposes making legislative provision for responsibilities to be imposed on employers, including an explicit legislative reminder that employers comply with all New Zealand employment laws and provision for further responsibilities to be established in government immigration policy.

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[2] New Zealand Law Society

The discussion paper also presents an option that would involve improving the enforceability of the current strict liability offence by:

- introducing a new obligation in the Immigration Act requiring employers to positively check (and cite reliable evidence) that a prospective employee is legally entitled to work in New Zealand, and
- removing the "reasonable excuse" of having sighted a tax code declaration.

Key questions

1. Should immigration legislation provide a stronger basis for employer responsibilities?
2. Should employers be legally obliged to positively check that a prospective employee is entitled to work for that employer?
3. Should the current "reasonable excuse" of having sighted a tax code declaration be removed as a strict liability offence for employers, who would be required to positively check a prospective employee's entitlement to work in New Zealand?
4. How could legislation support the obligation on employers not to employ unlawful workers?

Submitter response

One hundred and four submitters responded to this group of questions. This included 62 submitters responding on behalf of organisations and 42 private individuals. Organisations that made submissions on this proposal included immigration consultants, business and employer representatives, industry bodies, businesses, unions, community law centres, law societies, ethnic councils, migrant and refugee groups, volunteering organisations and government agencies.

Comments on question one

Approximately 65 percent of organisations and 80 percent of individual submitters who addressed this question agreed that immigration legislation should provide a stronger basis for employer responsibilities. These submitters commented that:

- many employers do not know what their responsibilities are, and/or
- the current system does not allow for sufficient measures to enforce employers' responsibilities, which leaves migrants vulnerable to exploitation.

Some submitters agreed with some aspects of the proposal but not others. Some submitters supported clarifying that employers must comply with the laws of New Zealand when employing migrants and that migrants are only entitled to work in New Zealand for the period of their work permit. Others considered that it is unnecessary to include such a provision in immigration legislation.

Some submitters were opposed to the proposed provision for additional employer responsibilities to be set out in government immigration policy. Concerns were expressed about the lack of certainty associated with this proposal and the possibility that any such requirements could be onerous for employers, especially smaller businesses. Submitters commented that this could be a significant deterrent to employers assisting migrants. Some

submitters expressed the view that employers should have the choice whether to opt in to any accredited employer policies and should not be required to meet these requirements in order to hire employees from overseas. One submitter commented that further consultation would be required on any new policy obligation on employers.

> *We are less supportive of the proposal that additional obligations may be imposed on employers through policy. At this stage what is actually required lacks certainty, however, any such obligation could make it overly onerous for smaller employers to be able to assist migrants.* (Employers and Manufacturers Association (Central) Inc)

Approximately 25 percent of organisations and 15 percent of individual submitters opposed any departure from the status quo. Many of the comments made by these submitters related to the possibility of employers being required to check the immigration status of prospective employers, and are discussed below. Some submitters expressed concern that employers were being "singled out" and commented that the legislative responsibilities of employers should be consistent with those of other third parties.

> *Employers face enough red tape, and we don't want to be turned into de facto immigration officials.* (Individual submitter)

> *The Association believes the current provisions to be adequate and that employers should not be unfairly impacted by additional responsibilities and costs over and above other third parties, particularly given that an employer is likely to have less influence over a migrant than a family member of individual sponsor. We therefore strongly believe that employer responsibilities need to be treated under the revised Immigration Act in a manner consistent with the responsibilities of other third parties.* (New Zealand Retailers Association)

Some submitters commented that the legislation should be slanted towards protecting the New Zealand employer rather than the non-resident employee. A number of submitters noted that employers make considerable effort and expense to bring employees to New Zealand and suggested that there be some provision to require those employees to remain with that employer for some period of time.

On the other hand, some submitters considered that insufficient emphasis was placed on the rights of migrant workers. These submitters suggested expanding the responsibilities of employers through:

- a universal good employer requirement
- a requirement for those bringing migrant workers to New Zealand to spend money on training New Zealand workers, possibly on a 1:5 ratio or as a percentage of wages paid
- a requirement to pay market rates rather than simply the minimum wage

- a requirement for employers to provide English language training, translation services and translated information and signage for temporary migrant workers that they recruit
- the use of employer bonds, initially in the fishing industry, to ensure that workers receive all of their wages, and
- the development of a framework to ensure the safety of temporary migrant workers while in New Zealand, drawing on the Code of Practice for the Pastoral Care of International Students and the Commonwealth Code of Practice for the International Recruitment of Health Workers.

Comments on question two

There was a high level of interest from submitters in the possibility of the legislation including a positive obligation on employers to check that a prospective employee is entitled to work for that employer. This option also generated a lot of discussion at the public stakeholder meetings.

Approximately two thirds of submitters supported this option, with some submitters commenting that it would help to protect New Zealand workers and act as a disincentive to employing illegal migrants. There was a difference in response between organisations and individuals: approximately 80 percent of individuals who responded to this question indicated their support for this option compared to approximately 60 percent of organisations.

In some cases submitters expressed qualified support, noting that:

- more work is required to determine what reliable evidence is
- the option should only be implemented if the existing law against racial discrimination in employment is effectively enforced, and/or
- employers should only be required to check the tax declaration.

Many submitters were strongly opposed to this option, particularly employers and employer groups, and also some migrant groups. The main reasons for their opposition related to the additional compliance costs that it would impose on employers and the risk that it would deter employers from employing migrants as a consequence. A number of submitters noted that employing migrants was already an onerous process and should not be made more so. Submitters were also concerned that it would aggravate the discrimination already faced by migrants when seeking employment.

> *We oppose all proposals to involve employers and education providers in compliance and enforcement of immigration policy. We believe that a number of the proposals in the discussion document will increase further the already heavy compliance costs burden on New Zealand businesses. Moreover we want employers and education institutions to be incentivised to employ more migrants, and attract more international students. There is a clear conflict between the discussion document's proposals and such incentivisation.* (Wellington Chamber of Commerce)

> *Requiring employers to check all applicants' immigration status is fraught with practical difficulties and should not be implemented. As noted in paragraph 1022 of the Discussion Paper, there is a wide variety of evidence available to prove a person's lawful ability to work in New Zealand. To require an employer to become an expert in interpreting passports, permits, visas, citizenship documents and birth certificates as to their validity does not make sense. It is unlikely, for example, that an employer is going to be able to interpret a New Zealand birth certificate to determine whether pursuant to section 6(1)(b) of the Citizenship Act 1977 a person is a New Zealand citizen or not.*
> (Immigration and Refugee Committee, Wellington District Law Society)

> *Although this may help maintain the integrity of the immigration system, this benefit is offset by the potential for selection discrimination. Barriers to migrant employment are already of concern, in particular the unemployment and underemployment of highly skilled and qualified migrants. This option would not be in the best interests for New Zealand or for migrant settlement.*
> (Asia New Zealand Foundation)

Submitters considered that this option would place an unreasonable burden on employers and suggested that there is a limit to how much an employer can reasonably be expected to establish. Some submitters commented that it would not be conducive to good employer-employee relationships. Many submitters were of the view that the employee should bear the responsibility of ensuring that they only undertake employment subject to the conditions of their permit.

Some submitters expressed concern that the option would result in New Zealand citizens and residents having to prove their citizenship or residence status before they could be employed in New Zealand.

One participant at a public stakeholder meeting suggested the use of a "three strikes" regime for employers:

- a first breach would result in a warning
- a second breach would result in a fine
- a third breach would result in the employer no longer being able to sponsor workers from overseas.

A number of submitters commented that if employers are required to check immigration status, they need to be able to access good information from the Department of Labour to enable them to do so. They considered that any such system needs to be easy for employers to access. One submitter expressed the view that it would be unsatisfactory to have New Zealanders carrying their passport or birth certificate around with them as it would lead to documents getting lost or stolen and would increase compliance and record keeping costs for employers. Another submitter commented on the privacy rights of individuals and suggested

that employers should only be able to access information on immigration status with the written consent of the employee.

Some submitters expressed concern at the length of time checking immigration status could take at peak times (such as the beginning of harvesting season) and the indirect effect this would have on all employers. Some submitters were of the view that information sharing between Immigration New Zealand and the Inland Revenue Department was desirable.

Some submitters commented that recruitment agencies and employment contractors should take responsibility for verifying the immigration status of people they refer to employers.

A number of submitters expressed concern about the potential impact of the option on volunteers and the organisations and communities that benefit from volunteering if volunteers were considered to be “employees”. They noted the current uncertainty around whether reimbursement of expenses constitutes “gain or reward” in terms of the current definition of employment in the 1987 Act. These submitters suggested expressly excluding volunteers from the definition of employment and including new definitions of volunteer and volunteering in the legislation. This is discussed further in section 15.

Comments on question three

There was a mixed response to the possibility of removing the “reasonable excuse” of having sighted a tax code declaration for the strict liability offence of employing an unlawful worker. Just over 55 percent of submitters supported the option, with a number commenting that it provides no real clarification of immigration status or that it is too low a threshold to be a reasonable defence.

Some submitters expressed the view that employers should be educated about their responsibilities and more effective ways of checking immigration status. However, other submitters expressed the view this was unlikely to be effective.

> *It is unlikely that the Department of Labour would be able effectively to educate and inform all employers of migrants' status and obligations in New Zealand. Different employers have different levels of comprehension of their obligations. Others do not use government agencies or employer organisations for the provision of information about compliance.* (Refugee and Immigration Committee, Wellington District Law Society)

Many submitters did not favour removing the reasonable excuse given their opposition to requiring employers to check immigration status. Approximately 20 percent of individual submitters and almost 40 percent of organisations indicated opposition to this option. Some submitters expressed the view that it was a reasonable defence and should be retained. Others considered that the responsibility should lie with the employee and that the employee should be held accountable for having made a false declaration. A number of submitters commented that the reasonable excuse should not be removed until more effective tools for checking immigration status are in place.

> *We contend that no legislation should be put in place removing the "reasonable excuse" until there is a clear and better way to establish the right to work.* (Horticulture New Zealand)

Some submitters suggested that a differentiated approach be taken, with a higher standard of proof required for those industries, sectors or employers where exploitation of temporary migrant workers has been a problem.

Comments on question four

A wide variety of suggestions were made by submitters on ways that employers could be supported to meet their obligation not to employ unlawful workers. These included a mix of legislative and administrative options:

- employer education and the dissemination of information about employer responsibilities and ways of checking immigration status
- having information available to employers so they can readily determine immigration status, for example through a centralised information depository as in Australia
- placing an onus on employees to present the appropriate documentation to employers
- clearly stating what constitutes acceptable proof of status in the legislation
- enabling all visa holders to work full-time
- strict sanctions for those who employ unlawful workers, including fines or imprisonment and/or publicity about recidivist companies
- more rigorous enforcement of third-tier offences (knowingly employing an unlawful worker and exploiting that worker)
- an 0800 number for people to report unlawful workers
- routine site inspections, and/or
- introducing an identification system for all New Zealanders.

