APPENDIX B

IMMIGRATION ACT REVIEW: BACKGROUND PAPER

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Executive Summary - Chapter 1 Core provisions

Proposal – Purpose of Immigration Bill

I propose that the Bill include a purpose statement. I propose that the purpose of the Bill is to:

a. allow for immigration to New Zealand that ensures that New Zealand has the skills and labour it needs
b. contribute to the security of New Zealand's border
c. uphold New Zealand immigration-related international obligations
d. facilitate the settlement of migrants and refugees, and
e. balance the rights of individuals with the obligation of the government to manage immigration in the national interest, as determined by the Crown.

Status quo – The purpose of New Zealand's immigration legislation is not set out in the 1987 Act. Some of the amendments to the 1987 Act have included purpose statements outlining the specific reform or change involved.

Discussion paper and submissions – Ninety percent of 125 submitters agreed that there should be a purpose statement in the legislation. The discussion paper asked if the purpose of New Zealand's immigration legislation was "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". Just under half the 72 organisations and approximately 75 percent of the 53 individual submitters indicated support for the suggested purpose. Submitters expressed a wide range of ideas about what further detail the purpose statement could include, including the positive goals of immigration, and the importance of individual rights.

Comment – The proposed approach responds to the key concerns in submissions including international obligations and individual rights, while maintaining government control.

Proposal – Government to control immigration

I propose that the Bill reaffirms the right of New Zealand citizens to be in New Zealand.

I propose that:

a. all non-citizens in New Zealand are required to hold a valid visa and to comply with the conditions of that visa, and
b. non-citizens in New Zealand who do not hold a valid visa are prohibited from applying for a visa (Chapter Three: Decision-making continues to enable the Minister to grant visas to non-citizens unlawfully in New Zealand, currently known as a section 35A).

Status quo – This proposal mirrors the 1987 Act's core provisions.

Discussion paper and submissions - The discussion paper did not seek specific comment on these fundamental issues. In general, explicit protection of New Zealand citizens' right to re-enter New Zealand was noted as a strength of the 1987 Act.

Comment – These proposals provide a necessary foundation for the government's ability

to manage the presence and activities of non-citizens in New Zealand.

Proposal – Excluded non-citizens

I propose that statutory prohibitions continue to exclude certain non-citizens from New Zealand and constitute sufficient grounds to decline any visa application and to refuse entry permission (except for residents). I propose that there be a delegable ministerial power to waive the application of the exclusion criteria.

I propose that the statutory exclusion criteria apply where:

a. a non-citizen has been sentenced to imprisonment for 5 years or more, or, within the past 10 years, for 12 months or more
b. a non-citizen is subject to a deportation order banning return to New Zealand, or is banned under any previous or current New Zealand statute
c. a non-citizen is or has been banned, or deported from any other country at any time
d. there is reason to believe a non-citizen is likely to commit an offence in New Zealand that is punishable by imprisonment, and
e. there is reason to believe a non-citizen is likely to be a threat or risk to national security, public order, or the public interest.

I propose that character policy set in Immigration Instructions continue to supplement the statutory exclusion criteria.

Status quo – This proposal largely mirrors the status quo, but has broadened the criteria relating to national security, public order, and the public interest to remove current restrictions that these risks must be connected to, for example, organised crime.

Discussion paper and submissions – The discussion paper proposed that the Bill should contain provisions to exclude non-citizens from New Zealand who meet clear criteria relating to both character and health. There were strong reservations from submitters on the proposal for health exclusion criteria, which is no longer being proposed. Those that supported character exclusion criteria remaining in the legislation commented that transparency was desirable.

Comment – The proposed exclusion criteria build on the 1987 Act and are an important mechanism in maintaining the safety and security of New Zealand, and the integrity of the immigration system. Unlike health criteria, character exclusion criteria relate to past or likely future convictions, actions or associations that put New Zealand at risk, and for which the person is culpable.

Proposal – Children born in New Zealand

I propose that the Bill include the current provisions that give New Zealand-born children who are not citizens the most favourable immigration status held by either of their parents.

Status quo – This proposal mirrors the status quo.

Discussion paper and submissions – This issue was not raised in the discussion paper.

Comment - The provisions in the 1987 Act came into force through amendments on 1 January 2006 in response to changes to New Zealand citizenship law. There is no reason to revisit these provisions at this early date.

Proposal – Fees and charges

I propose to carry the existing provisions over into the Bill. In addition, I propose that further flexibility be introduced by allowing regulations to prescribe the manner in which fees and charges are payable, and payment to third parties, who would transfer the amount to a departmental account.

Status quo – This proposal largely mirrors the status quo, but provides for more flexibility.

Discussion paper and submissions - This issue was not raised in the discussion paper

Comment - The proposals for third party fee management and for regulations to prescribe (and restrict) the manner of payment give the flexibility to stop, for example, taking cash payments in specified circumstances. This offers enhanced protection for the applicant and the department from loss or theft of cash.

CHAPTER ONE: CORE PROVISIONS

PURPOSE

1 This chapter discusses the recommendations on:

- the purpose of the Immigration Bill (the Bill)
- the government's role in controlling immigration
- the criteria that should exclude a person from New Zealand
- the status of New Zealand-born children without New Zealand citizenship, and
- fees and charges.

STATUS QUO

2 The Immigration Act 1987 (the 1987 Act) provides the legal framework that allows the government to manage immigration, but has no overarching purpose statement. The 1987 Act has core provisions to control the travel to, entry and stay of non-New Zealand citizens (non-citizens) in New Zealand, and to control their activities while here, such as work and study. It places obligations on non-citizens to maintain lawful status while in New Zealand and to leave when they have no lawful status. There are also statutory provisions that exclude the entry of some non-citizens on character grounds.

RATIONALE FOR THE PROPOSALS

3 The proposals in this chapter seek to establish a clear purpose for the Bill to allow the government to manage immigration in New Zealand's interests. The proposals maintain and clarify the core provisions for New Zealand citizens, and the core obligations on non-citizens. In the case of exclusion criteria, a detailed legislative provision is proposed to give a strong minimum standard.

PURPOSE OF IMMIGRATION BILL

Proposals

4 It is proposed that the Bill include a purpose statement.

5 It is proposed that the purpose of the Bill is to:

a. allow for immigration to New Zealand that ensures that New Zealand has the skills and labour it needs

b. contribute to the security of New Zealand's border

c. uphold New Zealand immigration-related international obligations

d. facilitate the settlement of migrants and refugees, and

e. balance the rights of individuals with the obligation of the government to manage immigration in the national interest, as determined by the Crown.

Status quo

6 The purpose of New Zealand's immigration legislation is not set out in the 1987 Act. Some of the amendments to the 1987 Act have included purpose statements outlining the specific reform or change involved.

Discussion paper and submissions

7 Ninety percent of 125 submitters agreed that there should be a purpose statement in the legislation. The discussion paper asked if the purpose of New Zealand's immigration legislation was "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". Just under half the 72 organisations and approximately 75 percent of the 53 individual submitters indicated support for the suggested purpose.

8 A number of submitters commented that the discussion of the purpose of immigration legislation placed too much emphasis on border security and that sovereignty issues need to be balanced against individual human rights. Submitters had a range of ideas about what further detail the purpose statement could include, for example:

- the New Zealand Association for Migration and Investment, and the Human Rights Foundation considered that the purpose statement should refer to recognising or upholding human rights
- the Human Rights Commission, and the Auckland District Law Society considered that it should refer to the Treaty of Waitangi and to the New Zealand Bill of Rights Act 1990
- the New Zealand Law Society considered that there was not sufficient recognition of the totality of New Zealand's immigration aims and obligations
- the New Zealand Council of Trade Unions commented that "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"
- the Wellington Chamber of Commerce and other submitters considered the statement should be more proactive and refer to generating economic growth, competing for potential migrants and/or maximising the benefits of immigration
- a number of submitters including the New Zealand Federation of Ethnic Councils Inc. commented that the purpose statement should affirm the importance of successful settlement, and
- Auckland Refugees as Survivors Centre commented that "it is essential to cement into the…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."

Comment

9 The submissions highlight the diverse range of views about the purpose of immigration. This diversity raises the possibility that an overly detailed purpose statement could be used in litigation over whether an individual decision or immigration policy category met the general purpose of the Bill, and/or correctly balanced the components of the purpose statement.

10 Litigation on the basis of a purpose statement would represent a risk to government's flexibility to make immigration policy and determine what is in the national interest. It may open up avenues of appeal against immigration decisions that were not intended by government.

11 The proposed approach responds to the key concerns in submissions including international obligations and individual rights, while maintaining government control. The proposed approach would allow the legislation to assist in the facilitation of the travel to, entry and stay of the permanent and temporary migrants that New Zealand wants, while ensuring fairness and transparency in maintaining the safety and security of the border.

12 The exact words of purpose statement will be finalised in drafting the Bill, and submitted to Cabinet for approval prior to the Bill's introduction to Parliament. Drafting a purpose statement that clearly determines who are subject to the provisions of immigration legislation would enable the Bill to clearly reflect the boundaries of the immigration system. For example, the immigration system has a distinct role in managing non-citizens at the border in the context of the wider set of border control functions performed, among others, by the New Zealand Customs Service.

GOVERNMENT TO CONTROL IMMIGRATION

Proposals

Rights of citizens protected

13 It is proposed that Bill reaffirms the right of New Zealand citizens to be in New Zealand.[1]

The requirement to hold a valid visa

14 It is proposed that:

a. all non-citizens in New Zealand are required to hold a valid visa and to comply with the conditions of that visa, and

b. non-citizens in New Zealand who do not hold a valid visa are prohibited from applying for a visa.

Status quo

15 Under the 1987 Act, and the New Zealand Bill of Rights Act 1990, every New Zealand citizen has a right to be in New Zealand at any time.

[1] New Zealand citizens include those from the Cook Islands, Niue and Tokelau, who would continue to be treated like all other New Zealand citizens under the Bill.

16 Non-citizens require authority to travel to, enter, and stay in New Zealand under the 1987 Act. They are obliged to leave New Zealand if they are here without authority and therefore in New Zealand unlawfully.

Discussion paper and submissions

17 The discussion paper did not seek specific comment on these fundamental issues. In general, explicit protection of New Zealand citizens' right to re-enter New Zealand was noted as a strength of the 1987 Act.

Comment

18 Accurate checking of citizenship in the immigration context protects the integrity of New Zealand citizenship and ensures that citizens are not subjected to controls intended for non-citizens. Controls for non-citizens can be managed through the requirement that they have a valid visa and comply with the conditions of that visa. The proposal for non-citizens to hold a valid visa provides a necessary foundation for the government's ability to manage their travel to and stay in New Zealand.

19 There are substantial differences in the rights available for non-citizens in New Zealand lawfully who hold a valid visa, and those in New Zealand unlawfully who do not. It is proposed that the distinction in these rights remains as a suitable incentive for non-citizens to maintain their lawful presence. The visa system is discussed in detail in *Chapter Two: Visas*. *Chapter Three: Decision-making* continues to enable the Minister to grant visas to non-citizens unlawfully in New Zealand, currently known as section 35A of the 1987 Act.

EXCLUDED NON-CITIZENS

Proposals

20 It is proposed that statutory prohibitions continue to exclude certain non-citizens from New Zealand and constitute sufficient grounds to decline any visa application and to refuse entry permission (except for residents).

21 It is proposed that there be a delegable ministerial power to waive the application of the exclusion criteria but no right to apply for this power to be exercised and no requirement on the decision-maker to give reasons.

22 It is proposed that character policy set in Immigration Instructions continue to supplement the statutory exclusion criteria.

Proposed exclusion criteria

23 It is proposed that the statutory exclusion criteria apply where:

a. a non-citizen has been sentenced to imprisonment for a term of 5 years or more, or for an indeterminate period capable of running for 5 years or more

b. a non-citizen has been sentenced, within the preceding 10 years, to imprisonment for a term of 12 months or more, or for an indeterminate period capable of running for 12 months or more

c. a non-citizen is subject to a deportation order banning return to New Zealand under the Bill

d. a non-citizen is or has been banned, removed, deported or excluded under any previous or current New Zealand statute, or designated under the Terrorism Suppression Act 2002

e. a non-citizen is or has been banned, removed, deported or excluded from any other country at any time

f. the Minister has reason to believe a non-citizen is likely to commit an offence in New Zealand that is punishable by imprisonment, or

g. the Minister has reason to believe a non-citizen is likely to be a threat or risk to national or international security, public order, or the public interest.

24 It is proposed that, as under the 1987 Act, diplomatic and consular officials in New Zealand and entitled to immunity from jurisdiction would not be subject to exclusion criteria, reflecting the requirements of international agreements relating to diplomatic status.

Status quo

25 The 1987 Act identifies grounds that make a non-citizen ineligible to enter New Zealand. These include criminal convictions, previous removal or deportation, being a threat to public safety and involvement in terrorism. A detailed discussion of the proposed exclusion criteria, and how it differs from the status quo is outlined in Table One below.

26 As well as legislative grounds for ineligibility, there are policy grounds. Entry can be refused on the basis of failure to meet minimum entry requirements applied to all visas and permits (for example, health or character requirements) and/or the specific policy criteria for the visa or permit type.

27 Special directions may be issued to waive the legislated exclusion criteria, and waivers may be made for health and character policy requirements.

Discussion paper and submissions

28 The discussion paper proposed that the Bill should contain provisions to exclude non-citizens from New Zealand who meet clear criteria relating to both character and health. There were strong reservations from submitters on the proposal for health exclusion criteria, which is no longer being proposed. Provisions for health criteria to continue be set in Immigration Instructions are discussed in *Chapter Three: Decision-making.*

29 Those that supported character exclusion criteria remaining in the legislation commented that this would enable non-citizens to determine whether any convictions would exclude them from entry. Transparency in character exclusion criteria was seen as desirable.

30 The New Zealand Law Society commented that there should be time limits after which exclusion based on convictions would cease, while other submitters were of the view that suspended sentences should not come within the criteria. The Human Rights Commission noted that exclusion

criteria based on "glorification of terrorism" had been controversial in the United Kingdom.

Comment

31 The proposed exclusion criteria build upon the provisions in section 7 of the 1987 Act and are an important mechanism in maintaining the safety and security of New Zealand, and the integrity of the immigration system. It is proposed to increase the effectiveness of these criteria, as set out in Table One below, in light of the current global environment which has changed considerably since 1987.

32 National or international security, public order and public interest exclusion provisions are more subjective than other criteria and potentially involve political judgements. It may be appropriate for these powers not to be delegated by the Minister, or to be delegated only narrowly.

33 Unlike health criteria, character exclusion criteria relate to past or likely future convictions, actions or associations that put New Zealand at risk, and for which the person is culpable. The ability to build upon the legislative exclusion criteria in Immigration Instructions allows differentiation in character standards to occur between different classes of non-citizen or for different visa types.

Table One: Detailed discussion of proposed exclusion criteria

Exclusion criteria	**Discussion**
Sentenced to imprisonment of 5 years or more	This mirrors the status quo
Sentenced to imprisonment of 12 months or more within the last 10 years	This mirrors the status quo. It places a time limit on how long lesser convictions trigger exclusion
Subject to a deportation order banning return to New Zealand	This mirrors the 1987 Act by enforcing bans on deportees returning, although the terminology is changed
Banned, removed, deported or excluded under any previous or current New Zealand statute, or designated under the Terrorism Suppression Act 2002	This carries over effect of current provisions, but is expanded to include any travel and entry bans under other statutes. This would clarify that these bans can be given effect under immigration legislation, without the inflexibility of listing specific statutes. Notable examples of bans are those imposed as part of sanctions regimes under the United Nations Act 1946 and where a person is designated under the Terrorism Suppression Act 2002
Banned, removed, deported or excluded from any other country at any time	This mirrors the status quo
Reason to believe likely to commit an offence in New Zealand punishable by imprisonment	This broadens the current exclusion criterion of a likelihood of committing an offence under the Crimes Act or Misuse of Drugs Act as there is no clear rationale for focusing only on these two Acts. The proposed wider approach is based on a likelihood of

Exclusion criteria	Discussion
	committing any offence under any New Zealand statute that is punishable by imprisonment. The proposal would require the decision-maker to identify that there was good reason to believe that a specific offence was likely to be committed, and to confirm that this offence would be punishable by imprisonment
Reason to believe likely to be a threat or risk to national or international security	This is designed to cover the current provisions that exclude non-citizens who are connected to an act of terrorism in New Zealand or overseas. While terrorism may have been a notable threat to national security when the 1987 Act was passed, and still is, the sources of threat are now broader than terrorists. This criterion would also take the place of the risk to "public safety" arising from terrorists, which exists in the 1987 Act
Reason to believe likely to be a threat or risk to public order or public interest	Public order and public interest exclusion provisions are currently based on organised crime and international circumstances, which are both too narrow. This criterion would allow threats or risks directly from a non-citizen to be addressed and would also exclude a person if the reaction to their presence in New Zealand would create disorder

CHILDREN BORN IN NEW ZEALAND

Proposal

34 It is proposed that the Bill include the current provisions that give New Zealand-born children who are not citizens the most favourable immigration status held by either of their parents.

Status quo

35 The proposal mirrors the status quo.

Discussion paper and submissions

36 This issue was not raised in the discussion paper.

Comment

37 The provisions in the 1987 Act came into force through amendments on 1 January 2006 in response to changes to New Zealand citizenship law. There is no reason to revisit these provisions at this early date.

FEES AND CHARGES

Proposals

38 It is proposed that the Bill:

a. allows fees and charges to be prescribed in regulations for any matter or service arising out of the Act, for them to apply to an individual or an

application, and that they be calculated to reflect the variable nature of the cost or potential cost of the matter or service, as under the 1987 Act

b. allows for different fees and charges to be prescribed for the same matter or service dependent on a range of factors, such as the way the service is provided, the location where the service is provided, and the manner through which the fee or charge may be payable, as under the 1987 Act

c. allows fees and charges to be paid to a third party, who could manage the amount and transfer it to the departmental bank account

d. allows for the imposition of the migrant levy on non-citizens who are granted visas, as under the 1987 Act

e. allows provisions that set up an "Immigration Resettlement and Research Fund" where the migrant levy is held to allow it to be managed and allocated appropriately, as under the 1987 Act

f. exempts protection claimants from the payment of fees and charges related to their claim, as for refugee status claimants under the 1987 Act, and

g. provides for individual waivers and refunds of fees and charges.

Status quo

39 The 1987 Act allows for fees to be prescribed in regulations for any matter or service arising out of the Act, and for them to apply to an individual or an application. The 1987 Act also allows for different fees to be prescribed for the same matter or service dependent on a range of factors, such as the way the service is provided and the location where the service is provided.

40 Under the 1987 Act, charges are allowed for services in relation to the administration of the Act, other than matters for which a fee applies. These services include telephone information services, courier charges, access to library or research services, and the cost of bulk forms.

41 The 1987 Act does not explicitly prohibit the payment of fees and charges to a third party.

Discussion paper and submissions

42 These issues were not included in the discussion paper.

Comment

43 Most of these proposals roll over the current provisions, which provide a high degree of financial flexibility. The proposals for third party fee management and for regulations to prescribe (and restrict) the manner of payment give the flexibility to stop, for example, taking cash payments in specified circumstances. This offers enhanced protection for the applicant and the department from loss or theft of cash.

Executive Summary - Chapter 2 The visa system

Proposal – Visa system

I propose that that the single term "visa" be used to describe all authorities to travel to or stay in New Zealand and that:

a. all non-citizens must hold a valid visa to before travelling to New Zealand, unless the requirement is waived individually or by class, and

b. non-citizens must abide by their visa conditions.

When entry permission is granted at the border, the "stay" conditions of a visa holder's visa would be activated. Where the requirement to hold a visa for travel to New Zealand had been waived, non-citizens would be granted a visa with "stay" conditions.

Consistent with a New Zealand citizen's right to be in New Zealand, I propose that the grant of New Zealand citizenship should cancel any visa held.

I also propose a power to cancel a temporary entrant, limited visitor, or transit passenger visa offshore or when entry permission is refused at the border.

Status quo – The 1987 Act currently establishes *visas* (for travel to New Zealand), *permits* (permitting a stay in New Zealand) and *exemptions*, which exempt a variety of classes of non-citizen from the requirement to hold a visa, permit, or both.

Discussion paper and submissions – The proposed use of the single term "visa" for all travel and stay authorisation granted to non-citizens received strong support at public meetings and in written submissions. Approximately 80 percent of 66 organisations and 65 percent of 45 individual submitters supported the proposal. Many 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.

Comment - Requiring non-citizens to hold visas is fundamental to maintaining control over immigration. The proposals build on the 1987 Act's clarity of status, but remove the visa/permit/exemption distinctions, which are not widely understood.

Proposal – Visa waivers and current exemptions

I propose that the Bill should provide for the requirement to have a visa before travel to New Zealand to be waived through:

a. regulations for classes of non-citizen and that set any criteria related to the waiver

b. a non-delegable Ministerial power to suspend or grant waivers for up to three months, pending regulations, and

c. a delegable Ministerial power to grant or suspend a waiver in relation to an individual.

I propose that the current visitor's visa waiver arrangements would continue with their current effect through regulations.

I propose that it be possible to deem visas permitting a stay in New Zealand to have been granted in situations specified in regulations or Immigration Instructions.

Visa system would apply to Australian citizens and residents

I propose that Australian citizens and residents not be exempted from the requirement

that all non-citizens hold a valid visa to be in New Zealand lawfully.

I propose that Australian citizens and residents be given a waiver from having to hold a visa to travel to New Zealand and that, on arrival, be granted a visa allowing an indefinite stay without work or study restrictions.

Status quo – The 1987 Act allows regulations to waive the requirement to hold a visa to travel to New Zealand. The 1987 Act and regulations exempt various classes of non-citizen from the requirement to hold permits to be in New Zealand for various purposes and periods.

Exemptions for Australian citizens and residents

The 1987 Act and regulations under it exempt Australian citizens and residents from the requirements to hold a visa and/or permit to enter and stay in New Zealand.

Discussion paper and submissions – Approximately 75 percent of 81 submitters agreed that the system should continue to allow for the equivalent of exemptions, within the visa system. The discussion paper noted that the current Australian exemption would remain in effect, perhaps using different terminology. There was no substantive public comment on this issue.

Comment – This proposal facilitates low risk travel while maintaining the flexibility to manage risk. This proposal would not change the effect of the current exemptions, but would give future flexibility to change them.

Although the proposed new visa system would apply to Australian citizens and residents (being non-citizens), there would be, in effect, no change to their present ability to travel to and stay in New Zealand. Any changes in the treatment of Australian citizens and residents travelling to and staying in New Zealand will be carefully communicated as early as possible to the Australian Government, at a suitable level, and ahead of any public announcement.

Proposal – Visa types and interim visas

I propose that the types of visa established under the Bill be:

a. permanent resident visas, giving an indefinite stay and right of re-entry without other conditions
b. resident visas, allowing non-citizens to stay indefinitely but subject to conditions, and those who meet conditions could become permanent residents
c. temporary entrant visas of various types valid for travel and stay for specified periods, rather than indefinitely, to be established in Immigration Instructions, including current temporary permit types and current temporary exemptions
d. limited visitor visas, giving a stay for an express purpose only, with extensions available only for that purpose, and
e. transit passenger visas, which do not give a right to apply for entry permission but allow the intentions of transit passengers to be examined before they travel.

I propose that when a temporary entrant in New Zealand lodges an application for another visa, the Bill should allow the grant a further visa or visas in order to maintain lawful status while the application is considered and that Immigration Instructions would guide whether to grant a visa in the interim, what type of visa should be granted, and what conditions should apply to the visa.

Status quo – The 1987 Act creates residence visas, residence permits, returning resident's visas, temporary visas, temporary permits (work, visitor and student), limited purpose visas/ permits, transit visas, and temporary and permanent visa and permit exemptions.

Applicants for further permits may incur periods of unlawful stay while they await a decision, as a result of applying close to the deadline or long decision-making times.

Discussion paper and submissions – The discussion paper proposed that the legislation would set out generic visa types, for example, permanent and temporary, and that the rules and conditions would be set outside the legislation. There was limited comment in this area. The proposal for visas in the interim received very high levels of support from public submissions. Ninety percent of 91 submitters indicated support.

Comment - The proposed visa types build on the current system but bring exemptions into the visa framework. The proposals broadly reflect the range of purposes for which non-citizens are in New Zealand, without being unduly complex. The proposal for visas in the interim would reduce the stress caused by becoming unlawful while working or studying in New Zealand, as well as periods of unlawfulness on the non-citizen's record.

Proposal – Regulatory and statutory border requirements

I propose that the Bill set out the fundamental requirements to apply forthwith for entry permission at an immigration control area, that entry permission decisions are final only once a non-citizen had left the immigration control area, that persons would be required to follow instructions while in the area, and that non-citizens would be liable for deportation without appeal if they entered New Zealand by evading some or all immigration border requirements. The Bill would specify that departures must occur through an immigration control area. Other immigration border requirements would be established in regulations.

Status quo – Statute currently governs the process and documentation requirements for immigration border decisions, with some use of regulations.

Discussion paper and submissions – The discussion paper did not seek comment on the legislative placement of immigration border requirements.

Comment – Some elements of immigration border management should remain in the statute because they are fundamental to determining immigration status and appeal rights. Moving other details of immigration border requirements into regulations enhances flexibility.

CHAPTER TWO: VISAS

PURPOSE

44 This chapter discusses the recommendations on:

- the visa system, including the effect of visas and visa conditions
- visa types and how current exemptions will be incorporated in the Immigration Bill (the Bill), and
- the rules for arrivals and departures.

STATUS QUO

45 The Immigration Act 1987 (the 1987 Act) currently manages the travel, stay, and permitted activities of non-citizens through a system of:

- *visas*, for travel to New Zealand, which indicate that the issuing officer knows of no reason why a permit should not be granted to the holder on arrival in New Zealand
- *permits*, granted on arrival in New Zealand, which allow a non-citizen to be in New Zealand and set the conditions of stay. Permits are granted at the border, allowing entry, and onshore, permitting extended stay or change of status, and
- *exemptions*, which exempt a variety of classes of non-citizen from the requirement to hold a visa, permit, or both in specified circumstances (for example, short-stay tourists and business visitors covered by one of 54 visa waiver arrangements are not required hold a visa before travelling to New Zealand if they are visiting for no more than three months).

RATIONALE FOR THE PROPOSALS

46 The proposed visa system is fundamental to managing the immigration system. It establishes the legal requirement for a non-citizen seeking to come to or remain in New Zealand to have their intentions scrutinised by the government. That scrutiny may be intensive or light-handed, according to need, but the authority to check non-citizens' intentions and put conditions on their stay is essential.

47 The current system ensures legal clarity of immigration status and is a sound legal foundation for the management of immigration decisions at the border. The ability to tailor levels of scrutiny and control to different groups is a useful feature. The proposals in this chapter seek to build on the current framework to create a strong, flexible and more intelligible visa system. Public consultation has largely confirmed that the distinctions between visas, permits and exemptions are not well understood. This chapter therefore proposes to use the term "visa" to describe all authorities granted to allow non-citizens to travel to or be in New Zealand.

48 The chapter proposes a visa system that retains visa types that broadly reflect the range of purposes for which non-citizens are in New Zealand, from well-settled permanent residents on the verge of gaining citizenship to passengers remaining in an airport while transiting New Zealand.

49 The current list of visa and permit exemptions covers a wide set of situations, from Australian citizens migrating permanently to airline crew transiting through a New Zealand airport. Exemptions currently waive specified requirements for specified classes of traveller. The effect of these exemptions can be maintained within the proposed visa system.

VISA SYSTEM

Proposal

50 It is proposed that New Zealand adopt the single term "visa" to describe all authorities to travel to or stay in New Zealand. It is proposed that visas would signify:

a. *permission to travel to New Zealand* - that there is no reason to believe that the holder will be refused New Zealand entry permission or transit permission if the conditions relating to travel are met, and/or

b. *permission to stay in New Zealand* - the conditions by which the holder must abide while in New Zealand after entry permission is granted or where a visa is granted onshore to extend a stay in New Zealand.

Status quo

51 The 1987 Act currently establishes *visas* (for travel to New Zealand), *permits* (permitting a stay in New Zealand) and *exemptions*, which exempt a variety of classes of non-citizen from the requirement to hold a visa, permit, or both.

Discussion paper and submissions

52 The discussion paper proposed the use of the single term "visa" for all travel and stay authorisation granted to non-citizens. Approximately 80 percent of 66 organisations and 65 percent of 45 individual submitters agreed. Most considered that the single term would assist clarity. Many submitters commented that the changes need to be well-communicated to stakeholders.

Comment

53 This proposal would bring the statute into line with the way the term "visa" is commonly used. It would reduce confusion for people interacting with the immigration system. It would also align with the practice in Australia. Non-citizens would still need to understand what their visas permitted them to do, and this would be an important component of the education and publicity accompanying the implementation of the new Act.

54 The remaining proposals in this section set out the detailed statutory provisions required to enable the visa system to function. Proposals at this level of detail were not in the discussion paper, and there is no further discussion of public views in this section.

Non-citizens required to hold a visa and abide by conditions

Proposals

55 It is proposed that all non-citizens must hold a valid visa to before travelling to New Zealand, unless the requirement is waived individually or by class.

56 It is proposed that non-citizens must abide by their visa conditions.

Status quo

57 The 1987 Act requires non-citizens to hold a visa to travel to New Zealand, unless exempt. The 1987 Act imposes conditions and requirements on permits. There is no explicit provision in the legislation requiring non-citizens to abide by conditions.

Comment

58 These proposals provide basic components of a universal visa system. The requirement for a visa before travel, and ability to waive this, allows the non-citizen's intentions to be assessed before they reach New Zealand.

One non-citizen, one visa

Proposal

59 It is proposed that only one visa may be held by a non-citizen at a time, and that each visa may be granted only to one non-citizen.

Status quo

60 It is possible under the 1987 Act for a permit or visa to be issued to more than one person. For example, a single visa could be issued where the parent and children were being issued with the same type of visa. In some cases, groups of non-citizens travel on one group visa.

Comment

61 The proposal reinforces the clarity of individual immigration status. Even in the increasingly infrequent cases of a child travelling on a parent's passport, the visa type granted to parents and children may differ where, for example, the parent holds a work visa and the children student visas. The facilitation provided by group visas could be maintained through the flexibility proposed below in setting the form in which visas are granted.

Entry permission

Proposal

62 It is proposed that a distinct decision on entry permission would be made at the border. It is proposed that where entry permission is granted:

a. a visa holder would be permitted to stay subject to the conditions of the visa held on arrival, or

b. a visa holder could be granted a new visa with conditions considered more appropriate, cancelling the existing visa, or

c. where the requirement to have a visa before travel has been waived, a non-citizen would be granted a visa allowing a stay in New Zealand of the type and conditions established in Immigration Instructions.

Status quo

63 In the case of a non-citizen holding a visa to travel to New Zealand, the visa type indicates the permit type to be granted, along with any conditions that are likely to apply to the non-citizen's stay. Under the 1987 Act, permits granted on arrival in New Zealand signify entry permission and set the conditions of stay.

Comment

64 The proposal for an entry permission decision mirrors the current function performed by the grant of a permit at the border. The factors and decision-making process taken into account in making entry permission decisions would vary according to the immigration status of the passenger. Permanent residents would be guaranteed entry, and there would be a greater degree of control over temporary entrants or limited visitors. Entry permission decisions would also continue to be subject to the exclusion criteria outlined in *Chapter One: Core provisions.*

Permission to travel

Proposal

65 It is proposed that visas that give permission to travel to New Zealand would be able to be granted for single, multiple, or a set number of journeys.

Status quo

66 The proposal reflects the status quo.

Comment

67 The ability to specify the number of times a visa may be used to travel to New Zealand assists the management of risk. In most cases, the ability to make multiple journeys during a longer stay in New Zealand is appropriate, for example for long term students. The settings for specific classes of non-citizens or policy categories would be set by Immigration Instructions.

Validity and expiry of visas

Proposals

68 It is proposed that for visas allowing time-limited stay (see *Visa types* below), the following rules should apply:

a. the start date and expiry date, or validity period, of a visa are to be specified when it is granted and this could be tied to a specifically defined event or be expressed in days, weeks, months or years

b. the start date of a visa may be the date of grant, a future date, or a past date

c. the start date and expiry date may specify the periods of permission to travel to New Zealand and/or permission to stay in New Zealand, and

d. visas are cancelled on the start date of any visa subsequently granted.

69 It is proposed that a visa expires when the holder leaves New Zealand, unless the visa allows re-entry and the non-citizen is granted entry permission on return to New Zealand.

Status quo

70 The proposal largely mirrors the status quo. The 1987 Act enable visas and permits to have different validity periods and dates, including retrospective start dates. Under the 1987 Act, permits, which allow a person to stay in New Zealand, expire when the holder leaves New Zealand.

Comment

71 The proposal to allow validity to be tied to a specifically defined event would be available for future use. It would be used only where it maintained absolute clarity for non-citizens about their status. The retention of retrospective start dates would allow periods of unlawful stay in New Zealand to be removed from the record where these were not the non-citizen's fault.

72 This proposal also provides clarity about when the conditions of stay of a visa expire. For example, it is important that it is clear that a visa that did not carry re-entry permission ceased to have any effect when the holder left New Zealand. From the non-citizen's point of view, it would be important to clearly communicate where a visa did not allow travel, for example, by including this specific advice on the visa.

Grant of New Zealand citizenship to cancel visas

Proposal

73 It is proposed that the grant of New Zealand citizenship cancels any visa held.

Status quo

74 The 1987 Act is silent on the effect that the grant of citizenship has on visas, permits and exemptions, and this has been the subject of some debate.

Comment

75 It is consistent with a citizen's right to be in New Zealand that they do not hold visas, which are designed to manage non-citizens. This review provides an opportunity to clarify the legal distinction between the status of citizens and non-citizens. This proposal would not affect the ability of New Zealanders to hold another nationality, and providing for New Zealand citizens to travel on non-New Zealand passports is discussed below under *Declaratory citizenship endorsement*.

76 The effect of this proposal is that if citizenship is subsequently lost, the non-citizen would be liable for deportation which is discussed further in *Chapter Five: Deportation*.

Cancellation of visas

Proposals

77 It is proposed that the Bill allow the cancellation of a temporary entrant, transit or limited visitor visa held by a non-citizen who is offshore or who has been refused entry at the border.

78 It is proposed that a visa granted in error at a departmental office (for example, where the wrong type of visa is granted or where incorrect conditions are set) may be cancelled at any time before either:

a. the visa has left the departmental office, where evidence of the visa is physical, such as a label endorsed in a passport, or

b. advice of the visa has been sent, where evidence of the visa is not in a physical form.

Status quo

79 The 1987 Act does not explicitly provide for the cancellation of a temporary visa but contains clear powers and processes for revoking permits. Legal opinion allows visa cancellation to take place in practice. The 1987 Act provides for permits to be revoked, if granted in error, before the non-citizen takes the permit from the office.

Comment

80 The ability to cancel temporary entrant, transit passenger, or limited visitor visas offshore or at the border is an important management tool. Cancellation would generally occur when there is cause to reconsider the initial assessment that there is no reason to believe that the holder will be refused entry. If a non-citizen is refused entry, it is appropriate that any visa held should not be reusable allowing a return to the border. The power to correct errors before the non-citizen is able to be affected by them upholds the integrity of the immigration system and clarity of status.

Visa conditions

Proposal

81 It is proposed that:

a. standard visa conditions may be set for specified classes of non-citizen or policy category by regulations and Immigration Instructions

b. when a visa is granted, standard conditions may be varied

c. the conditions of an existing visa may be varied on application or, with notification, at the initiative of an officer, and

d. that regulations or Immigration Instructions would govern the use of the legal power to vary conditions.

Status quo

82 The 1987 Act allows temporary permit conditions to be set for classes by regulations, policy, or special direction. Special direction may be used before, on or after the grant of a permit.

Comment

83 A legal mechanism for setting conditions by class provides for clarity and predictability for those non-citizens who are issued visas under a policy that has common conditions, for example, all the participants in a working holiday scheme would have the same conditions. The power to set conditions individually gives the flexibility to tailor visa conditions, for example to allow work for a particular employer, or in a particular industry.

Form in which visas are granted

Proposals

84 It is proposed that, in order to maintain the flexibility to use future technology, the Bill should specify that:

a. a visa is a record held by the Department in manner prescribed by Immigration Instructions (an electronic form is likely to be the default)

b. the type of evidence of their visa that non-citizens are to be given is to be specified in Immigration Instructions (*Chapter Three: Decision-making* proposes that the chief executive would be empowered to prescribe the visa format), and

c. non-citizens may receive or check evidence of their visa and its conditions on request.

85 It is proposed that ignorance of visa conditions is not a sufficient defence against a failure to meet visa conditions.

Status quo

86 The 1987 Act provides for visas and permits to be granted in an electronic form or endorsed in a passport, with both options currently in use.

Comment

87 Available and future technology offer various ways for non-citizens to hold evidence of their visas. These proposals reflect the increasing use and effectiveness of systems that check immigration status with the issuing authority, such as the Advance Passenger Processing system for offshore pre-boarding immigration checks. Establishing the authoritative visa as a departmental record allows the types of evidence of the visa to be varied according to circumstances. For example, a tourist in New Zealand for a short visit is less likely to need detailed evidence of their status than a permanent resident seeking to access services and entitlements.

88 Given the serious consequences for non-citizens breaching visa conditions, it is important that they are able to check them. This proposal would be governed by strong privacy safeguards when implemented, but would be future-proofed to allow any future technology to be used.

VISA WAIVERS AND CURRENT EXEMPTIONS

Proposals

89 It is proposed that the Bill should provide for the requirement to have a visa before travel to New Zealand to be waived through:

a. regulations for classes of non-citizen and to set any criteria or requirements related to the waiver

b. a non-delegable Ministerial power to suspend or grant waivers for up to three months, pending regulations, and

c. a delegable Ministerial power to grant or suspend a waiver in relation to an individual.

90 It is proposed that it also be possible to deem visas permitting a stay in New Zealand to have been granted in situations specified in regulations or Immigration Instructions.

Visitor visa waiver arrangements

91 It is proposed that the current visitor visa waiver arrangements would continue with their current effect through regulations. A temporary visitor visa would be granted on arrival replicating the current grant of a visitor permit for three months (or six months for British citizens).

Australian citizens and Australian permanent residents

92 It is proposed that the substance of Australians' current immigration entitlements in New Zealand be maintained by the following provisions:

a. regulations would waive the requirement to hold a New Zealand visa to travel to New Zealand for Australian citizens holding a valid Australian passport and for Australian residents with a valid passport and Australian permanent resident visa

b. regulations would specify that Australian citizens and residents granted entry permission at the border could be granted a resident or permanent resident visa allowing an indefinite stay without work or study restrictions, and

c. Immigration Instructions would allow Australian residents to be given re-entry permission on their New Zealand visa mirroring current returning resident visa (RRV) policy.

Status quo

93 Visa and permit exemptions are currently made, in both the 1987 Act and through regulations, to vary the level of pre-entry and immigration border screening for specified classes of non-citizens. Exemptions can allow travel to New Zealand without a visa, with a permit granted on arrival at the border. This mechanism is used for the entry of visa free tourists from over 50 countries. Some exemptions allow travel without a visa and a stay without a permit.

94 Diplomatic and consular officials, crew and passengers of seagoing craft, visiting forces and persons travelling to and from Antarctica, some fishing

crew, the crew of commercial aircraft, and the crew and passengers of an international vessel authorised to undertake domestic trade come within the existing exemption provisions.

Australian citizens and Australian permanent residents

95 Under the Trans-Tasman Travel Arrangement (TTTA), Australian citizens are exempted from the requirement to hold a visa to travel to or a permit to stay in New Zealand. The exemption is put into effect by regulations, not the 1987 Act. It gives Australian citizens an indefinite stay in New Zealand, without restriction on work, study or re-entry under immigration legislation.

96 The holders of Australian permanent resident visas are granted New Zealand residence permits on arrival[2]. To re-enter New Zealand, this group must continue to hold a valid Australian permanent resident visa or obtain a New Zealand RRV.

Discussion paper and submissions

97 Approximately 75 percent of 81 submitters agreed that the visa system should continue to allow for the equivalent of exemptions.

98 The discussion paper noted that the current Australian exemption would remain in effect, perhaps using different terminology. There was no substantive public comment on this issue.

Comment

99 These proposals would bring all non-citizens within the visa system. They would allow the facilitative effect of the current exemptions to continue without any actual increase in the current levels of immigration documentation and assessment, unless there were specific policy decisions requiring change made by Cabinet. They would, however, give greater flexibility for Cabinet to amend the effect of exemptions in the future without requiring legislative amendment

100 It has been necessary to suspend some visa waiver arrangements to manage, for example, unacceptable levels of unlawful working or unfounded refugee claims from non-citizens who may enter as visa-waiver visitors. Creating a ministerial power to suspend or grant for a limited period would allow a faster response to risk by dispensing with the need to make regulations initially. The ministerial power could also enhance flexibility by allowing for short term suspension or imposition of visa waivers.

101 The power to give or suspend individual waivers could be used in emergencies, along with the power to waive the requirement to hold a passport, for citizens and non-citizens alike.

Australian citizens and Australian permanent residents

102 Freedom of movement, as provided under the TTTA, is a key element in New Zealand's relationship with Australia. Although it is recommended that

[2] Australia does not offer similar levels of access to New Zealand permanent residents.

Australians, like all non-citizens, be brought under the proposed visa system, there would be no change in substance to their present ability to travel freely to and stay indefinitely in New Zealand. Australians would not be subject to any actual additional administrative requirements, such as completing visa application forms. The process at the border, in most cases, would be automatic and invisible. Australian residents and citizens would continue to be subject to exclusion and deportation criteria, as they currently are.

103 The special status of the bilateral relationship would be given an appropriately high level of prominence within the proposed new system through the use of regulations specifically designed to facilitate Australian entry. This mirrors the current level at which the Australian exemption is made.

104 The proposal also continues to give visibility to the special treatment accorded to Australians in comparison with other non-citizens, none of whom are granted residence without extensive application and assessment processes to determine if they meet detailed policy criteria. The proposal to grant Australians a visa, rather than give them exempt status, reflects the Australian use of a Special Category Visa, granted on arrival, to facilitate the entry of New Zealand citizens into Australia.

105 A communications strategy will be developed by Ministry of Foreign Affairs and Trade and the Department to enable communication of these proposals to the Australian Government at the earliest opportunity and at a suitable level. This strategy would outline the rationale for the proposals and their practical effect and give reassurance that these changes will not have any substantive effect on the entry of Australians into New Zealand.

VISA TYPES

106 It is proposed that the types of visa established under the Bill be:

a. permanent resident visas, giving an indefinite stay and right of re-entry without other conditions

b. resident visas, allowing non-citizens to stay indefinitely but subject to conditions, and those who meet conditions could become permanent residents

c. temporary entrant visas of various types valid for travel and stay for specified periods, rather than indefinitely, to be established in Immigration Instructions, including current temporary permit types and current temporary exemptions

d. limited visitor visas, giving a stay for an express purpose only, with extensions available only for that purpose, and

e. transit passenger visas, which do not give a right to apply for entry permission but allow the intentions of transit passengers to be examined before they travel.

Comment

107 Maintaining different visa types broadly reflects the different reasons non-citizens come to and are sought by New Zealand. These reasons range from permanent migration to passengers remaining in an airport lounge while

transiting New Zealand. Making provision for temporary flows is increasingly important as the mobility of skilled labour increases and permanent migration ceases to be the norm. Different visa types also enhance risk management by allowing the levels of verification to be segmented.

Permanent residents

Proposal

108 It is proposed that the Bill establishes the status of permanent resident and that permanent residents would be granted permanent resident visas giving:

a. permission to stay in New Zealand indefinitely not subject to other immigration conditions (for example, regarding employment or study)

b. indefinite permission to travel to New Zealand on any number of occasions, and

c. an entitlement to be granted entry permission.

Status quo

109 Permanent residence is not a status or term found in the 1987 Act, despite being in wide usage. All residence permits, including those subject to conditions, are valid for an indefinite stay, but expire when the holder leaves New Zealand. An RRV is required for a new residence permit to be granted on return to New Zealand. RRVs of indefinite validity can be issued, under policies that require migrants to have shown commitment to New Zealand.

Discussion paper and submissions

110 The discussion paper noted that permanent visas could be established in legislation as a generic visa type. Several individual submissions commented on the status of permanent residents. One considered that once "permanent residency" had been obtained, no further visas or permits should be required for stay or re-entry. Another was concerned that the status of the offshore holders of indefinite validity RRVs should be protected.

Comment

111 A status that allows non-citizens to live permanently in New Zealand is an essential tool for gaining national advantage from immigration. It offers the opportunity to settle and contribute in the long term. Permanence supports the development of national identity by providing a final step on the pathway to full New Zealand citizenship. A permanent status indicates a high level of mutual commitment between the migrant and New Zealand, encouraging good settlement outcomes. Liability for deportation would, however, remain a possibility for the first ten years of residence in the cases outlined in *Chapter Five: Deportation*.

112 This proposal will benefit migrants by reducing confusion regarding RRVS. Permanent residents will automatically have indefinite permission to re-enter New Zealand.

Residents

Proposals

113 It is proposed that the Bill establishes the status of resident and that residents would be granted resident visas that could give:

a. the option of imposing conditions which the resident must meet in order to become a permanent resident, and not be liable for deportation

b. if granted offshore, the option of refusing entry permission on the first journey to New Zealand if an impediment was identified that should have precluded residence approval (an independent tribunal appeal could be pursued in these cases)

c. where initial entry permission was granted, or where resident status was granted onshore, permission to stay in New Zealand indefinitely, and

d. where initial entry permission was granted, or where resident status was granted onshore, permission to travel to New Zealand on multiple journeys for a restricted period.

114 It is proposed that the Bill would give permission to work or study without restriction, but this could be varied by any specific conditions that are established in Immigration Instructions for particular policy categories. It is proposed that residents could have their status changed to permanent resident if they demonstrate they have met conditions.

Status quo

115 The provisions of the 1987 Act allow the grant of residence, while allowing indefinite stay, to be subject to:

a. the seldom-used power to refuse entry on first arrival in New Zealand if an impediment is discovered that should have precluded approval, with an appeal to the Residence Review Board available, and

b. meeting any conditions imposed for up to five years by policy, for example, investor category migrants' funds must remain in New Zealand in specified types of investment and for set periods. Revocation of residence and removal can follow a failure to meet conditions.

116 Residents are required by policy to demonstrate commitment to New Zealand during the first two years of residence before an RRV with indefinite validity may be granted. Those who do not meet any of the various aspects of the RRV policy may be issued with RRVs of reduced validity or, if offshore, may be refused an RRV and, thereby, lose residence.

Discussion paper and submissions

117 The proposal to distinguish between permanent resident status and resident status largely mirrors the functions of the current system and was developed in light of submissions that RRVs should not be required once permanent residence is granted.

Comment

118 These proposals group the current provisions applying conditionality to the early phase of settlement into a distinct visa type. When used appropriately, this is a useful tool to ensure that the aims of selection policy are achieved. As an option for transition to permanent resident status, resident status gives more certainty to the non-citizen than the option of granting a temporary entrant visa, which has an expiry date.

119 The conditional phase that resident status provides need not be used for all policy categories. The transition to permanent resident status need not be any more of an administrative burden than a current application for an indefinite RRV.

Temporary entrants

Proposals

120 It is proposed that the main temporary visa types initially established by Immigration Instructions would be temporary worker visa, temporary student visa, and temporary visitor visa, reflecting the temporary permit types in the 1987 Act. It is also proposed to establish in Immigration Instructions visa types to reflect existing time-limited visa or permit exemptions, as discussed above in *Visa waivers and current exemptions*.

Status quo

121 The 1987 Act establishes three types of temporary permit - work, student, and visitor. Each type has standard conditions set in the 1987 Act, with variations made by Government immigration policy for policy categories, or by special direction for individuals.

Discussion paper and submissions

122 The discussion paper proposed that a generic temporary visa type could be established, but noted another approach of giving visas the same names as policy categories. While there was little comment on the detail of these proposals, there was support for flexibility to create new temporary visas.

Comment

123 This proposal would allow the introduction of new visa types in the future, for example, a “temporary resident visa” allowing unrestricted work and study but for a limited period, or a visa specifically for protection claimants. It provides the flexibility to retain broad visa types for common situations, such as overseas students, but offers the ability to communicate status and conditions through the creation of category-specific visa types.

Limited visitors

Proposals

124 It is proposed that the Bill establishes a limited visitor visa that, like the current limited purpose visas and permits, allows travel to and stay in New Zealand only to undertake an express purpose. Limited visitors would be:

a. prohibited from applying onshore for any other visa type

b. permitted to apply for a further limited visitor visa only to fulfil the initial express purpose, and

c. ineligible to lodge a humanitarian appeal against deportation.