A few submitters from the fishing industry expressed particular concern about ship deserters. They expressed the view that, in addition to employers being obliged to check the immigration status of employees and contract labour, people should not be able to obtain an IRD number or a New Zealand driver's licence without demonstrating their immigration status and there should be some restriction on the ability of illegal workers to transfer funds out of New Zealand. These submitters considered that these measures would reduce the incentive for desertion and encourage some illegal workers to return home voluntarily.

A number of submitters expressed the view that the current legislation was adequate and that further measures were unnecessary.

Some submitters commented that there was too much emphasis in the discussion paper on punishing employers and that more attention should be given to ways of simplifying processes for employers. Some submitters expressed the view that the Department should place more trust in employers and issue permits in cases where an employer deems it necessary to employ a person from overseas.

The NZIS needs to pay more attention to the needs of companies and place more trust in them. If a company employs an applicant, but the applicant is unable to obtain residency or further permit extensions due to any specific reason, the NZIS should allow for discretion and approve permits to work if the company deems the applicant to be beneficial, or difficult to replace in the current market. (Individual submitter)

13.4: What legislative provisions are required to facilitate education provider benefits and enforce their responsibilities?

Summary of proposals

The discussion paper proposes including a specific requirement in immigration legislation that education providers offering places to international students be signatories to, and comply with, the Ministry of Education's Code of Practice for Pastoral Care of International Students.

The discussion paper also proposes strengthening the ability to enforce education provider obligations by:

- giving immigration officers the power to require information or documents from education providers where they have reasonable grounds to believe that an education provider has enrolled a student unlawfully, and
- establishing a more flexible penalties regime that includes instant fines, immigration consequences and prosecution.

Key questions
1. Should immigration legislation include a reference to education providers' obligations to comply with the Ministry of Education's Code of Practice for Pastoral Care of International Students? 2. Should immigration officers have the power to require information from education providers? 3. Is there a need for a flexible penalties regime to address non-compliance by education providers, including instant fines, immigration consequences and prosecution?

Submitter response

Seventy six submitters responded to one or more of these proposals. This included 38 submitters responding on behalf of organisations and 38 private individuals. Organisations that made submissions included immigration consultants, representatives for the education industry, business representatives, businesses, ethnic councils, refugee and migrant groups, other community groups, the New Zealand Law Society, the Children's Commissioner and Government agencies.

Comments on question one

Over 80 percent of submitters who addressed this issue expressed support for including a reference to education providers' obligation to comply with the Ministry of Education's Code

of Practice for Pastoral Care of International Students in immigration legislation. Submitters commented on the need to protect international students and ensure that education providers provide a high quality product and meet their responsibilities to students. A number of submitters made reference to the value of the export education industry to New Zealand and the importance of safeguarding New Zealand's international reputation.

> *International education is one of New Zealand's key revenue sources and it is therefore in the best interests of New Zealand to safeguard the quality of education and the responsibilities towards its international students. This would also enhance the perception of New Zealand as an attractive education destination.* (Asia New Zealand Foundation)

One submitter expressed the view that the legislation should also take the New Zealand Qualifications Authority's audit rating of education providers into account. The submitter expressed concern about low quality institutions being able to recruit international students. They argued that this is detrimental to the export education industry and fails to achieve the immigration objective of facilitating the entry of good quality students who can go on to become productive workers and residents.

Approximately 10 percent of submitters indicated that they did not support the inclusion of a reference to the Code in immigration legislation. These submitters commented that:

- the proposal is unnecessary
- it would impose additional compliance costs on education providers
- it would not address the issues
- changes might be required to the Code, and/or
- there would be ambiguity about whether requirements would be monitored and enforced by the Ministry of Education or the Department of Labour.

Comments on question two

Approximately 70 percent of organisations and 85 percent of individual submitters who addressed this issue supported giving immigration officers the power to require information from education providers. These submitters commented on the need to monitor compliance by both education providers and international students, and to ensure that education providers are fit to take on international students. One submitter expressed qualified support, noting their concerns that the proposal could impact on education providers who are meeting their obligations.

> *On the surface, this proposal will help the [Department of Labour] clamp down on unlawful practices involving 'fly-by-night' operators on the fringe of the industry. However, we believe it would be an unintended negative consequence if this increased power impacted negatively upon good providers who are enrolling students lawfully. If taken to an extreme, educational institutions could receive daily/weekly demands to open their books to immigration officers. Ultimately, the utility of this proposed amendment will*

> *get back to the definition of "…reasonable grounds to believe…".* (Education New Zealand)

Almost 20 percent of those who addressed this question indicated that they do not support the proposal. One submitter commented that the Government should "use a carrot, not a stick" in its approach to education providers, by encouraging education providers to meet the Ministry of Education's pastoral care standards. Others expressed the view that insufficient evidence had been presented in the discussion paper to warrant such a change for education providers. Concern was expressed that the compliance costs for businesses would be onerous.

Concerns were also expressed about the privacy of individuals.

> *Unless severely constrained, the proposal to grant immigration officers the power to require information from providers raises serious questions and challenges, with implications both for the Privacy Act and for the student-university relationship. Issues of student health and welfare, staff-student relationships, supervision of research, and support for students experiencing difficulties with study in New Zealand could all be compromised by unreasonable powers to demand information which should properly remain confidential to the student and certain staff within the institution.* (New Zealand Vice Chancellor's Committee)

One submitter expressed the view that immigration officers should be required to obtain a warrant from the court in order to obtain information from education providers.

Another submitter commented that the information that may be requested should be restricted to the name of the individual studying and their progress and attendance, which is relevant to compliance with the terms of their student visa.

Comments on question three

Approximately 75 percent of submitters responding to this question supported the introduction of a flexible penalties regime for education providers. Submitters commented that effective penalties are needed to motivate education providers to meet their obligations and deter them from exploiting students.

> *There can be a range of offences by education providers from technical breaches to conduct tantamount to extortion. A system that is fast, responsive and effective would benefit international students and aid in ensuring that there is fair competition between education providers.* (New Zealand Association for Migration and Investment)

Some submitters made suggestions on the range of penalties and actions that might be applied. These included fines, identification of offending providers, prosecution and checks of the visas of other students at the same institution. However, one submitter cautioned that care needs to be taken that children are not harmed by over zealous action against

education providers and commented that education providers should have the right to challenge actions of the bureaucracy.

One submitter noted that the current offence of having "knowingly" enrolled a student who is ineligible to study in New Zealand requires the education provider to have received written notification from an immigration officer of the person's ineligibility to study. They commented that the Ministry of Education's Code of Practice for Pastoral Care of International Students, on the other hand, requires that education providers only enrol those who have the correct visa or permit, and so education providers should "know" whether a person is eligible without having to receive written notification.

Approximately 15 percent opposed the introduction of a flexible penalties regime for education providers. These submitters expressed concern about the compliance costs for education providers and commented that there may be genuine circumstances for a student being enrolled pending the approval of a student permit. Submitters expressed concern that the proposed instant fine regime does not provide an opportunity for education providers to respond, or give any indication of what might constitute "reasonable grounds". One submitter suggested that individual circumstances need to be taken into account, which is not achievable with an instant fines regime. Some submitters commented that there was insufficient evidence to justify a change from the status quo.

Other comments

One submitter made general comments on the proposed changes to legislative provisions on education provider obligations. This submitter expressed the view that there are opportunities for improving the coordination between education providers and government agencies at the policy and operational level and that legislative change is unnecessary. They noted that international education is very sensitive to changes in immigration policy and that care is needed to avoid adversely affecting the attractiveness of a New Zealand education. The submitter also proposed that Immigration New Zealand be required to provide education providers with information of any change in a student's immigration status, particularly during their period of enrolment, to avoid placing an institution unintentionally in breach of the Code.

13.5: What legislative provisions are required to facilitate carrier benefits and enforce their responsibilities?

Summary of proposals

The discussion paper presents two options for consideration. Option A would effectively preserve the status quo, making only minor amendments to the legislation, including:

- providing greater clarity about the timeframe within which information about a person's travel plans must be provided to the Department of Labour
- clarifying that carriers need to check for evidence of tickets for onward travel and funds

- clarifying that responsibility for removal costs relates to people without the appropriate documentation or approval, and may extend to people who hold a visa issued in certain circumstances, and
- removing minor inconsistencies in the 1987 Act regarding removal procedures to ensure that people can be removed quickly.

Option B would enable the Department of Labour to issue instant fines (infringement notices) to carriers who fail to meet their obligations. The level of instant fine would vary depending on which obligation was not being met, and officers would have discretion not to issue a fine depending on the circumstances.

Key questions

1. Do you agree that the proposed minor amendments be made to the legislation to clarify carrier obligations?
2. Should the legislation provide for an instant fines regime, to address non-compliance by carriers with their obligations?

Submitter response

Seventy submitters responded to one or both of these questions. This included 36 submitters responding on behalf of organisations and 34 private individuals. Organisations that made submissions included immigration consultants, airlines and representatives for the airline industry, ethnic councils, refugee and migrant groups, human rights groups and the New Zealand Law Society.

Comments on question one

There was a reasonable level of support from submitters for making minor amendments to the legislation to clarify carrier obligations, with approximately 70 percent of submitters who addressed this question indicating support for the proposal. However, there was little substantive comment on the proposal and a number of submitters indicated that they were unable to express a definite view without seeing the proposed wording.

Approximately 15 percent of submitters indicated that they did not support the proposal, including the three airline representatives that made submissions on this issue. These submitters commented that it is no longer appropriate to require carriers to check evidence of onward travel arrangements or sufficient funds given that people often do not carry physical air tickets and people may have access to funds from a variety of sources (for example credit cards). Submitters sought further clarification of the other proposed minor amendments.

> *The International Air Transport Association has as a goal the elimination of paper tickets before 1 January 2008 and in line with this, increasing numbers of travellers may not actually have physical documents. This reduces the ability for a carrier to ensure that a traveller has an onward ticket if this is an e-ticket booked on a different carrier. Furthermore, it is questionable, given the decline in international airfares, whether evidence of an onward ticket is necessarily a good indicator of a person's intention when they arrive in New*

Zealand. We would note that neither the United Kingdom nor Australia require airlines to check for evidence of on onward ticket (although the United Kingdom does recommend that airlines seek to verify this).

Similarly, we would question the utility of any requirement that airlines check that travellers hold sufficient funds. Given the nature of the international banking system, use of credit cards etc, it is impossible for an airline check-in agent to establish with any veracity exactly how much money a traveller would have access to. (Air New Zealand)

Some submitters commented that the onus should be on the individual to have the appropriate documentation. One submitter raised concerns with carriers being held responsible for carrying people who do not hold a Returning Residents' Visa. Another commented that it is not reasonable to require carriers to respond to a change in an Advanced Passenger Processing (APP) directive, particularly once the traveller is already en route to New Zealand.