125 It is proposed that provisions in the 1987 Act to manage the entry of non-citizens brought to New Zealand under the Mutual Assistance in Criminal Matters Act 1992 should come within the limited visitor visa regime.

Status quo

126 The 1999 amendments to the 1987 Act introduced limited purpose visas and permits. All the main features of this regime are carried over under the limited visitor visa proposal.

Discussion paper and submissions

127 The discussion paper made no specific proposals on limited purpose visas.

Comment

128 Limited visitor visas are an important risk management tool that allow the entry of non-citizens who would be refused a temporary visa or permit because of a risk that could be managed by the more restrictive conditions of a limited visitor visa.

129 The limited visitor visa would also be able to be used to facilitate the stay in New Zealand of witnesses who, while otherwise ineligible to be in New Zealand, are required for a trial. The principal benefit of limited visitor visas is the unavailability of any appeal right if they overstay.

Transit passengers

Proposals

130 It is proposed that there should be a transit passenger visa that gives the transit passenger permission to remain in the immigration control area while transiting New Zealand. It is proposed that regulations should specify which classes of passenger, if any, must obtain transit visas, and the length that transit visas could be issued for. It is proposed that transit passenger visas may be revoked on arrival.

131 It is proposed that transit visa regulations should be able to be made without an expiry date, in contrast with the three year limit under the 1987 Act. To further enhance flexibility, it is proposed that the Ministerial special direction power to impose or suspend a transit visa requirement for up to three months should be effective when used, rather than being effective upon gazetting (which would still be required).

132 It is proposed that where a non-citizen has remained in the immigration control area for the specified length of their transit visa while transiting New Zealand, the non-citizen shall be deemed to have applied for entry permission, which would allow an officer to:

a. grant entry permission and a visa to stay in New Zealand, or

b. extend the time the transit passenger may remain in the immigration control area, or

c. refuse entry permission.

Status quo

133 The essential features of the current transit visa regime are carried over in the proposals. The current regime is imposed by regulations that may be valid for up to three years, with a Ministerial power to allow the imposition or suspension of a transit visa requirement for up to three months pending regulations. The 1987 Act is not clear on the options that exist when a transit passenger reaches the 24 hour limit they can remain in transit.

Discussion paper and submissions

134 The discussion paper did not discuss or seek submissions on transit visas.

Comment

135 The current transit visa regime manages risk by allowing the close scrutiny of non-citizens of specified classes purporting to transit New Zealand from or to specified places. The scope of the regime has increased over the years as new risks arise, being extended most recently in 2005 in response to risk from Nepalese transit passengers.

136 The ability to set transit visa requirements in regulations would enhance their effectiveness now, and enable them to be responsive to any changes in international travel in the future. For example, while the 1987 Act enables transit through New Zealand for 24 hours, and this is generally adequate for the purposes of most airline passengers, in the future, there may be need to extend transit time, to be responsive to flight patterns through New Zealand.

137 The ability to revoke a transit visa on arrival would allow non-genuine transit passengers to be brought into the process for dealing with other non-citizens refused entry at the border and would ensure transit visas were not re-used.

138 Enabling transit visa regulations to be set without an expiry date would not prevent regulations being made for a specified period to ensure review. It would, however, obviate the need to roll over regulations when there is no need for change.

Declaratory endorsements for New Zealand citizens using foreign passports

Proposal

139 It is proposed that the Bill allow the grant of an endorsement in a non-New Zealand passport on request that states the holder has the right to enter and be in New Zealand. This would facilitate the entry of New Zealand citizens travelling on non-New Zealand passports.

Status quo

140 Some New Zealand citizens have dual or multiple nationalities and seek to travel on the passports of another nationality. This is currently facilitated by issuing RRVs in New Zealand citizens' non-New Zealand passports.[3]

Discussion paper and submissions

141 The discussion paper did not include this issue.

Comment

142 It is consistent with a citizen's right to be in New Zealand that they do not need to hold a visa. Unlike the RRVs currently used, the proposed endorsement would not state that the holder was a New Zealand citizen. The endorsement should not usurp the role of citizenship certificates and passports as evidence of New Zealand citizenship. This approach would allow endorsements to be made in a way that did not disclose New Zealand citizenship, as some people may prefer that their dual citizenship not be disclosed to their other country.[4]

143 In order to backup any future change of policy to require New Zealand citizens to present New Zealand passports, there should be no ongoing right to apply for or be granted an endorsement. The endorsements should be able to be granted with limited validity. This would facilitate any new policy that encouraged the use of New Zealand passports or any new technology that made the endorsement redundant.

VISAS AVAILABLE IN THE INTERIM WHEN APPLICATION LODGED FOR FURTHER VISA

Proposals

144 It is proposed that when a temporary entrant in New Zealand lodges an application for another visa, the Bill should allow the grant of a further visa or visas in order to maintain the person's lawful status while the application is considered.

145 It is proposed that Immigration Instructions would guide whether to grant a visa in the interim, what type of visa should be granted, and what conditions should apply to the visa. Limited visitors would not be included in this provision.

Status quo

146 The 1987 Act makes no explicit provision for interim permits, but this could be done administratively.

[3] 631 people are recorded as being approved these RRVs in 2005/06.

[4] Future developments on pre-boarding clearance (as undertaken with the current Advance Passenger Processing system) could allow dual citizens to travel and return on their non-New Zealand passports without the need for a passport endorsement.

Discussion paper and submissions

147 This proposal received strong support from submissions and in the public meetings. Ninety percent of 91 submitters indicated support. 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 processing times.

Comment

148 Granting an interim visa would reduce the instances of otherwise law abiding non-citizens having a period of unlawful stay on their record. It could also enhance immigration data quality by reducing the number of false positives in the estimates of the numbers of non-citizens in New Zealand unlawfully.

149 Reasons not to grant an interim visa could include attempts by applicants to prolong their stay simply by lodging successive applications. Along with the provisions for interim visa, the Bill would contain provision (currently under section 35A of the 1987 Act) for a delegable ministerial power to grant visas to non-citizens unlawfully in New Zealand.

ARRIVALS AND DEPARTURES

Where entry permission is decided

Proposals

150 It is proposed that, as a default, entry permission decisions should be made while the passenger is in an immigration control area. In order to facilitate any future offshore pre-clearance developments, it is proposed that there be a delegable Ministerial power to vary the default requirement that entry permissions must be made in an immigration control area.

151 It is proposed that immigration control areas would be established by the chief executive to provide for the control of people subject to the provisions of the Bill at the border. Officers would have a statutory right of access to immigration control areas, although this would be managed in practice through inter-agency agreements, notably with the Aviation Security Service at airports.

152 It is proposed that the decision to grant or refuse entry permission would be made by an officer undertaking an immigration function. Most positive decisions would continue be made by customs officers delegated to perform immigration decision-making functions, with refusals being made by immigration officers after referral from Customs.

153 Provision would also be made for decisions by an approved automated system, to anticipate developments like self-service airport kiosks for low-risk passengers. It is proposed that entry permission decisions could also be deemed to have been made if certain specified conditions are met by low-risk passengers.

Status quo

154 The granting of a permit at the border is the action that currently gives entry permission. The 1987 Act uses Customs-designated areas for immigration

border functions. There are unused provisions in the 1987 Act allowing permits to be granted offshore, enacted in 1993 as part of a shelved trans-Tasman common border project.

Discussion paper and submissions

155 The discussion paper did not include a discussion of these issues.

Comment

156 Moving to a single term "visa" requires a process to replace the decision to grant a permit at the border. Providing a power that allows these decisions to be made at other than an immigration control area provides flexibility, for example, to allow decisions to be made offshore or onshore outside an immigration control area.

157 While the 1987 Act's use of Customs-designated areas for immigration border processing is currently adequate, providing specifically for the creation of immigration control areas would enhance flexibility. Any future proposal to vary the immigration control areas from the boundaries of the Customs areas would be subject to consultation across government. There is no intention to unnecessarily duplicate operational functions.

Statutory immigration border requirements

Proposals

158 It is proposed that the fundamental immigration border requirements established in the Bill should be:

a. the obligation to apply for entry permission forthwith upon arrival, except for transit passengers

b. that entry permission decisions are final once a non-citizen has left the immigration control area, but amenable to change prior to that point

c. non-citizens must remain in the immigration control area until permitted to leave. (The granting of entry permission would be considered permission to leave unless there was an instruction to remain)

d. non-citizens must comply with reasonable instructions while in the immigration control area, and

e. failure to remain or comply with instructions are offences.

159 It is proposed that non-citizens who evade some or all border requirements:

a. would be deemed to have had any visa held cancelled by the act of entering improperly

b. would be liable for deportation without appeal to the independent tribunal on either the facts or humanitarian grounds (judicial review would provide a backstop protection against mistaken identity), and

c. would be able to make protection claims.

160 It is proposed that passengers departing New Zealand must do so through an immigration control area, or through any other area permitted by the Minister (and that this would be a delegable power).

Status quo

161 The effect of the above proposals is the same as the status quo.

Discussion paper and submissions

162 The discussion paper did not seek comment on these proposals.

Comment

163 Some elements of immigration border management should remain in the statute as they are fundamental to determining immigration status and appeal rights. Specifying a point at which a non-citizen has been granted entry permission allows a distinction between those who have entered lawfully and unlawfully. It determines whether a non-citizen is subject to the immigration border regime or the rules regulating the stay of non-citizens lawfully in New Zealand.

164 The immigration border regime allows non-citizens refused entry to be sent out of New Zealand at the earliest opportunity (but not until any protection claim is finalised). Non-citizens lawfully in New Zealand, on the other hand, are generally allowed to change immigration status and have appeal rights.

Regulatory immigration border requirements

Proposal

165 It is proposed that the Bill should allow regulations to prescribe certain immigration border requirements, including but not limited to:

a. the manner in which entry permission must be requested

b. the obligations for arrivals outside an approved port (for example, by air charter at a minor airport)

c. what information or documents must be supplied and how (for example, electronic passenger manifests or "manual" arrival cards)

d. when a traveller is deemed to have requested entry permission

e. departure documentation required of passengers and carriers, and

f. the border requirements that New Zealand citizens must meet in order to allow their evidence of citizenship to be checked.

Status quo

166 The 1987 Act outlines the passenger documentation and reporting requirements that apply at boarding and on arrival, including the obligations on carriers to check specified requirements, submit passenger details to the approved system of pre-boarding checks, and comply with any boarding directives.

Discussion paper and submissions

167 The discussion paper did not seek comment on the legislative placement of immigration border requirements.

Comment

168 This proposal provides greater flexibility than the current statutory location of many administrative and process requirements.

When entry permission is refused

Proposals

169 It is proposed that New Zealand citizens, permanent residents and residents with visas valid for re-entry could not be refused entry. It is proposed to retain the power to refuse entry permission to residents coming to New Zealand for the first time, temporary entrants, limited visitors, and transit passengers.

170 It is proposed that if entry permission is refused:

a. any visa held is cancelled automatically

b. the non-citizen would be in New Zealand unlawfully but would not have access to appeal, and

c. the non-citizen concerned can be required to leave New Zealand on the first available craft.

Status quo

171 The 1987 Act allows entry permission (that is, a permit) to be refused other than in the case of RRV holders. New Zealand citizens cannot be refused entry.

Comment

172 The provisions that apply to the refusal of entry permission must be clear because of the need to maintain the immigration aspect of border security and the need for clarity for the non-citizens concerned. As outlined in *Chapter Six: Review and appeal*, it is proper to maintain the current provision that gives non-citizens refused entry permission no right of appeal. Those refused entry usually may be returned to their departure point under international civil aviation provisions.

173 A protection claimant refused entry permission would be permitted to stay until their protection claim was decided. As now, a protection claim at the border would not in itself lead to the granting of entry but action to require the claimant to leave would be suspended until the claim was decided. Maintaining protection claimants who fail to meet the requirements for entry permission in "refused entry" status can help facilitate their departure if their claim is unsuccessful.

174 While permanent residents and residents with visas valid for re-entry have an assurance of entry, temporary entrants can properly be given less certainty. Their proposed stay in New Zealand is temporary, their links to the country are likely to be less strong. They should not expect an unfettered right to enter New Zealand, even where they hold a visa.

Executive Summary - Chapter 3 Decision-making

Proposal – Immigration Instructions

I propose that the Bill allow the Minister to certify "Immigration Instructions", incorporating "Residence Instructions" and "Temporary Entry Instructions" that contain the fundamental rules relating to visa applicants and applications for travel to, entry and stay in New Zealand.

I propose that the Bill continue to enable Immigration Instructions for visa applicants be made with regard to character, health, immigration status, sponsorship, and bonds (among other things).

Status quo – The Minister has the power to set Government immigration policy (GIP) and Government residence policy (GRP) to provide a framework for immigration decision-making. The 1987 Act contains provisions that enable GIP and GRP to establish rules relating to visa applicants and applications. While there are heath criteria under GIP and GRP now, it is not referred to specifically in the legislation.

Discussion paper and submissions - Although a change in terminology (to Immigration Instructions) was not included in the discussion paper the submissions highlighted confusion over the use of "policy" in the 1987 Act. The proposal is intended to support the goal of accessible and understandable legislation.

The discussion paper proposed that health become an "exclusion" criterion in the legislation. Many of the 62 organisations and 59 individual submitters responded negatively to this proposal.

Comment – These proposals support the concept of framework legislation and seek to ensure that the Department can facilitate the travel, entry and stay of the non-citizens New Zealand wants.

Specifically indicating in the legislation that Immigration Instructions can be made regarding health criteria signals its importance. Not including it as "exclusion" criteria acknowledges that health is seldom a matter of individual culpability. The proposal will continue to enable health waivers.

Proposal – Role of the Minister

I propose that the Bill include the current powers of the Minister, updated to reflect proposals in this review, to:

a. certify Immigration Instructions

b. grant visas (including non-citizens unlawfully in New Zealand)

c. make special directions

d. cancel or suspend liability for deportation, and

e. delegate powers.

I propose that the Bill enables the Minister to delegate immigration decision-making functions with the exceptions of the ability to certify Immigration Instructions, make decisions based on classified information (if agreed in *Chapter Seven: Using classified Information*) and suspend or grant waivers for up to three months, pending regulations

(if agreed in *Chapter Two: Visas*).

Status quo - The 1987 Act confers most immigration decision-making powers on the Minister. The Minister then certifies how decisions can be made and delegates most powers. The Minister is unable to delegate certain powers including the ability to certify GIP and GRP, to make exceptions to GRP, or make deportation decisions.

Discussion paper and submissions - The discussion paper proposed allowing the power to make exceptions to residence policy to be delegable. The proposal was supported by approximately two-thirds of 107 submitters including the Auckland City Council and the Office of the Ombudsmen. Many submitters commented that the Minister should retain some power to intervene, which is proposed.

Comment – These proposals retain all the current powers of the Minister except the power to approve application forms and visa formats which would become a power of the chief executive of the Department.

The proposals would continue to enable the Minister to grant visas to non-citizens unlawfully in New Zealand (currently known as section 35A), and to delegate the power to make positive exceptions to Residence Instructions. In order to address any risk that the power would be used inappropriately, the Minister may choose to limit its delegation to particular, senior officers with an established understanding of the government's immigration priorities. This would address concerns expressed in the submissions.

Proposal – Officers appointed to undertake immigration functions

I propose that the powers for officers appointed to undertake immigration functions, including protection determination officers, continue to be provided for in the legislation.

I propose that in the Bill, New Zealand Police officers retain their current powers in the 1987 Act. I propose that the Bill require the chief executive of the Department to designate an officer or a class of officers to perform specified statutory functions subject to any limits or conditions. Also, I propose that officers can continue to be delegated ministerial immigration decision-making powers as per the status quo.

Status quo - The 1987 Act contains the powers of immigration and visa officers and police and customs officers. Immigration and visa officers can be delegated powers to exercise certain ministerial immigration decision-making functions.

Departmental officers can use their statutory powers after they are designated in their role, individually or by class, by the chief executive of the Department. Police and customs officers gain immigration powers by virtue of their appointment.

Discussion paper and submissions - Public submissions highlighted the importance of the ability to control who exercises powers under immigration legislation and of officers having experience, or training to undertake their role. This proposal was developed in response to submissions recommending greater control over who uses powers, and in what circumstances.

Comment – The statutory powers proposed in *Chapter Nine: Compliance and enforcement* and *Chapter Ten: Monitoring and detention* should be limited to Police and designated to officers with appropriate experience or after appropriate training. No powers will be automatically granted to officers (except Police) by virtue of their appointment into a role, be they departmental officers or customs officers. It is intended, however, that these provisions will continue to allow for overseas agents, and

customs officers to be designated powers, either individually or by class.

Proposal – Potentially prejudicial information (PPI) and reasons for decisions

I propose that the administrative practice of providing PPI and reasons for decisions to non-citizens engaged in the immigration system continue as per the 1987 Act, the Official Information Act 1982, the Privacy Act 1993, and the principles of administrative law. This means that in practice, PPI and reasons are given to all applicants, with some exceptions including when:

a. an applicant is in New Zealand unlawfully

b. the Department is making, serving or cancelling a removal order, or

c. the Minister decides a special direction request.

Status quo - The proposal mirrors the status quo.

Discussion paper and submissions - The discussion paper asked when PPI and reasons for decisions should be given to applicants: onshore only, or to applicants who are on and offshore. Most of the discussion supported PPI and reasons being given to all applicants. For example, 75 percent of 55 organisations and almost 90 percent of 52 individual submitters including the New Zealand Association for Migration and Investment (NZAMI), the New Zealand Law Society and the Human Rights Commission supported the status quo.

Comment - The status quo was supported across the Department, between agencies, in the public meetings, and submissions. If PPI is provided to a non-citizen, an appropriate decision on their application or immigration status can be made, considering all the relevant information. Immigration decision-makers felt that quality decisions would be hindered by withholding PPI from offshore applicants and felt that providing reasons for decisions would ensure that all applicants have a clear understanding of the decision made on their application.

Proposal - Electronic decision-making

I propose that the Bill enable electronic decision-making, with appropriate safeguards such as the ability to reverse decisions made in administrative error. I propose that implementation of electronic decision-making be subject to further Cabinet consideration.

Status quo - In administering the immigration system, the Department uses available and affordable technology to support the application process. For example, student permit renewal applications are lodged and sorted electronically. The 1987 Act does not contain provisions to enable electronic decision-making.

Discussion paper and submissions - Approximately 75 percent of 60 organisations, such as the NZAMI and Business NZ, and just over half the 47 individual submitters agreed to the proposal to enable electronic decision-making. They commented that New Zealand needs to move with the times and make use of technology.

Comment – Implementation of electronic decision-making would include a comprehensive risk analysis to ensure that robust and appropriate individual decisions can be made, and require Cabinet approval. It would also ensure that appropriate safeguards, such as the ability to reverse decisions made in administrative error, were transparent. Along with any specific provisions drafted to safeguard electronic decisions, powers to reverse decisions, and cancel visas, proposed for example in *Chapter Two:*

Visas and *Chapter Five: Deportation* would also provide safeguards.

The key benefits of electronic decision-making in a global immigration market would be to enable New Zealand to make efficient and effective decisions and retain a competitive edge. It would also enable Departmental resources to be allocated with a focus on managing risk in complex applications or to deal with high demand.

CHAPTER THREE: DECISION-MAKING

PURPOSE

175 This chapter discusses the recommendations on:

- Immigration Instructions for visa applicants and applications
- the role of the Minister of Immigration
- officers appointed to undertake immigration functions
- the role of the chief executive of the Department of Labour
- potentially prejudicial information and reasons for decisions, and
- electronic decision-making.

STATUS QUO

176 The Immigration Act 1987 (the 1987 Act) gives the Minister of Immigration (the Minister) and immigration and visa officers statutory powers to manage the administration of the immigration system. The Minister has the power to set Government immigration policy (GIP) and Government residence policy (GRP). GIP and GRP provide a framework for decision-making and contain some of the policies for visa and permit applicants and applications.

177 The 1987 Act gives the Minister the power to delegate most immigration decision-making powers. The Minister's decision-making powers include the ability to intervene and exercise discretion during applications, removals and deportations. The exercise of this discretionary power cannot be delegated in all circumstances.

RATIONALE FOR THE PROPOSALS

178 The global environment has changed considerably since 1987. People are moving across borders with greater frequency and in greater numbers. The control of that movement needs to be more sophisticated and there needs to be an increased emphasis on security. At the same time, more people are seeking to travel to New Zealand and New Zealand is seeking to facilitate the entry and stay of temporary and permanent migrants.

179 The proposals in this chapter recognise the new global environment and seek to create effective and efficient processes to manage the immigration system now and in the future. They seek to create an understandable and flexible framework for decision-making that maintains a high level of fairness.

IMMIGRATION INSTRUCTIONS

Proposals

180 It is proposed that the Immigration Bill (the Bill) allow the Minister to certify "Immigration Instructions", incorporating "Residence Instructions" and "Temporary Entry Instructions", that contain the fundamental rules relating to visa applicants and applications for travel to, entry and stay in New Zealand.

181 It is proposed that the Minister be able to certify where discretion can be exercised in both Residence and Temporary Entry Instructions.

182 It is proposed that the Bill replicate the provisions in the 1987 Act that require residence decisions to be consistent with Residence Instructions except where the Minister has certified that discretion can be exercised.

183 It is proposed that the Bill require Immigration Instructions to be published by the Department of Labour (the Department) except where the Instructions can be withheld in accordance with the Official Information Act 1982 (the OIA).

Status quo

184 The proposals above replicate the 1987 Act except that the terminology will change:

- GIP will be called "Immigration Instructions"
- GRP will be called "Residence Instructions", and
- temporary entry policy will be called "Temporary Entry Instructions".

Discussion paper and submissions

185 This proposal to change terminology was not included in the discussion paper. It is intended help create more understandable legislation. The submissions highlighted confusion over the use of "policy" in the 1987 Act.

186 Setting Immigration Instructions outside the statute would support the Bill as framework legislation. Approximately 80 percent of 94 submitters agreed that the Bill should be framework legislation.

Comment

187 These proposals support flexibility and responsiveness by continuing to enable specific and enforceable rules to be set outside the statute. For example, the Skilled Migrant Category, in Residence Instructions, would continue to contain the rules for skilled residence applications, while the rules for student visa applications would be in Temporary Entry Instructions. Publishing the Instructions ensures transparency and accessibility.

INSTRUCTIONS RELATING TO VISA APPLICANTS

Proposals

188 Consistent with the visa framework proposed in *Chapter Two: Visas*, it is proposed that Immigration Instructions for visa applicants be made, among other things, regarding:

a. character
b. health
c. sponsorship, and
d. bonds.

189 It is proposed that the Bill include the ability to decline an application from a non-citizen of 17 years of age or younger who is not married or in a civil union, if appropriate, where it is reasonably believed the consent of a parent or guardian is withheld.

Status quo

190 The 1987 Act contains provisions that enable GIP and GRP to establish policies relating to visa applicants, including the ability to decline an application from a non-citizen of 17 years or younger.[5]

Discussion paper and submissions

191 The discussion paper asked a number of questions in relation to, primarily, health and sponsorship which are discussed in the sections addressing these topics below.

Comment

192 These proposals support the concept of framework legislation and seek to ensure that the Department can facilitate the travel, entry and stay of the non-citizens New Zealand wants and needs.

193 As well as the legislative exclusion grounds proposed in *Chapter One: Core provisions*, character policy can be developed as an entry requirement applied to all visas or as specific criteria for a single visa type to support the intent of the visa. This maintains the status quo.

Health

Proposal

194 It is not proposed that health become "exclusion" criteria as proposed in the discussion paper but that the current practice of setting health criteria outside the legislation is retained, along with provisions for health waivers.

Status quo

195 Health is a criterion on which decisions are made under GIP and GRP, but it is not referred to specifically in the legislation. Waivers can be made in a range of circumstances where health criteria cannot be met.

Discussion paper and submissions

196 The proposal that immigration legislation include health "exclusion" criteria received 121 submissions. Most responded negatively with comments generally reflecting the Human Rights Commission's submission:

> *"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".*

197 A number of submitters commented that a non-citizen with a medical condition or disability may be able to make a significant contribution outweighing any medical costs. Submitters also commented that it should

5 This particular provision is consistent with the Hague Convention on Civil Aspects of International Child Abduction and the United Nations Convention on the Rights of the Child.

not be assumed that a person with disabilities is unwell. For example, the Disabled Persons' Assembly considered that the proposal improperly "medicalised" disability. Other submitters, such as Auckland Refugees as Survivors Centre, considered that any inclusion of health exclusion criteria in legislation must be accompanied by the ability to waive the criteria.

198 The New Zealand Association of Migration and Investment (NZAMI) noted that health factors would be subject to more frequent change than character. The proposal above acknowledges this, and addresses concerns expressed in the submissions by not establishing health as "exclusion" criteria.

Comment

199 Specifically indicating in the legislation that health is criteria on which Immigration Instructions can be made signals its importance. Not including it as "exclusion" criteria acknowledges that health is seldom a matter of individual culpability. Under the proposal, the provision for health waivers would be retained in Instructions as per the status quo.

Sponsorship

Proposals

200 It is proposed that the Bill enable temporary entry and residence applicants to be required to have a sponsor.

201 It is proposed that the Bill continues to enable natural persons to be sponsors and that the minimum criteria natural persons are required to satisfy include that they:

a. are a New Zealand citizen or permanent resident
b. are acceptable to the Minister or an officer, and
c. meet any other criteria including that required by:
    i. the Minister, or
    ii. Immigration Instructions.

202 It is proposed that the Bill enable organisations that are legal entities to be sponsors and that the minimum criteria include that the organisation:

a. is registered in New Zealand as a:
    i. company
    ii. incorporated society, or
    iii. charitable trust

OR

b. is a government agency or Crown Entity.

203 In addition to 202 (a) and (b) above, it is proposed that an organisation must also:

a. nominate an authorised contact
b. be acceptable to the Minister or an officer, and
c. meet any other criteria including that required by:
    i. the Minister, or

ii. Immigration Instructions.

204 It is proposed that the Bill allow a sponsor to be made liable for any costs incurred as specified by the conditions of their sponsorship, and for the repayment of those costs except where waived.

205 It is proposed that costs incurred include those incurred by the Crown, along with other publicly funded service providers.

Status quo

206 The 1987 Act enables temporary entry applicants to be required to have sponsors, while GRP enables residence applicants to be required to have sponsors. Sponsors are restricted to natural persons who must be acceptable to the Minister. The 1987 Act specifies that sponsors can be made liable for "costs incurred by the Crown". Referring to the Crown prevents certain publicly funded service providers from recovering costs if they are not legally "the Crown" but receive Crown funding.

Discussion paper and submissions

207 Submitters generally recognised that sponsorship was a valuable tool. Seventy percent of 92 submitters supported stronger legislative provisions for sponsorship. There was also support for organisations to be sponsors, for example, from Business New Zealand (Business NZ). Approximately 60 percent of submitters supported specific immigration consequences for failing to meet sponsor obligations.

208 The NZAMI noted concern over the potential burden that obligations may place on sponsors. This was also a concern for Pacific and refugee communities.

Comment

209 The proposals would help give sponsorship greater effect as a mechanism to reduce the risk of a non-citizen's failure to meet visa conditions. Ensuring that sponsors can be made liable for the costs they agreed to cover should reduce the cost of non-citizens accessing to publicly funded services they are not entitled to.

210 The specific conditions of sponsorship would be incorporated in Immigration Instructions and may include that a sponsor support an applicant's settlement, accept responsibility for their maintenance, or liability for the cost of their failure to meet their visa conditions. Maintenance may have different meanings, for example, health care or housing.

211 Meeting the requirement to be "acceptable to the Minister or a designated officer" could be given different meanings in Immigration Instructions. Criteria may be set in Instructions that sponsors would be required to meet. Not meeting the criteria for sponsorship would have the same effect as banning a sponsor who fails to comply with their obligations.

Bonds

Proposals

212 It is proposed that the Bill continue to enable bonds to be requested from temporary entry and residence applicants.

213 It is proposed that Residence or Temporary Entry Instructions establish the level of bond, and what expenses it may cover including:

a. deportation expenses incurred by the Department
b. un-entitled access to publicly funded services, and
c. any other expense specified.

Status quo

214 The 1987 Act enables bonds to be requested from applicants for various purposes, at a level determined in regulations for temporary entry applicants, and in GRP for residence applicants.

Discussion paper and submissions

215 As with sponsorship, some submitters opposed the use of bonds, commenting that they may be significant burden. Concern was also expressed that use of bonds would become a default in some visa categories.

Comment

216 As with sponsorship, the proposals would help give bonds greater effect as a mechanism to reduce the risk of a non-citizen's failure to meet visa conditions enabling, for example, the government to recover the cost of a non-citizen's deportation if they overstay their visa. These proposals do not mean bonds or sponsorship will be used more frequently than now.

INSTRUCTIONS RELATING TO VISA APPLICATIONS

Proposals

217 It is proposed that the Bill include the 1987 Act's fundamental requirements relating to applications, including requirements to:

a. apply in the prescribed format
b. use the approved forms[6]
c. pay the required fee
d. provide all the requested information
e. disclose all relevant facts, and
f. advise of any material change in circumstances.

6 The "prescribed format" and "approved forms" may be electronic, enabling some applications to be managed in an online format.

218 It is proposed that the provisions in the 1987 Act for Expressions of Interest in residence applications and Invitations to Apply for residence be included in the Bill without limiting their use to residence applications.

219 It is proposed that the Bill continue to include provisions for allowing applications to be lapsed (deemed as no longer current).

Status quo

220 The 1987 Act contains provisions that allow policy to be made relating to applications. Expressions of Interest and Invitations to Apply are used in residence visa (and permit) application processes. These processes cannot currently be used for temporary entry applications.

221 The 1987 Act contains provisions that guide when a visa or permit application can be lapsed.

Discussion paper and submissions

222 These proposals were not included in the discussion paper as they essentially carry over the status quo and are machinery to the effective and efficient management of the immigration system.

Comment

223 The proposals allowing rules to be made relating to visa applications, including using Expressions of Interest and Invitations to Apply, will enable the Department to make informed decisions on whether to grant a visa or permit. The proposals will also enable the Department to manage demand and prioritise the entry of the migrants that New Zealand wants and needs.

224 While is it desirable that a decision is made on each application the Department receives, provisions for allowing them to be lapsed are a useful tool where special circumstances require a significant shift in the process.

THE ROLE OF THE MINISTER OF IMMIGRATION

Proposals

225 It is proposed that the Bill include the current powers of the Minister, updated to reflect proposals in this review, to:

a. certify Immigration Instructions
b. grant visas (including to non-citizens unlawfully in New Zealand)
c. make special directions
d. cancel or suspend liability for deportation, and
e. delegate powers.

Delegation of ministerial functions

226 It is proposed that the Bill enables the Minister to delegate immigration decision-making functions with the exception of the ability to certify Immigration Instructions, make decisions based on classified information (if agreed in *Chapter Seven: Using classified information*) and suspend or grant waivers for up to three months, pending regulations (if agreed in *Chapter Two: Visas*).

227 It is proposed that Cabinet note that delegations would be limited to appropriate and suitable officers with proper training and/or experience in accordance with clear policies and procedures.

228 It is proposed that the Bill confirm that the power to make exceptions to Residence Instructions is discretionary so that no applicant has the right to:

a. apply for an exception, or

b. appeal against a decision not to make an exception.

229 It is proposed that the Bill includes the provision in the 1987 Act that requires the Department (in most cases) to consider a residence application received prior to it being considered by the Minister.

Status quo

230 In the 1987 Act the Minister has the power to:

a. certify GIP and GRP

b. grant visas and permits (including to non-citizens unlawfully in New Zealand under section 35A of the 1987 Act)

c. make special directions

d. order deportation

e. approve application forms and visa formats, and

f. delegate powers.

231 In the 1987 Act, the Minister is unable to delegate certain powers including the ability to certify GIP and GRP, to make exceptions to residence, and to order deportations.

Discussion paper and submissions

232 The discussion paper proposed allowing the power to make exceptions to residence policy to be delegable. The proposal was supported by approximately two-thirds of 107 submitters including the Auckland City Council and the Office of the Ombudsmen. There were many comments that the Minister should retain some power to intervene, which is proposed.

233 NZAMI expressed concern that exceptions made by the Department may be perceived as being motivated by bias or discrimination. Their concern echoed a risk noted in the discussion paper that decision-makers may come under pressure to use the discretionary power where it may not necessarily be warranted.

Comment

234 The ability for the Minister to grant visas (including to non-citizens unlawfully in New Zealand under section 35A of the 1987 Act, and as an exception to GRP) is considered important in creating a responsive and flexible immigration system. The proposals above retain all the current powers of the Minister except the power to approve application forms and visa formats which is generally an administrative matter.

235 These proposals would enable the Minister to delegate the power to make positive exceptions to Residence Instructions. The use of the power by delegated officers would be discretionary. The proposal would not limit any

appeal rights associated with a declined application. Applicants would continue to be able to appeal against a decline as provided for in *Chapter Six: Review and appeal.* As a part of that appeal, the Immigration and Protection Tribunal could recommend that the Minister approve the application as an exception to Residence Instructions.

236 In order to address any risk that the power would be used inappropriately, the Minister may choose to limit its delegation to particular, senior officers with an established understanding of the government's immigration priorities. This would address concerns expressed in submissions. Other delegations would also be limited to appropriate and suitable officers with proper training and/or experience in accordance with clear policies and procedures.

237 To further support the effective delegation of ministerial powers, there would be an administrative presumption that an applicant is required to submit an application and undertake an appeal before seeking ministerial intervention. This would ensure fairness and equity in the application process.

OFFICERS APPOINTED TO UNDERTAKE IMMIGRATION FUNCTIONS

Proposals

238 It is proposed that the powers for officers appointed to undertake immigration functions, including protection determination officers, continue to be provided for in the legislation.

239 It is proposed that in the Bill, New Zealand Police officers retain their current powers in the 1987 Act.

240 It is proposed that the Bill require the chief executive of the Department to designate an officer or a class of officers to perform specified statutory functions subject to any limits or conditions.

241 It is proposed that officers can continue to be delegated ministerial immigration decision-making powers.

242 It is proposed that the Bill explicitly enable designations to be withdrawn by the chief executive of the Department and delegations to be withdrawn by the Minister, and that designations and delegations be automatically revoked when an officer leaves the relevant position.

Status quo

243 The 1987 Act contains the powers of immigration and visa officers and refugee status officers. It contains some powers granted to police and customs officers. Officers can be delegated powers to exercise certain ministerial immigration decision-making functions.

244 Departmental officers can use their statutory powers after they are designated in their role, individually or by class, by the chief executive of the Department. Police and customs officers gain immigration powers by virtue of their appointment.

Discussion paper and submissions

245 Public submissions highlighted the importance of the ability to control who exercises powers under immigration legislation. They also highlighted the importance of officers having experience, or training to undertake their role.

246 The proposal to change the mechanics of designating statutory powers to officers was not in the discussion paper. It was developed in response to submissions recommending greater control over who uses powers, and in what circumstances.

Comment

247 These proposals will enable the use of the statutory powers proposed in *Chapter Nine: Compliance and enforcement* and *Chapter Ten: Monitoring and detention* to be limited to Police and to officers (who may also be customs officers) who have received the training that may be required. This will mean that the chief executive can assess the thoroughness of any training before designating powers to officers. The chief executive will also be able to maintain a transparent picture of which officers have designated powers.

248 Essentially, the change means that no powers will be automatically granted to officers (except Police) by virtue of their appointment to a role, be they departmental officers or customs officers. The chief executive will have greater ability to control who makes immigration decisions, protection determinations, and who exercises entry, search and detention functions.

249 It is intended that these provisions will continue to allow for overseas agents, police and customs officers to be designated powers, either individually or by class. For example, it is intended that customs officers continue in their current immigration role at the border.

POWERS OF THE CHIEF EXECUTIVE

Proposals

250 It is proposed that the Bill enable the chief executive to:

a. approve immigration application forms, and/or

b. approve visa formats.

251 It is proposed that the provisions in the 1987 Act that allow the chief executive to give instructions on the order and manner of processing applications are included in the Bill.

Status quo

252 The powers to approve forms and visa formats are currently delegable powers of the Minister. The power of the chief executive to give instructions on the order and manner of processing applications is the status quo.

Discussion paper and submissions

253 These proposals were not in the discussion paper as they are machinery.

Comment

254 Granting the power to approve forms and visa formats to the chief executive would mean application forms could be easily and readily updated, corrected and translated, and visa formats approved consistent with Immigration Instructions.

255 The power to give instructions on the order and manner of processing applications is a useful mechanism for the chief executive to contribute to managing the immigration system.

POTENTIALLY PREJUDICIAL INFORMATION AND REASONS FOR DECISIONS

What is potentially prejudicial information?

Potentially Prejudicial Information (PPI) is information that a decision-maker considers may lead to a negative outcome for a non-citizen engaged in the immigration system. For example, information may indicate that a visitor visa applicant intends to work in New Zealand.

Proposals

256 It is proposed that the administrative practice of providing PPI and reasons for decisions to non-citizens engaged in the immigration system continues as per the 1987 Act, the OIA, the Privacy Act 1993, and the principles of administrative law.

257 It is proposed that in practice, PPI and reasons are given to all applicants, with some exceptions including when:

a. an applicant is in New Zealand unlawfully
b. the Department is making, serving or cancelling a removal order, or
c. the Minister decides a special direction request.

Status quo

258 The status quo mirrors the proposal above.

Discussion paper and submission

259 The discussion paper asked when PPI and reasons for decisions should be given to applicants: onshore only, or to applicants who are on and offshore. The question generated considerable discussion in the Department, between agencies, in the public meetings, and submissions. Most of the discussion supported PPI and reasons being given to all applicants. For example, 75 percent of 55 organisations and almost 90 percent of 52 individual submitters including the NZAMI, NZLS and Human Rights Commission supported the status quo.

260 Submitters noted that withholding PPI and reasons would work against a fair immigration system and hinder effective decision-making.

Comment

261 The status quo was found to be appropriate and was supported across the Department, between agencies, in the public meetings, and submissions.

262 If PPI is provided to a non-citizen, an appropriate decision on their application or immigration status can be made, considering all the relevant information. Immigration decision-makers felt that the PPI process was an important aspect of making a decision on an application and that quality decisions would be hindered by withholding PPI from offshore applicants.

263 Immigration decision-makers also considered that providing reasons for decisions would ensure that all applicants have a clear understanding of the decision made on their application. Applicants may use the reasons to make an appropriate judgement on making further applications in the future.

ELECTRONIC DECISION-MAKING

Proposals

264 It is proposed that the Bill enable electronic decision-making, with appropriate safeguards such as the ability to reverse decisions made in administrative error.

265 It is proposed that the implementation of electronic decision-making would be subject to further Cabinet consideration.

Status quo

266 In administering the immigration system, the Department uses available and affordable technology to support the application process but final decisions must be made by officers. For example, student permit renewal applications are lodged and sorted electronically.

Discussion document and submissions

267 Approximately 75 percent of 60 organisations, such as the NZAMI and Business NZ, and just over half the 47 individual submitters supported the proposal to enable electronic decision-making. They commented that New Zealand needs to move with the times and make use of technology.

268 Organisations that supported the proposal included the Board of Airline Representatives New Zealand. Business NZ commented that the proposal seemed sensible and the New Zealand Law Society noted that it would be an appropriate use of technology.

269 The main concerns expressed in the submissions were around ensuring that electronic decisions are limited to low-risk approval decisions that do not require an individual judgement to be made. Electronic decision-making was acknowledged to be distinct from third party decision-making (discussed below) as the Department would control electronic decision-making processes and the computer systems that enabled them to occur.

Comment

270 Implementation of electronic decision-making would include a comprehensive risk analysis to ensure that robust and appropriate individual decisions can be made. It would also ensure that appropriate safeguards, such as the ability to reverse decisions made in administrative error, were transparent. Along with any specific provisions drafted to safeguard electronic decisions, powers to reverse decisions, and cancel visas, proposed

for example in *Chapter Two: Visas* and *Chapter Five: Deportation* would also provide safeguards.

271 The key benefits of electronic decision-making in a global immigration market would be to enable New Zealand to make efficient and effective decisions and retain a competitive edge. It would also enable Departmental resources to be allocated with a focus on managing risk in complex applications or to deal with high demand.

272 Australia allows for automated decision-making and has appropriate safeguards in legislation that allow an incorrect decision to be overturned by the Minister. This has enabled the development of an Electronic Travel Authority where a computer can make a number of visa decisions. Canada plans to use electronic decision-making in the future.

THIRD PARTY DECISION-MAKING

Proposal

273 It is proposed that the Bill should not enable third party decision-making, but that the Department should continue to use third parties to assist in some administrative and assessment functions in the immigration system.

Status quo

274 The Department facilitates third party relationships that contribute positively to the effective management of the immigration system and to the decision-making process, but third parties do not make final immigration decisions.

Discussion paper and submissions

275 The discussion paper asked if provisions for third party decision-making should be incorporated in the Bill. There was a mixed response. Organisations were evenly split with 45 percent supporting and opposing the proposal. Business and employer representatives, such as Education New Zealand and Business NZ, expressed strong support for the proposal while other organisations and individuals generally withheld their support. The proposal was opposed by the Council of Trade Unions and NZAMI.

Comment

276 The sovereign right of the government to control the border and make immigration decisions should not be outsourced to third parties as the immigration system supports the multi-faceted priorities of government in a unique and often complex manner. The decision not to propose third party decision-making acknowledges the real risk that third parties could not make decisions giving precedence to government priorities and national interest, rather than their own.

277 Is not intended that the Bill limit the use of third parties in the effective management of the immigration system. The status quo will continue in this regard. The Department will continue to facilitate third party relationships that can contribute positively to the effective management of the immigration system.

REGULATIONS

278 It is proposed that the Bill enable regulations to be made to facilitate effective immigration decision-making including, with regard to:

a. Immigration Instructions
b. visa applicants
c. applications for visas
d. sponsorship and bonds, and
e. electronic decision-making.

Executive Summary - Chapter 4 Protection

Proposal - A single determination procedure for assessing all core international obligations

I propose that New Zealand's existing obligations to assess claims to protection under 1951 Convention Relating to the Status of Refugees (the Refugee Convention), article 3 of the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment (CAT), and articles 6 and 7 of the International Covenant on Civil and Political Rights (the ICCPR) be set out in the Bill, in a single determination procedure, with a single right of appeal.

I propose that Bill sets out that a person is in need of protection if:

a. they are a refugee within the meaning of the Refugee Convention
b. as a result of deportation it is more likely than not that the person would be personally subjected to torture within the meaning of the CAT, or
c. as a result of deportation it is more likely than not that the person would personally be subjected to arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment if:

i. the person is unable or, because of the risk, unwilling to avail themselves of that the protection of their country of nationality or former habitual residence
ii. the risk would be faced by the person in every part of their country and is not faced generally by other individuals in or from that country
iii. the risk is not inherent in or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
iv. the risk is not caused by the inability of that country to provide adequate health or medical care.

I propose that the Bill:

a. clarify when refugees may be deported and how international obligations that prohibit deportation are to be taken into account
b. allow further claims to be made only where there has been a significant change in circumstances material to protection status, that was not generated by the claimant, but no further claims where manifestly unfounded, clearly abusive or simply repeated
c. require confidentiality regarding a protection claim to be maintained by all parties, including the media, with limited exceptions, and
d. allow for refugees to be selected offshore and brought to New Zealand and require that they may not be deported except in accordance with New Zealand's international obligations.

Status quo – New Zealand is party to the following immigration-related conventions: the Refugee Convention, CAT, the ICCPR, and the Convention on the Rights of the Child.

Only the Refugee Convention and the procedure for refugee status determination are included in the 1987 Act. Even though the 1987 Act does not include these obligations, like the Refugee Convention, article 3 of the CAT and articles 6 and 7 of the ICCPR create obligations not to return a person to a country where they would be in danger of particular human rights abuses.

Discussion paper and submissions – These proposals received high levels of support from public submissions, including the United Nations High Commissioner for Refugees (UNHCR).

Comment - Setting out a broader range of relevant international obligations in the Bill and establishing a single determination procedure would provide greater clarity and transparency. They would ensure more effective and efficient decision-making by reducing delays and double-ups. This approach would be similar to complementary protection regimes in Canada, the UK and Europe.

These proposals for change are forecast to have no significant impact on the number of protection claims in the long term. Providing for a moderately higher flow of protection claims would cost an additional $1.600 million over the first four years of operation. There would be no additional costs to the determination system in outyears.

Proposal – Who may be excluded from protection

I propose that determination officers would have the additional function of assessing whether there are serious reasons for considering that a claimant has:

a. committed a crime against peace, a war crime, or a crime against humanity

b. committed a serious non-political crime outside New Zealand prior to entry to New Zealand, or

c. been guilty of acts contrary to the purposes and principles of the United Nations.

Under the Refugee Convention, these provisions have the effect of excluding a person from refugee status, which means they may be deported unless they are also protected under CAT and ICCPR.

Where a person was found to be protected under CAT or ICCPR and to have committed one or more of the acts set out above, New Zealand would still be required (as now) not to return that person to torture or cruel treatment. I propose that the Minister would be responsible for determining what immigration status, if any, be given to persons protected under CAT or ICCPR but excluded from the Refugee Convention. Prosecution in New Zealand or extradition to a safe third country may also be options in such cases.

Status quo – As noted, only the Refugee Convention, including its exclusion provisions, is codified in the 1987 Act. The RSAA has applied the exclusion provisions of the Refugee Convention 18 times since 1995. It does not necessarily follow that such persons would be in danger of torture or protected under the ICCPR. However, [Information withheld under section 9(2)(h) of the Official Information Act 1982], unlike the Refugee Convention, article 3 of the CAT, and articles 6 and 7 of the ICCPR do not exclude anyone from protection, and do not allow any protected person to be expelled. These obligations apply regardless of whether New Zealand legislates for a single determination procedure.

There are a number of existing legal mechanisms for prosecuting or extraditing persons who have committed a particularly serious offence overseas. There may be persons, however, whom New Zealand considers to be of high risk, who are not able to be prosecuted or extradited.

Discussion paper and submissions – The proposal essentially mirrors that in the discussion paper, which proposed to clarify the mechanisms (such as prosecution or extradition) for dealing with persons who have committed very serious crimes, including torture or genocide. The discussion paper noted that the possibility of excluding persons

from protection under CAT and ICCPR was not feasible on the basis that it would place New Zealand in breach of its international obligations and the NZBORA.

The discussion paper did not generate widespread comment on this issue. A number of submitters expressed the view 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.

Comment – This issue has been given serious consideration. The proposed approach would ensure that New Zealand's international obligations were upheld, but that the small number of persons excludable under the Refugee Convention and protected under CAT or ICCPR would be clearly identified. This approach would allow for New Zealand's decisions on how to deal with such persons to reflect any future changes in these legal obligations.

Under this approach the Minister may choose to afford the person temporary or permanent protection. Country conditions often change over time, and the need for protection may be temporary only. In addition, prosecution in New Zealand, extradition, return with diplomatic assurances of safety, or deportation to a safe third country may be appropriate responses.

Proposal – The 1954 Convention Relating to the Status of Stateless Persons (Stateless Persons Convention)

I propose:

EITHER, OPTION A

a. that New Zealand should not become party to the Stateless Persons Convention at this time due to the need for more comparable international information to quantify the costs and risks to New Zealand, and because, if they get here, genuine stateless persons can be allowed to remain in New Zealand using other existing mechanisms

OR, OPTION B

b. to direct officials to report back on becoming party to the Stateless Persons Convention without incorporating it into the proposed single determination procedure in the Immigration Bill, in line with the practices of other countries

OR, OPTION C

c. to incorporate an assessment of the Stateless Persons Convention into the proposed single determination procedure in the Bill, to be assessed following assessments of the other obligations in all cases, in line with the recommendations of the UNHCR, and

d. to accede to the Stateless Persons Convention following treaty examination and passing of the Bill and to table the Convention and a National Interest Analysis for becoming party to the Convention in Parliament.

Status quo – New Zealand is not party to the Stateless Persons Convention. Stateless persons may be allowed to stay on the basis that they are also refugees or as a result of ministerial discretion. They may also directly apply for citizenship on the basis of being stateless.

Discussion paper and submissions - There was a reasonable level of support for New Zealand becoming party to the Stateless Persons Convention in public submissions.

Approximately 75 percent of 43 organisations, including the UNHCR and the Human Rights Commission, and 65 percent of 36 individual submitters expressed support for this option.
Comment – No other countries examined implement the Stateless Persons Convention in the way recommended by the UNHCR, that is a formal determination procedure for claimants, including those who claim at the border. Option A is recommended on the basis that is not possible to accurately quantify the costs of becoming party as there is no comparable international information. Under Option B, New Zealand could become party without a formal protection procedure which may minimise costs but may not be a durable solution long-term and would not be in line with UNHCR recommendations. Option B is not recommended by the Department or the Ministry of Foreign Affairs and Trade. Under Option C, New Zealand would become party to the Convention and incorporate it in the Bill in the proposed single determination procedure. This option would be consistent with New Zealand's broader human rights policy and objectives, and UNHCR recommendations. As noted, however, it is not possible to quantify the costs of this option to the protection determination system, social agencies required to provide, for example, health, housing and education support, or creating an additional avenue for abusive claims and associated risks.

CHAPTER FOUR: PROTECTION

PURPOSE

279 This chapter discusses the recommendations on:

- establishing in the Immigration Bill (the Bill) a single procedure for determining protection needs according to New Zealand's core immigration-related international obligations
- who may be excluded from protection
- rules relating to persons found to be refugees or protected persons, including immigration status and liability for deportation
- rules relating to the single determination procedure, including who may make a claim, obligations on claimants, powers of determination officers, further claims, confidentiality, and immigration status
- refugees selected offshore, and
- the 1954 Convention Relating to the Status of Stateless Persons (the Stateless Persons Convention), to which New Zealand is not party.

STATUS QUO

280 New Zealand is party to the following conventions with immigration implications:

- the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (the Refugee Convention)
- the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment (CAT)
- the International Covenant on Civil and Political Rights (ICCPR), and
- the Convention on the Rights of the Child (CRC).

281 The Refugee Convention requires New Zealand to meet a range of minimum standards for the treatment of refugees, such as non-discrimination, and access to employment, housing, education and the courts. Most fundamentally, New Zealand must not, except in limited circumstances relating to national security and public safety, expel or return a refugee to any other country or border where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.

282 Like the Refugee Convention, article 3 of the CAT and articles 6 and 7 of the ICCPR create obligations not to return a person to a country where they would be in danger of particular human rights abuses. Article 3 of the CAT, creates this obligation where there are substantial grounds for believing that a person would be in danger of being subjected to torture. Article 6 of the ICCPR requires that no one shall be arbitrarily deprived of life. Article 7 of the ICCPR requires that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. These obligations are also

reflected in sections 8 and 9 of the New Zealand Bill of Rights Act 1990 (NZBORA).[7]

283 It is generally accepted that Articles 6 and 7 of the ICCPR have within them an implicit non-return obligation similar to Article 3 of the CAT. Unlike the Refugee Convention, CAT and ICCPR provide no exceptions that allow the deportation of serious criminal offenders or security threats to the proscribed treatment.

284 The Immigration Act 1987 (the 1987 Act) requires that New Zealand's non-return obligations under the Refugee Convention must be met, and sets out the procedure for refugee status determination. While the 1987 Act does not refer to any other international protection obligations, case law requires statutory humanitarian appeals to consider New Zealand's broader range of international obligations. To this effect, the immigration Operational Manual already requires that New Zealand's obligations under CAT, ICCPR and CRC be considered prior to removing a person from New Zealand.

RATIONALE FOR PROPOSALS

285 The 1987 Act's provisions on refugee status determination are working well. The following aspects of the 1987 Act, in particular, are central to its success:

- requiring decisions to be made according to the Refugee Convention itself, rather than redefining it in the 1987 Act
- having designated officers to make determinations, who may not make immigration decisions and can become experts in refugee law, and
- having a *de novo* appeal to an independent and specialised body.

286 The proposals in this chapter build on these core provisions. The major proposal in this paper is to broaden the range of core international law protection obligations in the Bill and to establish a single determination procedure, rather than dealing with these other obligations administratively as currently occurs. This would provide greater clarity and transparency in New Zealand's international protection regime, and complement the core refugee protection regime. This approach is similar to complementary protection regimes in Canada, the United Kingdom (UK) and Europe and was encouraged by the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) in October 2005.

287 The proposals would:

a. create a more understandable and accessible protection system

b. ensure more effective and efficient decision-making by reducing delays and double-ups and allow decision-makers to become expert in all protection decisions

c. effect consistent processes for the treatment of protection claims, and

[7] Section 8: No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice. Section 9: Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

d. ensure consistency of decision-making between the Bill and the NZBORA.

288 It is not proposed to incorporate within the protection regime more general international obligations which do not include a clear obligation not to return a person to particular risk, such as articles 23 and 24 of the ICCPR, relating to the rights of the family and the child, and articles 3 and 9 of CRC, relating to the rights of the child. Careful consideration has been given to these obligations. There is already a settled position in New Zealand law and immigration policy that these obligations must be taken into account, but may not be the decisive factor in immigration decisions. Rather, the decision-maker has to balance competing factors, such as the right of the country to decide who should reside within its borders and the need to be fair to migrants who have not met policy requirements and who have left New Zealand without becoming unlawful. These obligations are met through Immigration Instructions, and the humanitarian appeals discussed in *Chapter Six: Review and appeal*.

A SINGLE PROTECTION DETERMINATION PROCEDURE

Proposal

289 It is proposed that:

a. New Zealand's existing obligations to assess claims to protection under the Refugee Convention, article 3 of the CAT, and articles 6 and 7 of the ICCPR be set out in the Bill, in a single determination procedure

b. a person is in need of protection if:

   i. they are a refugee within the meaning of the Refugee Convention

   ii. as a result of deportation it is more likely than not that the person would personally be subjected to torture within the meaning of the CAT, or

   iii. as a result of deportation it is more likely than not that the person would personally be subjected to arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment if:

      - the person is unable or, because of the risk, unwilling to avail themselves of the protection of their country of nationality or former habitual residence
      - the risk would be faced by the person in every part of their country and is not faced generally by other individuals in or from that country
      - the risk is not inherent in or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
      - the risk is not caused by the inability of that country to provide adequate health or medical care.

c. departmental protection decision-makers would be called 'determination officers'

d. claimants would be required to put forward any reasons why they may have a claim for international protection under the Refugee Convention, the CAT and articles 6 and 7 of the ICCPR

e. the Refugee Convention should be assessed first in each case on the basis that it establishes a detailed set of rights and entitlements for refugees that are not mirrored in CAT or ICCPR

f. where there were no grounds for assessing CAT or ICCPR, or the clear threshold of "more likely than not" was demonstrably not met, any CAT and ICCPR claim may be dismissed

g. there be a single right of appeal to the Immigration and Protection Tribunal (the tribunal) against a decision of a determination officer to decline protection

h. the tribunal should also be able to hear appeals against decisions to decline protection under one convention, even where the determination officer found the person should be granted protection under one of the other conventions (for example, a person may be declined under the Refugee Convention, but approved under the CAT. They may wish to challenge this decision on the basis that they consider they should be recognised as a refugee), and

i. all appeals against a decision of a determination officer would be de novo appeals and would consider whether the person should be protected under the Refugee Convention, article 3 of the CAT, or articles 6 or 7 of the ICCPR.

Status quo

290 As set out above, New Zealand has existing obligations not to return a person to another country in particular circumstances under the Refugee Convention, article 3 of the CAT and articles 6 and 7 of the ICCPR. However, under the 1987 Act there is no statutory process for assessing claims to protection under the CAT or articles 6 or 7 of the ICCPR.

291 Instructions to immigration officers currently require these obligations to be taken into account in removal processes. Claims may also be dealt with by the Removal Review Authority, the Deportation Review Tribunal and the Minister of Immigration (the Minister), with legal support, as individual cases arise. To date, the current system has managed the very small number of claims brought under the CAT and the ICCPR.

292 Under the current system, decision-makers assessing CAT and ICCPR are not necessarily protection specialists. There is a risk of inconsistent and incorrect decision-making. Decisions are generally made on the papers, and procedural safeguards could be stronger given the potentially serious nature of the issue. As a result, the system may be seen as unfair, and decisions may be vulnerable to judicial review. In addition, people genuinely at risk may not be aware of their ability to seek protection. Such obligations warrant a clear legal framework and determination process.

293 All persons declined refugee status by the Department of Labour (the Department) may currently appeal to the Refugee Status Appeals Authority (RSAA).

Discussion paper and submissions

294 The discussion paper proposed that the Refugee Convention, article 3 of the CAT, and articles 6 and 7 of the ICCPR be set out in the Bill, with clear guidelines to aid interpretation, in a single determination procedure, with a single right of appeal.

295 Organisations that made submissions on this issue included immigration consultants, ethnic councils, refugee and migrant groups, human rights groups, law societies, community law centres, other community groups, businesses, the UNCHR, and the Families Commission.

296 Submitters expressed strong support for the proposal to include New Zealand's international commitments to protect persons facing torture, arbitrary deprivation of life, or cruel, inhuman or degrading treatment or punishment in the Bill. Approximately 85 percent of 96 submitters indicated support for the proposal. Approximately 15 percent of individual submitters, but no organisations, were opposed.

297 Those who supported the proposal considered that it would confirm New Zealand's commitment to its obligations, ensure that they are applied consistently and accurately, and clarify entitlements. Some submitters, such as Amnesty International New Zealand, commented that the proposal would have a beneficial effect on New Zealand's international standing. Some submitters commented that clear guidelines would be required to aid in interpretation.

298 There was a high level of support for determining claims under the Refugee Convention, CAT and articles 6 and 7 of the ICCPR in a single procedure, with a single right of appeal. Over 80 percent of 40 organisations and approximately 70 percent of 35 individual submitters agreed with this proposal. Fewer than 10 percent of all 75 submitters were opposed.

299 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.

Comment

300 Based on the significant public support for these proposals, there have been no significant changes from the approach proposed in the discussion paper. Canada, the UK, and a number of European Union countries have single determination procedures that assess refugee status and broader humanitarian obligations.

301 The proposed test for CAT and ICCPR would simplify and standardise the test for non-return, and is similar to the approach taken in Canada's legislation. In so far as the express wording of article 3 of the CAT differs from that proposed, it does not do so in any material way.

302 Both the European Court of Human Rights (ECtHR) and English courts have emphasised that the ICCPR obligations do not extend to a general duty not to deport persons who are in need of medical care that will not be provided in their home country. The proposed approach relating to medical care reflects these findings and mirrors Canada's legislation.

303 The proposed process for decision-making would ensure any grounds for assessing CAT and ICCPR obligations would come to light in the Refugee Convention assessment, and that subsequent claims could be made only on the basis of a change in circumstances – not on the basis that a particular convention was not assessed.

Forecast operational impacts of a single determination procedure

304 As noted above, there are very few people who raise CAT and ICCPR issues in New Zealand. Other countries, [Information withheld under section 6(b) of the Official Information Act 1982], have confirmed that their experience is that few people who raise CAT and ICCPR issues are not also covered by the Refugee Convention. Any person with a genuine CAT or ICCPR claim would currently claim refugee status, and only a small number would not also meet the refugee test.

305 In addition, the proposals clarify that it must be "more likely than not" that the person will be personally subjected to torture, arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment, and explicitly exclude lawful sanctions and the inability of a country to provide health care as grounds for protection.

306 On this basis, these proposals for change are forecast to have no significant impact on the number of protection claims in the long term. Refugee status claims have proven to be volatile in the past, however, and the proposed changes could attract some additional claims initially, particularly before there is a clear understanding of the kinds of circumstances that may warrant protection.

307 Inflows of refugee status claims are currently the lowest they have been in more than ten years. In the late 1990s the annual inflow was over 2,000. Numbers have dropped from an inflow of 1,703 in 2000/01 to 317 claims in 2005/06. The forecast for 2006/07 is 350. It is conservatively estimated that there will be, in total (including refugee claims), 525 protection claims in each of the first two years of operation. This inflow is forecast to drop back to current levels in years four and five.

308 Providing for a moderately higher flow of protection claims would cost an additional $1.600 million over the first four years of operation. There would be no additional costs to the determination system in outyears.

WHO MAY BE EXCLUDED FROM PROTECTION

Proposals

309 It is proposed that determination officers would have the additional function of assessing whether there are serious reasons for considering that a claimant has:

a. committed a crime against peace, a war crime, or a crime against humanity

b. committed a serious non-political crime outside New Zealand prior to entry to New Zealand, or

c. been guilty of acts contrary to the purposes and principles of the United Nations.

310 Under the Refugee Convention, these provisions have the effect of excluding a person from the Refugee Convention, which means the person may be deported unless they are also protected under CAT or ICCPR.

311 Where a person was found to be protected under CAT or ICCPR and to have committed one or more of the acts set out above, New Zealand would still be required (as now) not to return that person to torture or cruel treatment. It is proposed that the Minister would be responsible for determining what immigration status, if any, be given to persons protected under CAT or ICCPR but excluded from the Refugee Convention. As discussed below, prosecution in New Zealand or extradition to a safe third country may also be options.

Status quo

312 As noted, only the Refugee Convention, including its exclusion provisions, is codified in the 1987 Act. The RSAA has applied the exclusion provisions of the Refugee Convention 18 times since 1995. It does not necessarily follow that such persons would be in danger of torture or protected under the ICCPR. However, [Information withheld under section 9(2)(h) of the Official Information Act 1982], unlike the Refugee Convention, article 3 of the CAT, and articles 6 and 7 of the ICCPR do not exclude anyone from protection, and do not allow any such protected person to be expelled. This is currently implemented administratively.

Discussion paper and submissions

313 The proposal essentially mirrors that in the discussion paper, which proposed to clarify the mechanisms (such as prosecution or extradition) for dealing with persons who have committed very serious crimes, including torture or genocide. The discussion paper noted that the possibility of excluding persons from protection under CAT and ICCPR was not feasible on the basis that it would place New Zealand in breach of its international obligations and the NZBORA.

314 The discussion paper did not generate widespread comment on this issue. A number of submitters expressed the view 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.

Comment

315 The review considered a range of options, from excluding all persons from protection where they may be excluded under the Refugee Convention, to specifying in the legislation that all international obligations must be upheld. The proposal represents a middle ground, which requires the process to clearly identify persons of risk to allow an appropriate response to be considered, within the bounds of our international obligations.

316 Jurisdictions including EU countries, the UK, Canada and Australia have legal precedent and/or legislation generally prohibiting expulsion where CAT and

ICCPR apply. The ECtHR has consistently upheld this prohibition, as has the UN's Special Rapporteur on Torture, and the Human Rights Committee.[8] In June 2005, New Zealand's Supreme Court indicated, consistent with international precedent, that articles 6 and 7 of the ICCPR and the corresponding sections 8 and 9 of the NZBORA did not allow New Zealand to deport a person if:

> '…there are substantial grounds for believing that, as a result of the deportation, the person would be in danger of being arbitrarily deprived of life or of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[9]

317 The practice of EU countries (including the UK), Australia, the Human Rights Committee, the ECtHR, the United Nations Committee Against Torture, and the Special Rapporteur on Torture follow this approach.

318 EU States and Canada which have incorporated the broader range of international obligations into their domestic legislation have mirrored assessment of the Refugee Convention's exclusion grounds in their legislation in respect of those broader grounds, as proposed above. This approach has the effect of limiting the status they are given, rather than resulting in deportation, which remains prohibited. EU states and other states party to CAT and ICCPR have been prevented by courts, or persuaded by United Nations Committee decisions, from proceeding with deportations to countries where a person faces the risk of torture.

319 To date, the Canadian Supreme Court has been alone in indicating that deportation to torture in truly exceptional circumstances, such as a threat to national security, may not breach Canada's Charter of Rights and Freedoms, although it accepts that it is contrary to CAT and ICCPR obligations. This position has been strongly criticised, not least for inconsistency with the absolute prohibition against expulsion to torture under the CAT. In light of increasing security concerns, however, it is possible that in the future courts could take a more conservative interpretation of these obligations in a manner similar to the Canadian Supreme Court.

320 The practical outcome of allowing the deportation of even a narrow group of protected persons would be that, in some cases, New Zealand may return a person to torture, arbitrary deprivation of life, or cruel, inhuman or degrading treatment or punishment. It would place New Zealand in breach of its international obligations and the NZBORA, and New Zealand would face criticism from the United Nations Committees that monitor compliance with the conventions. The New Zealand government has, to date, complied with Committee decisions, as do most developed countries.

321 The proposed approach would ensure that New Zealand's international obligations were upheld, but that the small number of persons excludable under the Refugee Convention and protected under CAT or ICCPR would be clearly identified. This approach would allow for New Zealand's decisions on

[8] The international body responsible for overseeing implementation of the ICCPR.
[9] Attorney-General v Zaoui (No. 2) [2005] NZSC 38.

how to deal with such persons to respond to any future changes in these legal obligations.

322 Under this approach the Minister may choose to afford the person temporary or permanent protection. Country conditions often change over time, and the need for protection may be temporary only. In addition, as discussed in more detail below, return with diplomatic assurances of safety, prosecution in New Zealand, or deportation or extradition to a safe third country may also be appropriate responses.

Protection in New Zealand

323 Return with diplomatic assurances of safety, prosecution in New Zealand, or deportation or extradition to a safe third country, as discussed below, will not always be possible. For example:

a. there may be no safe third country available for deportation or extradition

b. constraints on the ability to prosecute in New Zealand are likely to include the difficulty of obtaining sufficient evidence and the extremely high costs involved. The prosecution and extradition provisions outlined below have not been used to date and are only rarely likely to be viable

c. there may be persons who have not yet committed a crime but are nonetheless persons of particular concern, or

d. deporting a person who is a major security risk (to New Zealand or other countries), may not be in the best interests of New Zealand or countries with which it is working collaboratively.

324 [Information withheld under section 9(2)(g)(i) of the Official Information Act 1982]

Return with diplomatic assurances of safety, prosecution in New Zealand, or deportation or extradition to a safe third country

Diplomatic assurances of safety

325 Options for returning a person based on diplomatic assurances that the person would be protected could be explored when deciding whether a person had a claim to protection under CAT or ICCPR. Returns based on diplomatic assurances would require ongoing monitoring and possible re-evaluation to be considered genuine and in some instances may be difficult to administer. The absence of a reference to diplomatic assurances in the Bill would not preclude the government from seeking them in appropriate circumstances.

Prosecution in New Zealand or deportation or extradition to a safe third country

326 The obligation of protection under the CAT and the ICCPR extends only so far as to not return a person to a country where they face a danger of torture. That obligation does not prevent an individual being returned to a different country where they do not face this risk. Therefore, in so far as a safe third country is available and willing to take the individual, deporting or extraditing an individual to that country would not place New Zealand in breach of its obligations.

327 A number of existing provisions in New Zealand law deal with persons who may have committed a particularly serious crime overseas. New Zealand may be under an international obligation to extradite, or it may be necessary for New Zealand to provide protection and prosecute a person itself. Crimes where prosecution in New Zealand or extradition may be possible include:

a. Genocide, crimes against humanity or war crimes under the International Crimes and Criminal Court Act 2000. New Zealand has universal jurisdiction from specified dates in each case.

b. Terrorist acts under the Terrorism Suppression Act 2002. New Zealand has extra-territorial jurisdiction to try persons for terrorist bombings or the financing of terrorism where the act of terror was directed against New Zealand (including a New Zealand vessel or aircraft, New Zealand citizens, or New Zealand government facilities abroad). It also has extra-territorial jurisdiction for crimes against the Bombings and Financing Conventions where the alleged offender is present in New Zealand and is not extradited.

c. Crimes of violence against ships or fixed platforms under the Maritime Crimes Act 1999 and drug crimes under the Misuse of Drugs Act 1975. New Zealand has extra-territorial jurisdiction where the alleged offender is present in New Zealand.

RULES RELATING TO PERSONS FOUND TO BE REFUGEES OR PROTECTED PERSONS

Immigration status of refugees and protected persons

Proposal

328 It is proposed that the immigration status given to refugees and protected persons remain a matter for Immigration Instructions. Current operational policy allows for approved refugees to apply for residence on that basis.

Refugees and protected persons who become liable for deportation

Proposals

329 It is proposed that refugees and protected persons may become liable for deportation in the normal way, as set out in *Chapter Five: Deportation*, with the exception of fraud. For example, refugees and protected persons may become liable for deportation if they commit a serious criminal offence, or are found to be a threat or risk to national or international security.

330 In the case of fraud, it is proposed that a refugee or protected person would become liable for deportation where a determination officer determines that the status may have been gained by fraud, forgery, false or misleading representation or concealment of relevant information, and that the person is not in need of protection now (status quo). The onus would rest on the person themselves to establish their case for protection after a finding of fraud (status quo).

331 It is proposed that, mirroring the grounds for protection proposed above, the Bill would prohibit deportation of a person if:

a. they are a refugee within the meaning of the Refugee Convention, unless article 32.1 or article 33.2 allows it

b. as a result of deportation it is more likely than not that the person would personally be subjected to torture within the meaning of the CAT, or

c. as a result of deportation it is more likely than not that the person would personally be subjected to arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment if:

    i. the person is unable or, because of the risk, unwilling to avail themselves of the protection of their country of nationality or former habitual residence

    ii. the risk would be faced by the person in every part of their country and is not faced generally by other individuals in or from that country

    iii. the risk is not inherent in or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

    iv. the risk is not caused by the inability of that country to provide adequate health or medical care.

332 Protected persons liable for deportation (with the exception of threats to national or international security) would have available to them a single appeal right as discussed in *Chapter Six: Review and appeal*. This appeal would assess the facts where applicable (such as fraud), any current need for protection (as set out in paragraph 331 above), and any additional humanitarian appeal test.

333 It is proposed that where the tribunal had allowed the initial protection decision, the determination officer would refer the case to the tribunal directly.

Status quo

334 The 1987 Act prohibits deportation of a person if they are a refugee within the meaning of the Refugee Convention, unless article 32.1 or article 33.2 allow it. The proposed process for determining fraud above mirrors the status quo. There is, however, no clear process for assessing protection obligations in regard to refugees or protected persons who become liable for deportation through criminal offending.

Discussion paper and submissions

335 The discussion paper proposed that the legislation expressly prohibit the expulsion of a person where prohibited by New Zealand's international obligations. There was a high level of support in public submissions for clarifying in the legislation when a protected person may be deported. 90 percent of 33 individual submitters supported the proposal. 60 percent of 34 organisations agreed that the legislation should clarify when a protected person may be expelled, and 10 percent of organisations disagreed.

Comment

336 In combination with the appeals proposals in *Chapter Six: Review and appeal,* this proposal would ensure a clear and robust process for assessing whether or not a refugee or protected person may be deported.

RULES RELATING TO THE SINGLE DETERMINATION PROCEDURE

337 The proposals below generally extend the existing provisions of the 1987 Act relating to refugee status determination to assessing claims under the CAT and ICCPR.

Who may make a protection claim

Proposal

338 It is proposed that protection claims may not be made by New Zealand citizens as their citizenship guarantees them Crown protection. It is proposed that protection claims may be made by residents or permanent residents where that person has been issued with a deportation liability notice.

Status quo

339 Protection claims may not be made by New Zealand citizens and residents who already enjoy the full protection of the Crown. Protection concerns raised by residents who become liable for deportation must be addressed administratively or in the context of a humanitarian appeal, rather than through the formal determination process.

Discussion paper and submissions

340 This issue has arisen in the detailed analysis undertaken subsequent to the public consultation process.

Comment

341 This proposal addresses the difficulty that currently arises when a resident becomes liable for deportation and allows such claims to be determined by protection experts.

Claimants with protection available elsewhere

Proposal

342 In addition to the functions discussed at paragraphs 289 and 309 it is proposed a determination officer must determine whether a person who has been recognised as a Convention refugee or other protected person by another country is not a refugee or protected person in New Zealand on the basis that they can be received back and protected in another country without the risk of being returned to a country where they are at risk.

Status quo

343 This proposal mirrors a current function of refugee status officers.

Discussion paper and submissions

344 The discussion paper proposed that all legislative functions relating to refugee status determination be extended to the broader protection scheme. No submissions were received on this issue.

Comment

345 This proposal ensures that New Zealand is not obliged to protect non-citizens who have been, and can continue to be, protected in another country.

Obligations on protection claimants

Proposal

346 It is proposed that:

a. a protection claim is made as soon as a non-citizen in New Zealand signifies their intention to seek to be recognised as a refugee, or a protected person, to a representative of the Department, or to a member of the New Zealand Police

b. once a protection claim is made, the claimant must confirm the claim in writing in the prescribed manner

c. it is the responsibility of the claimant to establish the claim, and to ensure that all information, evidence and submissions are provided to the determination officer before a determination is made

d. claimants must provide a current address in New Zealand to which communications may be sent, and a current residential address, and must notify changes to either of those addresses, and

e. if a claimant leaves New Zealand their claim is considered to be withdrawn.

Status quo

347 This proposal mirrors the obligations on refugee claimants in the 1987 Act.

Discussion paper and submissions

348 The discussion paper proposed additional obligations on claimants and additional offences relating to informing officers of changes in circumstances, and not procuring protection through fraud. Submitters considered that the prospect of having a claim declined should be incentive enough for people to provide information. UNHCR recommends that protection claimants are not penalised for using false documentation. In light of these submissions and further analysis, no new obligations or offences are proposed.

Comment

349 This proposal ensures that there are clear and transparent obligations on persons seeking to engage with the protection determination system, but does not create offences that are in breach of recommended international standards.

Powers and procedures of determination officers

Proposals

350 It is proposed that:

a. in carrying out all their functions, determination officers must act in a manner that is consistent with New Zealand's obligations under the relevant conventions

b. subject to provisions in the Bill and any regulations made under it, and the requirements of fairness, determination officers may determine their own procedures

c. determination officers may decide the order in which matters are to be handled

d. determination officers may not also be employed to administer other immigration matters

e. determination officers may seek information from any source but are not obliged to seek any information, evidence or submissions further to that provided by the claimant or protected person under investigation

f. determination officers may determine a matter on the basis of the information, evidence and submissions provided by the claimant or protected person under investigation

g. determination officers may rely on the latest address provided for the purposes of communication

h. determination officers may require a claimant or protected person under investigation to attend an interview

i. determination officers may require a person in charge of a detention facility to produce a claimant or protected person under investigation for interview, and

j. where a claimant or protected person under investigation who is required to attend an interview fails to attend, determination officers may determine the case without conducting the interview.

351 It is proposed that determination officers should have the following powers in regard to requiring information for the purpose of protection matters:

a. determination officers may require a claimant or protected person under investigation to supply such information, and within such times, as the officer reasonably requires

b. determination officers may require a claimant or protected person under investigation to produce such documents in their possession or within their ability to obtain as the officer requires

c. determination officers may require a claimant or protected person under investigation to consent to the release by another person of any relevant documents or information relating to that person, and

d. if the officer has good cause to suspect that a person other than the claimant or protected person under investigation has in their possession or control any document of the claimant or protected person under

investigation (including any passport or travel document), the officer may request the person to produce any such document

352 It is proposed that the Bill explicitly authorise government departments to comply with requests for information from a determination officer to assist with determining protection matters.

Status quo

353 The proposals at paragraphs 350 and 351 mirror the status quo regarding refugee determination. The proposal at paragraph 352 is possible under the Privacy Act 1993, but the Privacy Act provisions allowing such information sharing are commonly misunderstood by government departments.

Discussion paper and submissions

354 The discussion paper proposed that all legislative functions relating to refugee status determination be extended to the broader protection scheme. No submissions were received on this issue.

Comment

355 In addition to requiring the onus of proof to rest on the claimant, allowing determination officers to conduct robust inquiries is an essential tool for identity and credibility to be tested, and for good decision-making.

356 Establishing a person's identity is crucial to maintaining integrity in the immigration system, but is often problematic. Many refugees or persons fleeing torture do not have identity documents and, in such cases, home country verification is generally not possible. Decision-makers therefore require other mechanisms for establishing identity and credibility.[10]

357 Not all asylum claimants are recent arrivals. Some have a significant history in New Zealand that is relevant to assessments. Information from other government departments may be pertinent to determining protection claims.

358 The proposal at paragraph 352 addresses the problem that officers can be hindered in their investigations by an inability to obtain information from other government departments. At present, officers must use the Official Information Act 1982 or the Privacy Act to request such information. From time to time other agencies take the view that it is not within the bounds of the Privacy Act to share the information (that it is not required for the maintenance of the law).

Further claims to protection

Proposals

359 It is proposed that:

[10] New powers for designated officers, including determination officers, relating to the use of biometric information are proposed in *Chapter Eleven: Biometric information*.

a. further claims to protection be allowed only where there has been a significant change in circumstances material to protection status, that was not generated by the claimant, since a decline decision

b. in any further claim, the claimant may not challenge any finding of credibility or fact made in relation to a previous claim and the officer may rely on any such finding, and

c. a determination officer may refuse to consider a further claim where:

    i. the claim is manifestly unfounded or clearly abusive, or

    ii. the previous claim is simply repeated.

360 It is proposed that a claimant may appeal to the tribunal against a decision of a determination officer to refuse to consider a claim on the basis that there has not been a significant change in circumstances material to protection status, which was not generated by the claimant.

361 It is proposed that a claimant may not appeal to the tribunal against a decision of a determination officer to refuse to consider a further claim on the basis that it is manifestly unfounded, clearly abusive, or simply repeated.

Status quo

362 Under the 1987 Act, a subsequent claim for refugee status may not be considered unless 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'. In practice, this is interpreted to encompass claims where a person's personal circumstances (such as their political or religious or family profile) have changed, on the basis that their circumstances in the home country would change as a result, if they were to return. A claimant may appeal against a decision of an officer to refuse to consider a subsequent claim.

Discussion paper and submissions

363 The discussion paper presented the first part of the proposal, but proposed that appeals be allowed "with leave" of the tribunal rather than expressly limiting the types of further claimants who can appeal. Approximately 75 percent of 36 organisations and 60 percent of 34 individual submitters supported the proposal in the discussion paper. Almost a quarter of individual submitters, but no organisations, opposed the proposal.

364 The appeal aspect of this proposal has been adjusted on the basis that leave provisions can be complex and a clear demarcation of who may have a further appeal and who may not would be preferable.

Comment

365 A person whose claim has been declined may have grounds for a new claim if their circumstances change significantly after the decline decision. For example, political regimes may change in the home country to the claimant's disadvantage or a previously safe claimant may come to the regime's attention.

366 While the current jurisprudence allows subsequent claims to be lodged where personal circumstances have changed, the legislation could be interpreted differently in the future. A person could be found to be a genuine refugee, but the claim could be invalid due to the limitation of domestic legislation. This would be inconsistent with New Zealand's obligations under the Refugee Convention.

367 It is appropriate, however, to establish a limit to subsequent claims to prevent ongoing cycles of claims. Prior to the introduction of the current limitation on subsequent claims, there were significant numbers of abusive repeat claims. The current threshold has helped to reduce these numbers significantly.

Confidentiality

Proposal

368 It is proposed that:

a. the confidentiality as to the identity of a protection claimant and the particulars of the case, must at all times, during and subsequent to the determination of the claim, be maintained by all, including the media and that only express permission by the claimant could waive this provision, and

b. 368(a) should not apply to prevent disclosure of particulars by the Department or the tribunal:

   i. to a person necessarily involved in determining the relevant claim or matters, or

   ii. to an officer or employee of a Government department or other Crown agency whose functions in relation to the claimant or other person require knowledge of those particulars, or

   iii. in dealings with other countries for the purpose of determining protection status, or

   iv. to the UNHCR or a representative of the High Commissioner, or

   v. to the extent that the particulars are published in a manner that is unlikely to allow identification of the person concerned, or

   vi. if there is no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure in the particular circumstances of the case.

369 It is proposed that the purpose of (b) ii above is to allow information to be shared, for example, for the purposes of assessing the protection claim itself, or eligibility to services such as legal aid or social welfare. In addition, it may be used in relation to a police investigation, or subsequent investigation of fraud.

Status quo

370 The 1987 Act requires that persons involved in determining refugee status at first instance and on appeal, must keep the identity of a refugee status claimant confidential both before and after a claim is determined, with

limited exceptions. Exceptions relate to disclosure to sources that may assist with the determination and would not endanger the safety of any person.

Discussion paper and submissions

371 The discussion paper proposed that all legislative functions relating to refugee status determination be extended to the broader protection scheme. The changes proposed were not explicitly discussed in the public discussion paper, as they have arisen in light of further analysis.

Comment

372 The current confidentiality provisions have the starting point that the claim must be confidential in all cases. Exceptions are then provided for to allow decision-makers to conduct investigations that have appropriate safeguards. However, the provisions do not apply to a person who is not involved in the decision-making process, including the media. In practice, therefore, the provision is not always effective in preventing the risks it is designed to prevent.

373 In comparison, the Criminal Justice Act 1985 makes an assumption of confidentiality in relation to the victims of certain sexual offences and child witnesses that extends to any publication by the media. The Criminal Justice Act prohibits the publication of the name or identifying particulars of children who are witnesses in criminal proceedings, and victims of specified sexual offences without their permission.

374 These proposals would better ensure that knowledge of the person's claim is not reported back to the home country. This may prevent potential persecution on the person's return to their home country should they be declined and/or potential persecution of the person's family who may still be in the home country while the claim is being determined. These proposals may also help to prevent a genuine claim being created where there was no claim previously.

Immigration status of protection claimants and failed protection claimants

Proposals

375 It is proposed that Immigration Instructions be updated to allow for protection claimants to be granted work or other appropriate temporary permits while awaiting a decision on a protection claim or appeal.

376 It is proposed that the Bill should prohibit failed protection claimants from applying for any type of further permit while in New Zealand (status quo). The Bill should clarify, however, that this provision has no further effect once a person leaves New Zealand or in the event that a person is granted a visa in exception to normal policy.

Status quo

377 Current operational policy allows for refugee status claimants to be granted work or other appropriate temporary permits while awaiting a decision on a refugee claim or appeal. The 1987 Act prohibits failed refugee status claimants from applying for any further permit while in New Zealand, but could be clearer.

Discussion paper and submissions

378 There was no proposal to change the status quo in the discussion paper. No submissions were received on this issue.

Comment

379 This provision helps maintain the integrity of the protection system by preventing further manipulation of the system by a failed claimant. There are no mechanisms for a person to remain lawfully in New Zealand unless they leave and apply from offshore. This proposal clarifies that this provision should cease to apply to persons who leave New Zealand and may wish to apply to return in the future, or who are granted a visa in exception to normal policy.

REFUGEES SELECTED OFFSHORE

Proposal

380 It is proposed that the Bill should allow for refugees to be selected offshore, brought to New Zealand, and recognised as refugees in New Zealand without needing to be subject to a formal determination process in New Zealand.

Status quo

381 In addition to approved asylum seekers onshore, New Zealand resettles up to 750 UNHCR-mandated refugees each year. The 1987 Act does not explicitly provide for UNHCR-mandated refugees to be recognised as refugees in New Zealand, although it is implied in the power of a refugee status officer to cancel the status of UNHCR-mandated refugees.

Discussion paper and submissions

382 This proposal mirrors that presented in the discussion paper. Approximately 85 percent of 37 organisations supported this proposal and of 37 individuals, approximately a half supported the proposal and a quarter opposed it. Of those who opposed the proposal, there seemed to be some concern about extending protection to a further group of people, which is a misunderstanding.

Comment

383 While, in practice, persons brought to New Zealand under the Refugee Quota Programme are treated as refugees according to the Refugee Convention, domestic legislative support for this practice could be clearer.

THE 1954 STATELESS PERSONS CONVENTION

Proposal

384 It is proposed:

EITHER, OPTION A

a. that New Zealand should not become party to the Stateless Persons Convention at this time due to the need for more comparable international information to quantify the costs and risks to New Zealand,

and because, if they get here, genuine stateless persons can be allowed to remain in New Zealand using other existing mechanisms

OR, OPTION B

b. to direct officials to report back on becoming party to the Stateless Persons Convention without incorporating it into the proposed single determination procedure in the Immigration Bill, in line with the practices of other countries

OR, OPTION C

c. to incorporate an assessment of the Stateless Persons Convention into the proposed single determination procedure in the Bill, to be assessed following assessments of the other obligations in all cases, in line with the recommendations of the UNHCR, and

d. to accede to Stateless Persons Convention following treaty examination and passing of the Bill and to table the Convention and a National Interest Analysis for becoming party to the Convention in Parliament.

Status quo

The Stateless Persons Convention

According to the Stateless Persons Convention, a stateless person is someone 'not considered as a national by any state under the operation of its law'. There are an estimated 11 million stateless persons worldwide. This compares with an estimated 8.4 million refugees worldwide.

A common way that people become stateless is when the borders of the country they were born in change. This happened to groups, for example, when the Soviet Union was disbanded and after the splitting up of former Czechoslovakia and former Yugoslavia into smaller countries. Palestinians are the most well known example of stateless persons.

By becoming party to the Convention, New Zealand would be obliged to give protection to persons in New Zealand where no other country recognised that person as a citizen by law. The rights given to a stateless person by the Convention include employment, housing, education, welfare, freedom of movement and religion, and access to the courts.

385 New Zealand is not party to the Stateless Persons Convention. Currently, if a stateless person arrives in New Zealand without any authorisation to enter, they are likely to apply for refugee status. In recent years, a very low number of refugee status claimants have also claimed to be stateless. Some stateless persons are recognised as refugees and are granted refugee status.

386 Other stateless persons are not refugees, and there is no formal mechanism for protecting them in New Zealand. Rather, on a case-by-case basis, the Minister or an immigration officer may use their discretion to grant the person a permit to stay. The Citizenship Act 1977 also allows a stateless person to apply for citizenship, which may be granted at the discretion of the Minister of Internal Affairs. The Department is not aware of this provision having been used to grant citizenship.

Discussion paper and submissions

387 Approximately 75 percent of 43 organisations and 65 percent of 36 individual submitters expressed support for New Zealand becoming party to the Stateless Persons Convention.

388 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 UNHCR.

389 Many submitters considered that becoming party would be consistent with New Zealand's support for international human rights, with Amnesty International 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. The UNHCR and the Human Rights Commission strongly encouraged New Zealand to become party.

390 Some submitters considered that there are serious risks of increasing numbers of applications. 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.

What do other countries do?

391 As at February 2006, 59 countries were party to the Stateless Persons Convention, including Australia, Norway and 13 EU member states. In comparison 145 countries were party to the Refugee Convention in February 2006.

392 In contrast to practices relating to the Refugee Convention, most countries party to the Stateless Persons Convention including Australia, Norway and the UK, do not have clear determination procedures. In these countries, the matter is dealt with case-by-case, in asylum procedures or when applications for residence or travel documents are made. Many states, including Australia, Spain and the UK, consider that the Convention does not confer a general right on stateless persons to enter or remain unless the Refugee Convention applies.

393 Despite the overall large number of stateless persons worldwide (11 million), all of the countries investigated have low numbers of stateless persons arriving or claiming in their country. This may be due to the fact that it is difficult for stateless persons to obtain travel documents. Further, to the best of our knowledge, no other country allows a stateless person to enter on the basis of their commitments under the Stateless Persons Convention.

394 Canada is not party to the Stateless Persons Convention and it recently reviewed this decision in 2003. Canada believes that Canadian legislation and practice relating to refugees provides protection to stateless persons, consistent with what is called for in the 1954 Convention on Statelessness.

Comment

395 In December 2003, Cabinet considered becoming party to the Stateless Persons Convention. Cabinet decided that New Zealand should not become party at that time, as it would require legislative and operational change that could have substantial costs, and invited the Minister to consider becoming party in the Immigration Act review.

Option A - Not becoming party to the Convention

396 Under Option A, New Zealand would not become party to the Convention on the basis of the potential costs and risks.

397 Becoming party would require New Zealand to offer a broad range of rights (similar to those enjoyed by refugees) to stateless persons. Should flows of stateless persons to New Zealand increase significantly, this would have substantial costs for the protection determination system, and social agencies required to provide, for example, health, housing and education support. The costs of becoming party to the Convention may include the costs of creating an additional avenue for abusive claims and associated risks. Verification difficulties may create extensive delays for the single determination procedure, and subsequent cost implications for social service agencies.

398 As there are no other countries that have implemented the Convention in the way that allows persons claiming statelessness at the border to access these rights, which is considered the correct legal approach and is recommended by the UNHCR, it is not possible to quantify these risks with any degree of accuracy. There may be risks with being a "first mover".

399 There would also be risks if New Zealand was to implement the Convention without a formal determination procedure as other countries have done (Option B). New Zealand's courts may hold that this is an incorrect interpretation of the Convention and require a formal determination procedure.

Option B - Becoming party to the Convention with no formal determination procedure

400 Under Option B, officials could report back to Cabinet on New Zealand becoming party to the Convention, but not including it in the legislative protection determination procedure proposed earlier in this paper, in line with the practices of other countries. In the short term this approach may minimise additional costs. In the longer term, the New Zealand courts may find that this practice is incorrect and New Zealand may need to amend the Immigration Act to include the Convention in the single protection determination procedure. The Department and the Ministry of Foreign Affairs and Trade do not support Option B.

Option C - Becoming party to the Convention with a formal determination procedure

401 Under Option C, assessment of the Convention would be included in the single determination procedure proposed earlier in this paper, which allows claims to be made by persons at the border.

402 The UNHCR recommends that countries who are party to the Convention establish a clear determination procedure, which includes those persons who

claim statelessness at the border but who otherwise have no permission to enter the country. The Department's legal opinion considers, particularly given our domestic legal environment, we would need a process for assessing statelessness claims from persons claiming at the border. This approach would reflect UNHCR recommendations, and the view that a person need not be in a country lawfully (according to the domestic law of the country) in order to avail themselves of an international agreement. It would, however, be in contrast to the practices of all the countries compared in this review. As a result, it is not possible to accurately cost this option.

403 The UNHCR is clear that this Convention is an important instrument to avoid and resolve statelessness. In response to the discussion paper, UNHCR "strongly encourage[d] the Government of New Zealand to accede […] in accordance with New Zealand's position as a country that supports efforts to maintain human rights standards". The Commission on Human Rights and the General Assembly have also encouraged all States to ratify this Convention.

404 Accession would also give New Zealand a mandate to encourage the UNHCR to pursue durable solutions for the global stateless population, with a view to achieving a reduction similar to that which has been achieved for the global refugee population (down 31 percent since 2000).

405 The risk of high numbers of claimants in New Zealand may be low due to the following factors (although this may change if New Zealand implements the Convention in a way that other countries have not):

a. New Zealand has previously recognised as refugees some stateless persons whose most basic human rights are not protected in their country of habitual residence, for example, the Bidun of Kuwait.

b. The current heightened security around international travel, such as New Zealand's Advance Passenger Processing, and quicker determination procedures, lessen incentives for claims.

c. UNHCR advises that geopolitical considerations and family links play a more crucial role as far as attractiveness of destination is concerned than accession to the Stateless Persons Convention or the way it is implemented.

REGULATIONS

406 It is proposed that the regulation making powers relating to refugee status determinations in the 1987 Act be mirrored in the Bill in relation to the broader protection claim process.

Executive Summary - Chapter 5 Deportation

Proposal – New "deportation" system

I propose that the Bill use the term "deportation" to describe all processes for requiring a non-citizen to leave New Zealand, with the exception of those refused entry at the border.

I propose that non-citizens should be liable for deportation when they come within the list of criteria specified in the Bill. There would be robust consideration of every individual case to assess whether deportation is appropriate, and a delegable ministerial power to intervene to cancel deportation liability.

I propose that non-citizens should maintain lawful status while in the deportation process, except for those who are liable because their visas have expired.

I propose that, with the exception of overstayers, non-citizens would be advised of deportation liability by the service of a deportation liability notice.

Status quo - The 1987 Act uses several different terms to describe the processes that require a person to leave New Zealand: removal, deportation, and revocation. It provides that people in New Zealand unlawfully are obliged to leave, but requires resident deportation and revocation processes to start with a Ministerial order.

Residents currently subject to deportation or revocation proceedings retain their status until these matters are finalised. Non-citizens' temporary permits are revoked and they remain in New Zealand unlawfully while their removal appeal is considered.

Discussion paper and submissions - The discussion paper proposal to use a single term was supported by most submissions. The proposed term "expulsion" was not favoured, but "deportation" was supported as being more transparent and understandable. Submitters expressed concerns about the proposed "automatic liability" including a perceived reduction in the level of legal protection available, and placing the onus of rebutting the presumption of deportation liability on the non-citizen. These concerns have been addressed in the modified proposals above.

The discussion paper proposed that immigration status expire on departure once all deportation appeals were exhausted. Public meetings were strongly in favour.

Comment – A single term would make the Bill more understandable. "Deportation" is already commonly used in regard to immigration processes. The discussion paper proposal has been developed in light of the submissions. The Department would clearly establish that there was a deportation liability. The option of cancelling deportation liability is available where individual circumstances make it appropriate. This would allow the Minister to require that specified types of cases to be brought to his or her attention by the Department before deportation liability was notified to a non-citizen.

The consequences of deportation for the non-citizen make it desirable for them to retain their status, where possible, until deportation is confirmed. The risk that it could encourage some non-citizens to enter the appeal system in order to prolong their stay would be balanced by speed in the appeal system and the option for monitoring and detention of those liable for deportation.

Proposal – Deportation liability criterion: Visa granted in error

I propose that non-citizens would be liable to have their visa revoked by deportation where the Minister or a delegated officer determines that a visa was granted in error.

Status quo - Temporary permits granted in error may be revoked, with an appeal on humanitarian grounds against removal available. The revocation of residence permits granted in error requires a ministerial decision, with appeal to the Deportation Review Tribunal on humanitarian grounds and to the High Court on the facts.

Discussion paper and submissions - The discussion paper noted that gaining a permit as result of administrative error could be grounds for deportation. A relevant point made by many several submitters is that departmental determinations need to be reviewable.

Comment – The proposal broadly translates the status quo into the proposed deportation system, but makes the Minister's power to act in cases involving residents delegable.

Proposal – Deportation liability criteria: Unlawful presence in New Zealand

I propose that non-citizens would be liable for deportation where:

a. they become unlawful in New Zealand on the expiry of a visa or for never having held a visa, or
b. the Minister or delegated officer determines that a visa was granted to a false identity.

Status quo – A non-citizen unlawfully in New Zealand is liable to be removed if the non-citizen does not appeal against the obligation to leave within 42 days of becoming unlawful or once their appeal is declined. The use of false identities is treated like other types of fraud, with the non-citizen's permit remaining in effect until it is revoked.

Discussion paper and submissions - The discussion paper noted that staying in New Zealand after the expiry of a permit would continue to be grounds for deportation. More than half the submissions agreed that non-citizens who obtained their status through fraud should be treated in the same way as persons unlawfully in New Zealand.

Comment – The core concepts that non-citizens here unlawfully are obliged to leave without further notification of this obligation and that they may be deported are not highly contentious, given that regularisation options continue to exist. The proposal to treat a visa granted to a false identity as never having been valid rests on the argument that the non-citizen should never have obtained the visa or benefit arising from it.

Proposal – Deportation liability criteria: Temporary stay in New Zealand revoked

I propose that non-citizens would be liable for deportation where:

a. the Minister or delegated officer considers that there are sufficient reasons to revoke their temporary entrant or limited visitor visa by deportation (14 days allowed to give reasons against revocation)
b. the Minister or delegated officer determines that their temporary entrant or limited visitor visa should be revoked by deportation because they meet the exclusion criteria (14 days not available).

Status quo – These proposals mirror provisions in the 1987 Act. The provision equivalent to the first proposal does not currently limit the grounds for revocation.

Discussion paper and submissions – The discussion paper proposed that the current flexibility around temporary permit revocation power should be retained.

Comment – These powers are important tools for the management of temporary entrants and limited visitors. Adding "sufficient reasons" in the Bill reflects the practice that has been built up under the current provision.

Proposal – Deportation liability criterion: threat or risk to national or international security

I propose that non-citizens who are determined to be a threat or a risk to national or international security could be deported by Order in Council made by the Governor-General. There would be no appeal, but judicial review would remain.

Status quo - The 1987 Act has two provisions: deportation by Order in Council for non-citizens who are a threat to national security and by ministerial order for suspected terrorists.

Discussion paper and submissions – The deportation criterion of being a threat to national security, including a terrorist threat, was criticised by some submitters as too vague, open to abuse, and unclear in decision-making processes.

Comment – This proposal amalgamates the two existing provisions. It seeks to ensure that the new provision is worded broadly enough to cover non-citizens who are themselves not an immediate threat, but are an integral part of a wider threat. Similarly, the scope of the provisions is extended to include both national and international security, reflecting the international collaborative nature of responses to terrorism and security threats. The proposal is not designed to increase the frequency of the use of this provision in comparison to the current comparable powers. The nature of the threats to be managed and the strength of the provision make it appropriate for the single decision-making point to be at the highest formal level within the executive.