Comments on question two

There were mixed views on whether the legislation should provide for an instant fines regime to address non-compliance by carriers. Approximately 45 percent of those who responded to the question indicated support for this option, approximately 35 percent were opposed to an instant fines regime, and the remainder were unsure or did not express a clear view. There was a difference in response between individuals and organisations: 60 percent of individuals supported the option compared to only a third of organisations.

Those who support an instant fines regime did not generally elaborate on their views. One submitter expressed the view that there should be varying levels of fine to ensure the penalty is closely associated with the offence and commented that the Canadian approach seems appropriate.

There were two main concerns expressed by submitters who oppose an instant fines regime. The first concern was raised by submitters representing the airline industry. These submitters noted that the overall level of non-compliance by carriers is very low and is often the result of complexity in the system. They argued that an instant fines regime would be unlikely to address this issue and that it would be far more effective to retain the current system of co-operation and education and work to improve carrier compliance. They also commented that an instant fines regime was likely to impact on the relationship between the Department of Labour and carriers.

Given that non-compliance by carriers is rarely deliberate, the imposition of a fine regime will not likely reduce the instances of non-compliance (as can be seen by the Australian infringement regime). Rather it will simply add to the costs and workload of both NZ immigration and carriers. This effort would be better spent investigating the problems and resolving them (i.e. more robust systems, improved reporting, increased training). (Qantas Airways Ltd)

> *The introduction of instant fines on airlines could well damage the existing good cooperation and working relationship which exists without achieving the expectation of Immigration NZ.* (Board of Airline Representatives New Zealand)

The second concern was raised by human rights groups and organisations representing refugee and migrant interests. These submitters expressed concern that an instant fines regime would adversely affect people seeking asylum in New Zealand and noted the UNHCR view that airlines should not be penalised for transporting people seeking protection from persecution.

> *We oppose any strengthening of penalties against carrier companies. We do not want to see airlines and other transport industries become de facto assessors of refugee status, or to see them punished for unknowingly giving assistance to people who seek protection from persecution.* (Caritas Aotearoa New Zealand)

One submitter commented that adding to carrier sanctions would bring into question New Zealand's commitment to international treaties that protect the rights of people to claim asylum. Another expressed the view that stowaways should not be denied the opportunity to seek protection by being immediately returned to their home country.

13.6: General comments and other issues raised by submitters

A few submitters made general comments on third party obligations. One submitter commented that while parties who benefit from the immigration process should have some responsibilities for ensuring the process works well, the responsibilities should not be so onerous that they become a disincentive for people to become part of the immigration process. Another commented that the purpose of the legislation should be to educate and enforce legislative requirements, and that third parties who continue to offend need to be aware that substantial penalties will be used where appropriate.

Some submitters considered that immigration legislation should include reference to other third parties, including community organisations that play a role in migrant settlement.

> *We also propose that the increasing role of other third party organisations such as Kia Ora, Citizens Bureau Settlement Support run under the City Council and even local organisations such as churches and refugee centres, be given a legislative backing in the Act to validate and provide opportunity for a broadening of the valuable work that they provide to the immigration process and especially to the settlement of immigrants.* (Zimbabwean Society)

Immigration consultants were also mentioned by submitters and participants in the stakeholder meetings as another third party that should be regulated through the Immigration Act. These submitters may not have been aware of the Immigration Advisers Licensing Bill currently being considered by Select Committee.

SECTION 14: NEW ZEALAND'S ROLE AS AN INTERNATIONAL CITIZEN

Overview

Submitters expressed strong support for the proposal that new immigration legislation include New Zealand's international commitments to protect persons facing torture, arbitrary deprivation of life, or cruel, inhuman or degrading treatment or punishment. Approximately 85 percent of submitters that addressed this issue indicated support for the proposal. Some submitters considered that other human rights instruments should also be included in the legislation, including the United Nations Convention on the Rights of the Child and the International Covenant on Civil and Political Rights (ICCPR).

There was also a high level of support for determining claims under the Refugee Convention, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention Against Torture) and articles 6 and 7 of the ICCPR in a single procedure, with a single right of appeal. Approximately 80 percent of organisations and 70 percent of individual submitters agreed with this proposal. Submitters emphasised the need for people seeking protection to have the same rights and procedural protections as refugee status claimants currently have, and for protected persons to have the same immigration status. Submitters also commented that refugee status/protection officers and members of the appeals tribunal would require additional training to ensure they are well-versed in all of New Zealand's international obligations.

Approximately 85 percent of organisations that made submissions agreed that immigration legislation should recognise refugees selected offshore. Approximately half the individual submitters supported the proposal and just over a quarter were opposed. The reasons for their opposition were not clear but appeared to relate to a concern about extending protection to a further group of people.

Submitters expressed mixed views on the proposed obligations of refugee status/protection claimants and the proposed offences for failing to meet these obligations. Many submitters considered that claimants should not be prosecuted for providing false documents or for failing to provide information. Submitters considered that the prospect of having a claim declined should be incentive enough for people to provide information.

Approximately 75 percent of organisations and 60 percent of individual submitters considered that subsequent claims should be allowed on the basis of a change in personal circumstances, with a number of submitters commenting that to not do so would breach New Zealand's obligations under the Refugee Convention. Approximately 70 percent of organisations and 85 percent of individual submitters agreed that there is no need for legislative change to deal with manifestly unfounded claims, persons coming from or via "safe countries" or mass arrivals. Submitters considered that the merits of each claim need to be considered on a case-by-case basis in order to protect individual human rights.

Individual submitters expressed strong support for clarifying when refugees or persons in need of international protection may be expelled: almost 90 percent of those who addressed

this issue agreed with the proposal. Of the organisations that responded, approximately 60 percent agreed, 10 percent disagreed and 30 percent either were unsure or did not express a clear preference either way. The main concerns were around ensuring that the legislative provisions and language are consistent with the Refugee Convention, the Convention Against Torture and articles 6 and 7 of the ICCPR.

There was a reasonably high level of support for New Zealand becoming party to the 1954 Convention Relating to the Status of Stateless Persons (the Stateless Persons Convention). Approximately 75 percent of organisations and 65 percent of individual submitters expressed support for this option.

14.1: Which of New Zealand's immigration-related international obligations should be incorporated into immigration legislation?

Summary of proposal

The discussion paper proposes that the obligations conferred by article 3 of the Convention Against Torture and articles 6 and 7 of the ICPPR be incorporated into New Zealand's immigration legislation. These articles place an absolute obligation on New Zealand to not return a person to a country where there are substantial grounds for believing that they would be in danger of being subjected to particular human rights abuses.

Key question
1. Should New Zealand's international commitments to protect persons facing torture; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment be set out in immigration legislation?

Submitter response

Ninety six submitters responded to this question: 54 submitters responded on behalf of an organisation and 42 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, airline representatives, a union, the United Nations High Commissioner for Refugees, the Families Commission, a territorial authority, government agencies and two political parties.

Approximately 85 percent of submitters that responded to this issue agreed that New Zealand's international commitments to protect persons facing torture, arbitrary deprivation of life, or cruel, inhuman or degrading treatment or punishment should be set out in immigration legislation. Approximately 15 percent of individual submitters were opposed to the proposal. No organisations were opposed to the proposal.

Submitters who support the proposal considered that including New Zealand's commitments under the Convention Against Torture and articles 6 and 7 of the ICCPR in immigration legislation would confirm New Zealand's commitment to its obligations, ensure that they are applied consistently and accurately, and clarify entitlements to potential protectees. Some

submitters also commented that the proposal would have a beneficial effect on New Zealand's international standing.

> *To address current protection gaps in these ways will enhance New Zealand's moral and political standing internationally. It will also further improve the persuasiveness of New Zealand in efforts to influence the behaviour of other countries in ways that promote regional and global peace, security and development. As these are matters important to New Zealand, they should be given effect within immigration legislation.* (Amnesty International New Zealand)

Some submitters commented that clear guidelines would be required to aid in interpretation. One submitter, however, cautioned against limiting international obligations through legislative guidelines.

> *It is important that the obligations as they stand at international law are incorporated and not limited by legislative drafting intent on aiding interpretation. Absolute obligations under international law should not be reduced to one of many considerations in the operation of the domestic law.* (Wellington Community Law Centre)

A number of submitters considered that other international obligations should also be set out in immigration legislation. Most commonly mentioned were the United Nations Convention on the Rights of the Child and the ICCPR. One submitter suggested that legislation should confirm that articles 23 and 24 of the ICCPR are mandatory considerations in decision making. Other submitters considered that these conventions should be included in full.

> *The reason for excluding other aspects of the ICCPR and of UNCROC as outlined in paragraph 1090 of the Discussion Paper is questioned. These instruments provide other key rights, which, when breached, produce circumstances of genuine need for protection and/or humanitarian assistance.* (New Zealand Law Society)

> *The Children's Commissioner strongly recommends that UNCROC be incorporated into immigration legislation and that a children's rights perspective is actively considered in the development of policies, practices and procedures, which support the implementation of immigration-related legislation.* (Children's Commissioner)

One submitter suggested that legislation incorporate the principles contained in case law that are derived from New Zealand's international obligations as a guide to decision-makers.

> *A simple process may be to incorporate the principles already detailed in case law into the principles by which immigration decisions are made – we understand that the decision-maker needs to balance competing factors and that no one factor is decisive; a list of factors/principles (that is already*

> *determined in case law) to assist the decision-maker may be appropriate. The Commission would support such an approach. We have already proposed that the best interests of children are included as one such principle in decision-making.* (Families Commission)

Some submitters commented that any other relevant human rights instruments that New Zealand is a signatory to should be included in immigration legislation. Specific suggestions were as follows:

- the 1954 Convention Relating to the Status of Stateless Persons (discussed in section 14.4)
- the International Covenant on Economic, Social and Cultural Rights
- Annex 9 of the Convention on International Civil Aviation (known as the Chicago Convention)
- the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention Against Trans-national Organised Crime, and
- the ILO Migration for Employment Convention.

Submitters also identified other conventions that New Zealand has not yet ratified, which might also be included at a later date. Some submitters referred to migrant-specific conventions including the ILO Migrant Workers (Supplementary Provisions) Convention and the UN Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families. One submitter commented that the immigration legislation should acknowledge New Zealand's obligations to disabled people worldwide and suggested that any obligations under the International Convention on the Rights of Disabled People, if passed by the United Nations, be included in the Act.

A number of submitters, on the other hand, expressed reservations about incorporating international obligations into New Zealand's immigration legislation. These submitters considered that the emphasis should be on the protection of New Zealand and its citizens and residents. One submitter commented that there needs to be provision for expelling those who have committed serious crimes against people or humanity.

Submitters made a number of suggestions about the legislative and administrative provisions that should be in place to support this proposal. These comments are included in section 14.2.1.

Submitters who oppose New Zealand's commitments under the Convention Against Torture and articles 6 and 7 of the ICCPR being set out in immigration legislation did not elaborate on their views.

14.2: How should refugee/protection status be determined?