Proposal – Deportation liability criteria: character

I propose that residents would be liable for deportation, within five years of residence being granted, where new information relating to character, applicable at the time residence was granted, indicates that the person would not have been granted residence if that information been available at that time.

Status quo – There is no comparable provision in the 1987 Act.

Discussion paper and submissions - This proposal has arisen from interagency consultation subsequent to the public consultation process.

Comment - The 1987 Act and the proposals below, allow a resident to be deported where there is clear evidence of immigration fraud, or where the person commits a serious criminal offence after the grant of residence. There are currently no immigration consequences for non-citizens where investigations relating to criminal activities the person was involved in prior to residence being granted commence after the grant of residence. This proposal would be useful in the situation where an non-citizen faces charges in their home country, but where extradition is not being sought by the home country. If a non-citizen was deported to face charges in their home country and was acquitted, policy could allow them to return to New Zealand.

In this situation, the Minister or delegated officer would need to be satisfied that residence would not have been granted had the information been available at the time that residence was granted. These types of cases are unlikely to be common, and the Minister may choose not to delegate consideration of them. An appeal to the tribunal would be available on the facts and on humanitarian grounds.

Proposal – Deportation liability criteria: offending, fraud, breaching visa conditions, and loss of citizenship

I propose that:

a. residents or permanent residents are liable for deportation where they receive a final conviction for a specified offence (set out below)

b. residents and permanent residents would be liable for deportation where convicted of gaining their visa by fraud, forgery, false or misleading representation or concealment of relevant information

c. residents and permanent residents would be liable for deportation where the Minister or delegated officer determines that the visa was gained by fraud, forgery, false or misleading representation or concealment of relevant information

d. residents would be liable for deportation where the Minister or delegated officer determines that they have breached or failed to meet their visa conditions

e. a person who is deprived of or successfully renounces New Zealand citizenship may be liable for deportation.

Status quo – The Minister may currently order the deportation of non-citizens convicted of specified offences and the revocation of residence that was gained on the basis of fraud, forgery, false or misleading representation or concealment of relevant information. To overturn a residence revocation, the High Court must be satisfied that residence was not procured by fraud, and generally applies a balance of probabilities test. The Minister may order revocation of residence where conditions have not been met.

The situation of people who lose citizenship varies according to whether they have retained residence status since gaining citizenship. Those who have may be subject to residence revocation. Those who have not may be subject to removal.

Discussion paper and submissions - The discussion paper presented possible deportation criteria as: a conviction or departmental finding that a visa or permit was obtained through fraud; failure to meet permit conditions; citizenship deprivation due to residence fraud; and a conviction for a serious criminal offence committed within up to ten years of residence being granted. Submissions did not address the substance of these specific criteria.

Comment – The proposals maintain the idea that residents and permanent residents, while moving toward full settlement, are still subject to immigration consequences for clearly defined offending. Using either court action or ministerial/departmental determinations that a resident visa or permanent resident visa was gained by fraud retains the flexibility to take action against fraud without needing to secure a conviction, but allows court action where criminal sanction is sought in addition to deportation.

Providing for deportation where residents fail to meet their visa conditions is necessary to make the conditions regime effective. The Bill clarifies the processes for former citizens.

Proposal – Offences warranting deportation

I propose to retain the two, five and ten year steps in the levels of seriousness of offending. The offences relating to unlawful workers would no longer be specified, but would be covered by the sentence based formula in some cases. Deportation liability would be triggered where a resident was convicted of an offence committed:

a. within ten years of the grant of residence, with an actual sentence of five years or more
b. within five years of the grant of residence, which was punishable by 24 months imprisonment or more
c. within two years of the grant of residence or anytime before that, which was punishable by 3 months imprisonment or more.

Status quo - The 1987 Act makes residents liable for deportation if they are convicted of specified offences. The offences vary on a scale of seriousness at two, five and ten year steps. Employing or exploiting an unlawful worker makes a non-citizen liable for deportation at any time during the first ten years of residence.

Discussion paper and submissions - The discussion paper proposed that a serious criminal offence committed within up to ten years of the grant of residence would be grounds for deportation. There was no proposal to change the current thresholds. Little direct comment was received on this proposal.

Comment – Using a possible rather than actual sentence gives the specialist tribunal the role of assessing humanitarian appeals at the five year stage, rather than having these matters intrude into sentencing decisions in the courts.

Proposal – Ability to suspend deportation liability

I propose that the Bill contain a delegable Ministerial power to suspend deportation liability of residents and permanent residents for up to five years, subject to good behaviour or other conditions specified by the Minister.

Status quo – There is no current equivalent power.

Discussion paper and submissions - This proposal was not included in the discussion paper and no specific submissions were received on it.

Comment – In some cases the prospect of deportation could have a positive effect on a non-citizen's behaviour, and a second chance may be justifiable. A power to suspend deportation liability would allow the Minister to give a second chance, subject to good behaviour or other specified conditions.

Proposal – Penalties after deportation

I propose that there should be a system of graduated bans preventing deportees from returning to New Zealand. Those overstayers who agree to leave voluntarily and pay their own way could leave without being served with a deportation order, and would not be subject to a statutory ban.

Status quo - Currently, removed overstayers are banned for five years and deported former residents are banned permanently.

Discussion paper and submissions - The discussion paper included a proposal for two

year, five year and permanent bans varied according to the seriousness of the reason for deportation. Differentiated ban periods received strong support in submissions.
Comment – Bans would reinforce that the deportee has been determined to be undesirable and should not attempt to return to New Zealand, potentially giving them both preventative and punitive effects. The gradations give incentives for early compliance.

CHAPTER FIVE: DEPORTATION

PURPOSE

407 This chapter discusses the recommendations on:

- using the single term "deportation"
- how deportation liability if triggered and how it can be cancelled
- the status of non-citizens during the deportation process
- the deportation liability criteria
- offences warranting deportation liability for residents and permanent residents
- how deportation liability is communicated
- the ability to suspend deportation liability
- the process for carrying out deportations
- the penalties that apply after deportation, and
- current provisions carried over.

STATUS QUO

408 Non-citizens in New Zealand unlawfully, including those who overstay or whose permits are *revoked*, may be *removed* from New Zealand. Serious criminal offenders and threats to national security may be *deported*.

RATIONALE FOR THE PROPOSALS

409 The current provisions are spread throughout the Immigration Act 1987 (the 1987 Act). This reduces clarity and undermines effectiveness in deporting non-citizens who have no entitlement to remain in New Zealand. The complexity of deportation and revocation processes can produce long decision-making times, undermining the ability to regulate immigration in New Zealand's interests and maintain the integrity of the immigration system.

410 This chapter proposes an integrated deportation system to reduce fragmentation, while retaining differentiation of treatment where appropriate. The proposed system includes creating a single list of statutory criteria that may trigger deportation. This clarity would reinforce the non-citizen's responsibility to avoid actions that make them liable for deportation. It would reduce the number of steps in the process and retain the current successful provisions whereby an overstayer may be removed when they become unlawful in New Zealand. Appeal rights would remain, as outlined in *Chapter Six: Review and appeal*.

USING THE SINGLE TERM "DEPORTATION"

Proposal

411 It is proposed to use the term "deportation" in the Immigration Bill (the Bill) to describe all processes for requiring a non-citizen to leave New Zealand, with the exception of those refused entry at the border (which are covered in *Chapter Two: Visas)*.

Status quo

412 The 1987 Act uses different terms to describe the processes that require a person to leave New Zealand:

- a non-citizen in New Zealand unlawfully may be *removed*
- a non-citizen threatening national security may be *deported*
- residence permit holders and Australian citizens convicted of specified offences within the first 10 years of residence may be *deported*
- where a residence or temporary permit is *revoked*, the non-citizen may be *removed*.

Discussion paper and submissions

413 The discussion paper proposed that a single term "expulsion" be used to refer to all the processes outlined above. Of 63 submitters, 37 agreed it would help to create more understandable legislation and 17 disagreed. Reservations about this proposal were mostly on the basis that different terms reflected the differing reasons for expulsion and the varying seriousness of types of case (noted by, for example, New Zealand Association for Migration and Investment, and the Asian Network Inc.). At public meetings the term "expulsion" was not favoured. "Deportation" generally received support on the basis that it was more transparent and understandable.

Comment

414 Using a single term to describe all the processes for requiring a non-citizen to leave New Zealand would make the legislation more understandable. "Deportation" has the advantage of being associated in common usage specifically with immigration and was the most preferred term in public meetings.

HOW DEPORTATION LIABILITY IS TRIGGERED AND HOW IT CAN BE CANCELLED

Proposals

415 It is proposed that non-citizens should be liable for deportation when they come within the list of deportation criteria specified in the Bill (discussed below).

416 It is proposed that the Minister of Immigration (the Minister) have a delegable power to cancel deportation liability where it was not considered appropriate to put a non-citizen through the deportation process.

417 It is proposed that that there would be robust consideration of every individual case to assess whether deportation is appropriate, but that the Minister or delegated officer would not be compelled to consider or make a deportation cancellation.

Status quo

418 The 1987 Act brings non-citizens into the removal and deportation system through various mechanisms:

a. When a non-citizen becomes unlawful in New Zealand they have a legal obligation to leave, without notification in addition to that given earlier on visas, permits and publicity material. If the non-citizen does not appeal against the obligation within 42 days of becoming unlawful or if their appeal is declined, a removal order may be served and the person removed. A removal order can be cancelled by an appropriately designated officer.

b. An obligation to leave and a 42 day appeal period is also triggered where a non-citizen's temporary permit is revoked. An officer may rescind the revocation if the non-citizen shows, within 14 days of notification, good reason why it should be rescinded (the 14 days are not available where the non-citizen comes within the exclusion criteria of the 1987 Act).

c. Non-citizens threatening national security can be deported on the strength of a deportation order made by the Governor-General by Order in Council. The Minister may order the deportation of suspected terrorists.

d. The Minister may order the deportation of residents who are convicted of specified offences within 10 years of residence being granted.

e. An officer may order the revocation of a residence permit granted as the result of administrative error within an airport arrival hall or departmental office. If another permit is not granted, a non-citizen onshore would be here unlawfully and liable for removal.

f. The Minister may revoke residence permits obtained through fraud or deception or where the non-citizen has failed to meet the requirements imposed on their residence permit. The non-citizen then becomes liable for removal.

Discussion paper and submissions

419 The discussion paper noted that the obligation on unlawful non-citizens to leave New Zealand and their liability for removal were clear and unambiguous. It noted that the requirement for ministerial involvement in resident deportation and revocations might not be necessary in all cases where the grounds were clear in the statute and appeal mechanisms existed. It was suggested that multiple appeal avenues and the need for all decisions to be taken at the ministerial level created delay in the process. The idea of "automatic liability", based on the current mechanism that creates a legal obligation to leave for unlawful non-citizens, was presented as a way of reducing delay, while retaining appropriate appeal options for non-citizens. Under the proposal in the discussion paper, a non-citizen became liable for deportation where they came within criteria specified in the statute, ministerial involvement was not mandatory, and all processes for revocation, deportation and removal were consolidated into one deportation framework.

420 Approximately a third of 47 organisations and 55 percent of individual submitters indicated support for extending automatic liability for expulsion to all grounds for expulsion. Approximately half of the organisations and 30 percent of individuals were opposed. Concerns included those of the Auckland District Law Society, which considered that the proposal reduced the level of legal protection available to some under the 1987 Act. The

Society also expressed concerns that deportation liability on the basis of a departmental determination would not be accompanied by communication of the reasons, which would breach natural justice. Some, including the Hutt Valley Community Law Centre, opposed the way deportation liability placed the onus of rebutting the presumption of deportation on the non-citizen. The Centre considered that the safeguards to ensure that departmental actions were correct should be strengthened.

421 Approximately 45 percent of 95 submitters agreed that a reduced role for the Minister would be appropriate, and approximately 40 percent disagreed. Among those opposed, some (including the Auckland District Law Society and the Canterbury Refugee Council) considered that the Minister should still be able to intervene and that ministerial oversight is necessary, along with robust review and appeal rights. Another submission considered that migrant communities have greater confidence in the Minister's decisions than in the Department's, and that making ministerial intervention discretionary would lead to only high profile cases being considered by the Minister.

Comment

422 The discussion paper proposal has been developed in light of the submissions. The deportation liability criteria would all be outcomes of other processes, for example, a court process that led to a conviction or a departmental investigation that sought comment from the non-citizen concerned. The deportation criteria outlined in the Bill itself would make a non-citizen prima facie liable for deportation.

423 The Department would clearly establish the facts to ensure that the non-citizen was indeed liable in every case. While deportation liability will be a clear standard, no set of rules can anticipate every possible set of individual circumstances. The Department could decide to cancel deportation liability or to refer a possible cancellation for the Minister's consideration.

424 The Minister could require that specified types of cases should be brought to his or her attention by the Department. For example, a Minister could ask to see all cases of residents liable for deportation once the Department had come its own conclusion about whether deportation should proceed or not, but before action was taken. Such a process would give an opportunity for ministerial intervention, but on the Minister's terms and without the Minister having to become a de facto appeal authority. This would reinforce the goal of providing a single and comprehensive appeal to the Immigration and Protection Tribunal (the tribunal).

425 Once it was established that a person was liable, and if there was no decision to intervene, a deportation liability notice would be served on the non-citizen (except for those liable because they had remained after the expiry of their visa). The process for serving notices is outlined below under *How deportation liability is communicated*.

STATUS OF NON-CITIZENS DURING DEPORTATION PROCESS

Proposals

426 It is proposed that non-citizens can maintain lawful status while in the deportation process, except for those who are liable because their visas have expired.

427 It is proposed that non-citizens holding a valid temporary entrant visa when deportation liability is triggered would be able to apply for further visas of the same type in order to maintain their lawful status during any appeal (as with any application, there would be no guarantee a visa would be granted).

428 It is proposed that the processing of any citizenship application from a non-citizen in the deportation process, or visa application that is dependent on the immigration status of that non-citizen, could be suspended, pending the outcome of the deportation appeal. This would be implemented through an amendment to the Citizenship Act 1977.

Status quo

429 Residents currently subject to deportation or revocation proceedings retain their status until these matters are finalised. Non-citizens' temporary permits are revoked. Currently this group remains in New Zealand unlawfully while their removal appeal is considered.

Discussion paper and submissions

430 The discussion paper proposed that immigration status expire on departure once all deportation appeals were exhausted. While there was no specific response in written submissions, attendees at public meetings were generally strongly in favour of the idea.

Comment

431 This proposal would allow a person to continue to work or study during any deportation appeal. The serious consequences of deportation for the non-citizen make it desirable for them to retain their status, where possible, until all options are exhausted and deportation is confirmed. This proposal carries the risk that it could encourage some non-citizens to enter the appeal system in order to prolong their stay and, for example, continue working. If their visas were left to expire during the appeal process, there would be less incentive to remain and pursue appeals that might have little chance of success. This risk would be balanced by speed in the appeal system and by the proposal in *Chapter Ten: Detention* that those liable for deportation could be monitored or even detained.

DEPORTATION LIABILITY CRITERIA

432 As discussed below, it is proposed that the criteria that would make a non-citizen liable for deportation are:

a. visas granted in error

b. unlawful presence in New Zealand

c. temporary stay in New Zealand revoked

d. threat or risk to national or international security

e. new information, applicable at the time residence was granted, that indicates that the non-citizen would not have been granted residence if that information been available at that time

f. conviction for offences specified in the Bill

g. resident visa or permanent resident visa obtained by fraud

h. resident breached visa conditions, and

i. where a person who lost New Zealand citizenship and reverted to resident status was liable for deportation as a resident.

433 Deportation would not inevitably follow liability. Action can be taken to cancel liability, as noted above under *How deportation liability is triggered and how it can be cancelled*. The appeal rights available are outlined in detail in *Chapter Six: Review and appeal*. In addition, any protection claim would be assessed before any deportation occurred.

Visa granted in error

Proposal

434 It is proposed that deportation liability would be triggered where the Minister or a delegated officer determines that a visa was granted in error and should be revoked by deportation, with the non-citizen given 14 days from the service of a deportation liability notice to give good reasons why deportation should not proceed.

435 This provision would apply where the non-citizen had been granted the wrong type of visa and sought to retain that status. Deportation need not be pursued where the non-citizen agreed to an adjustment of their immigration status or where it was considered inappropriate to pursue deportation. Factors such as the non-citizen's degree of knowledge of the error and their degree of connection with New Zealand could be considered. If the visa granted in error was to stand, deportation liability would be cancelled. If the deportation process continued, a tribunal appeal would be available. As discussed in *Chapter Six: Review and appeal,* non-citizens holding resident visas or permanent resident visas, this appeal would be on the facts and on humanitarian grounds. For others, only the humanitarian appeal would be available.

Status quo

436 The 1987 Act provides for the revocation of temporary permits granted in error, with 14 days to show good reason why the revocation should not take effect. If it does take effect, a removal appeal on humanitarian grounds is available. The revocation of residence permits granted in error requires a ministerial decision. Appeal is to the Deportation Review Tribunal on humanitarian grounds and to the High Court on the facts.

Discussion paper and submissions

437 The discussion paper noted that gaining a permit as result of administrative error could be grounds for deportation. No specific submissions were made on this point.

Comment

438 The proposal translates the status quo into the proposed deportation system. The notable change is that the Minister need not make the initial decision to act in cases involving residents, which could be made by delegated officers. The Minister could, of course, choose to retain this responsibility.

Unlawful presence in New Zealand

Proposals

439 It is proposed that deportation liability would be triggered where a non-citizen becomes unlawful in New Zealand on the expiry of a visa or by never having held a visa. Deportation liability would reinforce the statutory obligation for non-citizens here unlawfully to leave. This group would not include those who are unlawfully in New Zealand through evading immigration border processes, who would be treated like those refused entry at the border and could not appeal (discussed in *Chapter Two: Visas*). The Minister (and Department) would retain a discretionary power to regularise the status of people here unlawfully by granting a visa, thereby cancelling deportation liability.

440 It is proposed that deportation liability would be triggered where the Minister or delegated officer determines that a visa was granted to a false identity, in which case the non-citizen would be deemed to be unlawfully in New Zealand from the date the visa was granted to the false identity.

441 If, after a rigorous investigation, it was determined that the identity fraud was deliberate and significant, the non-citizen would be given a 14 day period from the service of a deportation liability notice to demonstrate that the false identity was, in fact, genuine (see *Chapter Six: Review and appeal*). If the use of a false identity is confirmed, the non-citizen would be deemed to have been unlawfully in New Zealand from the date a visa was first granted to the false identity.

442 For temporary entrants, the 42 day period to lodge a humanitarian appeal with the tribunal would have passed in many cases. The purported holders of resident or permanent resident visas would be able to appeal to the tribunal on the facts. The discretionary power to regularise the status of people here unlawfully would allow a visa to be granted in the non-citizen's true identity, for example, where a genuine refugee had used a false identity to flee persecution and enter New Zealand.

Status quo

443 The 1987 Act makes a non-citizen unlawfully in New Zealand liable to be removed, without individual notification of this liability, if the non-citizen does not appeal against the obligation to leave within 42 days of becoming unlawful or once their appeal is declined. The Minister has the power to

grant a permit to restore lawful status (section 35A). The Department uses this delegated power frequently to restore status in cases where removal is not desirable.

444 The use of false identities is not dealt with separately under the 1987 Act. It is treated like other types of fraud, with the non-citizen's permit remaining in effect until it is revoked.

Discussion paper and submissions

445 The discussion paper noted that staying in New Zealand after the expiry of a permit would continue to be grounds for deportation. The discussion paper asked if persons who obtained their status through fraud should be treated in the same way as persons unlawfully in New Zealand. Approximately half of the 43 organisations commenting and 75 percent of 51 individuals agreed.

Comment

446 A key power in the management of immigration is the ability to require non-citizens to leave New Zealand where they have entered on a temporary basis and lost their permission to stay. While there is considerable debate about what appeals and regularisation options should be available, the core concepts that non-citizens here unlawfully are obliged to leave without further notification of this obligation and that they may be deported are not highly contentious.

447 Ascertaining identity is the foundation of assessing individual immigration cases. Without confidence on identity all other verification is undermined. The proposal to treat a visa granted to a false identity as never having been valid rests on the argument that the non-citizen should never have obtained the visa or anything beneficial arising from it. These benefits would include the ability to make a humanitarian appeal to the tribunal on the same terms that are available to a non-citizen who has stayed in New Zealand after the expiry of their visa.

Temporary stay in New Zealand revoked

Proposals

448 It is proposed that deportation liability would be triggered where the Minister or delegated officer considers that there are sufficient reasons to revoke their temporary entrant or limited visitor visa by deportation. After a departmental (or ministerial) assessment that concluded that a non-citizen's temporary stay in New Zealand should cease, temporary entrants would be advised of the reasons through the service of a deportation liability notice and given 14 days to give reasons why they should be able to remain. If the reasons were accepted, deportation liability would be cancelled. If not, a humanitarian tribunal appeal would be available. Limited visitors would not receive the 14 day period or a tribunal appeal.

449 It is proposed that deportation liability would be triggered where the Minister or delegated officer determines that a temporary entrant visa or limited visitor visa should be revoked by deportation because the non-citizen meets the exclusion criteria (as outlined in *Chapter One: Core provisions*. This allows the ongoing application of the exclusion criteria where, for example,

their applicability had not been discovered on initial entry or was the result of subsequent offending. The 14 day period that applies to the criterion above would not be available to this class.

Status quo

450 These proposals mirror the 1987 Act's grounds for temporary permit revocation. The provisions comparable with the first proposal do not limit or specify the grounds on which revocation may be based. A 14 day period is allowed for non-citizens to submit good reasons why revocation should not proceed, and an appeal against removal is available if it does. The holders of limited purpose permits do not currently have a right to make such a submission or to appeal.

451 The provisions comparable with the second proposal do not include a 14 day period. A humanitarian removal appeal is available for temporary permit holders but not limited purpose permit holders.

Discussion paper and submissions

452 The discussion paper proposed that the current flexibility around temporary permit revocation power should be retained. There was limited comment in submissions.

Comment

453 Maintaining a provision akin to the current open ended temporary permit revocation process is an important tool for the management of temporary entrants and limited visitors. It is used in relation to people who have only been granted highly conditional permission to remain in New Zealand. While it is a broad power, its exercise is not arbitrary. Indeed, adding "sufficient reasons" in the Bill would reflect the practice that has been built up under the current provision. It is used, for example, where a person has offended at a level that does not meet the threshold of the statutory exclusion criteria, but which need not be tolerated from a non-citizen in New Zealand temporarily. It also allows revocation where a person has, for example, worked or studied in breach of their conditions.

454 Allowing the deportation of temporary entrants and limited visitors who are found to come within the exclusion criteria reinforces the effect of these criteria. This situation may arise where, for example, the applicability of the exclusion criteria was not discovered on initial entry or where it results from subsequent offending.

Threat or risk to national or international security

Proposal

455 It is proposed that deportation liability would be triggered where an Order in Council is made by the Governor-General ordering the deportation of a non-citizen who is determined to be a threat or a risk to national or international security. This criterion differs from those above in that there is no deportation liability phase, rather a direct order of deportation. There would be no tribunal appeal, but judicial review in relation to the statutory powers involved may be sought. The Bill would include a police power to arrest a

non-citizen, prior to the making of the Order in Council, where there is good reason to believe that the deportation criterion would apply.

Status quo

456 The 1987 Act provides for deportation, by Order in Council, for non-citizens who are a threat to national security. There is no appeal, but judicial review is available. The Act also provides for the deportation, by ministerial order, of suspected terrorists threatening New Zealand, with appeal to the High Court. There is a police power in the 1987 Act to arrest a non-citizen prior to the making of the Order in Council where there is good reason to believe that the national security deportation criterion would apply.

Discussion paper and submissions

457 A criterion of being a threat to national security, including a terrorist threat, was proposed in the discussion paper. As described, this was considered by one submitter to be too vague and open to abuse, unless clearly defined. The proposed national security deportation criterion was of concern to the Auckland District Law Society because the criteria and decision-making processes were unclear.

Comment

458 This proposal would amalgamate the two existing provisions and seeks to ensure that the new provision is not so narrowly worded as to be ineffective. Currently, it could be possible to interpret "threat" as not including where non-citizens are themselves not an immediate threat, but are an integral part of a wider or perhaps international threat. Adding the concept of risk to the concept of "threat" would address this problem.

459 Similarly, the focus on national security does not reflect the international collaborative nature of responses to terrorism and security threats. New Zealand's strong interests in assisting other states to manage security and terrorist threats would be better supported by including both national and international security in the deportation criterion.

460 The proposed power is strong, but the proposal is not designed to increase the frequency of its use in comparison to the comparable powers in the 1987 Act. These powers have been used infrequently, but as recently as early 2006. Global levels of security concern support the maintenance of a strong national security deportation power. The nature of the threats to be managed by this provision makes it appropriate for the decision to be taken at the highest formal level within the executive. The proposal allows the executive to fulfil its fundamental duty to protect the security of New Zealand, and reflects the general acknowledgment that it is for the executive to determine what is a threat to national security. The seriousness of the potential threat justifies the retention of an equivalent of the police power in the 1987 Act to arrest a non-citizen prior to the making of the Order in Council where there is good reason to believe that the national security deportation criterion would apply.

Character

Proposal

461 It is proposed that deportation liability would be triggered where, within five years of residence being granted, new information relating to character, applicable at the time residence was granted, indicates that a resident would not have been granted residence if that information been available the time of their application.

462 In this situation, the Minister or delegated officer would need to be satisfied that residence would not have been granted had the information been available at the time that residence was granted. These types of cases are unlikely to be common, and the Minister may choose not to delegate consideration of them. An appeal to the tribunal would be available on the facts and on humanitarian grounds.

Status quo

463 There is no comparable provision in the 1987 Act.

Discussion paper and submissions

464 This proposal has arisen from interagency consultation subsequent to the public consultation process.

Comment

465 The 1987 Act and the proposals below, allow a resident to be deported where there is clear evidence of immigration fraud, or where the person commits a serious criminal offence after the grant of residence. From time to time investigations relating to criminal activities the non-citizen was involved in prior to residence being granted commence after the grant of residence. Unless the non-citizen was under investigation at the time of their application, and they knew this, there would have been no fraud committed. This proposal would allow deportation in such cases, where there are currently no immigration consequences.

466 The five year limitation is in line with citizenship requirements and would ensure that citizens would not be captured by this provision. The proposal is also consistent with existing extradition law. It would be useful in the situation where a non-citizen faces charges in their home country, but where extradition is not being sought by the home country. If a non-citizen was deported to face charges in their home country and was acquitted, policy could allow them to return to New Zealand.

Offending, fraud, breaching visa conditions, and loss of citizenship

Proposals

467 It is proposed that deportation liability would be triggered where a resident or permanent resident receives a final conviction for a specified offence within 10 years of residence being granted. The proposed levels of offending and periods, starting at the grant of residence, from which they apply are outlined below under ***Offences Warranting Deportation***. In these cases, the Minister or delegated officer could intervene to cancel deportation

liability. If there was no cancellation, a tribunal appeal would be available on humanitarian grounds, but not on the facts, which were reviewable in the court process that led to the conviction.

468 It is proposed that deportation liability would be triggered where there is a conviction for obtaining a resident or permanent resident visa through fraud, forgery, false or misleading representation or concealment of relevant information. In these cases, the fraud has been established by a court process that has determined the facts and which included an opportunity to appeal. The Minister or a delegated officer could still choose to intervene and cancel deportation liability. Where there was no cancellation, a deportation liability notice would be served and a humanitarian appeal to the tribunal would be available.

469 It is proposed that deportation liability would be triggered where there is a departmental determination that a resident or permanent visa was obtained through fraud, forgery, false or misleading representation or concealment of relevant information. In this situation, the Minister or delegated officer would need to be satisfied, on the balance of probabilities, that there had been fraud before a deportation liability notice was served. An appeal to the tribunal would be available on the facts and on humanitarian grounds. The tribunal would also consider the factual situation on the balance of probabilities.

470 It is proposed that deportation liability would be triggered where there is a departmental determination that a resident or permanent resident has materially breached or failed to meet their conditions. Residents would be advised on approval of any conditions that apply to their visa (for example, investor migrants must retain their investments in New Zealand), and of their obligation to demonstrate that they have met the conditions. Where it is determined that conditions have not been met, the option remains of cancelling deportation liability if warranted by the individual circumstances of the case. Where there was no cancellation, a deportation liability notice would be served, triggering a right to a tribunal appeal on the facts (that is, whether there was a failure to meet, or a breach of, conditions) and on humanitarian grounds.

471 It is proposed that deportation liability would be triggered where a person is deprived of or successfully renounces New Zealand citizenship and the basis for the deprivation arose from an immigration matter that triggered deportation liability under paragraphs 468 and 469 above. Under proposals outlined in *Chapter Two: Visas*, New Zealand citizens would not hold visas. It is proposed that where deprivation or renunciation takes effect such persons would be deemed to hold a resident visa. If the factual basis for the loss of citizenship arose from circumstances described in paragraphs 468 and 469 above, then those facts would trigger deportation liability. At that point the Minister or delegated officer could intervene to cancel liability. If there was no cancellation, a deportation liability notice would be served. A tribunal appeal would be available on humanitarian grounds, but not on the facts, which were reviewable during the citizenship deprivation or renunciation process.

Status quo

472 Where residents are convicted of offences as specified in the 1987 Act, the Minister has the power to order deportation or not. The 1987 Act provides for the Minister to order the revocation of residence that was gained on the basis of fraud, forgery, false or misleading representation or concealment of relevant information. The person may appeal to the High Court which generally has applied a balance of probabilities test. The Minister is empowered under the 1987 Act to decide whether or not to order the revocation of residence where conditions have not been met.

473 The situation of people who lose citizenship varies according to whether they have retained residence status since they became New Zealand citizens. Residence is retained where a citizen uses their non-New Zealand passport with a New Zealand returning resident's visa to travel instead of a New Zealand passport. Where residence is retained, a full revocation process must be completed, including a re-examination of the facts that lead to the loss of citizenship if they are the basis of revocation. Where the former citizen does not have residence, they are likely to be in New Zealand unlawfully and subject to removal.

Discussion paper and submissions

474 The discussion paper presented deportation criteria as:

- a conviction for obtaining a visa or permit through fraud or misrepresentation
- a finding by the Department of Labour (the Department) that a person obtained their visa or permit through fraud or misrepresentation, or that their permit conditions have not been met
- citizenship deprivation due to residence fraud, and
- a conviction for a serious criminal offence committed within up to ten years of residence being granted, depending on the seriousness of the offence.

475 There were no submissions that addressed the substance of these specific criteria. Most submissions on deportation focused on process, who makes decisions, and appeal rights.

Comment

476 The proposal to retain the ability to deport residents or permanent residents for up to 10 years from the grant of that status maintains the idea that residents and permanent residents, while moving toward full settlement, are still subject to immigration consequences for clearly defined offending.

477 Allowing ministerial or departmental determinations that a resident visa or permanent resident visa was gained by fraud retains the flexibility to take action against immigration fraud without needing to secure a conviction. Retaining court findings of fraud as a separate criterion allows prosecutions to be pursued where criminal sanction and deterrent effect is sought in addition to the sanction of deportation.

478 The ability to deport where residents fail to meet their visa conditions is necessary to make the conditions regime effective.

479 The Bill offers an opportunity to clarify the processes applying to former citizens. The proposal aligns with the goal of reducing duplication because it allows the loss of citizenship to be determined by its own processes, with the facts determining whether there is any subsequent immigration action.

OFFENCES WARRANTING DEPORTATION

Proposal

480 It is proposed in paragraph 467 above that residents or permanent residents would be liable for deportation where they receive a final conviction for a specified offence. It is proposed that residents be liable for deportation:

a. when convicted of an offence committed within 10 years of the grant of residence where an actual sentence of 5 years or more, or indeterminate period capable of running for 5 years or more is imposed

b. when convicted of an offence committed within 5 years of the grant of residence which is punishable by imprisonment for 24 months or more, or

c. when convicted of an offence committed within 2 years of the grant of residence, or while in New Zealand prior to that, which is punishable by imprisonment for 3 months or more.

Status quo

Table One: Current and proposed deportation offence thresholds

Period, from grant of residence, during which offence committed	**Status quo**	**Proposed offence**
10 years	Actual sentence of 5 years or more, or indeterminate period capable of running for 5 years or more. Conviction for exploiting or knowingly employing an unlawful worker.	Actual sentence of 5 years or more, or indeterminate period capable of running for 5 years or more.
5 years	Actual sentence of 12 months or more, or indeterminate period capable of running for 12 months or more. Conviction for two offences punishable by imprisonment for 12 months or more for each.	Punishable by imprisonment for 24 months or more.
2 years or at anytime while in New Zealand temporarily or unlawfully	Conviction punishable by imprisonment for 3 months or more.	Conviction punishable by imprisonment for 3 months or more.

Discussion paper and submissions

481 The discussion paper proposed that a serious criminal offence committed within up to 10 years of the grant of residence would be grounds for deportation, depending on the seriousness of the offence. There was no proposal to change the current thresholds. Little direct comment was received on this proposal. Some submissions, mostly from private individuals, sought a hard line, with criminal offending by a non-citizen being sufficient for immediate deportation. The New Zealand Law Society

considered that a high degree of transparency in criteria was required, and that criteria should be outlined in legislation.

Comment

482 A definition of the offences considered serious enough to warrant deportation liability for residents is essential for clarity and fairness. The existence of clear criteria may also act as a deterrent. Retaining the current two, five and ten year steps allows deportation for lesser offences committed closer to the time residence was granted, with only more serious offences warranting the deportation of long-term residents.

483 It is proposed to change the level of offending that would trigger deportation liability during the first five years of residence. The current standard, outlined in Table One above is an actual sentence of 12 months imprisonment or more or two convictions each punishable by 12 months imprisonment or more. The proposed new level would be one offence punishable by 24 months imprisonment or more. Using a possible rather than actual sentence gives the specialist tribunal the role of assessing humanitarian appeals at this stage, rather than having these matters intrude into sentencing decisions in the courts, when counsel can and do argue for a sentence designed to fall short of the deportation liability threshold.

484 At the most serious level (five to ten year residents), maintaining provisions based on actual sentences handed down allows the complex mix of factors that go into the courts' sentencing decisions to influence which offenders become liable for deportation. Allowing this additional consideration to be brought to bear reflects the greater interests of long-term residents and the broad range of actual sentences that are handed down for serious offences. The proposal maintains the current alignment between the sentences that warrant the deportation of a resident of up to ten years standing with the sentences that disqualify a person from being granted New Zealand citizenship.

485 In addition to offences defined by sentence, a conviction under the 1987 Act for knowingly employing or exploiting unlawful workers also currently warrants deportation action within the 10 year period. These provisions, enacted in 2002, reflect a view that offences committed by migrants against migrants were particularly serious. This provision does not, however, align with a sentence-based approach and it is proposed to dispense with it. With a possible penalty of up to seven years imprisonment, convictions for these offences would bring a non-citizen within the deportation criteria for up to five years, and may do so for up to ten years.

HOW DEPORTATION LIABILITY IS COMMUNICATED

Proposals and status quo

486 It is proposed that, with two exceptions, a deportation liability notice be served on non-citizens liable for deportation that:

a. advises of deportation liability,

b. advises of any appeal rights, and

c. starts the time allowed to lodge any appeal and advises of the time limit.

487 It is proposed that former temporary entrants or limited visitors here unlawfully who are obliged to leave New Zealand need not be given a notification of their liability for deportation. The current duty of the chief executive to communicate in advance the obligation to leave before visa expiry would be carried over into the Bill.[11] Non-citizens are expected to abide by this obligation without the need of the reminder that would be provided by a deportation liability notice.

488 It is also proposed that a deportation liability notice would not be served in cases of deportation on the grounds of threat or risk to national or international security. As no appeal is provided for in these cases and early arrest is highly likely, a liability notice would be superfluous.

489 It is proposed that service would be by personal service or registered post, with registered post required where resident or permanent resident status is lost. In all cases, a deportation liability notice could be served at the time when a non-citizen is detained if not sooner.

490 It is proposed that deportation liability endures for up to ten years regardless of whether a deportation liability notice has been served. Deportation liability should not be undermined by any administrative delay in serving a notice. This would replace the status quo that deportation orders may only be made within six months of the deportee's release or, if not imprisoned, conviction.

Discussion paper and submissions

491 The discussion paper did not specifically propose a deportation liability notice. A number of submitters commented that notice of possible deportation should be provided. Submitters made reference to the need for non-citizens to know about, and be able to challenge, deportation based on administrative findings, for example, a finding that a visa was obtained by fraud.

Comment

492 These proposals provide most non-citizens with notification that they are liable for deportation, ensuring fairness and a knowledge of appeal options. The main exception is non-citizens in New Zealand unlawfully, as is the status quo. It is considered important to maintain the effect of the 1999 amendments to the 1987 Act in this regard. To introduce a deportation liability notice in this circumstance would reintroduce the inefficient two-step process that existed prior to 1999. This required an overstayer to be located once, to be served with notice, and then a second time to effect removal once any appeal was dealt with. The 1999 process reflects the idea that overstaying temporary entrants have entered on a temporary and conditional basis, and should not have an expectation of appeal rights at the level available to, for example, residents.

[11] As minimum, this obligation must currently be communicated through notices at branches and airport arrival halls, and on information leaflets and application forms. Visas and permits must contain words to the effect that "You must leave New Zealand before expiry of your permit, or face removal."

493 Beyond this exception (and national security deportations) it is an important general principle that non-citizens are informed of their liability. The service of notices on residents and permanent residents who are overseas frequently or for extended periods can be practically difficult. The proposal for there to be a 10 year time limit on either liability or service would overcome this in part, by allowing the Department to serve notices when the resident returns to New Zealand.

ABILITY TO SUSPEND DEPORTATION LIABILITY

Proposals

494 It is proposed that there be a delegable Ministerial power to suspend deportation liability of residents or permanent residents:

a. for up to five years from when the liability began, subject to such conditions as the Minister sees fit, and

b. with liability to be reactivated where those conditions are not met.

495 There would be no right to apply for suspension and no right to receive reasons for any decision. It is proposed that non-citizens subject to deportation liability suspension may proceed with their appeal to the tribunal.

496 It is proposed that citizenship or another visa could not be granted during a suspension to the non-citizen concerned. This will require an amendment to the Citizenship Act 1977 to prohibit residents from being granted New Zealand citizenship while subject to deportation liability suspension, except where there are current provisions for the mandatory grant of citizenship.[12]

Status quo

497 There is no equivalent process in the 1987 Act. It is possible for the Minister, in deciding not to order deportation, to tell a resident offender that further offending may not receive similar leniency.

Discussion paper and submissions

498 This proposal was not included in the discussion paper and no specific submissions were received on it. It has been developed as an option that reflects the principles of fairness and transparency and the graduated nature of sanctions proposed, for example, the graduated ban periods proposed below as penalties after deportation.

Comment

499 In some cases the prospect of deportation could have a positive effect on a non-citizen's behaviour, and a second chance may be justifiable. A power to suspend deportation liability (as opposed to cancelling it outright) would allow the Minister to give a second chance, subject to good behaviour or

[12] These are section 10 of the Citizenship Act 1977 and section 7(1)(b)(i) of the Citizenship (Western Samoa) Act 1982. These are transitional provisions that protect the rights of people as they existed when these Acts came into force.

other specified conditions. The absence of a formal right to apply for suspension would protect the Minister from becoming a de facto appeal authority. As with the cancellation process, the Minister could require administrative processes whereby specified types of cases would be brought to his or her attention. The extent of the Minister's involvement would also be influenced by the degree to which this power is delegated, if at all. The ability of non-citizens to continue with their tribunal appeal even where liability was suspended would give them an opportunity to seek to have their deportation liability quashed entirely, rather than wait out the suspension period.

PROCESS FOR DEPORTATION

Proposals

500 It is proposed that deportation shall not occur until any appeals available have been concluded.

501 It is proposed that a deportation order should be made and served on the non-citizen at the time of deportation to:

a. confirm that the non-citizen is a deportee and is being deported from New Zealand, specifying the section of the Act under which they became liable and confirming that any visa held was cancelled on departure

b. notify the period of any ban on returning to New Zealand, the effect of the ban, and the consequences of attempting to return to New Zealand during the ban, and

c. specify the costs to the Crown of deportation, if applicable and if known at the time of deportation, that must be repaid and that ban on returning is in force until this occurs.

Status quo

502 Removal orders and deportation orders are used in slightly different ways under the 1987 Act to give effect to removal and deportation. Deportation orders initiate the deportation liability and appeal right, and expire on departure. Removal orders signify the end of the removal process, in that they allow removal to occur. A removal order remains in force for five years from removal, thereby giving legal effect to the re-entry ban. The proposed deportation orders would have the same effect as current removal orders.

Discussion paper and submissions

503 The discussion paper proposed that a deportation order would activate deportation and that any permit held would be automatically revoked. This proposal did not prompt specific submissions.

Comment

504 Once any appeals available had been declined and liability for deportation thereby confirmed, sufficient powers are needed to deport non-citizens. As noted above, those liable for deportation are liable for detention, allowing detention to be imposed to facilitate actual deportation. Deportation would not, of course, occur until any appeals available had been concluded. A

deportation order is required to establish clearly the terms of the deportation. The deportation order provides a clear statement of why the non-citizen is being removed and any sanctions or obligations that result.

PENALTIES AFTER DEPORTATION

Proposal

505 It is proposed that there should be a system of graduated bans preventing deportees from returning to New Zealand. Those overstayers who agree to leave voluntarily and pay their own way could leave without being served with a deportation order, and would not be subject to a statutory ban. It is proposed that the bans outlined in Table Two below apply to non-citizens served with deportation orders.

Table Two: Bans

Deportation reason	Ban period
• Visas granted in error • Unlawfully in New Zealand if departs without deportation order and pays own costs	None
• Unlawfully in New Zealand, if deported after overstaying for one year or less	Two years
• Unlawfully in New Zealand, if deported after overstaying for more than one year • Unlawfully in New Zealand, if deported after overstaying on a second or subsequent occasion • Sufficient reasons to revoke temporary entrant or limited visitor visa • Temporary entrant or limited visitor revoked where meets exclusion criteria (some non-citizens would also be excluded for longer by the exclusion criteria) • Departmental determination that resident visa conditions breached or not met	Five years
• Visa granted in false identity • Threat or risk to national or international security • Conviction of resident or permanent resident of a specified offence • Conviction for gaining resident or permanent resident visa by fraud • Departmental determination that resident or permanent resident visa by fraud	Permanent
All the above	Until any costs of deportation repaid

506 To reinforce the effect of the ban periods, it is proposed that an attempt to re-enter New Zealand during a ban period would re-start the ban period from the date of attempted re-entry. Re-entry would be defined as applying for entry permission at the border, or boarding or attempting to board a craft for New Zealand.

507 It is appropriate that the Minister (at any time) and the tribunal (when declining a deportation appeal) should be able to waive or reduce the ban period that would usually apply. The Minister's power should be delegable, but as now there should be no right to apply for its exercise or receive reasons for any decision. The Minister could also require that any appeal right be exhausted before considering a case.

Status quo

508 Currently, removed overstayers are banned for five years and deported former residents are banned permanently.

Discussion paper and submissions

509 The discussion paper included a proposal for two year, five year and permanent bans varied according to the seriousness of the reason for deportation. The paper also discussed the option of permanent bans for all non-citizens who were deported. This alternative was not considered desirable.

510 Differentiated ban periods received strong support. Of 67 submitters, approximately 85 percent agreed with the proposal. One submitter wanted a ban period for those who leave New Zealand voluntarily to deter people from overstaying. Fines for overstaying or a prohibition on further sponsorship were suggested as penalties. Some submitters questioned whether failure to meet visa conditions warranted a five-year ban in all cases. Provision for consideration of mitigating circumstances was sought. The New Zealand Law Society considered that there should be 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.

Comment

511 Bans would reinforce that the deportee has been determined to be undesirable and should not attempt to return to New Zealand, potentially giving them both preventative and punitive effects. They bring deportees within the exclusion criteria while a ban is in force (see *Chapter One: Core provisions*). The gradations give incentives for early compliance. They reinforce the differences in the seriousness of the various reasons for which non-citizens may be deported.

PROPOSALS TO CARRY OVER CURRENT PROVISIONS

512 The provisions outlined below were not included in the discussion paper and were not the subject of submissions.

Deportation while serving a prison sentence

513 Provisions of the Parole Act 2002 allow the Minister to give effect to deportation of a non-citizen serving a term of imprisonment. This allows the Minister to determine when it is preferable that a non-citizen be deported rather than serve a full sentence. It is proposed to maintain this provision, with necessary amendments to align it with the proposed new deportation system. Current practice is for the Minister to consult the Minister of Justice before exercising this power.

Costs to the Crown of deportation

514 To have an effective enforcement system, the Crown should continue to be able to fund the costs of all deportations. This currently includes the authority to pay the costs of any partner or dependent child accompanying the deportee out of New Zealand, which should continue to be an option.

515 The Crown should also continue to be empowered to fund these costs, even where the partner or dependent child is not subject to a deportation order. This funding would not be a requirement, but a possibility. Current practice is to offer voluntary departure only where the non-citizen pays the cost and to use a removal order (with subsequent ban) where the Crown is covering the costs.

516 All these costs should continue to be recoverable as debts. It is proposed to roll over for the current process whereby the courts, on the Department's application, set the sum to be recovered.

517 Debt recovery may also be possible from sponsors who agreed to cover any costs arising from the entry of the person who is now a deportee. Deportees also have an incentive to repay deportation costs if they are likely to seek to return to New Zealand. It is proposed that any such costs must be repaid before any visa or entry permission may be granted.

Executive Summary - Chapter 6 Review and appeal

Proposal – A single appeals tribunal

I propose that the Bill establish a single independent Immigration and Protection Tribunal (the tribunal) that replaces the functions of the RRB, RRA, RSAA and DRT.

I propose that the tribunal initially be supported by **EITHER** the Department of Labour, **OR** the Ministry of Justice for the time being. I propose, among other things, that:

a. members be barristers and solicitors

b. the chair be a District Court Judge, and

c. the tribunal generally consists of one member, but in particularly complex cases may consist of more.

Status quo – There are currently four independent appeal bodies:

a. the Residence Review Board (RRB)

b. the Removal Review Authority (RRA)

c. the Deportation Review Tribunal (DRT), and

d. the Refugee Status Appeals Authority (RSAA).

In addition to the appeal bodies, appeals on the facts against liability for deportation are currently heard by the High Court in the case of residence revocations. The courts also hear appeals against criminal convictions.

Discussion paper and submissions - There was mixed support for creating a single tribunal from the public submissions. Those that did not support the proposal were largely concerned that the expertise and standing of the RSAA would be lost. The proposal attempts to address these concerns by clearly establishing in the legislation a legal framework for refugee and protection appeals.

Public submissions clearly favoured the tribunal being supported by the Ministry of Justice (Justice), rather than the Department, on the basis that it would be perceived to be completely independent from immigration decision-making.

Comment – Creating a single tribunal is central to many of the review proposals, including using classified information. It would enable both efficient decision-making, and the development of expertise by reducing delays and double-ups and provide for more consistent decision-making. It would be both fairer to the individual and provide for a more robust immigration system. The proposal would allow the tribunal to be more prominent, more obviously accessible, more independent and authoritative, and to secure greater efficiencies and economies of scale.

The total additional funding required for the single tribunal to be established within Justice is estimated at a maximum of $13.307 million operating and $4.765 million capital over five years. The total additional funding required for the single tribunal to be established within the Department is estimated at a maximum of $10.696 million operating and $2.753 million capital over five years. This option costs less as there would be no need for a new IT interface between the Department and the tribunal.

Proposal – Avenues of appeal

I propose that a person may have a single right of appeal to the tribunal only, and that where a person is eligible for more than one appeal, all grounds must be lodged together.

Immigration appeals

I propose that the Bill:

a. retain the status quo regarding reconsideration of declined temporary applicants

b. allow all declined residence applicants to appeal to the tribunal

c. allow one appeal against deportation on the facts only (to the Department, the courts or the tribunal depending on the circumstances), and

d. allow all persons liable for deportation to appeal on humanitarian grounds, with the current exceptions including national security threats and persons refused entry to New Zealand.

The current avenues of appeal to the High Court against residence revocation would be considered an appeal against deportation on the facts, and would go to the tribunal.

Humanitarian appeals would be allowed only where exceptional circumstances of a humanitarian nature would make it unjust or unduly harsh for the person to be deported from New Zealand, and it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand (current RRA test).

Protection-related appeals

As proposed in *Chapter Four: Protection*, all declined protection claimants may appeal to the tribunal. I propose that protected persons who become liable for deportation may appeal on matters of fact, including international obligations, followed by humanitarian grounds, where applicable.

Status quo – Temporary visa applicants offshore have no rights of appeal, but those lawfully onshore may seek departmental reconsideration if they are declined. Residence applicants anywhere in the world may appeal against a decline decision to the RRB. Declined refugee status claimants may appeal to the RSAA.

Persons unlawfully in New Zealand (including some failed refugee claimants) may appeal to the RRA against removal on humanitarian grounds. New Zealand residents may appeal to the DRT against deportation (for residence fraud, failure to meet residence conditions, or serious criminal offending) on humanitarian grounds. There are three similar humanitarian tests in the 1987 Act.

A person who obtained refugee status through fraud has access to appeals to the RSAA, the High Court and the DRT.

A refugee who commits a serious criminal offence has no appeal relating to international obligations, and a single appeal to the DRT (if a resident).

Discussion paper and submissions - There was strong support for retaining an appeal right for all declined residence applicants, and a humanitarian appeal right for all persons liable for deportation. There were mixed views on whether appeals should be determined together or separately.

A number of submitters expressed concern about the proposed humanitarian appeals test

(which mirrors the current RRA test). Some submitters, such as the Human Rights Commission, consider that there should be no public interest element in the test.

Comment – The proposals would allow for greater efficiencies in the appeals system. They would allow for appeals to be determined together, where a person was eligible for more than one appeal. This would significantly reduce delays in assessing whether or not a person should be deported from New Zealand and reduce the risk of inconsistent decision-making. In this respect, it would be both fairer to the individual and provide for a more robust immigration system.

The proposed humanitarian test is not considered to set an unreasonably high threshold. The public interest component is essential to enable the impact on victims and the New Zealand community to be taken into account. The test is considered to be less difficult than the Canadian humanitarian test which many submitters recommended.

Proposal – How the tribunal would operate

Timing – I propose that appeals to the tribunal must generally be lodged within 28 days of notice, or within 42 days of staying beyond the validity of a visa. Protection appellants have a shorter time period but out of time appeals are allowed in such cases.

Hearings - I propose that residence appeals are to be determined on the papers (status quo). I propose that in the case of protection appeals, the tribunal may dispense with an interview only if the person was interviewed or given the opportunity for an interview by a determination officer at first instance and the tribunal considers that the appeal is prima facie manifestly unfounded or clearly abusive (status quo).

In the case of deportation appeals, I propose that where the person is a New Zealand resident, the tribunal must conduct a hearing (status quo). In the case of deportation appeals where the person is a temporary entrant only, or is in New Zealand unlawfully, I propose that the tribunal must determine the appeal on the papers, unless, in its absolute discretion, it offers the appellant the opportunity to attend a hearing.

Legal aid – I propose that legal aid should be extended to the single protection determination procedure and appeal, but otherwise mirror the status quo.

General rules - I propose to transfer the existing successful general rules of the existing appeals bodies to the new tribunal.

Powers - I propose to transfer the existing successful powers of the existing appeals bodies to the new tribunal. I propose that the tribunal also have powers to require the Department to collect biometric information on its behalf for the purpose of identity verification.

Immigration consequences – I propose that where an appeal is allowed the person may continue to reside in New Zealand on their resident visa, where they have one. Otherwise:

a. the tribunal may direct the grant of a temporary visa for up to 12 months (with no further appeal rights), or

b. an immigration officer must grant a resident visa or a temporary visa of no less than six months duration.

I propose that the tribunal may suspend deportation liability for up to five years and may vary or waive the ban period in cases where it considered that a failed protection claimant genuinely believed that they had a valid protection claim and was not

considered to be abusing the protection system with a spurious claim.

Status quo –

Timing – The current appeal periods include 5, 10, 21 and 42 day timeframes.

Hearings - The RSAA and DRT are generally required to hold a hearing. RRA and RRB appeals must be heard on the papers.

Legal aid – Only refugee claimants and residents may have access to legal aid.

General rules - The proposed general rules mirror the existing provisions in the 1987 Act.

Powers - The existing appeals bodies have a number of powers in common. The DRT and RSAA both have the powers of a Commission of Inquiry.

Immigration consequences – Only the RRA may direct permits to be granted.

Discussion paper and submissions - The discussion paper sought views on how the tribunal should operate generally. Some submitters commented that the 42 day appeal period for overstayers should not be reduced. Submitters were generally in favour of allowing for oral hearings in deportation appeals. Some commented that legal aid should be more broadly available. There was support for retaining the general rules and powers of the RSAA.

Comment – These proposals provide a robust, transparent statutory framework for the tribunal that allow flexibility where appropriate. They maintain high standards of fairness by ensuring hearings and legal aid are available where necessary, and provide the tools for the tribunal to conduct robust investigations.

Proposal – Further appeals and judicial review

I propose that judicial review may be sought for a decision, except where that person has a *de novo* appeal to the tribunal.

I propose that:

a. a person may seek leave of the High Court to appeal a decision of the tribunal on a point of law, within 28 days of notification of the tribunal decision

b. judicial review proceedings must be lodged within 28 days of the decision to be reviewed

c. the High Court must endeavour to determine appeals on points of law and judicial review together where possible, and

d. as with the status quo, the Crown would have the same rights of appeal as the applicant themselves.

I propose to retain the existing provisions which restrict the Human Rights Commission from investigating complaints relating to the application of immigration law or policy, but allow the Commission to undertake all its other functions in relation to immigration.

Status quo – Currently judicial review may only be sought for a decision made under the 1987 Act within three months of the date of the decision. Appeals on points of law may not be made from the RSAA, but may be made from the other appeals bodies.

Section 149D of the 1987 Act restricts the ability of a person to make a complaint regarding the content or application of immigration law or policy to the Human Rights Commission on the basis that immigration matters inherently involve different treatment

on the basis of personal characteristics. The Human Rights Commission may, however, perform most of its broader functions under section 5 of the Human Rights Act. The provisions allow, for example, complaints to be made regarding discrimination that is not based on law or policy, by the Department, in the course of providing its services. They also allow the Commission to report to government on issues of discrimination in policy which it considers government should reconsider.

Discussion paper and submissions – Providing an appeal on points of law from the tribunal was supported by public submitters. The Human Rights Commission recommends that section 149D be repealed. It considers that the Commission should be able to bring civil proceedings relating to immigration law or policy arising from complaints to the Human Rights Tribunal.

Comment – It is a general principle in New Zealand that a person should have a first appeal as of right and a second appeal "by leave". This principle was followed when appeal structures were looked at during the development of the Supreme Court. These proposals recognise these fundamental principles but also build in particular time requirements to ensure the integrity and functionality of the immigration system.

The proposal ensures that the Commission has a role in commenting on proposed law and policy, and a role in investigating infringements of human rights that fall outside the application of agreed law and policy. The proposal mirrors the status quo in substance, but drafting of the Bill could clarify the breadth of the Human Rights Commission's role and the limited nature of the restriction.

This proposal is considered appropriate in light of proposals to establish a clear framework for investigating the application of law and policy through the independent tribunal, as well as the power of the Ombudsmen to address complaints about departmental decision-making. It would be counter to the review's intention to create fair, fast and firm decision-making processes to allow a parallel dispute resolution system for individual cases.

CHAPTER SIX: REVIEW AND APPEAL

PURPOSE

518 This chapter discusses the recommendations on:

- establishing a single independent immigration and protection appeals tribunal
- streamlining residence appeals, appeals against deportation, and protection-related appeals, and
- how the new tribunal would operate.

STATUS QUO

519 There are currently four independent immigration and refugee appeal bodies:

- the Residence Review Board (RRB)
- the Refugee Status Appeals Authority (RSAA)
- the Removal Review Authority (RRA), and
- the Deportation Review Tribunal (DRT).

520 The RSAA, RRA and RRB are independent bodies supported by the Department of Labour (the Department). The DRT is an independent body supported by the Ministry of Justice.

521 Temporary visa applicants offshore have no rights of appeal, but those lawfully onshore may seek departmental reconsideration if they are declined. Residence applicants anywhere in the world may appeal against a decline decision to the RRB. Declined refugee status claimants may appeal to the RSAA.

522 Persons unlawfully in New Zealand may appeal to the RRA against removal on humanitarian grounds. New Zealand residents may appeal to the DRT against deportation (for residence fraud, failure to meet residence conditions, or serious criminal offending) on humanitarian grounds.

523 In addition to the appeal bodies, appeals on the facts against deportation are currently heard by the High Court in the case of residence revocations. The courts also hear appeals against criminal convictions.

524 Under the Ombudsmen Act 1975, the Ombudsmen may review any decision or recommendation made or act done or omitted by a government department which affects any person in their personal capacity. In addition, judicial review may be sought for any decision made under the Immigration Act 1987 (the 1987 Act).

RATIONALE FOR PROPOSALS

525 There is a strong case for retaining an independent appeal mechanism for immigration and protection decisions. The 1987 Act has created bodies of experts in immigration and refugee law. They provide a trusted independent avenue of redress that helps avoid extensive litigation and judicial review. In comparison to Australia, the United Kingdom and Canada, New Zealand experiences significantly less litigation in the courts on immigration matters.

526 There are, however, several drivers for both streamlining the appeals tests, and the independent tribunals that hear those appeals:

a. the RRA and DRT consider very similar tests

b. many persons declined by the RSAA appeal to the RRA, and there could be greater streamlining between these appeals, and

c. New Zealand has not yet dealt with deporting refugees who commit serious criminal offences. The DRT is currently responsible for deportation appeals but has no express jurisdiction to consider international protection obligations.

527 Streamlining the appeals tests and the appeals bodies would:

a. maximise fairness in the immigration system by creating a single independent tribunal

b. ensure effective decision-making

c. create a more efficient system, with fewer delays and double-ups, and

d. create a more understandable and accessible appeals system.

A SINGLE INDEPENDENT IMMIGRATION AND PROTECTION APPEALS TRIBUNAL

Proposal

528 It is proposed that there be a single independent Immigration and Protection Tribunal (the tribunal) that replaces the current RRB, RRA, RSAA, and DRT.

Status quo

529 Each existing appeal body has been established for a single purpose. A person who has more than one appeal right has to appeal to more than one appeal body. This can create extended delays, particularly in reaching final deportation decisions. It is inefficient and ineffective for different bodies to assess the same cases for credibility and for the particulars of the case. For example, in 2005/06, 77 of 291 appeals to the RRA (26 percent) were failed refugee status claimants, most of whom had previously appealed to the RSAA.

530 Sharing knowledge and expertise is not facilitated by the current legislative structures. For example, the DRT and the RRA both consider very similar tests, requiring similar expertise and knowledge of domestic law and international human rights law.

531 All four appeal bodies have experienced problems with significant backlogs of appeals and subsequent delays in decision-making. This is due, in part, to the variation in the flow of appeals through the different bodies. There are also difficulties in adjusting resource levels quickly to respond to changeable flows in appeals. Small tribunals can have greater difficulty justifying full-time and permanent members. These delays can obstruct New Zealand's ability to regulate immigration efficiently and effectively.

532 These difficulties are exacerbated because the bodies are supported by different departments. Further, under the current structures, introducing

new appeal rights or removing existing appeal rights, as proposed below, would require structural change to one of the existing appeal bodies.

Discussion paper and submissions

533 The discussion paper proposed that a single tribunal be established. Organisations that made submissions on this topic 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 (UNHCR), and the Families Commission.

534 Approximately 70 percent of 58 organisations that responded supported the establishment of a single immigration and refugee tribunal. Individuals expressed mixed views, with just under half of 52 submitters 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 RSAA. Most of those who opposed the proposal considered that there should continue to be a separate refugee tribunal.

Comment

535 The proposed single immigration and protection tribunal is necessary for the protection, deportation, and classified information proposals to proceed, as well as for the proposals to streamline appeals more generally. For example, the deportation proposals remove the distinction between removal and deportation which distinguishes the roles of the RRA and the DRT. The tribunal would:

a. allow any person liable for deportation from New Zealand to have a single independent appeal, including where the person makes a protection claim

b. ensure all protection-related deportation appeals are heard by a tribunal with international law expertise

c. provide the independent scrutiny needed to allow for classified information to be used in immigration and protection decision-making, and

d. ensure speedier appeals processes and fewer delays in deportation.

536 Without the single tribunal many of the core Act review proposals would not be possible to implement. Creating a single tribunal would enable for greater efficiencies in the appeals system by allowing for appeals to be determined together, where a person was eligible for more than one appeal. This would significantly reduce delays in assessing whether or not a person should be expelled from New Zealand and the risk of inconsistent decision-making. It would be fairer to the individual and provide for a more robust immigration system.

537 The proposals are likely to result in the tribunal:

- being more prominent, better known and more obviously accessible, more independent and authoritative

- according tribunal members a more secure career, allowing them to be deployed in a range of compatible jurisdictions and enabling them to be better resourced and trained, and
- securing greater efficiencies and economies of scale in the long run.

538 The proposals in this chapter address submitter concerns relating to losing refugee expertise on the tribunal by creating clear legislative structures for protection-related appeals. This will mean that the tribunal has a clear role, set out in statute, to determine issues relating to international refugee and protection law. The proposal acknowledges, however, that there is considerable cross-over in the expertise required for protection and immigration appeals, particularly in the deportation context. For this reason, it is recommended that a single tribunal be created, albeit with distinct avenues of appeal for protection and immigration cases.

Forecast operational impacts

539 The current number of members (FTEs) is 20.15, plus five part-time DRT members. Based on the proposals for the single tribunal, the number of FTE members required is forecast to drop to 14 by year five of implementation. In the first four years of implementation additional members may be required to cover a possible moderate increase in protection claims and to allow the tribunal to develop new processes and expertise required for the new appeals processes proposed.

540 Costs relating to the proposal vary depending on the government department that supports the tribunal and are discussed below.

Supporting the tribunal

Proposal

541 It is proposed that the Bill provide for the tribunal to be supported by a government department determined by the Prime Minister. This is current practice and allows for future change without legislative change. It is proposed that the tribunal initially be supported by **EITHER** the Department **OR** the Ministry of Justice.

Status quo

542 The RSAA, RRA and RRB are independent bodies supported by the Department. The DRT is an independent body supported by the Ministry of Justice. The current annual cost of the appeals bodies for the Department is $6.101 million. The current annual cost of the DRT for the Ministry of Justice is $0.160 million.

Discussion paper and submissions

543 The discussion paper presented the Ministry of Justice as the preferred department to support the tribunal. There was strong support for the Ministry of Justice being responsible for servicing the tribunal. Almost 80 percent of 95 submitters supported this proposal. Submitters favoured a clear separation from the Department to enhance public confidence in the independence and integrity of the appeals bodies.

Comment

544 The costs of the single tribunal cover many of the costs of the proposals in the review, including the use of classified information, deportation, protection and streamlining appeals and appeals tests.

Table One: Net cost comparison of Justice or Labour supporting tribunal

	Justice ($M)	**Labour ($M)**
Maximum capital over first five years (net)	$4.765	$2.753
Maximum operating over first five years (net)	$13.307	$10.696
Cost in outyears (net)	$1.313	$0.431

545 Perceived independence holds a significant weighting in the public's perceptions of the integrity of the immigration system. It is also a sound policy goal. While work on a unified tribunals structure within the Ministry of Justice is still in its early stages, this proposal would also be in line with the Law Commission's recommendation that tribunals be brought under the umbrella of the Ministry of Justice.

546 The preferred policy proposal is for the tribunal to be supported by the Ministry of Justice. The costs in Table One above are projected maximum costs (additional to current baseline and fees), and further analysis, including an independent audit, will be undertaken prior to a budget bid. The costs relate to refurbishment of existing premises to house the new tribunal, developing a new case management system and website, having a District Court Judge as chair, and increased salaries for tribunal members commensurate with their new roles. The Ministry of Justice option also requires developing an IT interface between the Department and the tribunal to allow the tribunal access to the immigration Application Management System.

547 It would be unusual for a tribunal with at least one District Court Judge member not to be administered by the Ministry of Justice. It may also make the relationship between the Chief District Court Judge and the Judge sitting on the immigration tribunal difficult. While this has happened before in the case of the Employment Court, one of the reasons for transferring the Employment Court to the Ministry of Justice was so that the Employment Court Judges could have some collegiality with other Judges.

Statutory framework for the tribunal

Proposal

548 It is proposed that:

a. *The tribunal should consist of members who are barristers and solicitors who have held a practising certificate for at least five years or who have other equivalent or appropriate experience* – This is consistent with the RSAA, DRT and RRA and is essential to maintaining high calibre decision-making.

b. *The Bill retains the provision allowing UNHCR ex-officio members to sit on the tribunal* – This provision is not currently used but may be useful in

the future if, for example, there was a mass arrival of protection claimants.

c. *Members are appointed by the Governor-General on the recommendation of the Minister of Justice in consultation with the Minister of Immigration* – This is based on the tribunal being supported by the Ministry of Justice and is consistent with the proposed new Immigration Advisers Complaints and Disciplinary Tribunal.

d. *No person designated or delegated as an officer under the Bill and no person who has been a designated or delegated officer within the previous five years may be appointed as a member* – This is consistent with the 1987 Act and would ensure that the tribunal maintains independence from departmental decision-makers.

e. *The chair must be appointed as a District Court Judge by the Governor-General on the recommendation of the Attorney-General* – This would ensure that the tribunal would have sufficient standing and capacity to be entrusted with classified information (discussed in *Chapter Seven: Using classified information*). The Judge would be responsible to the Chief District Court Judge, although the tribunal itself would be outside his or her purview.

   Under the District Courts Act 1947, the maximum number of District Court Judges that may be appointed is 140. The difference between this cap and the current operating level of 130.2 is already earmarked for extra Judges that may be required for known upcoming pressures on judicial resource, such as the 1,000 extra police. This gap also takes account of unknown incremental pressures on judicial resource over time. It is therefore proposed that the cap on District Court Judges under the District Courts Act 1947 be lifted by one, to 141.

f. *District Court Judges with an immigration warrant may be seconded to the tribunal to determine classified information appeals where there is not sufficient capacity on the tribunal* – This would allow flexibility in cases where more than one Judge was required to determine a case.

g. *Remuneration of the District Court Judge would be set by the Remuneration Authority. Remuneration of the members would be set by the Cabinet fees framework* – This is consistent with the remuneration framework for tribunals generally.

h. *A member's term of appointment is for a period not exceeding five years* – Many similar tribunals supported by the Ministry of Justice have a five year term of appointment, such as the Human Rights Review Tribunal.

i. *For the purposes of any matter within its jurisdiction the tribunal consists of one member, but in particularly complex cases the chair may direct that more than one member hear and determine an appeal* – In most cases the complexity of the appeal would not warrant more than one member. This is particularly the case given that the tribunal will be seeking members with significant expertise who can determine the full range of its jurisdiction. In particularly complex cases, however, it is important for more than one member to be able to determine the case. This mirrors the current provisions of the RSAA.

j. *The tribunal must determine any appeal with all reasonable speed but may decide the order in which appeals are to be heard, and except as expressly provided, the tribunal may regulate its procedures as it sees fit* – The success of a tribunal is dependent largely on the flexibility to determine its own procedures. The legislation should provide the minimum provisions to give clear direction, without being prescriptive.

Status quo

549 The four current appeals bodies have some rules in common, and some differences. For example, members of the RSAA and RRA and the chair of the DRT must be barristers or solicitors with appropriate experience. The DRT also has lay persons as members and the RRB does not require members to be lawyers. There are no District Court Judges appointed to any of the existing appeal bodies.

550 With the exception of the DRT, which requires three members to hear each appeal, one member acts as the authority. The RSAA has the discretion to allow more than one member to hear an appeal where the case is particularly complex.

Discussion paper and submissions

551 The discussion paper did not make specific proposals relating to the detailed provisions of the tribunal, but sought feedback from those who had a particular interest on these questions. 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. 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. The New Zealand Law Society supported having District Court Judges as chair and deputy chair.

Comment

552 The value of a tribunal is having a group of independent experts who can assess departmental decisions and deportation cases more quickly than the courts and who can maintain the respect of the full range of stakeholders, from appellants, immigration advisers and the public, to the New Zealand government and international interests.

553 The proposals set out a legislative framework that allows for efficient decision-making, the development of expertise, and an appropriate level of fairness given the interests at stake. They build on the successful elements of the existing appeal bodies. In addition, the proposals address public concerns that creating a single tribunal may reduce the expertise of members, particularly in refugee law.

554 There are a number of additional factors that are considered vital to the success of the tribunal, but which are not appropriate to set out in legislation. For example, it is essential that the chair is a full-time position and that their role is to provide leadership and good management of the tribunal. The success of the amalgamated tribunal, in terms of efficiency and quality, will depend significantly on strong leadership. In order for the

tribunal members to become New Zealand's experts in immigration and international protection law, the chair, deputy chairs and members must be appointed based on their merits and competence. The success of the amalgamated tribunal is also largely dependent on members being able to hear multiple streams of appeals if necessary, on the proviso that they are appropriately trained.

AVENUES OF APPEAL

A single appeal

Proposal

555 It is proposed that a person may have a single right of appeal to the tribunal only, and that where a person is eligible for more than one appeal, all grounds must be lodged together. This is achieved by allowing only one appeal to the tribunal against deportation that addresses, where applicable, matters of fact, international protection obligations, and humanitarian grounds. This means that humanitarian grounds for appeal against deportation could be assessed in an appeal against a residence or protection decline.

556 Where a person did not take up their independent appeal right the Department would undertake a humanitarian assessment (not to be set out in legislation) prior to actual deportation.

557 In summary, the functions of the tribunal are to determine appeals against:

a. declined residence applications

b. deportation liability (on the facts and humanitarian grounds where applicable)

c. declined protection claims, and

d. deportation liability relating to refugees and protected persons.

Status quo

558 The current structure allows a person to appeal to separate appeals bodies, and the courts, depending on their circumstances. As discussed above, this can create multiple assessments of the same facts and delays for both the appellant themselves, and the Department in effecting deportation.

Discussion paper and submissions

559 The discussion paper proposed an option allowing for a single deportation appeal. Approximately 45 percent of 58 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 52 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.

Comment

560 The deportation appeals system in particular is complex and inefficient. Any person liable for deportation may have access to multiple avenues of appeal to different appeal bodies, the courts and the Minister. They can also appeal to the Ombudsmen and request judicial review. This can create years of delays in reaching a final decision in some cases. Such delays generally decrease the justification for expelling the person due to humanitarian considerations and undermine New Zealand's ability to regulate immigration.

561 While there are potential difficulties with one appeal in terms of the range of evidence that may be tendered, there are also potential difficulties in the two-appeal process. In particular, there is a possibility that, where an appellant receives a decision in respect of the facts of the matter, they will use the humanitarian appeal hearing as an opportunity to challenge the earlier decision.

562 On balance, and in light of the obvious efficiencies and cost-savings that would flow from it, it is considered that appeals can be fairly and appropriately determined through a single appeal but with a structured, stepped decision-making process as proposed below.

IMMIGRATION APPEALS

Temporary visa appeals

Proposals

563 It is proposed that there should continue to be no formal review or appeal rights:

a. for temporary visa applicants offshore (status quo), or

b. against a decision to refuse entry at the border (status quo).

564 It is proposed that declined onshore temporary entrant visa applicants should continue to be able to seek departmental reconsideration of that decision within 14 days of the decline decision, where they hold a valid visa (status quo).

Status quo

565 These proposals mirror the status quo.

Discussion paper and submissions

566 While the public discussion paper made no proposals for change in this area, a number of submitters considered that temporary entry applicants should have independent appeal rights.

Comment

567 Providing for review and appeal must be proportionate to the level of interest involved. The status quo is considered robust on the basis that temporary entry decisions are highly discretionary and that temporary applicants have fewer interests at stake than residence applicants. The government is held accountable to New Zealand for meeting New Zealand's temporary entry

needs, rather than particular individuals. Introducing independent appeal rights for temporary applicants would create a significant cost that is not considered justifiable in light of the interests at stake (in the last four years 25,000 to 30,000 temporary applications have been declined per year, around 6 percent of decisions made).

Residence appeals

Proposals

568 It is proposed that all residence applicants may continue to appeal to the tribunal against a residence decision of the Department, subject to the standard limitations below.

Limitations on residence appeals

569 As with the status quo, it is proposed that residence appeals may not be made in respect of:

a. a decision by the Minister not to issue a resident visa, with the exception of decisions involving the use of classified information (discussed in *Chapter Seven: Using classified information*)

b. expressions of interest in applying for residence, or

c. persons subject to statutory exclusion grounds (discussed in *Chapter One: Core provisions*).

Grounds for residence appeals

570 As with the status quo, it is proposed that the grounds for appeal would be that the decline was incorrect in terms of the applicable Immigration Instructions, or that the special circumstances of the appellant are such that an exception to that policy should be considered by the Minister.

What the tribunal may do in regard to residence appeals

571 It is proposed that the tribunal may uphold or reverse the residence decision, refer it back to the Department for reconsideration, or refer it to the Minister for consideration as an exception to policy. In the interests of efficiency, where possible, the tribunal should make a final decision itself.

Status quo

572 Residence applicants anywhere in the world may appeal against a decline decision to the RRB.

Discussion paper and submissions

573 The discussion paper presented three options regarding residence appeals and indicated that Option C was preferred:

a. Option A: all residence applicants may access independent appeal (the status quo)

b. Option B: residence applicants may access internal departmental review only, or

c. Option C: onshore residence applicants and offshore applicants with New Zealand employer or family member sponsors only may access independent appeal. Those who could not access independent appeal would have access to a departmental review.

574 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 101 submitters (53 organisations and 48 individuals) who addressed this issue considered that all residence applicants should have access to independent appeal (for example, Wellington Community Law Centre and Asia New Zealand Foundation). 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.

Comment

575 Option C would create new costs, particularly in implementing a departmental review mechanism for those failed residence applicants who did not have access to independent appeal, and in dealing with Ombudsmen complaints. In addition, the tribunal would need robust verification tools to ensure that New Zealand employer sponsors were legitimate, and that, for example, immigration consultants were not used. Determining whether a person was eligible to lodge an appeal would be a complex process in itself. All of these new costs are unlikely to be recovered by savings due to a reduction in independent appeals.

576 Option B would also create new costs relating to implementing a departmental review mechanism, and dealing with Ombudsmen complaints. These costs are unlikely to be recovered by any savings in light of the proposed single appeal tribunal.

577 The proposal (Option A) reflects the public's views and given the low numbers of residence appeals (see Table Two) is likely to be most efficient and effective in the new single tribunal framework.

Table Two: Numbers of residence decisions and appeals

	2002/03	**2003/04**	**2004/05**	**2005/06**
Total residence applicants declined	6,738 (12% of total decisions)	8,791 (18% of total decisions)	6,613 (12% of total decisions)	5,052 (9% of total decisions)
Residence Review Board	**2002/03**	**2003/04**	**2004/05**	**2005/06**
Appeals lodged	530	514	408	372
Decisions issued	309	410	418	635
Appeals allowed *	98 (32% of total decisions)	142 (35% of total decisions)	137 (33% of total decisions)	236 (37% of total decisions)
Appeals recommended	37 (12% of	36 (9% of	44 (11% of	43 (7% of

	2002/03	2003/04	2004/05	2005/06
to Minister as exception to policy	total decisions)	total decisions)	total decisions)	total decisions)

* Includes reversal of original decision and referral back to Department for reassessment.

Appeals against deportation liability on the facts

Proposals

578 It is proposed that the tribunal may consider appeals against deportation on the facts where liability was established through a decision of the Department:

a. that, on the balance of probabilities, a resident or permanent resident visa was obtained through fraud, where there has been no conviction for that fraud (currently heard by the High Court), or

b. that resident visa conditions were not met (currently heard by the High Court).

579 It is proposed that there be no appeal on the facts to the tribunal where:

a. a person becomes liable for deportation by remaining in New Zealand unlawfully (status quo)

b. a person becomes liable for deportation through criminal offending as they may appeal the conviction to the court (status quo)

c. a person becomes liable for deportation on the basis of being a threat to national security (status quo)

d. citizenship has been deprived by the Minister of Internal Affairs due to immigration fraud, as they may appeal the deprivation to the High Court (in addition to this appeal right currently the person may be able to appeal, on the same facts, to the High Court in relation to residence revocation and to the RSAA in relation to refugee cancellation), or

e. a temporary entrant or limited visitor visa holder is advised that their temporary stay has been revoked (status quo).

580 Rather than having an independent appeal, it is proposed that temporary entrants be given 14 days to provide reasons to the Department why they should not be deported, except in the case of administrative error, or where the person meets exclusion grounds (status quo).

Status quo

581 These proposals largely mirror the status quo. There are two differences. Firstly, avenues of appeal on the facts relating to residence fraud or not meeting conditions that currently go to the High Court would go to the tribunal, and could be dealt with as part of a single appeal that addressed other matters.

582 Secondly, there would only be one opportunity to contest the facts, whether to the tribunal or to the courts. This is the status quo in regard to current liability for deportation on grounds of criminal offending and residence fraud where there is a court conviction for that fraud. It differs from the status

quo in the refugee fraud area, and citizenship deprivation on the basis of residence fraud. In both of these cases there are currently multiple opportunities to contest the same facts, which is inconsistent with the framework for deportation appeals relating to criminal offending generally.

Discussion paper and submissions

583 Approximately 55 percent of 94 submitters agreed that persons should only have one opportunity to contest liability for expulsion on the facts. Approximately 35 percent opposed the proposal on the basis that it may be unfair and inflexible. A number of submitters, such as the Auckland District Law Society, considered that both temporary entrants and permanent residents should have access to independent appeal on the facts.

Comment

584 These proposals remove current anomalies where there are multiple appeals on the facts in some cases, and not in others. It means that there would be a single opportunity to contest deportation liability on the facts whether through the Department, the tribunal or the courts. Temporary entrants would have a review opportunity through the Department and residents may appeal to the tribunal. In the context of a conviction the opportunity to contest the facts is by way of a general appeal against conviction in the ordinary courts.

585 The proposal that a number of appeal routes that currently go to the High Court go to the tribunal would allow for greater efficiencies where a person could appeal on both facts and humanitarian grounds.

Deportation appeals on humanitarian grounds

Proposals

586 It is proposed that all persons liable for deportation may appeal to the tribunal within time limits. For clarity, the following persons would not have access to humanitarian appeal (the status quo):

a. a person refused entry to New Zealand

b. transit passenger visa holders

c. a person liable for deportation on grounds of being a national or international security risk or threat

d. a person in respect of whom a deportation order is in force (as discussed in *Chapter Five: Deportation*, deportation orders would only be made once the appeal period had expired or appeal was declined. This provision would mean that a person who re-entered New Zealand while a deportation order was still in force, could not access a further humanitarian appeal right), and

e. a person who is in New Zealand unlawfully due to the expiry of a limited visitor visa.

587 It is proposed that for the purposes of the humanitarian appeal the tribunal must determine whether there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the

person to be deported from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand. The fact that a person meets residence criteria does not in itself constitute exceptional circumstances of a humanitarian nature.

588 It is proposed that sections 105(1A) and 105A of the 1987 Act relating to victims' rights to make submissions in the case of criminal offenders be carried over.

Status quo

589 Persons unlawfully in New Zealand may appeal to the RRA against removal on humanitarian grounds. New Zealand residents may appeal to the DRT against deportation (for residence fraud, failure to meet residence conditions, or serious criminal offending) on humanitarian grounds.

590 There are three different, but similar humanitarian tests in the 1987 Act:

a. an appeal to the RRA may be upheld where "there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in the circumstances be contrary to the public interest to remain in New Zealand."

b. a person whose residence permit is revoked (on grounds of fraud or misrepresentation) may appeal to the DRT on the grounds that "it would be unjust or unduly harsh for the person to lose the right to be in New Zealand indefinitely." Even if this test is not met, the DRT may quash the revocation of the residence permit in any case, as it thinks fit.

c. a person subject to a deportation order (on grounds of serious criminal offending) may appeal to the DRT on the grounds that "it would be unjust or unduly harsh to deport the person from New Zealand, and that it would not be contrary to the public interest to allow the person to remain."

Table Three: Current humanitarian appeal numbers

	2002/03	**2003/04**	**2004/05**	**2005/06**
RRA – appeals lodged	475	415	410	329
RRA – appeals decided	425	391	300	303
RRA – appeals allowed	81 (19%)	40 (10%)	52 (17%)	53 (17.5%)
DRT (against residence revocation and deportation) – appeals lodged	30	26	50	55
DRT – appeals decided	15	15	31	23
DRT – appeals allowed	1	4	3	7

Discussion paper and submissions

591 The discussion paper proposed two options regarding who may have access to a humanitarian appeal against deportation. Option A allowed all liable persons access to independent humanitarian appeal within time limits. Option B restricted access to independent humanitarian appeal to persons

with a demonstrated connection to New Zealand. Under both options, any person who could not, or chose not to, access independent humanitarian appeal would have a departmental humanitarian assessment prior to deportation.

592 Most submitters (approximately 70 percent of 94) considered that all persons liable for expulsion should have access to independent humanitarian appeal. 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 maintain New Zealand's reputation for fairness.

593 The discussion paper proposed a single humanitarian test that mirrored the RRA test. There was considerable interest in this proposal. Most of the 94 submitters agreed that there be a single test but many submitters, particularly organisations, commented that the test proposed set too high a threshold. A number of submitters, including the Human Rights Commission, opposed the public interest element of the test. Others expressed concern that the humanitarian circumstances would need to be exceptional. Some submitters, including Grey Lynn Neighbourhood Law Office, commented that express reference should be made to New Zealand's international obligations.

Comment

594 In combination with streamlining liability for deportation (*Chapter Five: Deportation*), and creating a single deportation appeal within an amalgamated appeals tribunal, the time taken to deport a person could be reduced under Option A. Option A would ensure maximum fairness, while creating a system that allows for more effective and efficient decision-making processes. Given the low and decreasing number of humanitarian appeals that are taken up, the analysis indicates that Option B would have little impact in practice.

595 The proposed test mirrors the current RRA test which is well established as a tight test, but which allows an average of 17 percent of appeals each year. Adopting this test for all humanitarian appeals would address concerns with the DRT's two existing tests, which have been criticised for not adequately giving weight to the New Zealand public interest, and would allow for consistent application.

596 The public interest factor is the part that allows for the risk of reoffending, the impact on victims, and the impact on New Zealanders generally to be taken into account. Many submitters expressed general support for a framework that takes the New Zealand public interest into account in deportation cases. However, a number of public submissions commented that New Zealand should remove the public interest consideration, in a similar way to Canada's humanitarian policy test.

597 Canada's test is their government policy and is not applied by an independent tribunal. It is also, arguably, a much more difficult test than what is proposed as it requires the person to be suffering hardship that is unusual, excessive or undeserved and the result of circumstances beyond

their control. On balance, the public interest factor is considered to be an essential part of the appeal test.

Dealing with identity fraud

598 There are no proposals in regard to this issue in this chapter as they are covered in *Chapter Five: Deportation*. There are implications from the chapter five proposals for review and appeal, however, which are highlighted below.

Discussion paper and submissions

599 Approximately half the organisations and 75 percent of individual submitters (of a total of 94 submissions) 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.

Comment

600 As discussed in *Chapter Five: Deportation*, where the Minister or delegated officer determines that a visa was granted to a non-citizen under a false identity, that person will be deemed unlawful from the date they entered New Zealand, or the date of expiry of a previously held valid visa in their true identity.

601 In the case of temporary entrants, as proposed above, they would be given 14 days to provide reasons to the Department why they should not be deported. If the Department upheld its decision, the non-citizen's visa would be invalid from the date of its issue. The tribunal would have jurisdiction to hear a humanitarian appeal only within 42 days from when the person originally became unlawful.

602 Where the Department found that a resident visa was issued to a fraudulent identity, the non-citizen would be given 28 days from notice of deportation liability to appeal to the tribunal on the facts. Where the appeal was upheld, the person could remain on their resident visa. Where the appeal was overturned, the visa would be invalid and the person would be unlawfully in New Zealand from the date they entered New Zealand, or the date of expiry of a previously held valid visa in their true identity. As this would almost definitely be more than 42 days, the tribunal would have no jurisdiction to consider the humanitarian appeals test. As with any non-citizen in New Zealand unlawfully for a short or long time, the Department would be able to consider any reasons to allow the non-citizen to stay in New Zealand and the Minister would also have the ability to intervene.

PROTECTION-RELATED APPEALS

Initial protection appeals

603 This section discusses appeals against initial decisions to decline protection status.

Proposals

604 As discussed in *Chapter Four: Protection*, any person may appeal to the tribunal against an adverse protection decision. Where a person is not prevented from lodging a humanitarian appeal as set out above, (for example, they were not refused entry at the border), they may also lodge a humanitarian appeal with the protection appeal.

605 In all cases where a person has lodged a protection appeal and a humanitarian appeal, the tribunal must determine the protection appeal first. The tribunal may reverse or uphold the original decision, but it may not refer a decision back to a determination officer for reassessment.

Status quo

606 Currently humanitarian appeals must be lodged to the RRA, separate to a refugee status appeal which is lodged to the RSAA. Because a refugee status claimant is generally given a permit for the duration of their appeal to the RSAA, humanitarian appeals are usually lodged following refugee status appeals.

Discussion paper and submissions

607 As discussed in *Chapter Four: Protection*, there was a high level of support for determining claims under the Refugee Convention, the Convention Against Torture and articles 6 and 7 of the International Covenant on Civil and Political Rights in a single procedure, with a single right of appeal. Over 80 percent of 40 organisations and approximately 70 percent of 35 individual submitters agreed with this proposal. Less than 10 percent of all 75 submitters were opposed.

Comment

608 This proposal would prevent failed protection claimants having a separate appeal to the tribunal on humanitarian grounds. It would allow for maximum efficiency, and is more likely to result in robust, consistent decision-making.

Deportation appeals where person has protection status

609 This section discusses appeals against deportation from persons who have already been found to be refugees or protected persons.

Proposals

Fraud

610 It is proposed that where a person with protection status is notified of deportation liability due to fraud, there be a single appeal to the tribunal to assess, in this order:

a. whether the original protection status may have been obtained through fraud, and if so

b. whether the person is currently in need of international protection and if so whether the international conventions allow deportation, and, if deportation is allowed

c. whether there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be deported from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.

Criminal offending or unlawful stay

611 It is proposed that where a person with protection status is notified of deportation liability due to criminal offending, or becomes liable for deportation due to being unlawfully in New Zealand, that there be a single appeal to the tribunal that assesses:

a. whether the person is currently in need of international protection and if so whether the international conventions allow deportation, and, if deportation is allowed

b. whether there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be deported from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.

Status quo

612 This proposal mirrors the status quo regarding refugee fraud. However, refugees who meet deportation criteria through criminal offending may only appeal on humanitarian grounds to the DRT, which has no express jurisdiction to determine international obligations.

Discussion paper and submissions

613 The discussion paper proposed that the legislation expressly prohibit the expulsion of a person where prohibited by New Zealand's international obligations. The majority of submissions supported clarifying in the legislation when a protected person may be deported. Ninety percent of 33 individual submitters and 60 percent of 34 organisations supported the proposal. Ten percent of organisations disagreed.

Comment

614 From time to time persons previously found to be in need of international protection may become liable for deportation (for example, through fraud, or serious criminal offending). As discussed in *Chapter Four: Protection*, deportation of a protected person is prohibited in many cases.

615 These proposals set out on what grounds a refugee or protected person could appeal based on the different reasons that they may become liable for deportation. The proposals recognise the fundamental obligations that New Zealand has to not deport a person. They are likely to create greater efficiencies and to result in more consistent and robust decision-making by bringing together a number of different appeals tests which currently require separate appeals.

616 These proposals address the anomaly in the current system which does not have a clear and transparent process for ensuring New Zealand's

international obligations are assessed when a refugee or protected person becomes liable for deportation through criminal offending. It also provides a process for ensuring that protection obligations are upheld where a person has been granted a temporary visa only. While under the current practice this occurs very rarely, it is important to ensure that the legislation allows for the tribunal to assess protection needs in such cases.

HOW THE TRIBUNAL WOULD OPERATE

Timing

Proposals

617 It is proposed that:

a. appeals against residence decisions must be lodged within 42 days of notification of the original decision (status quo)

b. deportation appeals to the tribunal must be lodged within 42 days of a person staying beyond the validity of their permit (status quo), or within 28 days of receiving deportation liability notice, and

c. appeals to the tribunal against a protection decline must be lodged within 10 days of notification, or within five working days of notification where the person is in detention (status quo).

618 It is proposed that the tribunal may consider out of time appeals from protection claimants only (status quo).

619 As discussed earlier, the tribunal would be able to regulate its procedures as it sees fit. This would, among other things, allow the tribunal the discretion to hear appeals on the facts and on humanitarian grounds together or separately. It would also allow the tribunal flexibility in regard to when it heard and determined an appeal from a person who is serving a prison sentence. It is proposed that the Bill provide guidance to the tribunal that it must determine appeals prior, but as close as possible, to the person's date of release from prison.

Status quo

620 The current appeal periods include 5, 10, 21 and 42 day timeframes. Appeals against residence decisions must be lodged within 42 days of notice. Appeals against deportation to the RRA must be lodged within 42 days of staying beyond the validity of a permit. Appeals against a protection decline must be lodged within 10 or 5 days of notice, depending on the form of the notice. Appeals to the High Court and DRT currently must be lodged within 21 days of notice. Out of time appeals may be accepted from refugee appellants only.

Discussion paper and submissions

621 The discussion paper suggested that the timeframe for humanitarian appeals could be reduced to 28 days. The small number of submitters who commented on timeframes generally considered that the 42 day period should be retained, or that flexibility for hearing out of time appeals should be allowed.

Comment

622 These proposals largely mirror the status quo, but increase the appeal period from 21 days to 28 days in some cases. This recognises that a person may be lodging an appeal on more than one ground. In the deportation context, it is important to have a clear appeal period, after which deportation may proceed if the person has not lodged an appeal. These proposals allow certainty that all appeal rights have been exhausted before deportation is executed. An exception is provided in the case of protection claims on the basis that international obligations are at stake.

623 It will be vital to ensure that all non-citizens arriving in New Zealand are clearly informed that they may deported if they stay beyond the validity of their visa.

Hearings

Proposals

624 It is proposed that, as with the status quo:

a. residence appeals are to be determined on the papers

b. in the case of protection appeals, the tribunal may dispense with a hearing only if the person was interviewed or given the opportunity for a hearing by a determination officer at first instance and the tribunal considers that the appeal is prima facie manifestly unfounded or clearly abusive.

625 In the case of deportation appeals, it is proposed that, as with the status quo, where the person is a New Zealand resident, the tribunal must conduct a hearing. In the case of deportation appeals where the person is a temporary entrant only, or is in New Zealand unlawfully, it is proposed that the tribunal must determine the appeal on the papers, unless, in its absolute discretion, it offers the appellant the opportunity to attend a hearing.

Status quo

626 The RSAA and DRT are generally required to hold a hearing. RRA and RRB appeals must be heard on the papers.

Discussion paper and submissions

627 A number of submitters, such as the New Zealand Association for Migration and Investment, suggested that applicants should have the opportunity to be heard in person.

Comment

628 Determining appeals on the papers is efficient and fair in the case of residence appeals, where the initial decision is also made without a hearing and the appeals are straightforward. Protection appeals are generally so complex that having an oral hearing allows for a more efficient decision to be made. It also ensures that the decision is robust and fair. Likewise it is considered appropriate for deportation appeals from residents to have a hearing.

629 Determining deportation appeals from temporary entrants on the papers has generally worked well, but from there are cases with complex credibility issues that could be resolved more quickly and accurately through a hearing.

Legal aid

Proposal

630 To transfer the current framework to the new statutory environment, it is proposed that the Legal Services Act 2000 be amended to allow legal aid to be available for protection claims and appeals, and residents appealing against deportation on the facts or on humanitarian grounds.

631 Where an appeal to the tribunal on protection and humanitarian grounds is determined together, it is proposed that legal aid be available for the whole proceeding.

632 It is proposed that the prohibition on legal aid being granted to persons unlawfully or temporarily in New Zealand for immigration purposes, and to residence applicants, be retained.

Status quo

633 The Legal Services Act 2000 sets out who may access legal aid in relation to immigration and refugee matters. It prohibits legal aid from being granted to persons unlawfully or temporarily in New Zealand, for immigration purposes. It allows legal aid to be granted in respect of refugee status decisions and appeals, and appeals from residents against deportation to the DRT. In addition, there are standard financial eligibility criteria in the Legal Services Act that the individual has to meet and their case has to have reasonable prospects of success. Refugee and eligible immigration matters make up a small portion of legal aid grants.

Discussion paper and submissions

634 The discussion paper did not present proposals in regard to legal aid, but asked for people's views on this issue. Some submitters, such as the Families Commission, suggested that legal aid should be available for those making a humanitarian appeal. Others expressed the view that legal aid should only be available to residents and protection claimants.

Comment

635 As these proposals largely mirror the status quo, there are not considered to be material cost implications for legal aid. The number of applications for and grants of legal aid for refugee matters (initial claims and appeal) has been declining over recent years. As protection numbers are projected to increase moderately in the first two years and then drop back to current low numbers, the proposals to extend legal aid to a small number of additional protection and appeal matters is estimated to be cost neutral or at a minimal cost.

636 These assumptions do not take into account the Legal Services Amendment Act 2006 which extends financial eligibility. However, this is not expected to have a material impact, as most applicants would be financially eligible now.

General rules relating to appeals

Proposal

637 The following general rules relating to all appeals to the tribunal are proposed:

a. appeals must be lodged in the prescribed manner

b. appeals must be accompanied by the prescribed fee (if any)

c. appellants must supply an address on lodgement which may be used for communication purposes and must notify the tribunal of any change of address

d. for the purpose of communicating to the appellant, the tribunal may rely on the latest address provided

e. it is the responsibility of the appellant to establish their case and they must ensure that all information, evidence and submissions that they wish to have considered in support of the appeal are provided to the tribunal before it makes its decision

f. the appellant may not challenge any finding of credibility made by the tribunal in relation to any previous appeal made to the tribunal and the tribunal may rely on any such finding

g. when an appeal is lodged, the tribunal must give the Department a copy of the acknowledgment of appeal and any information, evidence or submissions lodged, and give the Department a specified time to lodge with the tribunal any files relating to the person and any other information, evidence and submissions in relation to the appeal, as the Department sees fit

h. the tribunal must disclose for comment any information that it proposes to take into account in determining the appeal where it may be prejudicial and is from a source other than the appellant, unless specified below:

    i. the tribunal is not required to disclose information that would be likely to endanger the safety of any person, but it may use this information, and

    ii. the tribunal must not disclose classified information (as discussed in *Chapter Seven: Using classified information*), and

    iii. appeals may be withdrawn at any time by the appellant or their representative, in writing.

Status quo

638 These proposals mirror the provisions of the existing appeals bodies.

Discussion paper and submissions

639 The discussion paper did not present proposals regarding these rules, but asked for people's views generally on how the tribunal should work. There was support for a tribunal to be established in a similar way to the RSAA.

Comment

640 These proposals transfer the existing successful rules relating to the existing appeals bodies to the new tribunal. They are essential to ensure the tribunal can function efficiently, and maintain appropriate information sharing with the Department.

Powers of the tribunal

Proposals

641 To transfer the existing successful powers of the appeals bodies to the tribunal, it is proposed that the tribunal should:

a. have the power to seek and require information from any source (including government departments and third parties), but not be obliged to seek any information, evidence or submissions further to that provided by the appellant, and may determine the appeal on the basis of the information, evidence and submissions provided by the appellant (subject to paragraph 637(g) above)

b. be able to require the chief executive of the Department to seek and provide relevant information

c. be able to determine an appeal without a hearing if the person fails without reasonable excuse to attend a notified hearing with the tribunal

d. have the powers to summons witnesses and necessary related powers, similar to the provisions in the Commissions of Inquiry Act 1908, and

e. have the powers to receive evidence, similar to section 4B of the Commissions of Inquiry Act.

642 It is proposed that no member is personally liable for any act of the tribunal. It is also proposed that the Bill establish offence provisions relating to obstructing or failing to comply with requirements of the tribunal, similar to section 9 of the Commissions of Inquiry Act.

643 It is proposed that the tribunal have the power to require the Department, within the bounds of the Department's agreed limitations on its use of biometric information, to collect biometric information from an appellant for the purpose of identity verification. As with the proposals regarding biometric information in *Chapter Eleven: Biometric information*, this power would only come into force following an assessment of the evidence of information standards and privacy guidelines for the use of biometric technologies and the development of the appropriate regulations, in consultation with the Privacy Commissioner.

Status quo

644 With the exception of the biometrics proposal, these proposals draw on existing powers of the appeals bodies. For example, the DRT and RSAA are currently deemed to have the powers of a Commission of Inquiry under the Commissions of Inquiry Act.