The discussion paper considers five questions relating to the determination of refugee or protection status:

1. What legislative provisions are required for broader protection status determination?
2. What legislative provisions are required for refugee status determination?
3. What legislative provisions are required to allow robust identity and credibility verification?
4. What legislative provisions are required to appropriately limit subsequent claims?
5. What legislative provisions are required to expedite determination in some cases?

14.2.1: What legislative provisions are required for broader protection status determination?

Summary of proposal

The discussion paper proposes that claims relating to the Convention Against Torture and articles 6 and 7 of the ICPPR be considered by refugee status officers under a single procedure that would assess all claims according to:

- the Refugee Convention
- the Convention Against Torture, and
- articles 6 and 7 of the ICPPR.

There would be a single right of appeal to the Refugee Status Appeals Authority (or the protection stream of a new independent immigration and refugee tribunal).

Under this proposal, all legislative functions relating to refugee status determination would be extended to the determination of Convention Against Torture claims and articles 6 and 7 of the ICPPR.

Key question
1. Should Refugee, Convention Against Torture and articles 6 and 7 of the ICCPR claims be assessed in a single procedure with a single right of appeal?

Submitter response

Seventy five submitters responded to this question: 40 submitters responded on behalf of an organisation and 35 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, the United Nations High Commissioner for Refugees, a territorial authority and one political party.

Over 80 percent of the organisations that responded to this issue agreed that there should be a single procedure with a single right of appeal for determining claims under the Refugee Convention, the Convention Against Torture and articles 6 and 7 of the ICCPR. Approximately 70 percent of individual submitters expressed support for this proposal and a further 25 percent either were unsure or did not express a clear preference either way. Less than 10 percent of all submitters were opposed to the proposal.

The UNHCR expressed support for a single procedure for determining the protection needs of an applicant, commenting that such a system would avoid fragmentation and duplication, utilise the expertise of existing refugee status authorities and assist in prompt decision-making.

> *In many cases, a single, consolidated procedure which assesses whether an asylum-seeker qualifies for refugee status or other complementary protection represents the clearest and swiftest means of identifying those in need of international protection. It could offer a more economical and less fragmented approach, which would ultimately lend itself more readily to the establishment of a more coherent interpretation of international protection needs.* (United Nations High Commissioner for Refugees)

Many submitters expressed qualified support for the proposal, generally seeking the same rights and protections for people seeking protection under the Convention for Torture or articles 6 and 7 of the ICCPR as refugee status applicants currently have. Submitters commented that:

- applicants should be provided with written reasons for any decision to enable them to adequately prepare for an appeal
- the right to a de novo appeal should be retained
- the calibre of the appeals body must be maintained
- legal aid should be available, and/or
- applicants should be able to seek judicial review and appeal to the High Court on a point of law.

One submitter commented that further consultation should be undertaken prior to the implementation of operational policy and administrative processes.

A number of submitters commented on the capacity and expertise of refugee status/protection officers and the appeals body. Some submitters commented that refugee status/protection officers should receive additional training to ensure that they are well-versed in all international instruments. One submitter considered that the legislation should require that refugee status/protection officers be legally trained. Some submitters commented that the Refugee Status Appeal Authority is well-placed to consider appeals because it is held in high regard and is already using and contributing to international jurisprudence. A number of submitters considered that members would nonetheless require additional training.

> *The training of officers, employed in first level assessment/determination in the proposed system, must be augmented to ensure that they are well-versed with regard to New Zealand's obligations under ALL the relevant international instruments – as opposed to just the 1951 Convention.* (RMS Refugee Resettlement)

> *The current procedures, judicial ability and jurisprudence of the RSAA provide an excellent model to build on for determinations under these additional international treaties. I stress again the need for considerable preliminary training.* (Individual submitter)

One submitter suggested that two refugee status/protection officers be assigned to the initial determination of protection cases – one with expertise in the refugee jurisdiction and the other with expertise in New Zealand's other international obligations. Likewise, the submitter considered that at least two members of the appeals body should be required to hear each appeal. Another submitter expressed the view that, if the Stateless Persons Convention is ratified, these claims should be dealt with by decision-makers with specialist expertise.

Some submitters commented additional resources would be required to support the process and/or that the capacity of the Refugee Status Branch should be reviewed. One submitter expressed concern that further delays would increase the time that some refugee status applicants are detained.

> *Delays in decision-making will necessarily impact on the length of detention for those claimants detained at the border. A resulting backlog, akin to that recently experienced, would be unfortunate. The amalgamated system will therefore require a comprehensive review of the capacity of the existing Refugee Status Branch to deal with an expansion in duties.* (New Zealand Law Society)

There was some comment on the way in which applications would be processed. Some submitters considered that applications for protection should first be considered against the Refugee Convention, with only those that are unsuccessful being considered against New Zealand's other international obligations. Other submitters commented that any hierarchy of decision-making should be made clear in the legislation. A number of submitters expressed the view that, regardless of the way in which different claims are handled, people found to be in need of protection under the Convention Against Torture or articles 6 and 7 of the ICCPR should have the same status as refugees.

> *We subscribe to a single determination procedure which would first determine the refugee status claim and then go on, if this was not successful, to consider a claim under International Conventions. Judicial review and the right to appeal to the High Court on a point of law, which are both currently available in refugee applications, should be available to broader protection status applications. A person failing refugee status but successful under the International Conventions should be able to access all rights pertaining to a Convention Refugee, including the right to apply for residence and citizenship.* (Auckland Refugee Council)

Another submitter, on the other hand, suggested that protected persons be granted a three year permit initially, but be able to work and access benefits and social services during this

period. Submitter comments relating to the status of protected persons are discussed further in section 14.5.

14.2.2: What legislative provisions are required for refugee status determination?

Summary of proposals

The discussion paper proposes retaining the current provisions that require decision-makers to determine whether a person is a refugee within the meaning of the Refugee Convention, and to act in a manner consistent with the Refugee Convention in carrying out all their functions.

In addition, the discussion paper proposes that the legislation:

- enable the selection of UNHCR-referred refugees by New Zealand refugee status officers offshore (with no appeal rights)
- clarify that refugees selected offshore have the same status as persons found to be refugees onshore, where they have been assessed according to the Refugee Convention, and
- clarify that no refugee may be expelled, except in accordance with the Refugee Convention.

Key question
1. Should immigration legislation recognise refugees selected offshore?

Submitter response

Seventy four submitters responded to this question: 37 submitters responded on behalf of an organisation and 37 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, law societies, community law centres, other community groups, businesses and the United Nations High Commissioner for Refugees.

There was a difference in response from organisations and individuals. Approximately 85 percent of the organisations that addressed this issue agreed that immigration legislation should recognise refugees selected offshore. Of the individual submitters that responded, approximately half expressed support for the proposal and just over a quarter were opposed.

The comments of submitters who support the proposal reflect different understandings of what it would entail. Some submitters sought assurance that refugee status officers would not undertake a secondary assessment of a person's refugee status, which has already been determined by the UNHCR. These submitters questioned the value of including refugee status officers on selection missions, suggesting that these resources would be better used in undertaking refugee determination activities onshore.

> *RMS seeks an assurance that the intended legislation does not seek to empower New Zealand immigration officers to make 'secondary' offshore*

> *determinations that bring into question the status of refugees who have already been recognized by UNHCR. UNHCR is the competent and internationally mandated UN agency responsible for the recognition and protection of refugees – and the search for durable solutions to their situation of displacement. Both historically and presently, many "Quota" refugees have been mandated on the basis of "group determination" as opposed to "individual determination". All persons submitted by UNHCR for possible resettlement in New Zealand, have already been accorded refugee status – prior to their referral for consideration.* (RMS Refugee Resettlement)

Other submitters expressed the view that the same selection processes should be applied to offshore refugees as apply onshore, including rights of appeal. One submitter suggested that New Zealand go further and enable any person who presents themselves to a New Zealand overseas post to claim refugee status.

Some submitters expressed the view that the review of the 1987 Act provides an opportunity to review New Zealand's level of commitment to the Refugee Quota Programme, with a view to increasing it above the current level of 750 places per annum. One submitter also commented that the review provides an opportunity to clarify priority categories for selection, especially New Zealand's commitment to family reunion.

Most submitters who oppose the proposal did not elaborate on their views. There seemed to be some concern about extending protection to a further group of people.

> *UN Refugee Scheme is enough.* (Individual submitter)

> *I do not agree that refugees be recognised offshore.* (Individual submitter)

14.2.3: What legislative provisions are required to allow robust identity and credibility verification?

Summary of proposals

The discussion paper proposes that decision-makers continue to determine claims on the basis of the information, evidence and submissions provided by refugee status claimants and retain existing powers to request information. It also proposes that legislative provisions be strengthened by clearly setting out the obligations of refugee/protection claimants and including new offences for failing to meet these obligations.

The obligations of refugee status/protection claimants would be to:

- inform an officer of any relevant fact or material change in circumstances that occurs after the claim is made, if that fact or change might affect the decision on the claim, and
- not attempt to procure refugee status by fraud, forgery, false or misleading representation or concealment of relevant information.

New offences would be created for:

- providing false information in support of a refugee or protection claim or appeal
- resisting or intentionally obstructing any refugee/protection officer in the exercise of his or her powers, and
- without reasonable excuse, refusing or failing to produce any available document or supply any information (including fingerprints or photographs) when required to do so in the investigation of a potential cancellation of status.

The discussion paper also indicates that the legislation could require other government departments to provide information relating to a refugee claimant when requested by a refugee status or protection officer, or member of the Refugee Status Appeals Authority (or its equivalent).

Key question
1. Do you agree that the powers of protection status decision-makers and related offence and penalty provisions should be strengthened as outlined?

Submitter response

Seventy submitters responded to this question: 35 submitters responded on behalf of an organisation and 35 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, the United Nations High Commissioner for Refugees and one political party.

The response from submitters was mixed: approximately 45 percent of submitters agreed with strengthening the powers of decision-makers and offence and penalty provisions as proposed, approximately 25 percent disagreed and approximately 25 percent indicated that they agreed with some aspects of the proposal. There was a difference between organisations and individual submitters: only around 35 percent of the organisations fully supported the proposal compared to approximately 55 percent of the individual submitters.

The main concerns with this proposal related to the proposed offence provisions. Many submitters considered that refugee status and other protection claimants should not be prosecuted for providing false documents or for failing to provide information. A number of submitters made reference to UNHCR criticism of such offence provisions. In its submission, the UNHCR expressed its view that the provision of false information needs to be considered in light of the circumstances of the case and does not provide grounds for refusing refugee status or prosecution.

> *It is UNHCR's view that though the practice of making false statements and providing false documents to refugee status determination officers is certainly undesirable, it is not a reason to deny refugee status nor should it be a basis upon which to prosecute.* (United Nations High Commissioner for Refugees)

Some submitters expressed the view that the possibility of a decline decision should be the only negative consequence of a claimant not complying with a request for information. Submitters commented that the prospect of a claim being declined or refugee status being cancelled should be sufficient incentive for people to provide information. Other submitters commented that existing provisions are adequate.