Discussion paper and submissions

645 The discussion paper did not present proposals regarding the powers of the tribunal, but asked for people's views, particularly on the commission of inquiry powers. A number of submitters considered that the tribunal should have inquisitorial powers, akin to those of the RSAA.

Comment

646 It is vital that the tribunal has the same ability to conduct equally robust investigations into identity as the Department, particularly in the context of potential fraud. For clarity and transparency, all powers of the tribunal will be set out in the new Bill without reference to the Commissions of Inquiry Act.

647 The primary use of biometric information would be to compare it against the departmental biometrics database or any relevant alert lists, within the bounds of the Department's agreed limitations on its use of biometric information.

Immigration consequences of appeals

Proposals

648 Where an appeal is allowed the person may continue to reside in New Zealand on their resident visa, where they have one. Otherwise:

a. the tribunal may direct the grant of a temporary visa for up to 12 months (with no further appeal rights), or

b. an immigration officer must grant a resident visa or a temporary visa of no less than six months duration.

649 It is proposed that the tribunal may suspend deportation liability of residents for up to five years. The five year period could be set to start upon an offender's release from prison. This would allow the tribunal to give a second chance to avoid deportation, subject to good behaviour or other specified conditions. Deportation liability would be reactivated where the conditions were not met.

650 Where an appeal is not allowed, the person may face immediate deportation. It is also proposed that the tribunal may vary or waive the ban period in cases where it considered that a failed protection claimant genuinely believed that they had a valid protection claim and was not considered to be abusing the protection system with a spurious claim.

Status quo

651 Where an appeal is allowed by the DRT, a person may remain on their residence permit. Where an appeal is allowed by the RRA, it may direct the Department to grant a temporary stay or residence. The RSAA may not grant any form of immigration status and a person approved by the RSAA must apply for a permit on that basis, according to immigration policy.

Discussion paper and submissions

652 Given the technical nature of this issue, the discussion paper did not present proposals on it, and there were no specific submissions.

Comment

653 As with the status quo, this proposal would allow the tribunal to determine that a person's humanitarian circumstances only required an additional stay of no more than 12 months. Persons granted a temporary visa following direction of the tribunal could not appeal against the obligation to leave New Zealand following the expiry of that visa.

654 This proposal would also allow the government to establish policy relating to the immigration status of persons in need of international protection. As noted in *Chapter Four: Protection*, the immigration status given to refugees and protected persons is a matter for Immigration Instructions.

655 In regard to suspending liability for deportation, as proposed in *Chapter Five: Deportation*, there may be cases where the threat of deportation can have a positive effect on behaviour, and where a second chance is justifiable.

When an appellant is overseas or otherwise out of contact

Proposal

656 It is proposed that where a person has a protection or deportation appeal before the tribunal and leaves New Zealand for any reason, their appeal should be treated as withdrawn. Residence appeals may be decided regarding an appellant who has left the country.

Status quo

657 This proposal mirrors the status quo for residence and refugee appeals. The 1987 Act is silent on the effect of a person leaving the country who has lodged a deportation appeal.

Discussion paper, submissions and comment

658 This issue is technical in nature and was not consulted. It is desirable to be clear and transparent on the implications of leaving New Zealand while an appeal is undecided.

FURTHER APPEALS AND JUDICIAL REVIEW

Proposals

659 It is proposed that judicial review may be sought for a decision, except where that person has a *de novo* appeal to the tribunal.

660 In light of the aim to create an efficient appeals system that does not result in years of delays, and the principles that govern New Zealand appeal structure generally, it is proposed that:

a. a person may seek leave of the High Court to appeal a decision of the tribunal on a point of law, within 28 days of notification of the tribunal decision

b. judicial review proceedings must be lodged within 28 days of the decision to be reviewed

c. the High Court must endeavour to determine appeals on points of law and judicial review together where possible, and

d. as with the status quo, the Crown would have the same rights of appeal as the applicant themselves.

Status quo

661 The 1987 Act allows judicial review to be sought for any decision made under the 1987 Act within three months of the date of the decision. This means a person may seek judicial review at multiple points in the immigration process.

662 Currently, appeals on points of law may not be made from the RSAA, but may be made from the other appeals bodies. Where a person appeals to the High Court and applies for judicial review, the High Court must endeavour to hear the two appeals together.

Discussion paper and submissions

663 The discussion paper did not present proposals in regard to further appeals, but asked for people's views on this issue. A number of submitters considered that there should an avenue of appeal to the High Court, from the tribunal, on points of law.

Comment

664 It is a general principle in New Zealand that a person should have a first appeal as of right and a second appeal "by leave". This principle was followed when appeal structures were looked at during the development of the Supreme Court.

665 The immigration context has particular imperatives around time for the system to function. The longer a person liable for deportation remains in the country, the greater the likelihood of them establishing ties to New Zealand which may justify their stay. In addition, appeals with little or no chance of success can be used to "buy time" in New Zealand.

The Human Rights Commission

Proposal

666 It is proposed that:

a. no complaints may be made under the Human Rights Act 1993 that relate to the content or application of immigration legislation, regulations or instructions, and the Human Rights Commission may not bring proceedings in relation to these matters

b. subject to paragraph 666(a) the Human Rights Commission may undertake all of its other functions including, but not limited to:

i. inquiring generally into any matter, or any practice, or any procedure, if it appears to the Commission that the matter involves, or may involve, the infringement of human rights

ii. making public statements in relation to any matter affecting human rights

iii. receiving and inviting representations from members of the public on any matter affecting human rights, and

iv. reporting to the Prime Minister on any matter affecting human rights, including the desirability of legislative, administrative, or other action to give better protection to human rights, or on the implications of any proposed legislation (including subordinate legislation) or proposed policy of the Government that the Commission considers may affect human rights.

Status quo

667 The 1987 Act restricts the ability of a person to make a complaint regarding the content or application of immigration law or policy to the Commission on the basis that immigration matters inherently involve different treatment on the basis of personal characteristics. The Commission may, however, perform most of its broader functions under section 5 of the Human Rights Act. The provisions allow, for example, complaints to be made regarding discrimination that is not based on law or policy, by the Department, in the course of providing its services. They also allow the Commission to report to government on issues of discrimination in policy which it considers government should reconsider.

668 The current provisions date from 2002 and replaced a much broader restriction in the Human Rights Act.[13]

Discussion paper and submissions

669 There was no proposal for change in the discussion paper. The Human Rights Commission recommends that section 149D be repealed on the basis that the Commission should be able to bring civil proceedings relating to immigration law or policy arising from complaints to the Human Rights Tribunal.

Comment

670 This proposal ensures that the Commission has a role in commenting on proposed law and policy, and a role in investigating infringements of human rights that fall outside the application of agreed law and policy. For example, in the context of the Skilled Migrant Category, the Commission could investigate alleged discrimination on the basis of ethnicity which is not a policy criterion, but could not investigate discrimination on the basis of a person being over 55 years of age, which is an agreed policy criterion.

671 The proposal mirrors the status quo in substance, but drafting of the Bill could clarify the breadth of the Human Rights Commission's role and the limited nature of the restriction. This proposal is considered appropriate in

[13] Nothing in [the Human Rights Act] shall affect any enactment or rule of law, or any policy or administrative practice of the Government of New Zealand that (a) relates to immigration or (b) distinguishes between NZ citizens and other persons, or between British subjects or Commonwealth citizens and aliens (Section 153 (3)).

light of proposals to establish a clear framework for investigating the application of law and policy through the independent tribunal, as well as the power of the Ombudsmen to address complaints about departmental decision-making. It would be counter to the review's intention to create fair, fast and firm decision-making processes to allow a parallel dispute resolution system for individual cases.

REGULATIONS

672 It is proposed that the Governor-General may from time to time, by Order in Council, make regulations for prescribing any procedural matters in relation to proceedings before the tribunal.

Executive Summary - Chapter 7 Using classified information

Proposal – Using classified information

I propose:

EITHER, OPTION A:

a. classified information may be used in immigration and protection decision-making with safeguards including non-classified summaries of information, special advocates, and appeals determined by a panel of up to three Judges on the Immigration and Protection Tribunal, as set out in detail below

OR, OPTION B:

b. the status quo be retained, that is, the Department does not use non-disclosed classified information in standard immigration decision-making

OR, OPTION C:

c. decisions on the use of classified information in decision-making be deferred to the review of Part 4A of the 1987 Act.

In addition to Option A, B or C, I propose that:

EITHER

officials report back on the review of Part 4A following the conclusion of Mr Zaoui's case,

OR

officials report back on Part 4A prior to finalising the draft Bill for introduction to Parliament in April 2007.

Status quo - The 1987 Act has no provisions for the use of classified information in decision-making other than Part 4A which is outside the scope of this review. This means that the Department does not use non-disclosed classified information in standard immigration decision-making.

Part 4A has provisions that allow for classified security information to be used in cases where an individual is a threat to security, public order or public interest, and where the appropriate response is to detain and deport a non-citizen.

Discussion paper and submissions - Public submissions on the use of classified information were mixed. Many submitters considered that decision-making and review processes need to be transparent, and that applicants should be provided with at least a summary of the information to enable them to challenge that information. A number of submitters recommended that appeals should be heard by a panel of three independent Judges.

Many submitters indicated strong opposition to the proposals on the grounds that they contravene a non-citizen's right to a fair hearing and the principles of administrative and natural justice. These submitters were of the view that all prejudicial information, including classified information, should be fully disclosed to applicants if it is to be used in decision-making. While some noted that the safeguards would help to alleviate their concerns, others were opposed to any use of classified information in decision-making. The Privacy Commissioner recommends that protection decisions are not made on the

basis of undisclosed classified information, in order to accord better with fair information handling and the practices of Canada, the UK and Australia.

Comment – The proposals for the use of classified information have carefully considered the concerns raised in public submissions in light of the small number of cases likely to be affected. Under Option A, a range of safeguards are proposed including requiring summaries of information, special advocates, and all appeals to be heard by a panel of up to three Judges on the independent tribunal. Option A would enable New Zealand to make immigration decisions using classified information in a way that reinforces our reputation as fair and principled.

Option A is supported by the Department, the New Zealand Security Intelligence Service, the New Zealand Police, the Government Communications Security Bureau, and the Ministry of Foreign Affairs and Trade. Justice is comfortable with either Option A or Option B.

On balance, bearing in mind the proposed safeguards and special appeals mechanisms, that the classified information must relate to issues of security, criminal conduct or significant international reputation considerations, and the significant risks New Zealand may be exposed to without these provisions, Option A is considered justifiable.

Option B would not allow for the use of classified information generally, may prevent New Zealand from making appropriate immigration decisions, and is not recommended. Classified information could be used only to locate open-source information that can be put to the applicant for comment. In many cases, this approach is successful. In other cases, reliable open source information cannot be found.

Under Option C, proposals on the use of classified information could be deferred until the review of Part 4A. This review is currently deferred until Mr Zaoui's case is completed. Deferring all decisions on classified information until Mr Zaoui's case is completed is not recommended on the basis that this case could be delayed for some time.

If Option A is agreed, officials could report-back on proposals for Part 4A in light of these decisions, for inclusion in the Bill prior to introduction to Parliament in April 2007.

The detailed proposals under Option A are set out below.

Proposal – Option A: Using classified information

I propose that the Bill set out a clear definition of classified information drawing on key common elements of existing legislative definitions.

I propose that classified information should only be used where national or international security, criminal conduct or significant international reputation issues for New Zealand may be an issue. Within this limitation, I propose that classified security information and other classified information may be able to be used, without disclosure, in visa, protection, and deportation decision-making (where Part 4A does not apply).

In all initial decisions using classified information the following safeguards would apply:

- Classified information can be used only in an adverse decision where there is insufficient reliable open-source information available.
- All immigration decisions involving classified information must be made by the Minister.
- All protection decisions involving classified information must be made by senior security-cleared determination officers to ensure that the experts in international law

are making the decisions.

- The decision-maker could receive a briefing from the relevant agency that held the classified information, relating to the information itself and its reliability.
- The decision-maker must, following consultation with the provider of the information, approve a summary of the information for release to the applicant except to the extent that a summary of any particular part of the information would involve disclosure that would be likely to prejudice the interests referred to in the definition of classified information.
- Where a decision relied on classified information, the applicant must be informed that the decision had been made on the basis of classified information, the broad reasons for the decision (such as character policy in a residence context or exclusion in a protection context) and what, if any, appeal rights were available.

The following persons would have access to appeal (where they ordinarily would):

- protection claimants in New Zealand
- residence applicants in New Zealand and offshore, and
- persons liable for deportation.

All appeals to the tribunal involving classified information must be heard by a panel of up to three Judges on the tribunal, depending on the complexity of the case. The appellant must also be able to choose from a panel of special advocates who have access to the classified information but may not disclose it, and whose role is to advocate on behalf of the appellant. The Judge(s) would also be required, following consultation with the agency that provided the information, to approve a non-classified summary of the classified information where possible.

CHAPTER SEVEN: USING CLASSIFIED INFORMATION

PURPOSE

673 This chapter discusses the recommendations on:

- defining classified information in the Immigration Bill (the Bill)
- using classified information in immigration, protection and deportation decision-making, and
- special appeals mechanisms for classified information.

STATUS QUO

Using classified information generally

674 Classified information in a general sense refers to official information that has a New Zealand government classification. Official information is classified according to the degree of harm that could result from its unauthorised disclosure. When official information has a classification, specified standards for its handling and protection must be followed. Classified information may include information which has been classified by a government other than New Zealand's. In this chapter, "classified information" is given a more specialised and restricted meaning (see paragraphs 695 and 696).

675 Classified information is subject to the same rules of disclosure as any other official information. Provisions under the Privacy Act 1993 and the Official Information Act 1982 (the OIA) allow information, including classified information, to be *withheld* from a person in some cases. These Acts do not govern whether classified information may be *used* in decision-making. On the basis of fairness and transparency, the Department does not use non-disclosed classified information in standard immigration decision-making.

Using classified security information

676 Part 4A of the Immigration Act 1987 (the 1987 Act) has its own natural justice arrangements that allow for non-disclosed classified security information to be used in cases where an individual is a threat to security, public order or public interest, and where the appropriate response is to detain and deport. Part 4A is outside the scope of this review and will be addressed at a later date. This chapter focuses on the question of whether classified information, including classified security information, should be able to be used in cases where Part 4A does not apply.

RATIONALE FOR PROPOSALS

677 The ability for classified information to be used in immigration and protection decision-making is limited. Part 4A of the 1987 Act has been used once only, in the case of Mr Zaoui. There are a small number of cases each year where classified information could give clear and reliable reasons for declining an immigration application, but where the high security threshold set by Part 4A is not met.

OPTIONS FOR CHANGE

Proposals

678 It is proposed that:

EITHER, OPTION A:

a. classified information may be used in immigration and protection decision-making with safeguards including non-classified summaries of information, special advocates, and appeals determined by a panel of up to three Judges on the Immigration and Protection Tribunal (the tribunal), as set out in detail below

OR, OPTION B:

b. the status quo be retained, that is, the Department does not use non-disclosed classified information in standard immigration decision-making

OR, OPTION C:

c. decisions on the use of classified information in decision-making be deferred to the review of Part 4A of the 1987 Act.

679 In addition to Option A, B or C, I propose that:

EITHER

a. officials report back on the review of Part 4A following the conclusion of Mr Zaoui's case,

OR

b. officials report back on Part 4A prior to finalising the draft Bill for introduction to Parliament in April 2007.

Status quo

680 As noted above, the 1987 Act has no provisions for the use of classified information in decision-making other than Part 4A. This means that the Department does not use non-disclosed classified information in standard immigration decision-making.

Discussion paper and submissions

681 The discussion paper proposed options that would allow for classified information to be used in immigration and protection decision-making without disclosure to the person concerned. The discussion paper proposed that immigration decisions using classified security information be reviewable by the Inspector-General of Intelligence and Security, and that immigration decisions using other classified information, and protection decisions, be reviewable by a Judge on the proposed new independent tribunal.

682 Organisations that made submissions included immigration consultants, refugee and migrant groups, ethnic councils, law societies, community law centres, human rights groups, other community groups, and businesses.

683 Many submitters indicated their support for the proposals to use classified information, with the strongest level of support for the use of classified security information in immigration decision-making (approximately 55

percent of 112 submitters). There was slightly less support for the use of other classified information in immigration decision-making (approximately half of all 112 submitters).

684 There were clear differences between individual responses and responses from organisations. Individuals were much more likely to support the proposals than oppose them. More organisations opposed the use of classified information than supported it.

685 Many submitters (both those who supported and opposed the proposals) considered that:

- decision-making and review processes need to be transparent
- applicants should have access to special advocates
- applicants should be provided with at least a summary of the information to enable them to challenge that information, and
- reviews should be undertaken by an independent body other than by the Inspector-General of Intelligence and Security or a member of the proposed tribunal acting alone.

686 Of those who opposed the proposals, many indicated strong opposition 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. For example, the New Zealand Law Society noted that there is no reason to distinguish between potentially prejudicial information, whether classified or unclassified and that classified information should remain as a "trigger" for the location of open source information only.

Comment

687 The proposals for the use of classified information have carefully considered the concerns raised in public submissions in light of the small number of cases likely to be affected. Under Option A, a range of safeguards are proposed including requiring summaries of information, special advocates, and all appeals to be heard by a panel of up to three Judges on the independent tribunal.

688 Option A would enable New Zealand to make immigration decisions using classified information in a way that reinforces our reputation as fair and principled. Providing robust safeguards is generally consistent with the development of New Zealand's jurisprudence both in terms of natural justice and the New Zealand Bill of Rights Act 1990.

689 Option A is supported by the Department of Labour, the New Zealand Security Intelligence Service, the New Zealand Police, the Government Communications Security Bureau, and the Ministry of Foreign Affairs and Trade. The Ministry of Justice is comfortable with either Option A or Option B.

690 Option B (the status quo) does not allow for the use of classified information generally and may prevent New Zealand from making appropriate immigration decisions. Option B is not recommended.

691 Under Option C, proposals on the use of classified information could be deferred until the review of Part 4A. This review is currently deferred until Mr Zaoui's case is completed. Deferring all decisions on classified information until Mr Zaoui's case is completed is not recommended on the basis that this case could be delayed for some time.

692 If Option A is agreed, officials could report-back on proposals for Part 4A in light of these decisions, for inclusion in the Bill prior to introduction to Parliament in April 2007.

693 The remainder of this paper discusses the proposals should Option A be agreed.

WHAT IS CLASSIFIED INFORMATION?

Proposals

694 It is proposed that classified information should only be used where national or international security issues, criminal conduct or significant international reputation issues for New Zealand may be an issue.

695 Drawing on key common elements of existing legislative definitions, it is proposed that "classified information" is classified security information and other classified information that:

a. may lead to the identification of the source of the information where the source will not consent to disclosure, or the methods of particular agencies (defined below), or a particular operation of a particular agency, and

b. if disclosed would be likely to prejudice the security or defence of New Zealand or New Zealand's international relations, or prejudice the entrusting of information to New Zealand on a basis of confidence, or prejudice the maintenance of the law, or endanger the safety of the applicant or another person (these mirror the conclusive reasons for withholding information under the OIA and the Privacy Act).

696 It is further proposed that:

a. "classified security information" is classified information originated or held by (or provided to any other government department through) an intelligence and security agency (such as the New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau), and

b. "other classified information" is classified information originated or held by a government department other than an intelligence and security agency, but does not include classified security information.

697 Any classified information that was to be used in an immigration or protection decision or appeal would need to have official certification in writing that it was classified information.

Status quo

698 There is no definition of classified information in the 1987 Act for the purpose of immigration decision-making, because it is generally not used, but there is in Part 4A and it is similar to that proposed above.

Discussion paper and submissions

699 Establishing a clear and limited definition of classified information in the legislation received a high level of support in public submissions.

Comment

700 It is important to be clear that the purpose for using classified information without disclosure would be limited to cases where its use was proportionate to the risk posed by the individual if they were allowed to enter or remain in New Zealand. For this reason it is proposed that classified information should only be used where national or international security issues, criminal conduct or significant international reputation issues for New Zealand may be an issue.

701 It is also important to have a clear definition of what classified information is. The Passports Act 1992, the Terrorism Suppression Act 2002 and Part 4A of the 1987 Act all have definitions of classified information that draw on the OIA. Other classified information refers to information classified by departments other than NZSIS and the Government Communications Security Bureau, such as the New Zealand Police.

INITIAL DECISIONS USING CLASSIFIED INFORMATION

Using classified information to decline a visa application

Proposals

702 Bearing in mind the safeguards and special appeals mechanisms discussed later, it is proposed that classified security information and other classified information may be able to be used in any decision to refuse a visa without disclosing the information to the applicant concerned. As discussed above the classified information must relate to issues of national or international security, criminal conduct or significant international reputation issues for New Zealand.

703 Given the different legislative structures for classified security information and other classified information, two sets of processes are proposed.

Proposals regarding classified security information

704 Under the New Zealand Security Intelligence Act 1969, the NZSIS has general powers that mean it may make recommendations in respect of matters to be decided under the Citizenship Act 1977 or the Immigration Act 1987, to the extent that those matters are relevant to security. While these provisions are used in the citizenship context, they have never been used in the immigration context, due to the Department's requirement to put all potentially prejudicial information to an applicant for comment.

705 To use this existing framework, it is proposed that the Minister of Immigration (the Minister) may rely on a recommendation of the NZSIS which is based on classified security information, in relation to an immigration decision, without disclosing the information to the applicant for comment. This would allow the Minister to decline a visa application on the basis of classified security information.

Proposals regarding other classified information

706 There are no existing mechanisms for the use of other classified information in immigration decision-making. For the reasons discussed above, it is proposed that the Minister may use other classified information in any decision to refuse a visa according to the relevant Immigration Instructions or legislation without disclosing the information to the applicant concerned. The classified information must relate to issues of national or international security, criminal conduct or significant international reputation considerations, and be relevant to the statutory exclusion grounds or Immigration Instructions on character criteria.

Status quo

707 As noted, classified information may not be used in decision-making unless it has been put to the applicant for comment. It is currently only used to locate open-source information that can be put to the applicant for comment. In many cases, this approach is successful. In other cases, reliable open-source information cannot be found.

Discussion paper and submissions

708 As noted above, many submitters indicated their support for the proposals to use classified information, with the strongest level of support for the use of classified security information in immigration decision-making (approximately 55 percent of 112 submitters). There was slightly less support for the use of other classified information in immigration decision-making (approximately half of all 112 submitters).

709 Of those who opposed the proposals, many indicated strong opposition 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. These concerns have been carefully considered in light of the small number of cases likely to be affected, and the range of safeguards that would help deliver fairness in a different way.

Comment

710 Allowing decision-makers to withhold potentially prejudicial information that was classified would strengthen the ability of New Zealand to choose who may enter and stay. This approach would align with the provisions in the OIA that allow information to be withheld. It would allow New Zealand to make appropriate decisions based on all available information. There are likely to be a very small number of cases each year where classified information is relevant and reliable open-source information is not available.

711 It is important that agencies that collect intelligence information that may be relevant to immigration decision-making have confidence that this information will be protected if it is disclosed to the Department of Labour (the Department). Without clear guidelines for the protection of such information there is a risk that such information may not be disclosed.

712 Australia, Canada and the United Kingdom (UK) all allow security and non-security related classified information to be used in immigration decision-making. Australia allows any classified information to be used to inform immigration decisions. In Canada, security or criminal intelligence information may be used in decisions relating to security, violating human or international rights, serious criminality or organised criminality. In the UK, classified information may be used in cases of national security, or for other public interest reasons.

Using classified information in protection decision-making

Proposal

713 On balance, bearing in mind the safeguards discussed below, it is proposed that classified security information and other classified information should be able to be used in protection decisions, where national or international security, criminal conduct or significant international reputation considerations may be an issue, without disclosing the information to the person concerned. This proposal would not change the criteria for the protection decision. The protection decision would still have to be made according to the relevant international conventions.

Status quo

714 Potentially prejudicial information and reasons for decisions are currently always given to refugee status claimants. This means that classified information cannot currently be used in deciding a protection claim. This may prevent New Zealand from making accurate protection determinations when reliable open-source information is unavailable.

Discussion paper and submissions

715 The response to the use of classified information in refugee/protection cases was reasonably even, with approximately 45 percent indicating support and approximately 40 percent indicating opposition (of 112 submitters).

716 The Privacy Commissioner recommends that protection decisions are not made on the basis of undisclosed classified information, in order to better accord with fair information handling and the practices of Canada, the UK, and Australia. This proposal below carries a high risk of criticism, from refugee advocates and other interested parties.

Comment

717 Protection and immigration decision-making are clearly linked. Once a non-citizen is granted protection status, they can then apply for residence on that basis. It is problematic when one set of decision-makers do not have information that may be available to a later set of decision-makers.

718 Protection decision-making is different to standard immigration decision-making. Temporary and residence policy have character provisions that set a threshold for approving an application. Protection decisions are based on international conventions and do not factor in character issues, except in the most extreme cases. Therefore, it would not usually be possible to decline protection status on the basis of an NZSIS recommendation, although such a recommendation could be used for temporary and residence decisions.

719 Classified information could, however, be useful in determining that someone was excluded from protection under the relevant international convention. In particular, other classified information about a country situation and other classified information that relates to the activities of the claimant would be useful in assessing both exclusion provisions and credibility in protection decision-making.

720 Canada, Australia and the UK do not allow the use of classified information in protection decision-making, on the basis that it cannot be disclosed to the claimant and that determining an international obligation requires fairness and natural justice standards to be upheld.

Using classified information in deportation decision-making

Proposal

721 It is proposed that, where Part 4A does not apply, the Minister may use classified security information and other classified information in a decision regarding deportation liability without disclosing the information to the person concerned, with the safeguards discussed below. As discussed above, the classified information must be related to national or international security, criminal conduct or significant international reputation considerations.

Status quo

722 Classified information is not currently used in deportation decision-making, other than to help locate open source information.

Discussion paper and submissions

723 The discussion paper did not expressly discuss using classified information in deportation decision-making, but was clear that the proposals related to situations where Part 4A did not apply. It became apparent in developing the proposals for change that it may be possible for classified information to be relevant to decisions to deport where the high threshold for Part 4A would not be reached. The proposal to be able to use classified information in deportation decision-making addresses this issue.

Comment

724 Liability for deportation is discussed in *Chapter Five: Deportation*. There is no proposal to introduce new criteria for deportation on the basis of classified information. Rather, this proposal relates to the ability to use classified information to assist with assessing the standard deportation criteria.

725 In the deportation context, classified information may be relevant in decisions to deport a temporary entrant where criminal conduct or

international reputation considerations were at issue, or in the case of deportation on the grounds of being a threat or risk to national or international security where other classified information was relevant to the decision.

Safeguards for all initial decisions (visas, protection and deportation) using classified information

Proposal

726 The following safeguards are proposed:

a. Classified information can be used only in an adverse decision where there is insufficient reliable open-source information available.

b. All immigration decisions involving classified information must be made by the Minister.

c. All protection decisions involving classified information must be made by senior security-cleared determination officers to ensure that the experts in international law are making the decisions, not the NZSIS, or the Minister.

d. The decision-maker could receive a briefing from the relevant agency that held the classified information, relating to the information itself and its reliability.

e. The decision-maker must, following consultation with the agency that provided the information, approve a summary of the information for release to the applicant except to the extent that a summary of any particular part of the information would involve disclosure that would be likely to prejudice the interests referred to in the definition of classified information.

f. Where a decision relied on classified information, the applicant must be informed that the decision had been made on the basis of classified information, the broad reasons for the decision (such as character policy in a residence context or exclusion in a protection context) and what, if any, appeal rights were available.

g. Independent appeal of the initial decision is provided for in most cases, as proposed below.

Status quo

727 As classified information is not currently used in decision-making, there are no safeguards for its use.

Discussion paper and submissions

728 As noted above, there was clear feedback from the public submissions (both those who supported and opposed the proposals) that:

- decision-making and review processes need to be transparent
- applicants should be provided with at least a summary of the information to enable them to challenge that information.

Comment

729 The proposed safeguards are designed to maximise fairness in initial decisions using classified information. They respond to the public's clear view that as much transparency as possible should be provided for.

APPEALS INVOLVING CLASSIFIED INFORMATION

730 Proposals for the use of classified information are dependent on adequate safeguards to deliver fairness. In addition to initial decisions being made by the most senior decision-makers and ensuring the use of classified information as a "last resort" option, special appeals mechanisms are an important safeguard.

What special appeals mechanisms do other countries use?

731 In Australia, classified information may be used to inform immigration decisions. In such cases, only generic reasons for decisions are given to applicants and there are no appeal mechanisms.

732 In Canada, the Minister may make a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organised criminality. The certificate may be based on security or criminal intelligence information. The certificate is then referred to the Federal Court for review. The Judge's determination is final and is not open to judicial review, but may be challenged under the Canadian Charter of Rights and Freedoms. There is a high number of challenges under the Charter.

733 In the UK, where the Secretary of State deports or excludes someone from the UK on national security grounds, or for other public interest reasons, on the basis of classified information, the person may appeal to the Special Immigration Appeals Commission (SIAC). Three members hear each appeal, including a High Court Judge and a member of the Asylum and Immigration Tribunal. Special advocates are used to advocate to SIAC on the appellant's behalf. They have access to the classified information but may not disclose it to the appellant. Between 1997 and 2005 SIAC heard 11 appeals.

734 The mechanisms in place in Canada and the UK are considered to be fairer than the Australian model which has no appeal rights, but they have both received criticism for contravening the rules of fairness and natural justice. This criticism and recommendations for improvements are useful for New Zealand to consider when addressing this issue. The proposals below draw on the UK model in particular, and the recommendations of a recent House of Commons report. It is important to note, however, that the scale of the issue in New Zealand is much smaller than in the UK or Canada. The proposals below, therefore, are tailored to New Zealand's context.

Avenues of appeal relating to the use of classified information

Proposals

735 It is proposed that, where a person would ordinarily have access to an appeal right to the tribunal, and classified information is at issue, the person should have access to special appeals mechanisms. This means that access

to special appeal mechanisms where classified information had been used would be available for:

a. residence applicants (in New Zealand or offshore)

b. protection claimants in New Zealand, and

c. persons liable for deportation who ordinarily have access to a deportation appeal.

736 It is proposed that, with the exception of the proposals for additional safeguards below, such as the summary of information and the panel of Judges, all rules relating to the appeal would mirror the standard appeal. For example, residence appeals are determined on the papers and protection appeals generally require hearings.

737 It is proposed that the tribunal may consider classified information in the context of an appeal where the classified information was not considered in a prior decision, and that the special appeals mechanisms would apply in these cases also.

Access to appeals where decision relies on classified information

Type of decision	**Standard appeal right**	**Appeal right where classified information is being used**
Immigration decisions		
Temporary entry applicant offshore	No right of review or appeal	No right of review or appeal
Temporary entry applicant onshore (if lawful)	Departmental reconsideration only	Departmental reconsideration only
Residence applicant onshore or offshore	May appeal to the tribunal	May appeal to the tribunal
Protection		
Protection claimant (onshore only)	May appeal to the tribunal	May appeal to the tribunal
Deportation		
Temporary entrant liable for deportation	No appeal on the facts, may appeal to the tribunal on humanitarian grounds	No appeal on the facts, may appeal to the tribunal on humanitarian grounds
Resident liable for deportation	May appeal to the tribunal on the facts and humanitarian grounds	May appeal to the tribunal on the facts and humanitarian grounds

Status quo

738 As classified information is not currently used in decision-making, there are no existing special appeals mechanisms.

Discussion paper and submissions

739 The discussion paper proposed that offshore applicants should have no access to special appeal mechanisms where classified information was used to decline an application. This proposal was an attempt to identify the kinds

of applicants with sufficient connection to New Zealand to justify special appeals mechanisms.

Comment

740 This proposal ensures that a person has the same access to independent appeal whether or not classified information is at issue. The proposal extends the original proposal to allow all residence applicants access to special appeals mechanisms on the basis that some offshore applicants may have strong connections to New Zealand. This may also help address some stakeholder concerns.

741 As noted above, with the exception of the special appeals mechanisms discussed below, such as special advocates and summaries of information, the general rules applying to the standard appeal right would remain. For example, timeframes for lodging appeals and rules relating to who may have a hearing would remain the same.

General provisions relating to classified information-related appeals to the tribunal

Proposals

Who must hear the appeal

742 To build in special fairness mechanisms to the appeals process, because the person has not had the opportunity to comment on the prejudicial information, it is proposed that all appeals to the tribunal involving classified information must be heard by a panel of up to three Judges on the tribunal, depending on the complexity of the case. This would ensure that the person or persons hearing the appeal are of the highest standing, and that international sources have confidence in sharing information with New Zealand.

743 As discussed in *Chapter Six: Review and appeal*, the Chair will have the discretion to require up to three members to hear an appeal in complex cases. Provision has been made for District Court Judges to join a panel on the tribunal to determine a classified information appeal.

Grounds for appeal

744 It is proposed that where classified information was at issue and the person could appeal to the tribunal, the standard residence, protection or deportation appeals tests would apply. For example, if the person was declined residence, the primary role of the tribunal would be to assess whether the person met residence criteria. If the person was unlawfully in New Zealand and liable for deportation, the primary role of the tribunal would be to assess the humanitarian appeals test.

745 In addition, it is proposed that in appeals involving classified information, the tribunal must assess:

a. whether the classified information at issue is relevant to the applicable Immigration Instructions, immigration legislation or international conventions

b. whether the information at issue is classified information

c. whether the information is credible, and

d. the integrity of the overall conclusions drawn, in light of all the information available, including the classified information and the relevant criteria under which the initial decision was made.

Briefing by relevant agency

746 It is proposed that the Judge(s) could receive a briefing from the relevant agency that held the classified information, relating to the information itself and its reliability.

Release of summary

747 As with the initial decision, it is proposed that the Judge(s), following consultation with the agency that provided the information, must approve a summary of the information for release to the appellant except to the extent that a summary of any particular part of the information would involve disclosure that would be likely to prejudice any of the interests referred to in the definition of classified information.

Special advocates

748 Given the limitations placed on an appellant's ability to know the case against them and present their case to the tribunal, it is proposed that appellants be able to choose from a panel of security-cleared special advocates. Special advocates are barristers or solicitors who may have access to the relevant classified information but may not disclose it. The functions of the special advocate are to represent the interests of the appellant by:

a. making submissions to the tribunal at any hearings from which the appellant and his or her representatives are excluded

b. challenging the classification of the information relied upon by the Crown, and its relevancy

c. challenging the decision of the Department in relation to the appellant's application

d. cross-examining witnesses at any hearings, and

e. making written submissions to the tribunal.

749 Based on the UK's experience, it is proposed that:

a. Once a special advocate has seen the classified information, they may have no further contact in person with the appellant. The special advocate may apply to the tribunal in writing, for further written communication with the appellant. The appellant may communicate with the special advocate in writing.

b. The Bill would include a provision modifying the special advocate's standard obligations as a lawyer, such as the duty to disclose to a client all information received that relates to the client's affairs. The Bill would also need to modify the application of section 4 of the Lawyers and

Conveyancers Act 2006, which requires lawyers to act in accordance with certain fundamental obligations.

750 Procedures would be required for how special advocates are to be appointed, developing appropriate training and practice guidelines, and providing appropriately cleared research resources. It is proposed that the Bill provide for these procedures to be developed in regulations. At this stage is it considered that the Legal Services Agency would be the most appropriate agency to maintain the list of special advocates and to support them administratively.

751 As discussed in *Chapter Six: Review and appeal*, the tribunal would have the power to call witnesses. This power would allow for special advocates to request the tribunal to call particular witnesses. In the context of classified information-related appeals, the tribunal would be required to protect the classified information from disclosure. It is proposed that guidelines and procedures for calling witnesses in the classified information appeal context be developed in regulations.

What the tribunal may do

752 The tribunal would have the power to uphold or overturn the original decision. It would not have the power to release the classified information. In the case of residence appeals only, where necessary in the circumstances (for example for further processing) the tribunal could refer the decision back to the Department or the Minister for reconsideration. In the interests of efficiency, where possible, the tribunal should make a final decision itself.

General practices and procedures to protect classified information

753 Any procedure that involves the use of classified information requires measures to ensure the physical protection of the information. It is proposed that measures for both special advocates and the tribunal to hold classified information be developed in regulations.

Status quo

754 As classified information is not currently used in decision-making, there are no existing special appeals mechanisms.

Discussion paper and submissions

755 There was strong support for independent appeals mechanisms. A number of public submissions expressed the view that three people should determine these appeals as in the UK. As discussed in *Chapter Six: Review and appeal*, in particularly complex cases the tribunal would have the discretion to have up to three members determine an appeal. Chapter Six allows for immigration-warranted District Court Judges to be seconded to the tribunal to join a panel to determine a classified information appeal. This approach would allow consideration of, on a case-by-case basis, the cost involved and the level of interest at stake.

756 There was also strong support from submitters for the use of special advocates, particularly where the person could choose from a panel, and for a requirement to release a summary of the information where possible.

Comment

757 The proposals for the special appeals to the tribunal build in three key safeguards: using Judges to hear the appeals, requiring summaries to be provided where possible, and using special advocates.

758 The special advocate provisions in the UK have been in place since 1997. They have received significant public criticism, but their use has been supported by the House of Lords. A House of Commons report in 2005 recommended a number of changes to improve the system, which have informed the proposals in this paper.

759 The most significant costs of these proposals would arise from appointing a District Court Judge to the tribunal (although the scale and importance of the tribunal may justify that anyway), the special advocate provisions, and the length of time such appeals are likely to take given their potential complexity. The number of appellants likely to access these special appeals mechanisms is likely to be very low, however. In addition, using the tribunal to determine these appeals is likely to be the most efficient mechanism, as its members would be the most experienced in immigration and protection law. The Zaoui case has shown the importance of having clear procedures in place, and adequate support and resources for decision-makers, for timely decision-making to be possible.

Executive summary - Chapter 8 Third party obligations

Proposals – Employer obligations and penalties

I propose to continue employer obligations so an employer must not either knowingly or without reasonable excuse, employ (or maintain the employment of) a non-citizen who is not entitled to work and that holding an Inland Revenue Department (IRD) tax code declaration IR330 form would no longer constitute a reasonable excuse.

I propose that an employer would have a reasonable excuse for employing a non-citizen without entitlement to work if they do not know that the non-citizen is not entitled, and have taken reasonable steps to determine the non-citizen's entitlement.

I propose:

EITHER, Option A

a. that the Bill enable the Department to disclose that an identifiable, non-citizen prospective employee is entitled to work, and the duration of that entitlement with a potential employer (without explicit consent from the prospective employee)

OR, Option B

b. to retain the status quo, whereby the Department requires the explicit consent of a non-citizen to disclose if they are entitled to work, and the duration of that entitlement.

Status quo – Employer obligations in the 1987 Act are the same as the proposals above but holding an IR330 form signed by them is a reasonable excuse. Because of this, employers are not required to take reasonable steps to check entitlement, and prosecutions for unlawfully employing a non-citizen have not been made. Relying on the form effectively enables employers to bypass their obligations.

Discussion paper and submissions - Sixty five percent of 62 organisations and 80 percent of 42 individual submitters supported providing a stronger legislative basis for employer responsibilities. The New Zealand Association for Migration and Investment (NZAMI) supported the proposal "because the current system does not allow sufficient measures for enforcement of employer's responsibilities". Some employer organisations, such as Business New Zealand (Business NZ), felt that any strengthening of obligations in the Bill would be unfair. Many submitters commented that the Department should be able to share immigration status information with prospective employers.

Comment – The use of unlawful workers can deny opportunities for lawful workers and undermine working conditions. While obligations on employers will remain the same under these proposals, changes to the reasonable excuse are intended to provide stronger incentives for employers to comply.

Requiring reasonable steps to establish work entitlement is not intended to make the employment process more difficult. Guidance would be developed by the Department in consultation with business and employer stakeholders. This approach has been supported by Business NZ and will be responsive to different employment scenarios.

If work entitlement information could be shared, the Department could develop an electronic system that enabled a non-citizen's work entitlement information to be

disclosed, with appropriate safeguards, such as requiring employers to register with the Department, and to provide identifying information about the non-citizen that could not generally be expected to hold without consent. The information provided to an employer would also be limited to work entitlement, and duration. Specific information on immigration status would not be disclosed.

If entitlement to work, and the duration of that entitlement, can only be shared with explicit consent, the cost of compliance with employer obligations is likely to be higher, for the Department and the prospective employer, and this may impact negatively on non-citizens.

Proposals – Education provider obligations and penalties

I propose that an education provider must not either knowingly or without reasonable excuse, enrol (or maintain the enrolment of) a non-citizen who is not entitled to study but that an education provider does not commit an offence for enrolling, or maintaining the enrolment of a non-citizen child in compulsory education.

I propose that an education provider would have a reasonable excuse for enrolling a non-citizen without entitlement to study if they:

a. do not know that the non-citizen is not entitled, and

b. have taken reasonable steps to determine the non-citizen's entitlement.

I propose that the strict liability offence of, without reasonable excuse, enrolling a non-citizen who is not entitled to study can result in a maximum fine of $30,000 on conviction and that the offence of knowingly enrolling or continuing to enrol a non-citizen who is not entitled to study can result in a maximum fine of $50,000 on conviction.

Status quo – Education providers must not knowingly enrol or continue the enrolment of a non-citizen who is not entitled to undertake a course of study. The penalty for non-compliance with this obligation is a fine of up to $2,000 on conviction.

Discussion paper and submissions - Over three-quarters of 76 submitters supported the introduction of a flexible offences and penalties regime for education providers. Many commented that it was needed to motivate education providers to meet their obligations. The NZAMI commented that a "fast, responsive and effective system would benefit international students and aid in ensuring that there is fair competition between education providers". The New Zealand Qualifications Authority was also supportive. The discussion paper did not propose specific penalties and no comments were made on levels of fines.

Comment – The offences for education providers would be a more appropriate incentive for them to comply with their obligations. They should not create compliance costs as education providers will have access to enrolment entitlement details through the Ministry of Education's ENROL database (an enrolment register).

The maximum level of penalties proposed provides the courts with an appropriate framework to fine education providers for offences at a proportionate level now, and in the future. While the specific penalties were not proposed in the discussion paper, anecdotal feedback from the education sector showed support for a higher penalties regime. The sector expressed concerns that a small number of "bad apples" brings the whole education export sector into disrepute.

Proposal – Carrier obligations and penalties

I propose that the obligations on carriers including the provisions that require them to check immigration documentation, comply with the Advance Passenger Processing system (APP system) and provide Passenger Name Record data (PNR data), are retained in the Bill with amendments:

a. to enable the immigration information and documentation that carriers are required to check and provide to the Department to be specified in regulations

b. so that the Department is able to access PNR data for 14 days prior to the arrival of a craft, on the day of arrival, and for 14 days after the craft's arrival, and

c. to clarify the obligation on carriers to remove refused entry non-citizens, unauthorised crew and those being deported from New Zealand, on the first available flight.

I propose to introduce an instant fine system for strict liability offences where carriers fail to comply with obligations to check immigration documentation, comply with the APP system and provide PNR data and that:

a. for failure to check prescribed immigration documentation where the security of the border is not compromised (for example, failure to check evidence of sufficient funds) there is a fine of $1,000 for a person in charge of a craft or for a carrier

b. for failure to check prescribed immigration documentation where the security of the border is compromised (for example, allowing a non-citizen to travel without a valid visa) there is a fine of $2,500 for a person in charge of a craft, or up to $5,000 for a carrier, and

c. for failure to comply with other APP system and PNR data related obligations there is a fine of $2,500 for a person in charge of a craft or $5,000 for a carrier.

I propose that the Bill continue the ability of the Department to prosecute a carrier for breach of obligations with a maximum penalty on conviction of up to $25,000 for a person in charge of a craft or $50,000 for a carrier, and/or imprisonment not exceeding three months.

Status quo - The 1987 Act requires carriers to ensure that all passengers boarding a craft have appropriate immigration documentation, including a passport. Carriers are also required to provide information on passengers including their name and date of birth. This information and documentation is specified in the 1987 Act. The 1987 Act enables the chief executive to request PNR data for a passenger who intends to board a craft within 24 hours prior to and after the arrival of the craft on which that passenger intended to or did travel to New Zealand.

Currently, a carrier can delay removal of a non-citizen if it considers that a seat on a craft is "not available". Airlines sometime delay removal where an economy seat is not available, but seats remain in other classes.

There is no instant fine system for carriers who fail to meet their obligations in the immigration system. The Department may seek prosecution of a carrier for breach of obligations with a maximum penalty on conviction of up to $20,000.

Discussion paper and submissions - Seventy percent of 70 submitters supported making minor amendments to the legislation to clarify carrier obligations, including NZAMI and the Civil Aviation Authority but there was little substantive comment on the

proposal. Airlines were not supportive of the proposals that may increase their obligations, or create new penalties.

There were mixed views on the proposal to introduce an instant fine system in the submissions with approximately 45 percent of 70 submitters, such as NZAMI, indicating support and, approximately 35 percent opposed. There was more support for the proposal from individuals than organisations. Airlines including Qantas and Air New Zealand, and airline representatives such as Board of Airlines Representatives New Zealand did not support the proposal.

Comment - Enabling the immigration information and documentation carriers are required to check and provide to be set in regulations would ensure greater flexibility in the future. The proposal to extend the timeframe to access PNR data will enable the Department to apply immigration filters to support effective and efficient entry decisions over a longer period, and is consistent with timeframes available to Customs.

While the 1987 Act provides strong statutory sanctions for carriers who fail their obligations, prosecutions have been rare. Offences are dealt with through a voluntary system of penalty-free infringement notices. While relative compliance with obligations is more than 98 percent, the absolute number of prima facie breaches by carriers is high. In 2005/06, the Department issued 1,557 informal infringement notices. About 200 of these breaches resulted in an undocumented non-citizen or a non-citizen who presented a potential security risk arriving at the border. It is reasonable for a carrier to expect financial penalties for non-compliance as they operate in an international environment where pre-boarding checks are normal and instant fines are a standard sanction.

Proposals – Data matching and disclosure of information

I propose that the existing provisions for data matching continue between the Department and the Department of Corrections (Corrections) to determine the immigration status of any person sentenced to imprisonment, and also with Justice for fines enforcement purposes.

I propose that the Bill:

EITHER

a. continue data-matching provisions with the agency responsible for the administration of the Social Security Act 1964 with amendments to enable the chief executive of the Department to supply:

   i. information on the date of deportation, in relation to those non-citizens deported from New Zealand, and

   ii. the outcome of a protection claim determination, and any determination of a protection appeal for protection claimants.

OR

b. continue data-matching provisions with the agency responsible for the administration of the Social Security Act 1964 as per the status quo.

I propose to continue to enable the Department to disclose specified information to an overseas agency, body, or person involved in the prevention, detection, investigation, prosecution, or punishment of immigration or other offences, or border security.

Status quo - The proposals for data matching with Corrections and Justice and the proposal for disclosure of information to international agencies mirror the status quo.

The data match with the agency responsible for the Social Security Act 1964 does not allow information to be shared on deportation, or outcomes of protection claims.

Discussion paper and submissions - These proposals for change were not consulted upon as they arose subsequent to the consultation process. Many submitters on the third party proposals in the discussion paper 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.

Comment - The data matches with Corrections and MoJ operate successfully and in accordance with the Privacy Act 1993. The above proposal will ensure that data matches with the Ministry of Social Development, to determine a non-citizen's entitlement or eligibility for any benefit, and the amount of that benefit, can be effective for protection claimants, and that benefit payments can be ceased where appropriate including when a non-citizen is deported from New Zealand.

The Department is able to disclose specified information to help prevent, identify or respond to violations of New Zealand law, or the law of the state the information is being disclosed to. Disclosure of this information contributes to the security of international borders through systems such as the Regional Management Alert System (RMAS) which target the detection of invalid travel documents.

Proposals – Disclosure to verify eligibility for publicly funded services

I propose that specific provisions are included in the Bill to enable the Department to disclose immigration status information about an identifiable non-citizen to publicly funded service providers who require this information to determine eligibility (without explicit consent from the non-citizen), for example to:

- determine their entitlement to publicly funded health services where the non-citizen is unable or unwilling to provide this information, or
- assess a non-citizen's liability to repay the cost of publicly funded health services they may have accessed.

I propose that the Bill specify that individual agreements could be made with specific publicly funded service providers where immigration status information was required to determine eligibility. Note that the Department would not capture any information on the non-citizen in the process of disclosing this information.

Status quo - The Department must have the explicit consent of a non-citizen to share immigration status information.

Discussion paper and submissions - Approximately 65 percent of submitters expressed the view that disclosing immigration status is necessary to ensure that health, welfare and other publicly funded services are provided only to those who are eligible. Education New Zealand also commented on the negative effect that those who illegally access services have on others and similar comments were made by Pacific communities during the stakeholder dialogues.

The Human Rights Commission expressed some concern for children whose unlawful parents may not seek required medical assistance or enrol them in school for fear of a negative immigration consequence.

Comment - The selected disclosure of immigration status information to publicly funded service providers may help the fair allocation of public resources and to manage the

public debt. New Zealand Immigration application forms and New Zealand arrival cards signed by a non-citizen currently authorise certain information to be disclosed. There are limitations to the use of these forms and cards.

The Bill would specify that individual agreements could be made with publicly funded service providers where immigration status information was required to determine eligibility. If immigration status information could be shared, visa applicants would be informed of the potential sharing of this information to service providers.

Publicly funded service providers receiving immigration status information would be bound by the Privacy Act 1993. The proposal could help reduce the estimated $6.1 million worth of annual debt owed to District Health Boards by non-citizens.

The Department would not capture any information on the non-citizen in the process of disclosing this information. This would address the concerns raised by the Human Rights Commission and others in submissions about negative consequences for minors.

CHAPTER EIGHT: THIRD PARTIES

PURPOSE

760 This chapter discusses the recommendations on third parties including:

- Employer obligations and penalties
- Education provider obligations and penalties, and
- Carrier obligations and penalties.

761 It also discusses the recommendations on data-matching and disclosure of information.

STATUS QUO

762 There are obligations for a range of third parties in the immigration system including employers, education providers and carriers[14]. They complement the obligations of non-citizens to have lawful entitlement to travel to, enter and stay in New Zealand and to comply with their visa and permit conditions.

763 Carrier obligations focus on their critical role in checking passengers and providing the Department of Labour (the Department) with information that contributes to maintaining the security of the border. The Department also exchanges information with national and international agencies. On an international level, this contributes to the management of global flows of people. Nationally, it allows agencies to manage publicly funded services.

RATIONALE FOR PROPOSALS

764 The current obligations on third parties generally appear to be appropriate but the legislation lacks appropriate incentives for employers, education providers and carriers to comply. The proposals in this chapter maintain the premise that third parties do, and should continue to, support New Zealand's immigration interests and the immigration system's integrity, but equally ensure they continue to benefit from an efficient and effective system. They seek to create incentives for third parties to comply with their obligations.

765 Along with the proposals for third parties, this chapter seeks to continue the provisions for disclosure of information internationally for investigations into immigration or other offences, and to support border security. It also seeks to continue the current provisions for data-matching with onshore agencies.

766 The chapter seeks to enable information on immigration status to be shared with specified third parties to enable them to fulfil their obligations in the immigration system and to ensure that only those non-citizens with entitlement receive publicly funded services.

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[14]Carriers include the owner or charterer of any form of aircraft, maritime vessel, or other vehicle that transports people to and/or from New Zealand or the person in charge of the carrier if the owner or charterer is not in New Zealand.

EMPLOYER OBLIGATIONS

Proposals

767 It is proposed to continue the employer obligations imposed by the Immigration Act 1987 (the 1987 Act) in the Immigration Bill (the Bill), that is, an employer must not:

a. either knowingly or without reasonable excuse, employ (or continue to employ) a non-citizen who is not entitled to work, or

b. exploit (in a specified way) a non-citizen who is not entitled to work.

IR330 form

768 It is proposed that holding an Inland Revenue Department (IRD) tax code declaration IR330 form would no longer constitute a reasonable excuse for employing a non-citizen without entitlement to work.

Positively checking entitlement to work

769 It is proposed that an employer would have a reasonable excuse for employing a non-citizen without entitlement to work if they:

a. do not know that the non-citizen is not entitled, and

b. have taken reasonable steps to determine the non-citizen's entitlement.

770 It is proposed that an employer can be deemed to know a non-citizen does not have entitlement to work if they have been informed of this by an officer in the preceding 12 months.

771 It is proposed that employers would not commit an offence by honouring the termination clause of an employment agreement, as per the status quo.

Status quo

772 Employer obligations under the 1987 Act are the same as the proposals above. Not knowing the non-citizen was not entitled to work, and holding an IR330 form signed by them is the statutory definition of a reasonable excuse for employing a non-citizen without entitlement to work. Because of this, employers are not required to take reasonable steps to check entitlement, and prosecutions for unlawfully employing a non-citizen have not been made. Relying on the form effectively enables employers to bypass their obligation to only employ non-citizens with entitlement to work.

Discussion paper and submissions

773 Sixty five percent of 62 organisations and 80 percent of 42 individual submitters supported providing a stronger legislative basis for employer responsibilities. The New Zealand Association for Migration and Investment (NZAMI) supported the proposal "because the current system does not allow sufficient measures for enforcement of employer's responsibilities and that leaves migrants vulnerable to exploitation".

774 Approximately 25 percent of organisations and 15 percent of individuals opposed any change. Some employer organisations, such as the New Zealand Retailer's Association and Business New Zealand (Business NZ), felt that any strengthening of obligations in the Bill would be unfair.

IR330 form

775 Responses to the proposed removal of the IR330 form as a statutory reasonable excuse were mixed, with approximately 55 percent of 104 submitters supporting the proposal. The New Zealand Council of Trade Unions (CTU) commented that the "sighting of an employee's tax code declaration is too low a threshold" to be a reasonable excuse. The NZAMI also supported its removal. Business and employers groups, including Business NZ, supported the use of the IR330 form.

Positively checking entitlement to work

776 There was a difference between individual and organisational responses to the proposal to require employers to take a more proactive approach to checking entitlement to work. Approximately 80 percent of 42 individuals, compared to approximately 60 percent of 62 organisations, expressed support. The New Zealand Law Society (NZLS) noted that if "an employer has an obligation then the employer should comply with that obligation". The key concern expressed by the NZLS and other submitters, including Business NZ and the Wellington Chamber of Commerce, related to employers' ability to comply, along with potential compliance costs.

Comment

777 Low unemployment and skills shortages have created an environment where there are incentives for overstayers to maintain their unlawful presence in New Zealand and for non-citizens to work without entitlement. Estimates indicate that approximately 9,000[15] overstayers may be working in New Zealand. There are also an unquantifiable number of non-citizens lawfully in New Zealand but working without entitlement to do so. For example, a number of non-citizens on visitor's permits may be working unlawfully.

778 The use of unlawful workers can deny opportunities for lawful workers to gain employment and can undermine conditions for all workers. This is a concern noted by the CTU. The use of unlawful workers also undermines the immigration system. For example, where student permit holders work more than the 20 hours per week they are entitled to, they are treating their student permit as a de-facto work permit and accessing the labour market in a way that was not intended.

IR330 form

779 While obligations on employers would remain the same under these proposals, changes to the reasonable excuse are intended to provide an incentive for employers to comply with their immigration obligations. As noted in the discussion paper, the IR330 form, which provides employers with a reasonable excuse, is used for tax purposes when a person starts a new job. The form is a self-assessed declaration of tax liability and entitlement to work made by an individual.

[15] This figure is based on the following assumptions. It is estimated that there are 18,600 overstayers in New Zealand, 14,700 of whom are estimated to be aged 18 to 64 years. The labour market participation rate is approximately 60 percent for this age range.

780 Limited verification of the IR330 form's accuracy is undertaken by IRD, and no verification is undertaken of the declaration of entitlement to work by the Department which has no ownership of the form. Relying on the form effectively enables employers to bypass their immigration obligations.

Positively checking entitlement to work

781 Taking reasonable steps to establish work entitlement is not intended to make the employment process more difficult. Guidance on what constitutes reasonable steps would be developed by the Department in consultation with business and employer stakeholders. This approach has been supported by Business NZ and will be responsive to a range of different employment scenarios. For example:

- A recruitment agency could include a check box about entitlement to work on registration forms and request proof of that status from a prospective employee. They could hold that proof on file.
- In the fruit picking industry, where instances of unlawful work are relatively common, it may be reasonable to expect an employer to hold a copy of a non-citizen's passport or visa details for the length of their employment to prove their entitlement to work.
- Where an employee presented a resume with details of continuous education and previous employment in New Zealand, an employer could check qualifications and references, and keep a record of this on file.
- Retaining a copy of a New Zealand birth certificate, passport or citizenship certificate would generally be evidence of reasonable steps to establish a person was a citizen.

No penalty for honouring termination clauses of employment agreements

782 Carrying over the provisions that ensure employers are not penalised for honouring termination clauses of employment agreements would ensure consistency between employment and immigration law.

783 In developing these proposals, the Department considered a system of matching work entitlement to an IRD tax number. This was suggested in stakeholder dialogues and in the public submissions. An IRD tax number is not linked in any way to work entitlement and is not responsive to a change in immigration status by non-citizens. Tax numbers are a requirement for all those with income, not just for those who work.

Reducing compliance costs for employers

Proposals

784 It is proposed that:

EITHER, Option A

a. the Bill enable the Department to disclose that an identifiable, non-citizen prospective employee is entitled to work, and the duration of that entitlement with a potential employer (without explicit consent from the prospective employee)

OR, Option B

b. retain the status quo, whereby the Department requires the explicit consent of a non-citizen to disclose if they are entitled to work, and the duration of that entitlement.

Status quo

785 The Department requires the explicit consent of a non-citizen to disclose if they are entitled to work, and the duration of that entitlement.

Discussion paper and submissions

786 The discussion paper proposal to develop an internet or fax-back system for registered employers to check entitlement information received support. The Australian internet system discussed below was referred to by submitters as an example of such a system. Submissions reiterated that if any changes were made to employers' obligations, steps would need to be taken to reduce compliance costs for employers fulfilling their obligations. Many submitters commented that the Department should be able to share immigration status information with prospective employers.

Comment

Option A

787 If work entitlement information could be disclosed to prospective employers *without explicit consent*, the Department would develop an electronic system that enabled employers to verify entitlement to work, and the duration of that entitlement via the internet. The system could be similar to that in Australia where an employer registers with the Department of Immigration and Multicultural Affairs and, by providing specific details of a prospective employee, can receive instant notification of their entitlement to work.

788 Requiring a prospective employer to register with the Department before they could use the electronic system would help to safeguard the non-citizen's personal information. The Department would be able to record and monitor employers' access to the system, and based on registration information, investigate any indicators of abuse.

789 Requiring employers to provide a range of information about a prospective employee that they could not generally be expected to have obtained without the consent of the non-citizen would also provide another safeguard.

790 The information that the internet system would disclose to a prospective employer would be limited, providing another safeguard. Only entitlement to work, and the duration of that entitlement would be disclosed. Information about a non-citizen's immigration status would not be provided.

791 Employers receiving information would be bound by the Privacy Act 1993 in their management and use of the information, and the Department would inform them of this when disclosing any information. Visa applicants would be informed of the potential sharing of work entitlement information with prospective employers, for example, on the Department's website, visa application forms, arrival cards, and on any other appropriate information.

792 If a visa applicant is applying for a visa to New Zealand that incorporates some type of entitlement to work, it is not unreasonable to expect that information about that entitlement could be provided to a prospective employer. Having provision to disclose information may also benefit non-citizens who, for example, may not have evidence of their visa.

793 If agreed, the cost of developing an internet system, including appropriate electronic safeguards, will be absorbed as part of the wider IT changes in the Department's new business model. If the new business model funding is not agreed, a separate costing exercise would be undertaken.

Option B

794 If entitlement to work, and the duration of that entitlement, *can only be shared with explicit consent*, the cost of compliance with employer obligations is likely to be higher, for the Department and the prospective employer. This may impact negatively on non-citizens seeking employment in New Zealand by reducing the incentives for an employer to consider them for a vacant position.

795 While consent to share information could be incorporated into some visa application forms, not all applicants are currently required to complete these forms, and technology may further reduce their use in the future. The Department could still develop a facilitative system, such as a fax-back system, where a prospective employer and employee signed consent for the information to be disclosed. The Department would have to manually process the request for information, including verifying that a non-citizen has actually provided their consent. This process would require ongoing resources, and instant access to information could not be guaranteed. The discussion paper noted that this process creates an administrative burden for the potential employee, employer, and the Department.

Penalties for employers

Proposals

796 It is proposed that a maximum fine of $10,000 on conviction is maintained for the offence of, without reasonable excuse, employing a non-citizen who is not entitled to work.

797 It is proposed that a maximum fine of $50,000 on conviction is maintained for the offence of knowingly employing or continuing to employ a non-citizen who is not entitled to work.

798 It is proposed that committing an offence of exploitation would continue to attract a maximum penalty of up to $100,000 and/or seven years imprisonment.

Status quo

799 These proposals mirror the status quo.

Discussion paper and submissions

800 The current offences for employers were discussed in submissions. There was some comment, in particular from Business NZ, that the current penalties were high and that they did not support any increase.

Comment

801 The penalties for employers provide clear and proportionate responses to offences where it is found that an employer does not have a reasonable excuse for failing to confirm work entitlement or has knowingly continued to allow a non-citizen to work without entitlement.

802 The Department would continue to have administrative discretion to prosecute employers. For example, the first time an employer is found to have employed an unlawful worker the Department may wish to work with them to prevent a similar offence occurring. This discretion will be particularly useful during the establishment phase of the new Act.

803 Retaining an exploitation offence supports New Zealand's obligations under the United Nations Convention against Transnational Organised Crime by providing a disincentive to smuggle and/or traffic migrants. The penalty for exploitation offences sends a message that exploitation is unacceptable.

EDUCATION PROVIDER OBLIGATIONS

Proposals

804 It is proposed that an education provider must not either knowingly or without reasonable excuse, enrol (or maintain the enrolment of) a non-citizen who is not entitled to study.

805 It is proposed that an education provider would have a reasonable excuse for enrolling a non-citizen without entitlement to study if they:

a. do not know that the non-citizen is not entitled, and

b. have taken reasonable steps to determine the non-citizen's entitlement.

806 It is proposed that an education provider can be deemed to know that a non-citizen does not have entitlement to study if they have been informed of this by an officer in the preceding 12 months.

807 In order to support the withdrawal of New Zealand's reservation on the United Nations Convention on the Rights of the Child (CRC), it is proposed that an education provider does not commit an offence for enrolling, or maintaining the enrolment of, a non-citizen child in compulsory education.

Status quo

808 An education provider commits an offence if they knowingly enrol or continue the enrolment of a non-citizen who is not entitled to study. They are deemed to know if they have been informed of this in writing by an immigration officer in the preceding 12 months.

Discussion paper and submissions

809 The discussion paper proposed cross referencing the Ministry of Education's Code of Practice for Pastoral Care of International Students (the Code) in the

Bill to highlight the importance of education provider obligations. Although the proposal received support, further work showed that it would be an unnecessary duplication of obligations (which are broader that just those required under immigration legislation).

Comment

810 There has been a considerable increase in the value of the education export sector, and in the number of non-citizens entering New Zealand to study, since the 1987 Act was passed. Ten thousand student visas were approved in 1990/91, compared with 99,000 in 2005/06. In 2005/06, the sector earned approximately $2.21 billion. Education providers play a key role in the sector by ensuring that only non-citizens entitled to study do so.

811 Significant numbers of non-citizens studying without entitlement would impact on the government's ability to control the mix, distribution, and number of students. There would also be negative impacts on Crown revenue where those without entitlement accessed subsidised courses.

812 The proposed offences for education providers would be an appropriate incentive for them to comply with their obligations in the immigration system. The obligations should not create compliance costs as education providers will have access to enrolment entitlement details through the Ministry of Education's ENROL database (an enrolment register). Providers are also already required to hold entitlement details for students by the Code.

813 The proposal that education providers do not commit an offence for enrolling, or continuing the enrolment, of a non-citizen child in compulsory education supports lifting New Zealand's current reservation on CRC. This proposal follows from Cabinet's 'in principle' decision to end the limitation on access to publicly funded education services for children unlawfully in New Zealand [CAB Min (05) 41/3 refers].

Education provider penalties

Proposals

814 It is proposed that the offence of, without reasonable excuse, enrolling a non-citizen who is not entitled to study would result in a maximum fine of $30,000 on conviction.

815 It is proposed that the offence of knowingly enrolling or continuing to enrol a non-citizen who is not entitled to study would result in a maximum fine of $50,000 on conviction.

Status quo

816 The current maximum fine for knowingly enrolling or continuing to enrol a non-citizen who is not entitled to study is a maximum of $2,000 on conviction.

Discussion paper and submissions

817 Over three-quarters of 76 submitters supported the introduction of a flexible offences and penalties regime for education providers. Many commented

that such a regime was needed to motivate education providers to meet their obligations and deter them from exploiting students. The NZAMI commented that a "fast, responsive and effective system would benefit international students and aid in ensuring that there is fair competition between education providers". The New Zealand Qualifications Authority was also supportive.

818 The discussion paper did not propose specific penalties and no comments were made on an appropriate level of penalty. The 15 percent of submitters opposed to the introduction of a penalties regime for education providers expressed concern about the compliance costs for education providers.

Comment

819 The penalties proposed for education providers increase the current penalty of $2,000 that could be sought on conviction but that has never been applied and has proven to be inadequate. The cost of seeking conviction for such a minimal fine is not a viable option for the Department.

820 The maximum level of penalties proposed provides the courts with an appropriate framework to fine education providers for offences at a proportionate level now, and in the future. While the specific penalties were not proposed in the discussion paper, anecdotal feedback from the education sector showed support for a higher penalties regime. The sector expressed concerns that a small number of "bad apples" brings the whole education export sector into disrepute.

821 As with employer penalties, the Department would continue to have administrative discretion to prosecute. For example, in the first instance an education provider is found to have enrolled a non-citizen without entitlement the Department may wish to work with them to prevent a reoccurrence. This discretion will be particularly useful during the establishment phase of the new Act.

CARRIER OBLIGATIONS

Proposals

822 It is proposed that the obligations on carriers in the 1987 Act, including the provisions that require them to check immigration documentation, comply with the Advance Passenger Processing system (APP system) and provide Passenger Name Record data (PNR data), are retained in the Bill with the amendments proposed below.

Checking of immigration documentation and the APP system

823 It is proposed that the immigration documentation that carriers are required to check be specified in regulations.

824 It is proposed that the immigration information that carriers must check and provide to enable the APP system to operate be specified in regulations.

PNR data

825 It is proposed that the Department be able to access PNR data for 14 days prior to the arrival of a craft, on the day of arrival, and for 14 days after the craft's arrival.

826 It is proposed that the Department be able to access PNR data for the purposes of identifying and managing immigration risks.

Removal of non-citizens without entitlement to enter or remain

827 It is proposed that carriers continue to be responsible for the cost of detaining, maintaining and removing a non-citizen:

a. who has travelled to New Zealand with them and been refused entry, and

b. crew member who has remained in New Zealand without authorisation.

828 It is proposed that the Bill clarify the obligation on carriers to remove refused entry non-citizens, unauthorised crew and those being deported from New Zealand, on the first available flight.

Status quo

Checking of immigration documentation and the APP system

829 The 1987 Act requires carriers to ensure that all passengers boarding a craft have appropriate immigration documentation, including a passport, visa, evidence of ongoing travel arrangements, and sufficient funds. Carriers are also required to provide the Department with information on passengers including their name, date of birth, nationality, sex and passport number. The documentation that carriers are required to check, and the information they are required to provide is generally specified in the 1987 Act.

PNR data

830 The 1987 Act enables the chief executive of the Department to request PNR data for a passenger who intends to board a craft within 24 hours prior to and after the arrival of the craft on which that passenger intended to or did travel to New Zealand.

Removal of non-citizens without entitlement to enter or remain

831 While a carrier is obliged to remove a non-citizen on the first available flight, a carrier can delay removal of a non-citizen if it considers that a seat on a craft is "not available". Airlines sometimes delay removal where an economy seat is not available, but seats remain in other classes.

Discussion paper and submissions

832 Seventy percent of 70 submitters supported making minor amendments to the legislation to clarify carrier obligations, including NZAMI and the Civil Aviation Authority (CAA) but there was little substantive comment on the proposal. Airlines were not supportive of the proposals that may have increased their obligations, or created new penalties.

833 The current legislative requirement to check for evidence of tickets for onward travel and funds is not supported by Air NZ or Qantas who commented that the "travel industry is undergoing a step change, with booking increasingly being made on the net and ticketless travel making inroads". The proposal to remove this requirement from the legislation may therefore receive support from airlines and airline representatives.

834 The proposal to clarify obligations to remove non-citizens without entitlement to remain was not in the discussion paper as it arose through the development of the proposals in *Chapter Ten: Monitoring and detention*. The proposal may not receive support from airlines but will ensure the expedient departure of non-citizens being deported from New Zealand.

Comment

Checking of immigration documentation and the APP system

835 The proposals above support carriers' critical role in checking and providing the Department with information about passengers who are seeking to travel to New Zealand. Specifying the immigration information and documentation carriers are required to check and provide in regulations would ensure greater flexibility in the future and responds to airlines' submissions.

836 Greater flexibility would enable the Department to respond appropriately to advances in international travel. For example, the International Air Transport Association is seeking to eliminate paper tickets by early 2008.

PNR data

837 The short period of time in which the Department can access PNR data under the 1987 Act hinders the Department's ability to apply immigration filters to support effective and efficient immigration decisions. The proposed amendment to extend the timeframe in which PNR data can be accessed by the Department should not impose any costs on carriers who are providing the data in the same way and for the same length of time to the New Zealand Customs Service (Customs).

838 To avoid unnecessary duplication of resources, implementation of the proposal will be explored in conjunction with Customs who have invited the Department to place staff at their National Targeting Centre for this purpose.

Removal of non-citizens without entitlement to enter or remain

839 The obligations on carriers to remove non-citizens reinforce their obligations not to bring non-citizens to New Zealand who have no entitlement to enter. The obligations also oblige carriers to take responsibility for their crew.

840 The requirement that a carrier remove a non-citizen being deported ensures that the non-citizen is not held in immigration detention longer than is necessary and is an important contributing factor to the effectiveness of the deportation system. While delays in boarding can address valid safety concerns, delays based on inconvenience are not acceptable. This proposal clarifies the status quo for carriers.

Penalties for carriers

Proposals

Instant fine system

841 It is proposed to introduce an instant fine system for strict liability offences where carriers fail to comply with obligations to check immigration documentation, comply with the APP system and provide PNR data.

842 It is proposed that for failure to check prescribed immigration documentation:

a. where the security of the border is not compromised (for example, failure to check evidence of sufficient funds) there is a fine of $1,000 for a person in charge of a craft or for a carrier, and

b. where the security of the border is compromised (for example, allowing a non-citizen to travel without a valid visa) there is a fine of $2,500 for a person in charge of a craft, or $5,000 for a carrier.

843 It is proposed that for failure to comply with other APP system and PNR data related obligations there is a fine of $2,500 for a person in charge of a craft or $5,000 for a carrier.

Prosecution

844 It is proposed that the Bill allow the Department to prosecute a carrier for breach of obligations with a maximum penalty on conviction of up to $25,000 for a person in charge of a craft or $50,000 for a carrier, and/or imprisonment not exceeding three months.

Failure to remove non-citizens without entitlement to enter or remain

845 It is proposed that the current maximum penalty on conviction of up to $10,000 for a person in charge of a craft, and $20,000 for a carrier, for failing to remove a non-citizen refused entry to New Zealand, or being deported from New Zealand is retained.

Status quo

846 There is no instant fine system for carriers who fail to meet their obligations in the immigration system. The Department may seek prosecution of a carrier for breach of obligations with a maximum penalty on conviction of up to $10,000 for a person in charge of a craft or $20,000 for a carrier, and/or imprisonment not exceeding three months.

847 The current maximum penalty on conviction for failing to remove a non-citizen is up to $10,000 for a person in charge of a craft, and $20,000 for a carrier, as proposed above.

Discussion paper and submissions

848 There were mixed views on the proposal to introduce an instant fine system with approximately 45 percent of the 77 submitters, such as NZAMI, indicating support and, approximately 35 percent opposed. There was more support for the proposal from individuals than organisations. Business NZ suggested that minor amendments to clarify legislation be made but that the current voluntary system of penalty-free infringement notices continue.

849 Airlines including Qantas and Air NZ, and airline representatives such as Board of Airlines Representatives New Zealand (BARNZ) did not support the proposal. BARNZ commented that an instant fines system may impact negatively on the good relationship between airlines and the Department. The CAA commented in their submission that if the “system of infringement notices and fines contributed to the security of civil aviation, the CAA would not be against such a proposal being given further consideration”.

850 Concern was expressed by the United Nations High Commissioner for Refugees (UNHCR) "that carrier companies should not be penalised for transporting people who are seeking international protection from persecution". This concern was reiterated in a number of other submissions made by human rights groups and ethnic organisations.

Comment

Instant fine system

851 While the Act provides strong statutory sanctions for carriers who fail in their obligations, prosecutions have been rare. Most offences have been dealt with through a voluntary system of penalty-free infringement notices where the Department requests that carriers investigate any breach of obligation and then provides education to prevent recurrence.

852 Breaches of carrier obligations generally result from a carrier not running an APP check or overriding an APP notification without approval, or from data entry errors by check-in agents. Anecdotal comment suggests that carriers apply less vigilance to non-citizens travelling to New Zealand compared to places where instant fines are imposed.

853 While relative compliance with obligations is more than 98 percent, the absolute number of prima facie breaches by carriers is high. In 2005/06, the Department issued 1,557 informal infringement notices. About 200 of these breaches resulted in an undocumented non-citizen, or a non-citizen who presented a potential security risk, arriving at the border. In these circumstances, the non-citizen may be detained impacting on them, and generating associated compliance costs.

854 It is reasonable for a carrier to expect financial penalties for non-compliance. Carriers operate in an international environment where pre-boarding checks are normal and instant fines are a standard sanction. Provisions for carriers to contest any infringement would be provided.

855 The Department would have administrative discretion to enforce the fines, allowing flexibility in some cases. For example, discretion may be used where an airline transported an asylum seeker who presented at check-in with a false identity and documentation. This discretion will be particularly useful during the establishment phase of the new Act.

Prosecution

856 Retaining the ability to seek the conviction of a carrier who fails to comply with its obligations and increasing the penalties on conviction will reduce the risk of trivialising the seriousness of carrier offences through the low level of instant fines being proposed. It will enable the Department to take appropriate action if a significant breach occurred, or if a single airline was consistently breaching obligations.

Failure to remove non-citizens without entitlement to enter or remain

857 Retaining the ability to prosecute airlines who fail to remove non-citizens with no entitlement to remain in New Zealand reinforces the importance of

this obligation in supporting the integrity of the immigration system and effectiveness of the monitoring and detention system.

DATA MATCHING AND DISCLOSURE OF INFORMATION

Proposals

Data matching with government agencies

858 It is proposed that the existing provisions for data matching continue between the Department and:

a. the Department of Corrections (Corrections) to determine the immigration status of any person sentenced to imprisonment, and

b. the Ministry of Justice (Justice) (or the agency responsible for the enforcement of fines) for fines enforcement purposes.

859 It is proposed that the Bill:

EITHER, Option A

a. continue data-matching provisions with the agency responsible for the administration of the Social Security Act 1964 with amendments to enable the chief executive of the Department to supply:

   i. information on the date of deportation, in relation to those non-citizens deported from New Zealand, and

   ii. the outcome of a protection claim determination, and any determination of a protection appeal for protection claimants

OR, Option B

b. continue data-matching provisions with the agency responsible for the administration of the Social Security Act 1964 as per the status quo.

Disclosure of information to international agencies

860 It is proposed to continue to enable the Department to disclose specified information to an overseas agency, body, or person involved in the prevention, detection, investigation, prosecution, or punishment of immigration or other offences, or border security.

Status quo

861 The proposals for data matching with Corrections and Justice and the proposal for disclosure of information to international agencies mirror the status quo.

862 The data match with the agency responsible for the Social Security Act 1964 does not allow information to be shared on deportation, or on protection claimants.

Discussion paper

863 These proposals for change were not consulted in the discussion paper as they arose out of departmental consideration of information exchange capabilities in the 1987 Act and requirements for the future. Many submitters on the third party proposals in the discussion paper, however,

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.

Comment

Data matching with government agencies

864 Data matching with other government agencies enables the fair allocation of public resources, supports the maintenance of law and the security of the border. The data matches with Corrections and Justice operate successfully and in accordance with Privacy Act 1993.

865 The purpose of the data-match with the agency responsible for the administration of the Social Security Act 1964 is to verify entitlement or eligibility of any person for any benefit and the amount of that benefit. Currently, the chief executive may supply information in relation to non-citizens who may be in New Zealand unlawfully or who are in New Zealand on a temporary permit. Information on non-citizens who have been deported from New Zealand cannot be supplied, nor can information on the outcomes of protection claims. This limits the effectiveness of the provisions.

866 Amendments to this data-match would be used to ensure that state funded benefits or support cease where a non-citizen is deported and that any benefit paid to protection claimants is done so within the provisions of the Social Security Act 1964.

Disclosure of information to international agencies

867 The Department is able to disclose specified information to help prevent, identify or respond to violations of New Zealand law, or the law of the state to which the information is being disclosed. Disclosure of this information enables the Department and international agencies to manage the flow of people around the world. It contributes to the security of international borders through systems such as the Regional Management Alert System (RMAS).

868 RMAS allows the detection of invalid travel documents either at airport check-in counters before passengers board flights, or before their arrival in the destination country, depending on the country of departure. As of mid August 2006 a total of 99 lost, stolen or otherwise invalid New Zealand passports have been detected by the RMAS system since it was enacted on 1 April 2006.

DISCLOSURE TO VERIFY ELIGIBILITY FOR PUBLICLY FUNDED SERVICES

Proposals

869 It is proposed that the Bill include specific provisions to enable the Department to disclose immigration status information about an identifiable non-citizen to publicly funded service providers who require this information to determine eligibility (without *explicit* consent from the non-citizen), for example to:

- determine their entitlement to publicly funded health services where the non-citizen is unable or unwilling to provide this information, or
- assess a non-citizen's liability to repay the cost of publicly funded health services they may have accessed.

870 It is proposed that the Bill specify that individual agreements could be made with specific publicly funded service providers where immigration status information was required to determine eligibility.

871 The Department would not capture any information on the non-citizen in the process of disclosing this information.

Status quo

872 The Department must have the explicit consent of a non-citizen to share immigration status information with publicly funded service providers for the purpose of determining eligibility.

Discussion paper and submissions

873 Approximately 65 percent of 54 organisations and 41 individuals indicated support for this proposal. Many who supported 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. One submitter commented on the impact non-citizens accessing services without entitlement have on those who do "play by the rules". Education New Zealand also commented on the negative effect that those who illegally access services have on others and similar comments were made by Pacific communities during the stakeholder dialogues.

874 The Human Rights Commission (HRC) expressed some concern for children whose unlawful parents may not seek required medical assistance or enrol them in school for fear of a negative immigration consequence.

Comment

875 Along with data matching between the Department and other government agencies currently provided for, the selected disclosure of immigration status information to publicly funded service providers who require this information to determine eligibility may help the fair allocation of public resources and to manage the public debt incurred by non-citizens.

876 New Zealand Immigration application forms and New Zealand arrival cards signed by a non-citizen currently authorise certain information to be disclosed to assess an individual's entitlement to services, such as health services. There are limitations to the use of these forms and cards as a mechanism for gaining consent as not all non-citizens are required to complete either or both forms.

877 The Bill would require the agreements to specify the purpose for providing the information and that the information disclosed would be related to entitlement to access specific services only, and not be any other information. This would provide a safeguard for non-citizens.

878 Publicly funded service providers receiving information would be bound by the Privacy Act 1993 in their management and use of the information. The

Department would inform them of this. Also, the Department would not capture any information on the non-citizen in the process of disclosing this information. This would address the concerns raised by the HRC and others in submissions about negative consequences for minors whose parents were unlawfully in New Zealand did not want to seek medical assistance due to the fear of a negative immigration consequence.

879 If immigration status information could be shared as proposed, visa applicants would be informed of the potential sharing of this information with service providers, for example, on:

- information provided about different visas on the Department's website
- visa application forms
- arrival cards, and
- any other appropriate documentation.

880 The Department could establish an electronic system similar to, and combined with, that proposed for employers. It would include all appropriate electronic safeguards. As noted earlier, the cost of developing a system will be absorbed as part of the Department's new business model.

881 An electronic system would help to reduce the significant number of inquiries to the Department that currently occur, in particular from District Health Boards (DHBs) seeking to confirm entitlement to medical services. Facilitating the access of information to DHBs could help reduce the estimated $6.1 million worth of debt owed by non-citizens.

Executive Summary - Chapter 9 Compliance and enforcement

Proposal – Access to address information

I propose that the Bill enable designated officers and determination officers to require address information to locate people who are, or may be, liable for deportation from New Zealand.

I propose that the power be able to be applied to any company or organisation within a prescribed list of broad industry groups.

Status quo - The 1987 Act allows immigration officers to require specified companies and government agencies to provide address information about individuals who are unlawfully present in New Zealand. There is no power to acquire address information about people who are under investigation and who may face deportation.

Discussion paper and submissions – Seventy percent of 94 submitters favoured increasing the purposes for seeking address information (beyond locating overstayers). Submitters stressed the need to adhere to human rights and privacy considerations, and to ensure adequate oversight. Sixty five percent of submitters favoured increasing the sources of address information by listing a greater range of industries.

Comment - Without this power, immigration compliance officers can only rely on address information provided at the last point the person had dealings with the Department. This information is frequently out of date.

The current list of companies is outdated and is not comprehensive. Updating the list as proposed would enhance the Department's ability to locate people and would future proof the legislation. Information will be held securely and be sought and accessed by appropriately trained, designated immigration officers.

Proposal – Powers of entry and search

I propose that powers of entry and search contained within the 1987 Act be carried over into the Bill as powers designated by the chief executive. This aligns with proposals in *Chapter Three: Decision-making*. I also propose that this power be activated by Order in Council, made once the chief executive has satisfied the Minister that all necessary training, systems and procedures were in place.

I propose that the Bill establish the power for designated officers to enter and search buildings and premises to serve and/or execute a deportation notice or order.

I propose that designated officers may enter and search buildings, premises and craft in border areas to locate people who may be committing an immigration offence, unlawfully present in New Zealand, refused entry to New Zealand, or to detect or prevent an immigration offence.

Status quo - Both immigration and police officers may serve a removal or deportation order. Only police officers may enter a building or premises in order to do so. Police officers and customs officers (undertaking an immigration function) have powers of entry to border areas to locate and detain people unlawfully present, ineligible to enter New Zealand, refused entry to New Zealand, or who are or may be committing immigration offences.

Discussion paper and submissions - The discussion paper asked if immigration officers should have the same powers of entry and search as Customs and Police in the immigration context. The proposals to enhance immigration compliance officers' powers of entry and search were supported by 40 percent of 95 submitters. Organisations opposed, including the New Zealand Law Society and the Wellington District Law Society, 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 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 human rights.

Comment - Compliance officers must be able to obtain sufficient information to investigate and respond to non-compliance with immigration obligations. The requirement that these powers only come into force through Order in Council provides a safeguard for the exercise of these powers by immigration officers. It allows the Minister to ensure that the Department has developed operational instructions and administrative oversight procedures to govern the exercise of these powers. The Minister would also need to be satisfied that the Department has developed and implemented an appropriate training programme for officers who are to be designated these powers. Operational instructions would require that exercise of this power by designated immigration officers be limited to circumstances where police are not available in the time required to safely and successfully achieve the desired immigration outcome.

Serving and executing removal and deportation orders

The absence of the power to enter and search premises substantially limits compliance officers in their ability to effectively carry out the function of serving and executing removal and deportation orders. Most people are found at premises that they return to regularly, such as their place of residence or work. When serving a deportation order immigration compliance officers would be better able to provide advice about the process of deportation, duration of bans on re-entry to New Zealand, and any costs involved.

Entry at the border to locate people, and to detect or prevent offences

The current legislation limits the ability of immigration officers to enforce immigration obligations, deliver immigration outcomes and manage immigration risks at the border. It also limits future options for whole of government management of this environment.

Proposal – Powers of entry and inspection

I propose that powers of entry and inspection contained within the 1987 Act be carried over into the Bill as powers designated by the chief executive. This aligns with proposals in *Chapter Three: Decision-making*. I propose that powers of entry and inspection (where these are additional to those existing in the 1987 Act) be activated by Order in Council made once the chief executive had satisfied the Minister that all necessary training, systems and procedures were in place.

I propose that the Bill establish a power for designated officers to enter buildings and premises to inspect and copy information held by an:

a. accommodation provider to assist in locating people unlawfully present in New Zealand

b. employer about a non-citizen who is suspected of being unlawfully present in New Zealand or who may not be entitled to undertake that employment

c. education provider about a student's entitlement to study or other information that establishes the student's non-compliance with visa conditions, and

d. employer or education provider that is relevant to an investigation into their compliance with their immigration obligations.

Status quo - Immigration officers have powers of entry and inspection of accommodation providers' records to locate overstayers.

The 1987 Act allows officers to enter employers' premises to inspect and copy time and wage information on an employee suspected of being here unlawfully, or who may be working contrary to their permit conditions. The 1987 Act does not specifically allow immigration officers to enter and inspect records to determine whether that organisation is meeting its immigration obligations. The 1987 Act does not provide for immigration officers to inspect information establishing a student's entitlement to study or compliance with immigration obligations.

Discussion paper and submissions - The issue of accessing additional information related to non-citizens' compliance with permit conditions was raised in the discussion document. The proposal received a high level of support.

The discussion paper also contained proposals to clarify and strengthen obligations on third parties, particularly education providers and employers. A power allowing inspection of records in order to monitor compliance with immigration obligations was discussed in relation to education providers. Approximately 70 percent of 38 organisations and 85 percent of 38 individual submitters supported this proposed power. Submitters commented on the need to monitor compliance with immigration obligations by both education providers and non-citizen students. The New Zealand Vice Chancellor's Committee submission expressed a concern that confidential student information held by universities should not be shared.

Comment - The ability to inspect records and relevant files held by third parties (employers and education providers) is crucial for undertaking effective investigations and to increase incentives to comply with immigration obligations. This power does not include any search capability. It permits officers to enter premises to request the provision of relevant files and documentation to monitor compliance. Powers of entry and inspection are less intrusive than powers of entry and search. The Order in Council requirement allows the Minister to ensure that the Department has developed operational instructions and administrative oversight procedures to govern the exercise of these powers. The Minister would also need to be satisfied that the Department has developed and implemented appropriate training for officers likely to be designated these powers.

These proposals would enable the Department to ensure that education providers, employers and non-citizens are fulfilling their immigration obligations. This would contribute to the integrity of the immigration system by ensuring that only those entitled to study or work did so, and that student visas were not seen as an easy entry into New Zealand.

Proposal – Entry at the border to locate documents

I propose that the Bill empower designated officers to search for travel and identity documentation. This power would be able to be exercised only when exercising the power of entry and search to locate a person who is unlawfully present, refused entry, or committing an offence under the 1987 Act in border areas and craft.

Status quo - The 1987 Act provides for police and customs officers (undertaking immigration duties) to enter and search border areas and craft to locate and detain non-citizens. There is no provision to search for travel and/or identity documentation.

Discussion paper and submissions - This issue was not raised in the public discussion document. It arose following further consideration of the adequacy of the current power and the public consultation.

Comment - Providing additional powers to search for travel and identity documentation would enhance the effectiveness of entry and search powers. Obtaining travel or identity information would allow officers to more quickly establish the identity of a person, identify potential flaws in processing systems by allowing that person's entry to be traced, and increase the ability to identify people who assisted in their entry.

Proposal - Entry and search of Immigration Control Areas and craft

I propose to introduce a statutory power of entry for designated immigration officers to Immigration Control Areas (as discussed in *Chapter Two: Visas*), and craft within those areas, to undertake immigration duties and to search for travel and identity documentation.

Status quo - Immigration officers do not have a statutory power of entry to border areas and craft for the purpose of fulfilling ordinary immigration functions.

Discussion paper and submissions - This issue was not raised in the discussion paper. The creation of immigration specific processing zones (Immigration Control Areas) had not been raised at that point. As a largely technical modification to existing definitions of areas it is unlikely to attract substantial public comment.

Comment - The current inability for immigration officers to access border areas to carry out immigration functions reduces the ability of the Department to deliver expected immigration outcomes – particularly around the arrival and departure of non-citizens of interest (such as people who are inadmissible, make protection claims, or who are being deported from New Zealand). The possible prevention of immigration officers accessing these areas reduces the opportunity for the Department to take part in a whole of government response to an issue involving immigration concerns.

Proposal - Power to require the provision of space at airports and exemption from charge for operational space

I propose that the Bill provide for the Department to require from airport management companies the provision of space for operational purposes.

I propose that operational spaces used by the Department not be subject to charges.

The extent of both proposed powers would align with similar provisions in Customs and Ministry of Agriculture and Forestry legislation.

Status quo - Other government agencies with significant roles at the border have legislative provisions allowing them to require the provision of operational space. This provision has not been used as the most frequent inhibitor to additional space has been the physical and structural capacity of the airport.

[Information withheld under sections 9(2)(i) and 9(2)(j) of the Official Information Act 1982]

Other airports do not currently charge the Department for space required or space is required on only an ad hoc basis.

Other government agencies also have provision to use operational space without charge. This provision is used and these agencies pay rent only for space used for staff and administrative functions.

Discussion paper and submissions – This proposal was not consulted on as it is an issue largely confined to airport management companies. In a separate consultation exercise, airport management companies were contacted to outline the proposal and seek comment. Airports raised concerns about the possibility that this power could lead to an increased demand for space and the possibility that there may be duplication in space requirements of government agencies. The basis for making this change was also queried in terms of public and private benefit and the usefulness of user pays to ensure space requirements remain reasonable. Further discussions with airport management companies will clarify many of the points raised but it is expected that the metropolitan international airports (who currently charge for space) may be opposed to this proposal.

Comment - Like other border agencies, the Department has had difficulty in obtaining sufficient space for the effective conduct of operations at the airport. Budgetary pressure has resulted in confined areas for interviewing arriving passengers. Arriving passengers waiting for an immigration interview must queue for lengthy periods at peak times. Foreign governments have commented negatively on this treatment of their citizens.

The Customs and MAF power to require the provision of space has not been used by those agencies. However the presence of this power allows for it to be used in the future.

The Department currently rents all space required for immigration processing of arriving and departing passengers from airport companies. Other key border agencies (Customs and MAF) are legislatively exempted from being charged for operational space.

That Customs and MAF do not pay charges for operational processing space reflects the nature of the service provided by government border agencies. Their services, like immigration services, are essential. The airport could not operate as an international airport without them.

Proposal – Confirmation of existing powers, offences, penalties for offences, procedural provisions related to offences

I propose that all other powers for immigration and refugee status officers (to be renamed determination officers), police and customs officers from the 1987 Act be continued in the Bill, subject to any changes agreed as a result of proposals in this review.

I propose that the current range of offences provided for in the 1987 Act be continued in the Bill subject to any changes agreed as a result of proposals in this review.

I propose that penalties in the 1987 Act, as they relate to offences identified for renewal, be renewed incorporating any variations proposed and agreed in this review.

I propose that indictable offences being carried over from the 1987 Act (and any new ones proposed in the review) remain as indictable offences, and that all other offences be summary offences. I propose that information must be laid within two years of the earlier of when the person laying the information became aware of, or should reasonably

have become aware of, the matters to which the offence relates.
Status quo - The 1987 Act sets out a number of powers, offences and penalties to support various requirements. The offences and penalties were last reviewed and modified in 2002. Changes to the existing provisions are identified in the relevant sections.
Discussion paper and submissions – Changes to the Powers, offences, penalties and procedural provisions related to offences were not proposed in the discussion document except in relation to changes being discussed in proposals covered in other chapters.
Comment – Powers, offences, penalties and procedural provisions are required to support the operation of immigration legislation. No changes are proposed to the majority of these. A minor amendment to the timeframe within which information must be laid is intended to increase flexibility and prevent people from escaping prosecution by hiding the relevant matter.

CHAPTER NINE: COMPLIANCE AND ENFORCEMENT

PURPOSE

882 This chapter discusses the recommendations on:

- access to address information to locate people who are liable, or may be liable, for deportation from New Zealand
- powers of entry, search and inspection
- requiring airport companies to provide space for immigration border functions and exempting the Department from charges for passenger processing space
- evidence in proceedings provisions, and
- remaining powers, offences, penalties, and procedural provisions.

STATUS QUO

883 The immigration system enables people to enter and stay in New Zealand. At the same time, the immigration system must enable the government to ensure the safety and security of New Zealand in a challenging global environment. The immigration system relies on people taking responsibility for obtaining their permit legitimately, complying with the rules of their permit, abiding by New Zealand law and leaving before their permit expires.

884 Compliance and enforcement activity undertaken by the Department of Labour (the Department) broadly falls into three categories:

a. Obtaining information to allow the Department to:
   i. detect immigration fraud or misrepresentation
   ii. identify people breaching the conditions of their permit, and
   iii. locate people who are in New Zealand unlawfully.
b. Taking some form of action based on the information obtained, including:
   i. assisting people who have not complied with immigration conditions to return to compliant behaviour before further action is required
   ii. returning people to lawful status
   iii. locating people who are liable for removal or deportation, and
   iv. serving and executing removal or deportation orders.
c. Following up the commission of an offence under the Immigration Act 1987 (the 1987 Act) or non-compliant activity.

RATIONALE FOR PROPOSALS

885 The powers set out in the 1987 Act are not optimal as:

a. there are limited sources of information that compliance officers can access to locate people unlawfully present in New Zealand
b. currently, compliance officers may only seek address information about people unlawfully present in New Zealand. There is no equivalent power to allow the location of people who are liable for deportation or who may

be liable for deportation for suspected fraud or misrepresentation when obtaining their permit, or who are breaching their conditions of stay

c. the types of information that can be accessed when investigating compliance with immigration conditions or New Zealand employer immigration obligations are tightly prescribed and officers may be unable to access relevant information, and

d. some powers of entry, inspection, and search contained within the 1987 Act are not conferred on officers with primary responsibility for delivering on immigration outcomes.

886 The proposals in this paper will improve the Department's ability to support the integrity of the immigration system by enhancing its access to information, people and places. They will improve the Department's ability to:

a. source address information from a greater range of organisations that hold or are likely to hold this as part of the normal course of their operations (i.e. without introducing any new requirement to obtain and/or store address information)

b. locate people for a greater variety of purposes

c. investigate compliance with conditions of entry and stay and with employers' and education providers' immigration obligations

d. acquire operational space at airports on the same basis as other key border agencies (New Zealand Customs Service (Customs) and the Ministry of Agriculture and Forestry (MAF)), and

e. access ports and port environs to conduct normal immigration operational functions (such as processing passengers, deporting passengers, questioning arrivals).

ACCESS TO ADDRESS INFORMATION

Proposals

887 It is proposed that the Immigration Bill (the Bill) enables designated officers or determination officers to require address information to locate people who are liable, or who may be liable, for deportation from New Zealand. The process for requiring address information, which includes a written request, would mirror the 1987 Act.

888 It is proposed that the Bill enables designated officers and determination officers to require address information from any business or organisation that exists within a list of industry groups, or from any specified government agency.

889 It is proposed that the list of industry groups and government agencies that may be required to provide address information include:

a. education providers (in relation to enrolled students over the age of 17 years only)

b. other government agencies:

   i. New Zealand Customs Service

   ii. Ministry of Social Development

iii. Ministry of Justice

iv. New Zealand Police (Police)

v. Land Transport New Zealand

vi. Department of Building and Housing

vii. Housing New Zealand

c. postal and courier companies

d. telecommunications providers

e. internet providers

f. subscription television providers

g. finance and banking providers

h. local and regional government

i. insurance providers

j. utility providers (e.g. electricity, gas, water)

k. employers (in relation only to an employee who is being located), and

l. real estate agencies.

Status quo

890 The 1987 Act allows immigration officers to require specified companies and government agencies to provide address information about individuals who are unlawfully present in New Zealand (overstayers). The Department must also locate persons necessary:

a. to complete an investigation process (including providing the person with potentially prejudicial information to allow them to correct and contest information or findings), and

b. for the Department to undertake compliance activity (such as serving and executing a deportation order).

891 Officers currently rely on the last known address to locate persons for these purposes. If the person is no longer at that address then the Department has limited means by which to acquire further information. The Privacy Act 1993 does provide for the sharing of information where such sharing is necessary to avoid prejudice to the maintenance of the law. However the application of this privacy principle in these circumstances is regularly disputed.

Discussion paper and submissions

892 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.

893 Seventy percent of 94 submitters favoured increasing the purposes for which information may be sought beyond locating overstayers. All submitters stressed the need to adhere to human rights obligations and privacy considerations, and to ensure adequate oversight.