> *We believe that protection status decision makers (current RSOs) already have the necessary authority to efficiently process claims. We do not believe that punitive measures will be a deterrent for abusive claims and that any penalties or fines imposed may be difficult to effect.* (Auckland Refugee Council)

Submitters commented that consideration needs to be given to the reasons that refugee status claimants conceal information or provide false information, which may include fear of government agencies, fear of reprisals from home governments and advice from third parties such as people smugglers. Submitters also noted that claimants may be compelled to travel on false documents in order to reach a potential country of asylum.

> *The law centre deals with cases where people have provided false information either because of the advice that they have received off-shore, which anecdotal evidence suggests, includes advice from immigration officers, or because their particular circumstances often involve life or death decisions and/or other humanitarian circumstances.* (Grey Lynn Neighbourhood Law Office)

One submitter expressed concern that refugee status claimants who find it difficult to prove their case could be charged with providing false information under the proposal. The submitter suggested that a more effective way of deterring false claims for refugee status would be to process suspected false claims so expeditiously that there is no benefit in a person falsely claiming refugee status in order to extend their stay here.

One submitter commented on the proposed obligations of refugee status/protection claimants and expressed concern about placing the same obligations on refugee claimants as on visa and permit applicants, given that the two groups come from very different circumstances.

Another submitter commented on the proposed power to require information from other government departments, noting that it should be made clear that such information is only to be made available for the purpose of determining a protection claim. The submitter also expressed the view that the proposed power should not be extended to include health and education providers, consultants, agents, lawyers or third party individuals.

14.2.4: What legislative provisions are required to appropriately limit subsequent claims?

Summary of proposals

The discussion paper presents two options for consideration:

A. Maintaining the status quo by only considering a subsequent claim for refugee status in cases where the refugee status officer is satisfied that "circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim", or
B. Allowing subsequent claims in cases where there has been a significant change in circumstances that is material to the person's refugee or protection status, whether those changes are in the home country or changes in the person's personal situation.

The discussion paper indicates that there is no clear preference for either option at this stage.

Key question
1. Should subsequent claims be explicitly allowed on the basis of a change in personal circumstances (that is material to refugee status), either in the home country or otherwise?

Submitter response

Seventy submitters responded to this question: 36 submitters responded on behalf of an organisation and 34 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, airline representatives and the United Nations High Commissioner for Refugees.

Approximately 75 percent of organisations and 60 percent of individual submitters that addressed this issue considered that subsequent claims should be allowed on the basis of a change in personal circumstances. A number of submitters commented that to not do so would breach New Zealand's obligations under the Refugee Convention.

> *New information and new evidence should be able to be considered to be fair to the applicant.* (Global Immigration Group)

> *Claimants whose personal position changes should be able to reapply for refugee status. The present situation limits applications for further consideration to changes in the country of origin, yet a person's individual circumstances may also change. Not allowing for this contravenes New Zealand's commitment to the Refugee Convention.* (Human Rights Commission)

One submitter expressed the view that this provision should also apply to claims made under the Convention Against Torture or articles 6 and 7 of the ICCPR. Some submitters

agreed that people should have to apply for leave to the Refugee Status Appeals Authority (or equivalent appeals body) to appeal a decision on a subsequent claim but others did not. One submitter considered that grounds for leave to appeal should be set out in the legislation.

One submitter questioned whether any consideration had been given to declining claims that have already been rejected in certain countries.

> *In relation to limiting subsequent claims, we query whether New Zealand Immigration has considered whether it is feasible that if a claim is made and rejected in certain specified countries (e.g. Australia) then a subsequent claim in New Zealand could be automatically denied – as provided for in the Dublin Convention.* (Board of Airline Representatives New Zealand)

Almost a quarter of individual submitters disagreed that subsequent claims should be allowed on the basis of a change in personal circumstances. These submitters did not elaborate on their views. No organisations were opposed to this option.

14.2.5: Are legislative provisions required to expedite determination in some cases?

Summary of proposals

The discussion paper considers whether legislative provisions should be introduced to allow for expedited procedures in cases of:

- manifestly unfounded claims
- claims from persons who may have lived, or spent time on the way to New Zealand, in countries where there is considered to be protection from persecution, and
- mass arrivals of claimants.

The discussion paper concludes that current processes work well and that there is no need for change in this area.

Key question
1. Do you agree that there is no need for legislative change to deal with manifestly unfounded claims, persons coming from or via “safe countries” or mass arrivals?

Submitter response

Sixty four submitters responded to this question: 32 submitters responded on behalf of an organisation and 32 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses and the United Nations High Commissioner for Refugees.

Approximately 70 percent of organisations and 85 percent of individual submitters agreed that there is no need for legislative change to deal with manifestly unfounded claims,

persons coming from or via “safe countries” or mass arrivals. Submitters considered that it essential that the merits of each claim are considered on a case-by-case basis in order to protect individual human rights. Some submitters commented that lists of “safe countries of origin” or “safe third countries” have proven ineffective in other countries.

> *The current system which allows assessment of individual claims on a case-by-case basis is preferred in order to meet with international human rights obligations. This is balanced by the need for all claims to be dealt with as effectively and efficiently as possible.* (New Zealand Law Society)

> *The experience of some States demonstrates that, where relatively few applications are generally received, a focus on prompt quality decision-making under a single procedure is likely to be a more effective option than determination under an accelerated procedure.* (United Nations High Commissioner for Refugees)

Approximately 10 percent of all submitters did not agree that there is no need for legislative change to deal with manifestly unfounded claims, persons coming from or via “safe countries” or mass arrivals. One submitter commented that that legislation should be made now to ensure that “a counter/barrier” is in place if required.

14.3: What provisions are required for the expulsion of protected persons?

Summary of proposals

The discussion paper proposes that the legislation establish clear and coherent provisions on the expulsion of protected persons that are consistent with New Zealand’s international obligations. Under this proposal, the legislation would prohibit the expulsion of a person:

- recognised as a refugee in New Zealand, unless article 32.1 or 33.2 of the Refugee Convention allows it, or
- protected under the Convention Against Torture or articles 6 and 7 of the ICCPR (other than to a safe third country as appropriate).

The legislation would also clarify the situations in which expulsion to a third country may be a viable alternative.

The discussion paper indicates that the assessment would be undertaken:

- in the context of the independent appeal in the case of serious criminal offenders or suspected terrorists
- in the context of a departmental assessment prior to expulsion, where the person did not make an independent appeal, or
- by the Minister of Immigration in the case of security threats (where there would be no right of appeal).

Key question
1. Do you agree that specific provisions and procedures should be set out in legislation to clarify when refugees or persons in need of international protection may be expelled?

Submitter response

Sixty seven submitters responded to this question: 34 submitters responded on behalf of an organisation and 33 submitters responded as private individuals. Organisations that made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups law societies, community law centres, other community groups, businesses and the United Nations High Commissioner for Refugees.

There was a difference in response by organisations and individuals. Of the organisations that responded to this issue, approximately 60 percent agreed that the legislation should clarify when a protected person may be expelled, approximately 10 percent disagreed and approximately 30 percent either were unsure or did not indicate a clear preference either way. Support was stronger among individual submitters, with almost 90 percent indicating agreement to the proposal.

A number of submitters commented that legislative provisions on expulsion need to be carefully drafted to ensure that they are consistent with New Zealand international human rights obligations and, in particular, with the Refugee Convention, the Convention Against Torture and articles 6 and 7 of the ICCPR. Some submitters questioned the need to clarify when a protected person may be expelled given these international obligations.

> *These must be taken into careful consideration when being set out.* (Ambedkar Mission Society NZ Inc)

> *This review does provide opportunity to harmonize New Zealand immigration legislation with the language of the Refugee Convention, relevant UNHCR guidelines, the CAT, and ICCPR. This should not limit the international obligations under these treaties to some of many considerations, nor limit their application domestically. This is especially important to safeguard the rights of those in need of protection.* (Wellington Community Law Centre)

One submitter expressed the view that there should be clear guidelines as to how a person protected from expulsion should be dealt with by the New Zealand justice system and/or the international system in the case of crimes committed against humanity.

Some submitters expressed concern about possible expulsion to a safe third country. One submitter commented that the potential risks need to be assessed in each case, such as the risk of chain refoulement, along with factors such as the third country's human rights record, whether there is an established infrastructure to deal with refugees, willingness of the third country to accept the person, any threats to physical security or subsistence, and whether there is a link between the protected person and the third country.

Some submitters considered that the legislation should also set out the circumstances under which a protected person is no longer liable for expulsion. One submitter expressed the view that a person who has been granted New Zealand citizenship should not be able to be expelled.

> *If any New Zealand citizen is convicted of a crime (of whatever magnitude) he/she is subject to the penalties prescribed by law. The application of further punishment by the subsequent revocation of citizenship and/or deportation seems contrary to the principles of natural justice, fairness and equity – no matter how serious the crime.*
>
> *It is recommended, therefore, that current legislation (which permits the revocation of citizenship and subsequent deportation of anyone committing a serious crime within 10 years of gaining residence) be amended to exempt anyone who has already been granted New Zealand citizenship – with the exception of those who have falsely obtained their citizenship by withholding, or failing to disclose, information that would have been prejudicial to their application – or persons who may be subject to lawful extradition or surrender to an international tribunal.* (RMS Refugee Resettlement)

14.4: Should New Zealand become a party to the 1954 Convention Relating to the Status of Stateless Persons?

Summary of proposals

The discussion paper presents two options for consideration:

A. Maintaining the status quo and continuing to deal with any stateless people on a case-by-case basis, or
B. Becoming party to the Stateless Persons Convention and providing for a determination to occur in the single procedure proposed for considering claims under the Convention of Torture and articles 6 and 7 of the ICPPR.

Under Option B, if a person in New Zealand was found to be stateless, they would be given all the rights as set out in the Stateless Persons Convention, with a temporary or residence permit granted to enable them to access those rights. The legislation would reflect the obligation under the Stateless Persons Convention not to expel a stateless person lawfully in New Zealand, unless than as allowed by the Convention.

The discussion paper indicates that there is no preference for either option at this stage.

Key question
1. Should New Zealand become party to the 1954 Stateless Persons Convention?

Submitter response

Seventy nine submitters responded to this question: 43 submitters responded on behalf of an organisation and 36 submitters responded as private individuals. Organisations that

made submissions included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, an education sector representative, a territorial authority, the Families Commission and the United Nations High Commissioner for Refugees.

Approximately 75 percent of organisations and 65 percent of individual submitters considered that New Zealand should become party to the 1954 Stateless Persons Convention. Many submitters considered that this would be consistent with New Zealand's support for international human rights, with some commenting that to not do so would undermine New Zealand's credibility in this area. A number of submitters commented that statelessness is a growing international problem and that signing the Convention would ensure that New Zealand has a proper process for dealing with such people.

> *Accession is consistent with New Zealand's broader human rights policy and objectives to be a good international citizen. In this regard, the failure to accede to this instrument may be said to reduce New Zealand's credibility and, as a result, the persuasiveness of New Zealand's advocacy on human rights matters. It would certainly be the case that, as a party to the Stateless Persons Convention, New Zealand would have greater authority to advocate for further ratification, in order to reduce statelessness and displacement around the world.* (Amnesty International New Zealand)

> *The issue of stateless persons is a growing problem worldwide. If New Zealand were a signatory, it would ensure that we had procedures in place to deal with such people in a respectful and compassionate way.* (St Anne's Parish Social Justice Group)

In its submission, the UNHCR strongly encouraged New Zealand to accede to both the 1954 Convention and the 1961 Convention of the Reduction of Statelessness, which sets out measures to ensure that persons do not become stateless or are enabled to regain an effective nationality.

Some submitters expressed the view that statelessness should be considered as part of the single protection procedure discussion in section 14.2.1.

Some submitters commented that stateless people need to be able to access the education, health and social services required by the Stateless Persons Convention and have the right to remain in New Zealand. One submitter expressed the view that the costs would be minimal as the number of stateless people coming to New Zealand is unlikely to increase. Other submitters, on the other hand, considered that there is a risk of increasing number of applications. One submitter commented that there could also be a risk of people renouncing their citizenship in order to claim statelessness.

> *There are some serious risks that would have to be satisfied in order to proceed. Prime amongst these, in my view, are:*

- *The potential for an increase in persons claiming Statelessness*
- *Encouragement of persons to renounce their citizenship in order to claim Statelessness.*

> *A key question is what sanctions the 1954 convention allows where a person renounces their citizenship? These concerns may prove to be unfounded, however my submission is to proceed with caution.* (Individual submitter)

Approximately 20 percent of individual submitters and just over five percent of organisations expressed the view that New Zealand should not become party to the Stateless Persons Convention. One submitter commented that there are too many risks as New Zealand is still seen as a "soft touch". Another commented that New Zealand should not be signing up to any more international conventions.

14.5: General comments and other issues raised by submitters

Some submitters made general comments on the proposals, commenting that respect for New Zealand's international obligations should be an overriding principle. A number of submitters expressed concern, however, that the proposals place too strong an emphasis on international obligations and not enough emphasis on New Zealand's interests.

> *There seems to be a constant theme of not wanting to "contravene our international obligations" when really the focus should be on what is best for NZ. If the convention doesn't always fit with what we want then we should still have the fortitude to change it. We will still be playing our global citizen role for the most part and a lot more than most countries.* (Individual submitter)

Some submitters commented on the need for New Zealand to avoid becoming a target for non-genuine refugees or people smugglers, with one suggesting that all refugee status claimants should be held in custody as in Australia. Another submitter, however, advocated abandoning the detention proposals discussed in section 12. One submitter commented that many refugees have serious psychological problems and that New Zealand needs to be sure that it can afford the resources to help them before accepting them.

One submitter expressed concern that the cumulative effect of the proposals in the discussion paper would adversely affect refugees and asylum seekers.

> *The measures proposed will impact heavily on refugees and asylum seekers, their families and immigrants from refugee-like situations. The result will be the systematic dismantling of the institution of asylum through the cumulative effect of interdiction measures, biometric testing, increased detention, restricted access to appeal, the increased power of officials and unsubstantiated allegations in the name of "security concerns". These measures ensure that very few asylum seekers will reach New Zealand, potentially denying them the right to refuge.* (Human Rights Foundation)

One submitter suggested that consideration be given to New Zealand's future obligations as an international citizen to people likely to be displaced due to environmental factors, including climate change.

> *There is no current international framework for this discussion, but New Zealand cannot wait for the world to catch up with this issue. The issue is already one that is affecting people in the Pacific, and New Zealand will be one of the first nations to need to develop a response.* (Caritas Aotearoa New Zealand)

Another submitter commented that "internally displaced people" should be included among those facing inhuman and degrading treatment.

A number of submitters commented on the status of people seeking protection in New Zealand, expressing concern that some claimants are unable to work or access health and other services because they do not hold a permit to be in New Zealand. One submitter considered that claimants who are not granted a work permit on arrival in New Zealand should instead be issued with a limited purpose permit that allows them to work and access services while waiting for their claim to be determined, and to seek leave to access the Removal Review Authority.

Another submitter suggested the creation and use of a "legal presence permit" for these cases. This submitter also commented that New Zealand is not obliged to give residence to successful refugee claimants and suggested that they initially be issued with a legal presence permit for a three year period.

> *This permit would be made available to each 'quota refugee', in lieu of the permanent residence permit now granted automatically and to each asylum seeker (having passed identity and security clearances) for an indefinite time covering either the period during which his/her application for asylum is being considered, or until such time as that person leaves New Zealand (for example to return to the home land or to travel to another country e.g. Australia). Such a permit could also be made available to a person who, for whatever reason, is unable to obtain documentation enabling him or her to depart from New Zealand. The holder of such a legal presence permit might be given the right to apply for permanent residence after a qualifying period of perhaps 3 years. The rights attaching to such permits would be established in legislation but would include all rights guaranteed under the UN Convention on Refugees, the right to work, and whatever access to health, education and social benefits the government might consider to be appropriate.* (Refugee and Immigration Committee, Wellington District Law Society)

Some submitters suggested that refugees be granted temporary protection until it is safe to return to their home country.

SECTION 15: OTHER ISSUES

Overview

Some submitters proposed that an Immigration Commissioner be established to oversee the exercise of powers by immigration officers. Such a commissioner would fulfil a similar role to other specialist statutory commissioners, and would focus on removal and detention issues, complaints of misconduct or unfairness against departmental officers and others exercising delegated powers, and other urgent issues for which no immediate remedy exists.

A number of submitters proposed that volunteering be excluded from the definition of employment in immigration legislation so that organisations with volunteers do not find themselves unexpectedly regarded as employers under the Immigration Act.

Some submitters suggested that consideration be given to the government agency that is responsible for the administration of immigration legislation. One submitter suggested that the family, humanitarian and refugee aspects of immigration policy be transferred to another agency such as the Ministry of Justice. Another suggested that responsibility for all immigration policy be shifted to an agency with a stronger focus on maximising the benefits of immigration.

Many submitters took the opportunity to comment on specific aspects of immigration policy. Over 3,500 individuals signed submissions seeking greater access to New Zealand for Pacific peoples. Comments were also made on the processing of immigration applications by immigration officers and the need for greater attention to various settlement and post-migration issues.

15.1: Comments relevant to the Immigration Act Review

A number of submitters made general comments on the review process or commented on other aspects of the 1987 Act that were not specifically addressed in the discussion paper.

General comments

Many individual submitters expressed general support for the proposals set out in the discussion paper, with a number commenting on the need to tighten up immigration controls. However, other submitters considered that further work should be undertaken to develop a smaller, more targeted set of amendments to the existing legislation. Some submitters expressed disappointment that the review had focused on problems with the existing legislation rather than taking a more “blue skies” approach.

A number of submitters commented that the real problems are with immigration policy and practice and expressed their interest in being consulted on any reviews of immigration policy and service delivery. As discussed in sections 15.2 and 15.3, many submitters suggested specific changes to immigration policy and its implementation.

Some submitters expressed concern about the timeframe for consultation on the discussion paper. Some submitters commented that not all migrant communities had the opportunity to consider the proposed changes in their own language.

Immigration Commissioner

Some submitters proposed that the new legislation, or a separate piece of legislation, establish an independent Immigration Commissioner akin to the Police Complaints Authority, the Health and Disability Commissioner and other statutory commissioners. Submitters commented that there is a need for a specialist body to oversee the exercise of powers by immigration officers, particularly the existing and proposed powers relating to detention and removal.

> *The Department of Labour (Immigration New Zealand) is believed to be currently the only government department with sweeping powers of detention whose activities are not subject to oversight by an independent specialist body, in addition to the Ombudsmen.* (Refugee and Immigration Committee, Wellington District Law Committee)
>
> *There is an argument that an independent Commissioner would be a fair increase in accountability for immigration officers in parallel with the increased accountability of consultants under the immigration advisor's bill currently before Parliament.* (Hutt Valley Community Law Centre)

Submitters proposed that such a Commissioner would focus on:

- removal and detention issues
- complaints of misconduct or unfairness against departmental officers and others exercising delegated powers, and
- other urgent issues for which no immediate remedy exists (for example, declined temporary permits).

Submitters proposed that the Commissioner have the power to:

- investigate and require the provision of information, similar to other state sector commissioners
- require that the status quo be maintained in genuine cases while an investigation is underway
- make binding decisions in some limited areas (in relation to preservation of status and conduct)
- make recommendations and require a report back to the Commissioner on those recommendations, and
- refer matters to another statutory body such as the proposed immigration and refugee appeals tribunal or the Human Rights Review Tribunal.

The Commissioner would not have the power to investigate decisions of the Minister, the appeals tribunal(s) or the courts.

One submitter suggested that, in the absence of legal aid, a network of advocates be established to assist basic access to the Commissioner for those with language, cultural or other barriers.

Definition of employment

A number of submitters, including the Office for the Community and Voluntary Sector and Volunteering New Zealand, proposed that volunteering be excluded from the definition of employment in immigration legislation so that organisations with volunteers do not find themselves unexpectedly regarded as employers under the Immigration Act.

The 1987 Act defines "employment" as any activity undertaken for gain or reward. Submitters noted that the Department of Labour advised community organisations in 2003 that overseas volunteers do not require a work permit if the organisation they volunteer for is clearly a charity and the volunteer gains no financial advantage. Submitters commented that in practice, however, the phrase "gain or reward" has been interpreted differently by different immigration officers. Submitters suggested adding volunteers or volunteering to the list of exclusions set out in section 2 of the Act to avoid any further confusion.

Volunteering New Zealand suggested that the exclusion be restricted to activities undertaken for a non-for-profit organisation and that a volunteer be defined as follows:

> *"A volunteer is an individual who, by free choice, offers his or her time, work and skills, occasionally or on a regular basis, without expectation of compensation, other than reimbursement of reasonable expenses and subsistence allowance necessary for the accomplishment of his or her assignments as a volunteer, for the public benefit, individually or within a framework of informal or officially registered non-government non-profit organisations or national or international public entities."* (Volunteering New Zealand)

Responsibility for immigration

Some submitters commented on the government agency that has responsibility for administering immigration legislation. One submitter expressed concern that the Department of Labour's focus on employment and economic development does not always sit comfortably with New Zealand's human rights obligations, including the administration of family and refugee policy. The submitter suggested a separation of functions in order to eliminate competition for processing resources and priority between the two distinct streams.

> *It is considered that the differences between the drivers for the immigration stream and the drivers of the family reunification/humanitarian/refugee stream are such that the two streams should be administered by different government departments. The immigration stream, which is explicitly aimed at meeting New Zealand's domestic immigration and work-force objectives, should continue to be managed, and prioritised by the Department of Labour. The family, humanitarian and refugee streams should not be required to*

> *compete with the migration streams, as they do currently within the Department of Labour. These streams, which are government by human rights, humanitarian considerations and international obligations (and hence a different philosophy), should be managed by a different department, possibly by the Ministry of Justice.* (Refugee and Immigration Committee, Wellington District Law Society)

Another submitter, on the other hand, commented that the discussion paper focuses too much on border security and not enough on maximising the benefits of immigration. The submitter suggested that immigration policy might be better located within New Zealand Trade and Enterprise (NZTE), the Ministry of Foreign Affairs and Trade or the Treasury, or that an independent immigration promotion agency be established in a similar way to NZTE or Tourism New Zealand. One submitter suggested that Immigration New Zealand stand alone, separate from the Department of Labour.

15.2: Comments on immigration policy

Many submitters took the opportunity to make submissions on various aspects of immigration policy. Immigration policy is outside the scope of the current review. However, the range of comments made by submitters is summarised below.

Submissions from Pacific communities

Over 3,500 individuals from New Zealand's Pacific communities signed submissions seeking better access to New Zealand. This included over 2,300 individuals who signed a submission from the Tongan community, who also responded to the issues addressed in the discussion paper. The Tongan community submitted that people from Tonga, Samoa and Fiji be given better opportunities to enter New Zealand than people from other countries and proposed quotas of 3,000 places for Tonga, 4,000 for Samoa and 5,000 for Fiji. The Tongan community also proposed arrangements to regularise the status of those unlawfully in New Zealand who have or are able to find employment here.

Over 1,200 individuals from the Tongan, Samoan, Fijian, and Tuvaluan, Vanuatu and Cook Island communities submitted or signed a common submission that proposed specific visa arrangements for people from the Pacific. The key points of that submission are set out in full:

1. That Pacific people be allowed to travel to NZ and be issued on arrival or prior to departure from country of residence a single visa that allows them to work, visit etc.
2. That every 12 months their visa may be extended for a further 12 months by application to NZIS in NZ
3. That they must hold compulsory medical health insurance for the duration of their stay in NZ
4. That they must obtain a health clearance before leaving county of residence
5. That they must obtain a police clearance before leaving country of residence. [Anyone with a criminal conviction will not be accepted]

6. That they cannot access the NZ social welfare system or unemployment benefit; if they are unemployed they must return home. All Government agencies have access to the immigration status equally
7. That if they commit a criminal offence [to be specified] they will be immediately deported for commitment in their country of origin, and not be able to return to NZ for 10 years subject to a review panel.
8. That their children will have access to education and doctors' visits including themselves, as they will able working and paying taxes.
9. That they will have the same rights as anyone else to apply for NZ residency after two years, providing they meet all the criteria
10. That they will be able to return home and have access to return to NZ without a stand down period.
11. That People aged 50+ will have freedom to travel to and from NZ without restrictions and if able, work, as long as the have medical insurance and sponsorship guarantees by their NZ families to look after them whilst in NZ.

A submission was also made by the Fijian community that proposed similar arrangements for Fijians with skills that are in short supply in New Zealand. This submission also sought an increase in Fiji's Pacific Access Quota from 250 to 750 places, with 375 places reserved for indigenous Fijians.

Other comments on immigration policy

Immigration intake

- New Zealand needs a population policy.
- New Zealand should reduce or reconsider immigration levels given climate change, peak fuel and/or pressures on New Zealand's housing market and infrastructure.
- New Zealand should be encouraging skilled expatriates to return home.
- There should not be wide variations in the level of the migrant intake from year-to-year.
- The balance of migrants accepted should be shifted in favour of more skilled migrants.
- New Zealand should only take migrants from similar cultures who are able to fit in to New Zealand lifestyles.

Skilled migration policy

- The Skilled Migrant Category should be reviewed.
- The "comparable labour markets policy" is inappropriate given globalisation of skills, standards and knowledge. Work experience should be recognised from other countries.
- Policy should be simplified for people in professions that New Zealand needs.
- Migrants should be bonded for at least two years to the sort of work they came here for.
- The job offer requirements are hard to meet because the job offer must be valid at the time of expression of interest and again before residence approval – employers are not prepared to wait that long.

- The English requirement should be reduced, set on the basis of the average level of New Zealanders, and/or aligned with Australia's requirement.
- The English requirement should generally be high but appropriate to the person's occupation.
- There should be a policy commitment to better employment outcomes for migrant workers.
- Policy should consider the impact of the "brain drain" on other countries.
- Immigration policy has been Anglicised – there is a need for a stronger focus on Asia.

Business immigration policy

- The English requirement should be removed from the Long-term Business Visa (LTBV) policy.
- The English and age requirements should be removed from the Investor Category.
- Investors should be required to make a more active financial investment.
- The level of investment required is fair but the requirement to transfer the funds to the Government for minimal interest is not.
- LTBV applicants should have a longer period of time to shift to New Zealand.
- Too much detail is required for business plans.

Family policy

- It should be easier for siblings and other family members to get residence in New Zealand.
- Migrants should not be able to bring their sibling here if the sibling is the last family member left in their home country.
- Partnership requirements should be tightened up.
- The requirement for partners to demonstrate correspondence is outdated.
- People applying for residence on partnership grounds should be able to stay here while their application is considered.
- Partners should get a five-year permit initially and then residence if the relationship is still stable after that time.
- The suitability of the New Zealand partner should be assessed before a person obtains a visa on partnership grounds.

Work policy

- Work permit policy is not meeting the needs of employers.
- More Pacific Access Category visas should be issued to help address labour shortages.
- Shortages of seasonal workers should be declared early in the year.
- Seasonal workers should be able to obtain a visa from offshore and return every year.
- Seasonal workers should be able to move between employers.
- Skilled workers should be able to obtain residence; others should get a work permit.
- The occupational skills list is inflexible.
- There is scope for improving the working holiday scheme by allowing visa holders to undertake more study and to work for the same employer for more than three months.
- There is a shortage of truck drivers that needs to be addressed.

- Foreign fishing crew should be subject to streamlined procedures given they spend most of their time at sea and have limited impact on the New Zealand population.

Student policy

- New Zealand should facilitate residence for those who are studying here.
- The limit on the number of hours that may be worked should be removed to enable international students to undertake vocational courses and work-based training.
- The requirement for medical insurance should be extended to graduating students transferring to a six-month visa.
- Both parents should be able to obtain a Guardian Visa.

Visitor policy

- People should be able to get a visa to enable them to look for a job.
- Discriminatory rules are being applied to visitor visa applicants from some countries – the same rules should apply to everyone.
- Applicants should not need to produce evidence of a return ticket until the application is approved in principle.

Returning resident's visa (RRV) policy

- People who marry a New Zealand citizen should be entitled to a RRV issued for an indefinite period.
- There should be flexibility for people working on overseas contracts.
- The principal applicant should not need to apply for a RRV in order for a family member to obtain a RRV.

Refugee and humanitarian policies

- Refugee status applications need to be thoroughly scrutinised.
- There is a need for a common-sense approach to humanitarian issues.
- Family reunification policies and processes are not working for refugees.
- Too many additional family members of refugees are being allowed to come to New Zealand.

Other

- Once the framework is set, it should be simple, transparent and stable so as not to undermine migrant confidence.
- Immigration policy needs to be linked to wider skills and economic development.
- Consideration needs to be given to the role of immigration policy in sustaining New Zealand's international education profile.
- People from the Pacific Islands should have better access to New Zealand (see below).
- Immigration health policy should not take a narrow view of disability.
- The Domestic Violence Policy should be reviewed.
- Buddhist monks who have demonstrated that they are good "citizens" should be allowed to stay here as long as they have the support of the community.
- Residents should get a four-year probationary visa.

- The status of overstayers should be legalised if they have been here a long time and are contributing to the community.
- New Zealand should test prospective migrants' acceptance of New Zealand values.

15.3: Comments on service delivery

A number of submitters commented on the processing of applications by immigration officers. These issues are outside the scope of the Immigration Act Review. However, the main concerns were as follows:

- The application process takes too long.
- Immigration officers do not always have detailed knowledge of immigration policy requirements.
- Application forms and processes should be less complicated so people do not need to use immigration consultants.
- Change of case managers upsets continuity.
- Immigration officers are sometimes unkind and appear to be prejudiced.
- Overseas officers should not make visa decisions.
- Applicants should not need to submit birth certificates and/or police certificates with each new application.
- Immigration New Zealand needs to be better resourced to enable efficient processing of applications and enforcement of the legislation.
- Higher fees should be charged for LTBV applications to weed out non-genuine applications.
- Immigration New Zealand should acknowledge receipt of passports.
- Decision-making by the Immigration Profiling Group should be transparent.
- Applications from Mongolia should be processed in Seoul rather than Beijing.

A number of individual submitters commented on the helpfulness of the Department of Labour's marketing directors in the United States.

15.4: Other comments

A number of submitters commented on broader issues relating to the settlement of migrants and New Zealand's approach to immigration. These issues are also outside the scope of the Immigration Act Review, but are briefly summarised as follows.

- There is a need to look into why many migrants leave New Zealand after a relatively short period of time.
- Problems with non-recognition of qualifications need to be addressed.
- A public education programme is required about the vital contribution of migrants and migrant workers in New Zealand the problems of discrimination against migrants.
- Allowance for the regulation of immigration should be made in GATTS negotiations.
- Resources are required to provide settlement assistance to migrants.
- Refugee resettlement issues need to be better coordinated and addressed.
- Migrant unemployment and underemployment needs to be addressed.
- Migrants should attend Treaty of Waitangi training.

- There should be a greater emphasis on training New Zealanders to meet New Zealand's skill needs.
- The benefit stand-down period for new migrants should be extended to four years.
- People should not be able to drive in New Zealand until they have passed the New Zealand driving test.
- A one-stop business development agency should be established to assist migrants to set up their own businesses.
- New Zealand should consider making a greater distinction between residence and citizenship.

APPENDIX 1: THE CONSULTATION PROCESS

On 5 April 2006, the Minister of Immigration, Hon David Cunliffe released a discussion paper on the Immigration Act Review for public consultation. The discussion paper explained the purpose and scope of the review and set out a comprehensive range of options for legislative change. The discussion paper was prepared by the Department of Labour, in consultation with other government departments, and approved for release by the Cabinet.

The discussion paper was made available on the Department of Labour's website and hard copies could be obtained from the Department on request via a dedicated email address, post or a freephone number.

In early April 2006, the Minister of Immigration contacted organisations and individuals known to have an interest in immigration including:

- immigration consultants and lawyers
- Pacific, migrant, refugee and ethnic groups
- community groups working with migrants and refugees
- business and employer groups, and
- education providers.

These organisations and individuals were provided with a copy of the discussion paper, or a shorter overview paper, and were advised how to obtain further copies of the discussion document and the process and timeframe for making a submission. They were also advised of the public meetings being held and asked to distribute public meeting invitations to their networks.

Between late April and mid-June 2006, the Department of the Labour held 19 public meetings with stakeholders in Auckland, Hamilton, Napier, Wellington, Nelson, Christchurch and Dunedin. The meetings gave stakeholders an opportunity to hear a presentation by the Department on the options for change, and to ask questions or make comments. In addition, the Department held 13 one-on-one meetings with key stakeholders.

The Department of Labour produced translations of the presentation in the Samoan, Tongan, Tuvalu, and Kiribati languages, and one page translations of the key information on the review and the submission process in the Korean, Chinese (simplified), Chinese (traditional), Hindi and Arabic languages.

Over 1,500 copies of the discussion paper and 3,000 copies of the overview paper were distributed to organisations and individuals throughout the country (including distribution at the public meetings). More than 650 people attended the public meetings.

Organisations and individuals were invited to make submissions online, through a website tool developed specifically for this purpose, or by sending written submissions to the

Department of Labour by post or the dedicated email address. The closing date for submissions was 1 July 2006.

APPENDIX 2: ANALYSIS OF SUBMISSIONS

Submissions were made in one of two ways:

1. by completing the online submission form, or
2. by sending written comments to the Department of Labour via post or email.

Submissions that were made online were linked directly to an Access database. Submitter responses and comments were then extracted and organised by each question in a Word format.

For the written submissions, each submission was read carefully as it was received and analysed to identify which question or section of the discussion paper the comments related to. The comments were then entered verbatim into the Word document alongside the comments made by online submitters.

Wherever possible, written submission comments were linked to a specific question in the discussion paper. If comments did not clearly relate to a specific question but did relate to a particular section of the discussion paper, the comments were linked to the general question at the end of each section of the online questionnaire, which asked submitters to provide any other comments they had on that section. General comments that did not clearly relate to a specific question or section of the discussion paper were identified separately.

Some written submission comments related to more than one question or section of the discussion paper. In these cases, they were linked to all of the relevant questions or sections.

Once all submissions had been received, qualitative analysis was undertaken by reading through all the comments made on each question and identifying the range of responses and key themes. This analysis was undertaken section by section.

Many of the key questions in the discussion paper asked for a yes or no response or gave a number of other pre-determined responses for submitters to choose from. Simple quantitative analysis was undertaken by identifying the number of submitters responding to each question, whether they were responding on behalf of an organisation or as an individual, and the range of responses.

For the written submissions, a response was only counted if the submitter clearly indicated support for, or opposition to, the proposal (or another pre-determined response). The quantitative analysis needs to be treated with caution because not all submitters indicated a clear response to the question asked.

APPENDIX 3: LIST OF SUBMITTERS

Organisations

Access Immigration
Air New Zealand
Ambedkar Mission Society NZ Inc.
Amnesty International New Zealand
Arabs at Green Bay
Asia New Zealand Foundation
Association for Migration and Investment
Association of Consultant Engineers NZ Ltd
Auckland City Council
Auckland District Law Society: Immigration and Refugee Law Committee
Auckland Refugees as Survivors Centre
Bangladesh NZ Friendship Society Inc
Bay of Plenty Buddhist Association
Board of Airline Representatives
Business New Zealand
Canterbury Refugee Council Inc
Caritas Aotearoa New Zealand
CCS
Children's Commissioner
Christchurch City Council
Christchurch Community Law Centre
Christchurch Ethnic Council
Churches' Agency on Social Issues
Council for International Development
DPA (NZ) Inc.
Education New Zealand
Employers and Manufacturers Association (Central) Inc
Families Commission
Federation of Islamic Associations New Zealand
Fiji Association in Auckland
Fiji Club of New Zealand
Fingerprint & Forensic Services Limited
Fragomen New Zealand
Friends of Refugees Trust
Global Immigration Group
Grey Lynn Community Law Centre
Horticulture New Zealand
Hospitality Association
Human Rights Foundation
Hutt Ethnic Council
Hutt Valley Community Law Centre
IAAF High Performance Training Centre - Oceania
Immigration Committee, Tongan Community
Institution of Professional Engineers New Zealand Inc
International Academy Consortium
International People Solutions Ltd
Korean/New Zealand Business Council
Local Government New Zealand
Ministry of Education
Ministry of Health
Ministry of Research, Science and Technology
Ministry of Tourism
Ministry of Transport
Motor Trade Association
National Collective of Independent Women's Refuges
National Council of Women
National Evidential Services
New Zealand AIDS Foundation
New Zealand Burma Support Group
New Zealand Chinese Association (Auckland branch)
New Zealand Chinese Association (Waikato Branch)
New Zealand Council of Trade Unions
New Zealand Defence Force
New Zealand Federation of Ethnic Councils
New Zealand First
New Zealand Indian Central Association
New Zealand Indian Senior Citizens Association
New Zealand Kiwifruit Growers Inc
New Zealand Labour Party Pacific Sector Council
New Zealand Law Society
New Zealand Meat Workers and Related Trades Union Incorporated

New Zealand Police
New Zealand Qualifications Authority
New Zealand Vice Chancellors' Committee
North Shore Rodney Ethnic Council (to be Inc)
Northland Electorate
Office for the Community & Voluntary Sector
Office of the Human Rights Commission
Office of the Ombudsman
Ora Limited
Pacific Islanders' Presbyterian Church
Pasifika Integrated Health Care Ltd.
Pathways to New Zealand Ltd
Progressive Party
Qantas
Recruitment and Consulting Services Association
Refugee Council of New Zealand
Religious Society of Friends, Aotearoa/New Zealand
Retailers Association
RMS Refugee Resettlement
Road Transport Forum New Zealand
Rotorua Ethnic Council
Sampang Immigration Consultants
Sanford Limited
SORAL: Apia Samoa/New Zealand
South East Resources Ltd.
St Anne's Parish Social Justice Group
Tauranga Regional Ethnic Council
Tauranga Translation Service
The Asian Network Incorporated
The Peace Foundation
Tourism Industry
Tuvalu Community trust
United Nations High Commissioner for Refugees
University of Waikato
Viti Centre Trust
Volunteering Canterbury
Volunteering New Zealand
Waitakere Community Law Service
Wellington Chamber of Commerce
Wellington Chinese Association
Wellington Community Law Centre, Wellington District Law Society: Refugee and Immigration Committee
Wellington Institute of Technology
Wellington International Filipino Society Inc. (WIFS)
Wellington Lao Community
WWOOF - World Wide Opportunities on Organic Farms
Zimbabwean Society

Individual submitters

A G Malcolm
A W Ritchie
Aamir Iqbal Sami
Alan Vowles
Alison Joy Mace
Alison Masters
Allan Bourne
Allan MacKenzie
Allan Mackey
Alwyn Parry
Amanda Drumm
Andrew Maxwell Ford
Angela Ricker
Anita Mansell
Anna Kim
Anna Kim
Antony Cotton
Anurag Pandey
Arthur J Anae
Barbara Hume
Bernard Gadd
Bevan McRae Nicol
Bin Zhang
Brendon Cullen
Bruce Candy
Bryan Alfred Walker
Camille Nakhid
Carl Horn
Charles E Davis
Cheries Macintosh
Chris Bean
Chris Gianos

Christopher Peirce
Claire Louise Jane Trimboy
Clara Simpson
D David Davies
D M A Perera
Dan Dunne
Daniel Mark Ford
Daniel Wayman
Dave Moskovitz
David J Lee
Deanna R Yarndley
Deniss Yeung
Dennis John Paul
Dewald de Lange
Dorothy Macedo
Douglas Wall
Dr J M McKinnon
Dr Michael John Kidd
Drammer Dakmak
Edward Fraser Ross Campbell
Edwin Welch
Elisabeth Simeonides
Fiona Groves
G P Singh
Ganges B Singh
Garry
Geoffrey Leicester
Geoffrey Paul Abraham
Geoffrey Stewart Pownall
George Schuster
Gill
Glenda Saunders
Graham Calder
Gurpreet Kaur
H T Murfitt
Heather Devere
Hongshan Zhao
Hovhannisyan Artyom
H P Luthera
Huang Weishan
Ian Otten
Ian Parker
Ikeraam
Indrani Ambepitiya
Irene Oosterhof
Ivan Simeonov Georgiev
J B Boswell
J D Linton
Jamnong Chanla
Jan Cohen
Javed Chaudhry
Jay Thompson
Jennifer Marina Pons
Jenson Deokiesingh
Jessica Pettersen
Joan Guo
Joe and Gaylene Thompson
John Fenton
John M Olson
Joy Urlich
Joytika Agnew
Judy Paine
Julio Veasco Verzo
Justin Erik Allen Glyn
Kam Wan and Joseph Cheong
Kamaljit Singh
Karen Lyons
Kate Sanford
Katie Small
Kawther Hamdi
Keem Kim Chin
Ken Walker
Lawrayne Diane Hughes
Ling Ling Liang
Loren O'Sullivan
M Britten
M J Allen
M Waseem
M D Bushe
Marcos Pinto
Marcus Adams
Marilyn Woolford Chandler
Mark Collet
Mark D Sadler
Martin Edwards
MaryEllen Wierschem
Matthew Oborn
M C W Alloway, D Alloway & P D Alloway
Meng Ly
Michael Gibson
Michael O'Neil
Michael Sutton

Michele Nelsen
Mike Im
Mohd Abdul Mateen
Mustafa Birkan Kures
Natalie Ericsen
Neil Budgen
Neil Patel
Noel Tiano
Odessa Marie Heraud
P & R Phillip
Parshotam Khasia
Patricia Vermillion-Peirce
Pete Patterson
Peter & Gillian Bennett
Peter David Smith
Peter Leather
Phil and Jane Peters
Phillip Arnold Higgins
Pijush Kanti Bandyopadhyay
Pip Jamieson
Praveen Dasarathi
R J Chrystall
R Sunico
R S Startton
Radha Balakrishnan
Rainet Nicole
Ralph Penning
R B Harris
Reshmi Pratap
Richard Bushe
Richard Watt
Robin Ord
Ron Pankhurst
Ronald Close
Rosemary Cooper
Roy Teodolfo Bustenera
Ruben Chaston
Ruth DeSouza
S F Vaughan
Sagar Mittal
Sam Yau
Sarah Eskrick
Satish Chand
Scott Lee
Seenuan Stuart
Siew Butterworth
Siosaia
Sisa Tuicakau
Soner Tari
Suchat Khunsing
Sukanya Cox
Susan Blair
Susan Brown
Susan Davis
Tarek Asham Yassa
Thomas Thong
Tiangao Yang
Tim McKenzie
Trinette Tawse
Tuiafelolo Laufou Taavao Vole
Tze Ming Mok
Uelese Sua
Venerable Suthep Suropong Abbot
Victoria Smith
Vivek Walia
Wendy K Brackstone
William Soko Osborne and R Osborne
Xianyu Wanzi
Zhang Wei
Name unknown or unreadable (9)