894 Sixty-five percent of submitters favoured increasing the sources of address information by listing a greater range of industries. Approximately 20 percent of all submitters did not support the proposal. Many submitters agreed that health and education providers should not be among the organisations that may be required to provide information due to the risk that people may deprive themselves and their children of health and education services.

Comment

895 Without this power, immigration compliance officers can only rely on address information provided at the last point the person had dealings with the Department. This information is frequently out of date. Those who deliberately seek to enter and stay in New Zealand based on false or misleading information seldom give correct or current address information.

896 The current list of companies that can be required to provide address information is outdated and is not comprehensive (for example, it refers only to two telecommunications companies: Telecom and the now non-existent Clear Communications). Broadening the application of this existing power to a greater number of industries, without specifying particular companies, would significantly enhance the Department's ability to locate people and would future-proof this aspect of the legislation.

Administrative internal review

897 To mitigate against unreasonable requests, the Department would develop an internal review mechanism to monitor the number of requests to individuals, companies, organisations and agencies. The Department would also monitor compliance with the obligation to provide information and the accuracy of information provided. Requests to government agencies would specify a departmental contact to which responses could be directed if there are operational or intelligence interests linked to an address or person. Such a mechanism would ensure that requests for information are justified, are made on a scale appropriate to the power (that is, a limited number of simultaneous requests), and that companies are not inundated by requests for information.

New Zealand Bill of Rights Act 1990 and privacy implications

898 Extending the existing power to obtain address information raises issues under section 21 of the New Zealand Bill of Rights Act 1990 (the NZBORA) - the right to be free from unreasonable search and seizure. This proposal is considered justified by the Ministry of Justice as the Department requires reliable information in order to locate people who are, or who may be, liable for deportation. The type of information that can be requested is limited and the process for gathering and storing information would be subject to appropriate safeguards in the Bill to ensure consistency with the NZBORA (such as a threshold test for the initiation of this power). The internal review mechanism discussed above would help to ensure consistency with NZBORA.

899 The Department must also comply with Privacy Act 1993 requirements surrounding the storage and access to private information. Information will

be held securely, and only required of organisations and accessed by appropriately trained and designated immigration officers.

Education providers

900 The Human Rights Commission noted that requiring address information from health and education providers could detrimentally impact on children's rights to access health and education services. The Commission commented that parents unlawfully in New Zealand may refrain from accessing services for their children out of fear of a negative immigration consequence. In addition, New Zealand must uphold access to education services as required by the United Nations Convention on the Rights of the Child for children aged 17 years and under. The proposal addresses the Human Rights Commission's concerns by specifying that educations providers must provide address information only in relation to students over 17 years of age.

POWERS OF ENTRY

Powers of entry and search

Proposals

901 It is proposed that powers of entry and search contained within the 1987 Act be carried over into the Bill as powers designated by the chief executive. This would remove reference from the legislation to particular officers or agencies being able to exercise these powers and instead allow these powers to be designated to the appropriate officers and aligns with proposals in *Chapter Three: Decision-making*.

902 As a safeguard in exercising potentially intrusive powers of entry and search, it is proposed that this power be activated by Order in Council, made once the chief executive has satisfied the Minister of Immigration (the Minister) that all necessary training, systems and procedures were in place.

903 It is proposed that the Bill establish a power for designated officers to enter and search buildings and premises to serve and/or execute a deportation notice or order.

904 It is proposed that designated officers may enter and search buildings, premises and craft in border areas to locate people who may be committing an immigration offence, unlawfully present in New Zealand, refused entry to New Zealand, or to detect or prevent an immigration offence.

Status quo

905 Both immigration and police officers may serve a removal or deportation order. Only police officers may enter a building or premises in order to do so. Police officers and customs officers (undertaking an immigration function) have powers of entry to border areas to locate and detain people unlawfully present, ineligible to enter New Zealand, refused entry to New Zealand, or who are or may be committing immigration offences.

Discussion paper and submissions

906 The public discussion paper asked if "immigration officers should have the same powers of entry and search as Customs and Police have in the

immigration context". This proposal was supported by 40 percent of 95 submitters. Approximately a third of 55 organisations indicated support for the proposal and approximately 55 percent were opposed. Organisations opposed included the New Zealand Law Society, Wellington District Law Society, The Asian Network Ltd, and Waitakere Community Law Service.

907 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 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 considered that the proposal is unnecessary and any issues can be dealt with administratively.

908 Submissions indicated some misunderstanding about the difference in roles of compliance officers compared with visa and permit officers, and the extent of Customs' role in immigration compliance activity.[16] There was also misperception that compliance officers currently only undertake entry and inspection with a police presence.[17]

Comment

909 Compliance officers must be able to obtain sufficient information about compliance with immigration obligations. This assists with making accurate and timely interventions to correct non-compliant behaviour, and includes the ability to take appropriate compliance action. Making these powers able to be designated by the chief executive would enable the chief executive to designate officers of other government departments as well as immigration officers.

910 The requirement that these powers only come into force through Order in Council provides a safeguard for the exercise of these powers by immigration officers. It allows the Minister to ensure that the Department has developed operational instructions and administrative oversight procedures to govern the exercise of these powers. The Minister would also need to be satisfied that the Department has developed and implemented an appropriate training programme for officers who are to be designated these powers. Operational instructions would require that exercise of this power by designated immigration officers be limited to circumstances where police are not available in the time required to safely and successfully achieve the desired immigration outcome.

Serving and executing removal and deportation orders

911 The current absence of the power for immigration officers to enter and search premises substantially limits their ability to effectively carry out the function of serving and executing removal and deportation orders. Most people are found at premises that they return to regularly, such as their

[16] Customs officers' role in immigration compliance activity is limited to border areas.
[17] A number of entry and inspection powers are extended only to compliance officers, and police do not play any role in the exercise of these powers.

place of residence or work. Police involvement in immigration matters is often a low priority for police resources, creating administrative difficulties in serving and executing deportation orders.

912 In *Chapter Five: Deportation* a new process is proposed involving serving a deportation liability notice. This notice includes important information about appeal rights and time limits. Police involvement at this early stage may create the appearance of greater criminality than is necessarily the case, and may inhibit the person from seeking advice about appeals and consideration of their case. Immigration officers are best placed to provide this information when the notice is served.

913 Similarly, on the serving of a deportation order immigration compliance officers would be better placed than police to provide advice about the process of deportation, duration of bans on re-entry to New Zealand, and any costs involved.

Entry at the border to locate people, and to detect or prevent offences

914 The current power is designed to achieve immigration outcomes, yet it is not able to be designated to immigration officers. This exclusion limits the ability of immigration officers to enforce immigration obligations, deliver immigration outcomes and manage immigration risks. It also limits future options for whole of government management of the border.

915 Enabling compliance officers to exercise this power would allow compliance officers to work alongside Police and Customs in the delivery of immigration outcomes. The Department would continue to acknowledge and use other agency's areas of expertise (such as Customs' detailed search capability and craft control powers). This would not significantly alter existing functions and responsibilities at ports, or significantly duplicate resources or training. Police and Customs officers undertaking immigration duties would continue to be designated this power.

916 As a privacy safeguard, the proposal limits the exercise of this power to the border environment which is a heavily regulated environment designed to protect New Zealand's border. There should be a reduced expectation of privacy within this environment by those seeking to enter New Zealand. A search as outlined above cannot be considered to be an intrusion into a reasonable expectation of privacy in the border environment.

Powers of entry and inspection

Proposals

917 It is proposed that powers of entry and inspection contained within the 1987 Act be carried over into the Bill as powers designated by the chief executive. This would remove reference from the legislation to particular officers or agencies being able to exercise these powers and instead allow these powers to be designated to the appropriate officers and aligns with proposals in *Chapter Three: Decision-making*.

918 It is proposed that the Bill establish a power for designated immigration officers to enter buildings and premises to inspect and copy information held by an:

a. accommodation provider to assist in locating people unlawfully present in New Zealand
b. employer about a non-citizen who is suspected of being unlawfully present in New Zealand or who may not be entitled to undertake that employment (including time and wage records as well as any documents held that record remuneration or employment conditions of an employee being investigated)
c. education provider about a student's entitlement to study or other information that establishes a student's non-compliance with visa conditions, and
d. employer or education provider that is relevant to an investigation into their compliance with their immigration obligations.

919 As a safeguard in exercising these powers, it is proposed that powers of entry and inspection (where these are additional to those existing in the 1987 Act) be activated by Order in Council made once the chief executive had satisfied the Minister that all necessary training, systems and procedures were in place.

Status quo

920 Immigration officers have powers of entry and inspection of accommodation providers' records when locating overstayers. No warrant is required to exercise these powers.

921 The 1987 Act allows immigration officers to enter employers' premises to inspect and copy time and wage information regarding an employee suspected of being here unlawfully, or who may be working in breach of their permit conditions. No warrant is required in order to exercise this power.

922 The 1987 Act does not specifically allow immigration officers to enter and inspect records held by an education provider to determine whether that organisation is meeting its immigration obligations. The 1987 Act does not provide for immigration officers to inspect information establishing a student's entitlement to study or their non-compliance with immigration obligations.

Discussion paper and submissions

923 The discussion paper asked "What provision should there be for requiring organisations to provide information to assist with an immigration investigation?" The proposal to increase access to information received high level of support as noted in paragraphs 892 – 894.

924 The discussion paper also contained proposals to clarify and strengthen obligations on third parties, particularly education providers and employers. A power allowing inspection of records in order to monitor compliance with immigration obligations was discussed in relation to education providers. Approximately 70 percent of 38 organisations and 85 percent of 38 individual submitters supported this proposed power. Submitters commented on the need to monitor compliance with immigration obligations by both education providers and non-citizen students. The New Zealand Vice Chancellor's Committee submission expressed a concern that confidential student information held by universities should not be shared.

925 The Ministry of Education submitted that:

"Knowing where international students are and whether they are attending courses is vital to the safety of international students in New Zealand. Providing immigration officers with the power to require information from education providers will assist in the monitoring of both students' and providers' compliance with immigration requirements. It should be noted that the industry itself has requested (via the Code office) that the Department of Labour undertake 'spot checks' of providers in an effort to weed out those institutions that are perpetually non-compliant".

Comment

926 This power does not include a search capability, instead it permits officers to enter premises to request the provision of relevant files and documentation to monitor compliance. Powers of entry and inspection are less intrusive than powers of entry and search. The requirement that these powers should come into force through an Order in Council provides a safeguard for the exercise of these powers by immigration officers. The Order in Council requirement allows the Minister to ensure that the Department has developed operational instructions and administrative oversight procedures to govern the exercise of these powers. The Minister would also need to be satisfied that the Department has developed and implemented an appropriate training programme for officers who are to be designated these powers.

927 The existing power to inspect time and wage records is vital when investigating compliance with permit conditions, but restricts the ability of compliance officers to inspect and copy other information held by an employer (such as a letter offering the job, or an employment agreement). This information may establish whether an individual is complying with their visa conditions.

928 The ability to inspect records and relevant files held by third parties (employers and education providers) is crucial for undertaking effective investigations. Further, the ability to detect non-compliance increases incentives for third parties to comply with their obligations. *Chapter Eight: Third parties* sets out proposals to improve obligations on third parties and provides for a more consistent infringement system to support this.

929 These proposals would enable the Department to ensure that education providers, employers and non-citizens are fulfilling their immigration obligations. They would contribute to the integrity of the immigration system by ensuring that only those entitled to study or work did so, and that student visas were not seem as an easy entry into New Zealand.

Entry at the border to locate people, and to detect or prevent offences

Proposal

930 It is proposed that the Bill empower designated officers to search for travel and identity documentation. This power would be able to be exercised only when exercising the power of entry and search to locate a person who is unlawfully present, refused entry, or committing an offence under the 1987 Act in border areas and craft.

Status quo

931 The 1987 Act provides for police and customs officers undertaking immigration duties to enter and search border areas and craft to locate and detain people. There is no provision for an associated search for travel and/or identity documentation.

Discussion paper and submissions

932 This issue was not raised in the public discussion document. It arose following further consideration of the adequacy of the current power and the public consultation.

Comment

933 Currently, the 1987 Act provides for the location of a person in a border area who is unlawfully present, refused entry, or committing an offence under the 1987 Act. The power should, however, also provide for designated officers to search for travel and identity documentation related to an individual who is being sought, or who has been located, under this power. The ability to search for travel and identity documents while, or immediately upon, locating an individual would increase the likelihood of, for example, positively identifying the individual, and/or encouraging the individual to identify people who assisted in their entry.

934 This power would be limited to the border environment which is a heavily regulated environment designed to protect New Zealand's border. There should be a reduced expectation of privacy within this environment by those seeking to enter New Zealand. It is considered that a search as outlined above cannot be considered to be an intrusion into a reasonable expectation of privacy. Exercise of this power would be limited to those immigration officers who had undertaken an approved training programme and would require acting within agreed operational instructions.

Entry and search of Immigration Control Areas and craft

Proposal

935 It is proposed to introduce a statutory power of entry for designated immigration officers to Immigration Control Areas (as discussed in *Chapter Two: Visas*), and craft within those areas, to undertake immigration duties and to search for travel and identity documentation.

Status quo

936 Immigration officers do not have a statutory power of entry to border areas and craft for the purpose of fulfilling ordinary immigration functions such as:

a. processing arriving passengers
b. interviewing passengers identified as inadmissible prior to their disembarkation from a craft, to view their seating or to identify those seated with them
c. attempting to locate passengers' travel or identity documents, or
d. facilitating the departure of people being removed, deported or turned around.

Discussion paper and submissions

937 This issue was not raised in the discussion document. The creation of immigration specific processing zones (Immigration Control Areas) had not been raised at that point. It is largely a technical modification to existing definitions of areas and is unlikely to attract substantial public comment.

Comment

938 The current inability for immigration officers to access border areas to carry out immigration functions reduces the ability of the Department to deliver expected immigration outcomes – particularly around the arrival and departure of people of interest (such as people who are inadmissible, make protection claims, or who are being deported from New Zealand). The possibility that immigration officers may be prevented access to these areas reduces the opportunity for the Department to take part in a whole of government response to an issue involving immigration concerns.

939 This provision would still require inter-agency agreements around access within areas designated by other pieces of legislation (such as the Customs and Excise Act 1996 and the Civil Aviation Act 1990). This is analogous to the situation whereby Customs officers acquire access to Aviation Security Areas that co-exist with Customs Controlled Areas.

New Zealand Bill of Rights and human rights

940 The proposals identified above modify the existing powers of entry in a number of areas. Any change in powers of entry raises issues under section 21 of the NZBORA - the right to be free from unreasonable search and seizure. The proposals above are considered justified as the Department requires reliable information in order to determine compliance with immigration obligations or conditions of entry and stay in New Zealand.

941 The information that is proposed to be subject to entry and search, or entry and inspection, is very limited and the process for gathering and storing such information would be subject to appropriate safeguards in the Bill to ensure consistency with the NZBORA. The ability to locate people is also required in order to detect and prevent immigration offences, to prevent the entry of inadmissible people to New Zealand and to deport people who are in New Zealand unlawfully.

POWER TO REQUIRE THE PROVISION OF SPACE AT AIRPORTS AND EXEMPTION FROM CHARGE FOR OPERATIONAL SPACE

Proposals

942 It is proposed that the Bill provide for the Department to require from airport management companies the provision of space for operational purposes.

943 It is proposed that operational spaces used by the Department not be subject to charges. The extent of both proposed powers would align with similar provisions in Customs and MAF legislation.

Status quo

944 Other government agencies with significant roles at the border have legislative provisions allowing them to require the provision of operational space. This provision has not been used as the most frequent inhibitor to additional space has been the physical and structural capacity of the airport at the point where agencies must be placed. Negotiations for space improvements occur regularly between agencies and the airport companies.

945 [Information withheld under sections 9(2)(i) and 9(2)(j) of the Official Information Act 1982]

946 Other airports (regional international airports) do not currently charge the Department for space required or space is required on only an ad hoc basis. Passenger flows at these ports require a more limited immigration presence than at the metropolitan international airports.

947 The government agencies that require airport space also have provision to use operational space without charge. This provision is used and these agencies pay rent only for "back office" functions and staff spaces with operational areas attracting no rental.

Discussion paper and submissions

948 This proposal was not consulted on as it is an issue largely confined to airport management companies. In a separate consultation exercise, airport management companies were contacted to outline the proposal and seek comment. Airports raised concerns about the possibility that this power could lead to an increased demand for space and the possibility that there may be duplication in space requirements of government agencies. The basis for making this change was also queried in terms of public and private benefit and the usefulness of user pays to ensure space requirements remain reasonable. Further discussions with airport management companies will clarify many of the points raised but it is expected that the metropolitan international airports (who currently charge for space) may be opposed to this proposal.

Comment

Requiring operational processing space

949 Like other border agencies, the Department has had difficulty in obtaining sufficient space for the effective conduct of operations at the airport which are necessary to facilitate the arrival and entry of passengers into New Zealand. Budgetary pressure for increasingly expensive floor space has resulted in confined areas for interviewing arriving passengers who may present a risk. The facilities for arriving passengers who must frequently queue for reasonably lengthy periods at peak times while they wait to be interviewed has received negative comment from foreign governments when commenting on the treatment of their citizens, and from New Zealanders accompanying arriving foreign citizens.

950 Other key border agencies (Customs and MAF) have legislative powers to require the provision of space at airports for operational activities but have not used this power. The presence of this power, however, allows for a

future possibility where the government may exercise this power for all government border agencies (for instance in an emergency or in the event that relations between government agencies and airport company deteriorate to a degree where space is affecting the delivery of required government services).

951 It is envisaged that if the Department obtains a similar power it will also not explicitly use this power, but will retain the ability to do so should the government consider it necessary.

Exemption from charge for operational processing space

952 The Department currently rents all space required for immigration processing of arriving and departing passengers from airport companies. Other key border agencies (Customs and MAF) are legislatively exempted from being charged for operational space by the airport company.

953 That Customs and MAF do not pay charges for operational processing space reflects the nature of the service provided by government border agencies. Their services, like immigration services, are essential and non-commercial and without which the airport could not operate as an international airport.

954 Exemption from charges for operational space would result in a minimal revenue reduction for the metropolitan international airports as set out in status quo above.

EVIDENCE IN PROCEEDINGS

Proposals

955 It is proposed that the Bill continue to allow for certification of particular matters that will be presumed to be evidence in proceedings before a court or the Immigration and Protection tribunal.

956 It is proposed that the Bill include the following as additional matters that can be certified as evidence:

a. certification of an individual's fingerprints obtained under a particular name in a particular country
b. certification that a person has or has not been granted any particular immigration status (including any particular type of visa or permit, refugee or protection status, permanent residence, and/or citizenship) under a particular name in a particular country
c. certification that a person has been deported from another country (New Zealand is already covered)
d. certification that a person has or has not been issued a passport, certificate of identity, or other document under a particular name in a particular country
e. certification that a person has or has not been convicted, charged, and/or is under investigation under a particular name in a particular country
f. certification that a person has or has not been awarded a particular qualification under a particular name in a particular country

g. certification that a person was or was not employed in a particular position (by a particular employer) under a particular name in a particular country, and

h. certification that a certain document or application was received by an immigration officer on a certain date.

Status quo

957 The 1987 Act enables an immigration officer to provide a statement of certain matters to a court. This statement is able to be rebutted in court by the defendant. In the absence of proof to the contrary, the statement will be deemed to be proof of the matter.

Discussion paper and submissions

958 This matter was not discussed in the discussion document as at that time there was no proposal for change. Following the public consultation period, further review identified a number of additional facts that need to be included within this mechanism.

Comment

959 This mechanism is required because to prove some facts in the normal way in Court is too big a burden on the State. A current example is proving that the Department did not grant a permit to an individual. A negative fact is far easier to prove as incorrect (by producing a permit) than it is to prove correct.

960 Without this proposal, proving the proposed additional facts in court imposes a substantial burden on the State, as it often imposes substantial costs for a number of New Zealand government agencies and liaison with overseas agencies. The time and cost involved in, for instance, locating and bringing to New Zealand a witness from another country to testify that a person was deported from that country, can delay and make the cost of proving a case disproportionate to the offence.

CONFIRMATION OF EXISTING POWERS

961 It is proposed that all other powers for immigration and refugee status officers (to be renamed determination officers), police and customs officers from the 1987 Act be continued in the Bill, subject to any changes agreed as a result of proposals in this and other chapters.

CONFIRMATION OF EXISTING OFFENCES

962 It is proposed that the current range of offences provided for in the 1987 Act be continued in the Bill subject to any changes agreed as a result of proposals in this and other chapters.

963 Offences are required to support the immigration system by providing incentives to comply with obligations, as well as to manage risks and appropriately penalise non compliance with obligations. Offences and the penalties in the 1987 Act were last reviewed in 2002. A brief description of the current general offences provided for in the 1987 Act is attached in Annex A.

CONFIRMATION OF EXISTING PENALTIES FOR OFFENCES

964 It is proposed that penalties in the 1987 Act, as they relate to offences identified for renewal, should be renewed incorporating any variations proposed and agreed in this review.

965 Penalties are an important component to the immigration system which places obligations on non-citizens and third parties interacting with non-citizens. The system relies on all involved meeting these obligations. Offences and penalties were last reviewed and amended in 2002.

PROCEDURAL PROVISIONS RELATED TO OFFENCES

966 It is proposed that indictable offences being carried over from the 1987 Act (and any new ones proposed in the review) remain as indictable offences, and that all other offences be summary offences. *Chapter Eight: Third parties* proposes a range of infringement offences in relation to third parties.

967 It is also proposed that information must be laid within two years of the earlier of when the person laying the information became aware of, or should reasonably have become aware of, the matters to which the offence relates. Such flexibility in the proposed limitation period would mean that people cannot escape prosecution by hiding the relevant matter.

ANNEX A: SUMMARY OF EXISTING GENERAL OFFENCES BY PENALTY

$100,000 fine and / or 7 years imprisonment	
142 (1) (c)	Giving false or misleading information to a immigration, visa, or refugee status officer
142 (1) (d)	Producing travel identity documentation knowing it relates to another person or knowing it to be forged or obtained fraudulently
142 (1) (e)	Providing a travel identity document to a person (the receiver) knowing that the receiver will try to produce it as relating to themselves or provide it to another person to produce as relating to themselves
142 (1) (ea)	For material benefit assists or advises a person to remain in New Zealand unlawfully or to breach a condition of their permit
142 (2)	Making changes, additions, alterations or attaching additional material to an application after it has been signed by the applicant as being true
$100,000 fine and / or 7 years imprisonment for each person for whom the offence was committed	
142 (1) (eb)	Assists or advises a person to enter New Zealand unlawfully knowing that person's entry is or would be unlawful or reckless as to whether that person's entry is or would be unlawful
142 (1) (ec)	Assists or advises another person to complete an arrival card in a manner that the person assisting or advising knows to be false or misleading
$5,000 fine and / or 3 months imprisonment	
142 (1) (f)	Assists or advises a person to remain in New Zealand unlawfully or to breach a condition of their permit
142 (1) (g)	Resists or intentionally obstructs any visa officer, immigration officer or member of the police in the exercise of the powers of that officer or member under the 1987 Act
$2,000 fine	
All other offences where penalty not otherwise specified	

Executive Summary - Chapter 10 Monitoring and detention

Proposal - Monitoring and detention

I propose that the Bill enable the Department to decide an appropriate form of management for non-citizens who are liable for detention including:

a. agreeing to reporting and residency requirements outside the warrant of commitment (warrant) process, or

b. requesting the courts order a non-citizen's release on conditions, or authorise their detention under a warrant.

I propose that where there is a change in the circumstances of the non-citizen the Department or the non-citizen can apply for a review of their monitoring and detention.

I propose that all non-citizens who are detained for immigration purposes and satisfy qualifying criteria have access to legal aid.

Status quo – Agreements to reporting and residency requirements between the Department and a non-citizen are not prohibited by the 1987 Act and informal agreements have been made. These informal agreements do not have a legislative foundation.

The provisions for court-ordered monitoring and detention, along with those for making an application for early review, vary under different sections of the 1987 Act. The Department must first detain a non-citizen, and then apply for an order from the courts to release them on conditions.

Non-citizens who are detained are usually ineligible for legal aid unless they are refugee status claimants who satisfy qualifying criteria.

Discussion paper and submissions - These proposals were not in the discussion paper. They arose after consideration of submissions supporting the use of alternatives to secure detention, including the Human Rights Commission submission that was supported by a number of other organisations and individual submitters.

The proposal will enable the courts to use discretion to release on conditions in a greater range of circumstances addressing concerns expressed by the Human Rights Commission and other submitters that the warrant process is a rubber-stamping exercise.

There was no proposal to extend provisions for legal aid in the discussion paper. There were many submissions, including from the New Zealand Law Society, which commented that legal aid should be available for immigration detainees.

Comment - The proposed immigration monitoring and detention system would build on the provisions in the 1987 Act, but allow for greater responsiveness and flexibility in the management of non-citizens who are liable for detention. They would enable the Bill to provide for a tiered system as a tool to assist in the management of non-citizens who are liable for detention. The system would be designed to manage risks to the:

- *integrity of the immigration system* where non-citizens fail to comply with its requirements during their entry or stay in New Zealand, and
- *safety and security of New Zealand* that a non-citizen may represent, or may be

suspected of representing.

Enabling the Department to make an agreement to reporting or residency requirements outside the courts would formalise a process to manage low level risk.

Enabling greater flexibility on behalf of the courts, the Department and the non-citizen would mean appropriate decisions could be made on a case-by-case basis. It would also enable greater responsiveness to change in circumstances.

The numbers of non-citizens that would meet the criteria and require legal aid is likely to be minimal, but this proposal ensures that those without alternative means can access representation during any period they may be detained.

Proposal – Initial period of detention without a warrant and review of warrants

I propose that the Bill enables a non-citizen to be detained for an initial period of up to 96 hours (four days), after which the system of warrants would continue to allow the courts to release a non-citizen on conditions, or to detain them considering the:

a. individual circumstances of their case

b. level of risk the non-citizen represents, and

c. need to ensure a high level of compliance with immigration law.

I propose that the Bill enable the courts to issue a warrant authorising detention for up to 28 days.

I propose that the Bill waive the requirement to renew a warrant where a non-citizen has been refused entry to New Zealand, but remains in the country for unrelated criminal justice reasons.

Status quo – The 1987 Act enables a non-citizen to be detained for an initial period of either 48 hours or 72 hours. The 1987 Act is inconsistent about the length of time for which the courts may issue a warrant, varying between seven, 28 and 30 days.

The Department is required to seek and renew a warrant every seven days for the entire duration of a non-citizens' unrelated custody for criminal justice reasons to prevent them accessing a humanitarian appeal against removal.

Discussion paper and submissions - Forty-nine organisations and 38 individuals made submissions on the proposal to extend the initial period of detention without a warrant. Forty-five percent of submitters supported the proposal, 35 percent did not.

Approximately 40 percent of 83 submitters who addressed the proposal agreed that the review period for warrants should be increased to no more than 28 days. Most agreed that immigration detainees should have early access to the courts and regular review of their detention.

Approximately 60 percent of 77 submitters agreed to the proposal to waive a warrant where a non-citizen has been refused entry to New Zealand, but remains in the country for unrelated criminal justice reasons but little substantive comment was made.

Comment – The initial period of detention without a warrant was intended to be sufficient to enable the Department to manage a non-citizen's departure where they had no legal entitlement to remain. The Department has increasingly found that the allowed time is not sufficient. The proposal should significantly reduce the cost associated with the warrant process through reducing the need to obtain warrants for refused entry non-

citizens being turned around at the airport. It has potential to halve the number of warrants for non-citizens being deported from New Zealand.

These proposals will give the courts greater discretion in the length of the warrant they issue. Safeguards such as the ability to apply for a writ of habeas corpus and enabling the Department and non-citizens to seek a review, along with entitlement to legal aid, ensures that access to the courts will not be limited.

These proposals would ensure that a non-citizen who committed a criminal offence travelling to and entering New Zealand did not gain any rights in the immigration system if they remained in the country for criminal justice reasons. If a non-citizen did not depart after any criminal justice matters were resolved, any immigration monitoring or detention that may be required would comply with the proposals in this chapter.

Proposal – Limits on secure immigration detention

I propose that where a non-citizen has exhausted all appeal rights and has no right to remain in New Zealand, and they have not departed after an ongoing period of secure immigration detention of six months, the courts may not issue any further warrants for secure immigration detention except where a direct or indirect reason for the non-citizen failing to depart is due to some action or inaction by the non-citizen themselves.

I propose that the courts must undertake greater scrutiny of secure immigration detention of six months of more and, that after twelve months that the Bill require the courts to consider ordering the non-citizen to either:

a. cease the action preventing their departure being facilitated, or

b. undertake an action in order to facilitate their departure.

Status quo - There are no limits on detention under the 1987 Act except a three month limit on detention for non-citizens issued a removal order (who do not subsequently claim refugee status or hinder the removal process).

Discussion paper and submissions - There was no proposal to limit the provisions for indefinite detention in the 1987 Act. The proposal to do so responds to the numerous public submissions that commented that detention should not be ongoing.

Comment - It is appropriate that the immigration system does not create an incentive for non-citizens to hinder their departure in order to achieve an immigration outcome. It is appropriate however, that in order to detain a non-citizen in immigration detention for longer than six months, the courts must be entirely satisfied that they have deliberately obstructed their departure. The proposal above will require the Department to provide non-affidavit evidence of this to the courts' satisfaction before they order any further immigration detention after six months.

The proposal above will see the Bill contain a statutory provision enabling the courts to order a non-citizen to sign travel documents where they have been in secure immigration detention for an ongoing period of 12 months. It would result in an ability to find the non-citizen in contempt of court where they fail to do so.

Proposal – Who may be monitored or detained for immigration purposes

I propose that the Bill allow non-citizens to be monitored or detained where they fail to comply with the requirements of the immigration system, and represent or are suspected of representing a risk to New Zealand, where:

a. they are refused entry at the border

b. their identity is unknown

c. they are a risk or threat to national or international security

d. they are liable for deportation, or

e. they have been issued with a deportation order.

Status quo - Under the 1987 Act a non-citizen may be liable for detention where they:

- they are refused entry at the border
- a decision on their eligibility for a permit cannot be made
- their identity is unknown
- they have been issued with a removal or deportation order, and
- they are a threat to security or are suspected terrorists.

Discussion paper and submissions - The discussion paper queried if detention should be available both at the border and onshore, primarily for the purposes of detaining protection claimants. This proposal is now considered unnecessary as the fact that a protection claim has been made should not in itself lead to liability for detention.

Comment - This proposal has a foundation drawn from the 1987 Act but would allow non-citizens who are liable for deportation to be detained during an immigration appeal. The ability to detain non-citizens in this circumstance, where required, is considered appropriate as the ability to access an immigration appeal does not necessarily reduce any risk the non-citizen may represent.

Proposal – Powers of detention

I propose that the Bill incorporate a statutory power, that will be activated by Order in Council subject to further Cabinet agreement, for designated officers to detain non-citizens for immigration purposes:

a. for up to four hours, OR

b. until police officers give effect to the detention, OR

c. until the non-citizen is detained in a place of detention, whichever occurs first.

Status quo - The Department is required to rely on police officers to arrest and detain a non-citizen where this is required.

Discussion paper and submission - Approximately 70 percent of 33 individual submitters, along with 50 percent of 42 organisations, expressed support for the proposal to grant certain officers a limited power of detention. They commented on the need for specialist training and attention to the rights of detainees in using such a power.

Comment – A limited statutory power of detention would enable the Department to effectively manage the immigration system and be responsive to any risk presented without the need to depend on police officers. This would have administrative benefits for the Department and the Police in the day to day management of the immigration system.

The proposals in *Decision-making* would ensure that only designated officers with

appropriate training and support in, among other things, human rights obligations and health and safety would exercise powers of detention.

Proposal – Secure detention

I propose that the provisions in the 1987 Act, which enable the Department to manage open detention at Mangere, be incorporated in the Bill without the restriction limiting them to refused entry non-citizens, allowing their application to all non-citizens liable for detention.

I propose that the Department develop terms of reference to undertake a whole of government scoping exercise that considers options for undertaking secure immigration detention, supported by appropriate resources.

Status quo - Under the 1987 Act, the chief executive of the Department can designate a place as a place of immigration detention but the Department's power to manage immigration detention is limited to those non-citizens refused entry to New Zealand.

If a non-citizen requires detention, they will generally be held in either Police facilities (for short durations) or Corrections facilities.

The Corrections Act contains the ability for all immigration detainees to be accommodated under a separate regime from other prisoners. Resource constraints mean that a completely separate regime would require non-citizens to be in cells for 23 hours of each day.

Discussion document and submissions - The Ministry of Foreign Affairs and Trade advise that a number of international governments have expressed concern that their citizens have been held in Police and Corrections facilities while their departure from New Zealand is facilitated. The United Nations High Commissioner for Refugees' submission confirmed that they are not supportive of the practice of using Police or Corrections facilities to detain asylum-seekers. Amnesty International reiterated that it:

"does not support the detention of refugees or asylum seekers in penal facilities unless the detainee has been properly charged or convicted of a criminal offence in New Zealand. Often such incarceration is seen and experienced as punishment when no crime has been committed, and the physical and psychological impact is disproportionate to the risk posed, if any, to the community".

Comment - The use of Police and Corrections facilities for immigration detention attracts criticism, nationally and internationally. Removing limitations on the Department's ability to give effect to immigration detention outside Police or Corrections facilities would enable the Department to consider and appropriately manage protection status claimants (in the short term) and the government to consider the use of alternative immigration detention facilities in the future.

CHAPTER TEN: MONITORING AND DETENTION

PURPOSE

968 This chapter discusses the recommendations on:

- habeas corpus and legal aid for immigration detainees
- monitoring by the Department of Labour
- court-ordered monitoring and detention
- length of court ordered monitoring and detention
- review of warrants of commitment
- the initial period of detention without a warrant of commitment
- who may be monitored or detained for immigration purposes
- powers of detention, and
- secure immigration detention.

STATUS QUO

969 The government has a sovereign right to choose which non-citizens travel to, enter and stay in New Zealand. It is also the government's right to facilitate the departure of non-citizens who have no right to remain. Where a non-citizen breaks the rules for travel, entry and stay, they become liable for monitoring or detention. The Department of Labour's (the Department) use of monitoring or detention authorised by the Immigration Act 1987 (the 1987 Act) and is guided by operational instructions.

970 The 1987 Act requires any extended period of monitoring or detention to be ordered or authorised by the courts. The courts can order a non-citizen's release on conditions, or authorise their detention under a warrant of commitment (warrant). The 1987 Act includes limits on the length of detention without a warrant, and the process by which warrants can be issued and reviewed. These provisions vary, as described in Annex A, depending on why the non-citizen is liable for detention.

971 Where a non-citizen is monitored, they are released on conditions ordered by the courts. They may be required to reside at a particular location (such as the Takanini accommodation facility managed by the Department). Reporting conditions may also be required.

972 Where a non-citizen is detained, they may be in open detention in the Mangere accommodation facility (Mangere) if they are refugee status claimants. Detention can also include secure detention in New Zealand Police (Police) or Department of Corrections (Corrections) facilities.

RATIONALE FOR PROPOSALS

973 Immigration monitoring and detention, in particular secure immigration detention, is an issue that attracts debate, both nationally and internationally. The detention proposals in the discussion paper drew over 70 submissions from individuals, and national and international organisations including the United Nations High Commission for Refugees (UNHCR).

974 The proposals in this chapter respond to the submissions and seek a tiered monitoring and detention system that balances the need to uphold the rights of the individual against with the need to ensure:

- the integrity of the immigration system where non-citizens fail to comply with its requirements during their entry or stay in New Zealand, and
- the safety and security of New Zealand where a non-citizen may represent, or be suspected of representing a risk.

975 The proposals have been developed with regard to New Zealand's national and international obligations, and benchmarked against international best practise guidelines on detention issued by the United Nations. The system being proposed is tiered, and would establish a number of alternatives to the use of secure immigration detention which will be limited.

A commitment to human rights obligations

976 The monitoring and detention system proposed has been developed with particular regard to:

- sections 22 and 23 of the New Zealand Bill of Rights Act 1990 (NZBORA). These sections contain provisions relating to personal liberty, and the rights of persons who are arrested and detained, and
- the international conventions New Zealand is party to, such as the United Nations International Covenant on Civil and Political Rights, and the United Nations Convention Relating to the Status of Refugees (Refugee Convention).

977 The proposals put forward in this paper have been benchmarked against the:

- United Nations Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment (UN Detention Guidelines). In particular, Principles Two and Four of the UN Detention Guidelines require detention to be carried out in accordance with the law and with judicial oversight, and
- UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers (UNHCR Detention Standards for Asylum Seekers) which propose alternatives to the use of secure immigration detention based on consideration of the individual circumstances of each case.

978 Further alignment with the NZBORA and the relevant international conventions will occur through the Department's operational instructions which will guide the use of monitoring and detention.

HABEAS CORPUS

979 None of the proposals outlined below limit a non-citizen's right to apply for a writ of habeas corpus to challenge the legality of their detention.

LEGAL AID

Proposal

980 It is proposed that all non-citizens who satisfy qualifying criteria have access to legal aid to support them:

a. at warrant of commitment hearings, and

b. during any period they are detained under a warrant of commitment.

Status quo

981 Non-citizens who are detained are usually ineligible for legal aid unless they are refugee status claimants who satisfy qualifying criteria.

Discussion paper and submissions

982 There was no proposal to extend provisions for legal aid in the discussion paper. There were many submissions, including from the New Zealand Law Society (NZLS), which commented that legal aid should be available for immigration detainees.

Comment

983 The numbers of non-citizens that would meet the qualifying criteria and require legal assistance is likely to be minimal but this proposal ensures that those without alternative means can access representation during any period they may be detained. The Ministry of Justice has advised that the cost associated with this proposal is not considered to be significant.

MONITORING BY THE DEPARTMENT OF LABOUR

Proposal

984 It is proposed that the Bill enable the Department to seek agreement from a non-citizen who is liable for detention that they:

a. report to the Department at set periods of time, and/or

b. reside in an agreed and specified location, and/or

c. provide a guarantor responsible for:

i. ensuring compliance with conditions of monitoring, and/or

ii. reporting including any failure to meet those conditions.

Status quo

985 This type of agreement is not prohibited by the 1987 Act and *informal* agreements can currently be made between the Department and a non-citizen.

Discussion paper and submissions

986 This proposal was not in the discussion paper. It arose after consideration of submissions supporting the use of alternatives to secure detention, including the Human Rights Commission (HRC) submission that was supported by a number of other organisations and individual submitters. It also responds to the comments made by the UNHCR that:

"Where there are monitoring mechanisms which can be employed as viable alternatives to detention, such as reporting obligations or guarantor requirements, these should be applied first, unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose".

Comment

987 Where a non-citizen is liable for detention, an analysis of the risk they present may mean that they can be appropriately managed in the community. The provisions in the 1987 Act for this to occur through a court order for release on conditions (a release order) vary considerably. To obtain a release order, the Department must first *detain* the non-citizen, and then apply for the release order from the courts.

988 Establishing provisions for a formal agreement to be made outside the court process would enhance the status quo. It would give the agreement legislative support and would not require the non-citizen to be detained.

989 The use of agreements between the Department and a non-citizen would be authorised by the legislation and guided by operational instructions which would also outline procedures where agreement could not be reached or conditions were not met. In these cases, a non-citizen could be detained as per the proposals below.

COURT ORDERED MONITORING AND DETENTION

Proposals

990 It is proposed that the current system for ongoing monitoring and detention is continued and enables the courts to order the release of a non-citizen on conditions, or to authorise their detention under a warrant after considering the:

a. individual circumstances of their case
b. level of risk the non-citizen represents, and
c. need to ensure a high level of compliance with immigration law.

991 In considering the level of risk, it is proposed that where a non-citizen's identity is unknown, they cannot be released on conditions unless there are exceptional circumstances.

992 It is proposed that where there is a change in the circumstances of the non-citizen during their monitoring or detention, the Department or the non-citizen can apply to the courts for a review.

993 It is proposed that applications for a review during monitoring or detention are limited to where new information can be presented about the non-citizen's circumstances.

994 It is proposed that where an application for a review during monitoring or detention is made by a non-citizen, and change in circumstances is not

proven, the non-citizen's ability to make subsequent applications should be at the discretion of the courts.

Status quo

995 The provisions for release on conditions and detention, and for making an application for a review during monitoring and detention vary under different sections of the 1987 Act. For example, under section 60 of the 1987 Act, a non-citizen served with a removal order cannot be released on conditions until their third warrant hearing. An application for a review of their detention is not provided for under the legislation.

Discussion paper and submissions

996 These proposals arose from the consultation process which highlighted the need to ensure that the discretion of the courts, and the rights of non-citizens, were upheld during any period of monitoring and detention.

997 Granting discretion to the courts to release on conditions in a greater range of circumstances addresses concerns expressed by the HRC and other submitters such as the Whitireia Community Law Centre, that the warrant process is a rubber-stamping exercise.

Comment

998 These proposals build on provisions in the 1987 Act which allow the courts to order a non-citizen's release on conditions in some circumstances but limit its ability to do so in others.

999 Requiring the courts to consider the circumstances of the case and the level of risk, along with the need to ensure a high level of compliance with immigration law, will provide the courts with greater discretion more closely aligned to NZBORA and New Zealand's international obligations. It is anticipated that the courts will consider a range of other factors such as the cumulative effect of any warrants authorised over an ongoing period.

1000 The proposal that detention is required where identity is unknown (unless there are exceptional circumstances) acknowledges that in this circumstance an appropriate risk assessment cannot take place, and that this is a risk in itself.

1001 The proposals enabling applications for a review of monitoring or detention would give the Department greater flexibility and the non-citizen greater rights in the monitoring and detention system. To ensure that applications for a review during a period of monitoring and detention are not abused, the proposals seek to limit applications for review to where new information on the non-citizen's circumstances can be presented for consideration.

LENGTH OF COURT ORDERED SECURE IMMIGRATION DETENTION

Proposals

Secure immigration detention up to six months

1002 It is proposed that where a non-citizen has exhausted all appeal rights and has no right to remain in New Zealand, the courts may issue warrants for

their secure immigration detention for up to six months after considering the factors agreed in paragraph 990 above under *Court ordered monitoring and detention*.

Secure detention from six months

1003 It is proposed that where a non-citizen has exhausted all appeal rights and has no right to remain in New Zealand, and they have not departed after an ongoing period of secure immigration detention of six months, the courts may not issue any further warrants for secure immigration detention except where a direct or indirect reason for the non-citizen failing to depart is due to some action or inaction by the non-citizen themselves.

1004 It is proposed that the courts can issue further warrants for secure immigration detention after six months where the Department:

a. can provide evidence to the courts of the non-citizen's deliberate obstruction of the removal process, and

b. satisfy the other provisions required for the issue of a warrant as agreed in paragraph 990 above.

1005 It is proposed that in the hearing for warrants for secure immigration detention after six months, the Department is required to provide objective evidence to prove the non-citizen's deliberate obstruction of the deportation process.

Secure immigration detention from 12 months

1006 Where a non-citizen has exhausted all appeal rights and has no right to remain in New Zealand, and they have not departed after an ongoing period of secure immigration detention of 12 months, it is proposed that the Bill require the courts to consider ordering the non-citizen to either:

a. cease the action preventing their departure being facilitated, or

b. undertake an action in order to facilitate their departure.

1007 Where the courts order the non-citizen to cease or undertake an action, it is proposed that they must:

a. give the non-citizen a timeframe to consider the order, and

b. advise them of the consequences of failure to comply with the order.

1008 It is proposed that during the timeframe in which the non-citizen can consider the court order, the non-citizen remains in immigration detention.

1009 Note that if the non-citizen fails to comply with the court order, the court may find them in contempt of court, and respond accordingly.

<u>Status quo</u>

1010 In most cases there are no limits on secure immigration detention under the 1987 Act. Court ordered detention under a warrant can continue as long as the courts are satisfied that detention remains lawful. The only limit on detention is a three month limit for non-citizens issued a removal order where a direct or indirect reason for the non-citizen failing to have their departure facilitated is due to some action or inaction by the non-citizen.

Discussion paper and submissions

1011 There was a proposal in the discussion paper to extend the three month limit on detention for non-citizens issued a removal order where administrative difficulties prevented their departure. The proposal received mixed support but was strongly opposed by some organisations such as Amnesty International and the New Zealand Association for Migration and Investment.

1012 There was no proposal to limit the length of detention in the 1987 Act. The proposal to do so responds to the numerous public submissions that commented that detention should not be ongoing.

Comment

Secure immigration detention up to six months

1013 Most non-citizens in secure immigration detention who have no right to remain in New Zealand assist in their departure process. Where they do so, and they are unable to depart New Zealand after an ongoing period of six months, it is appropriate that the government seek an alternative outcome to secure immigration detention.

1014 A range of options are available to manage a non-citizen who has not actively hindered the departure process but has not departed, such as release on conditions ordered by the courts, or release on a monitoring agreement made between the Department and the non-citizen. Under these options, the non-citizen could remain liable for deportation. If there was little possibility of removing the non-citizen within a reasonable timeframe, the government may chose to regularise their immigration status. Granting a temporary visa would allow the non-citizen's status to be reviewed again on application for a further visa.

Secure immigration detention from six months

1015 Under the system proposed in this paper, the only non-citizens likely to be in immigration detention for ongoing periods are those who have actively hindered their departure. Where these non-citizens had been refused entry, they had to no right to enter New Zealand. Where they have become liable for deportation after a period of lawful stay in New Zealand, they would have already tested their right to remain through appeal processes.

1016 It is appropriate that the immigration system does not create an incentive for non-citizens to hinder their departure in order to achieve an immigration outcome. Knowing that they would be released into the community after six months in detention would create an incentive where non-citizens would travel to New Zealand and refuse to cooperate with authorities or non-citizens liable for deportation would refuse to cooperate.

1017 It is appropriate however, that in order to detain a non-citizen in immigration detention for longer than six months, the courts must be entirely satisfied that they have deliberately obstructed their departure. The proposal above will require the Department to provide evidence of this to the courts' satisfaction before they order any further immigration detention. The evidence the Department provides will be required to be more than affidavit evidence. This may involve providing objective documentary evidence,

and/or appearing before the court to provide evidence in chief. If required to provide evidence, officers representing the Department would be open to cross examination.

Secure immigration detention from 12 months

1018 The proposal above will see the Bill contain a statutory provision enabling the courts to order a non-citizen to sign travel documents where they have been in secure immigration detention for an ongoing period of 12 months. It would result in an ability to find the non-citizen in contempt of court where they fail to do so. The non-citizen could then be detained in the criminal justice system until they signed travel documentation, if the courts thought this appropriate.

1019 Alongside with legislative provisions to manage a non-citizen with no entitlement to remain in New Zealand, the government could seek alternative ways to remove the non-citizen. The government could, for example, make individual or group return agreements with certain countries so that non-citizens being removed from New Zealand did not need signed travel documentation.

REVIEW OF WARRANTS OF COMMITMENT

Proposal

1020 It is proposed that the Bill enable the courts to issue a warrant of commitment authorising detention for *up to* 28 days.

Status quo

1021 The 1987 Act is inconsistent about the length of time for which the courts may issue a warrant. It varies between seven, 28 and 30 days (as described in Annex A).

Discussion paper and submissions

1022 Approximately 40 percent of 83 submitters who addressed this issue agreed that the review period for warrants should be increased to no more than 28 days. Approximately 40 percent of submitters were opposed to the proposal, and the remainder did not indicate a clear preference.

1023 Amnesty International commented that "it is a fundamental right for a detained person to have the legality of their detention reviewed within a reasonable time" and did not support the proposal. The NZLS did not support the proposal and commented:

> *"The power to continue detention must be balanced by regular review, allowing detainees the opportunity to instruct counsel and to present relevant information to the court when this becomes available".*

Comment

1024 This proposal will enable the courts to set an appropriate point of review for warrants within a 28 day timeframe considering the circumstances of the case. For example:

- the court may issue a warrant for seven days based on a reasonable estimate of the time taken to facilitate departure, or
- where a non-citizen's identity is unknown, the court may issue a warrant for 28 days based on the inability to either remove the non-citizen or appropriately assess the risk they present.

1025 Safeguards such as maintaining the ability to apply for a writ of habeas corpus and enabling the Department and non-citizens to seek a warrant review in light of new information, along with entitlement to legal aid, address the concerns raised in submissions. These safeguards would also ensure that immigration detention is consistent with NZBORA and New Zealand's international obligations.

1026 Along with the review of monitoring and detention by the courts, the Department has an internal administrative review process. This process will continue as it enables the Department to consider the appropriateness of monitoring and detention outside a warrant hearing.

Review of warrants of commitment for criminal prisoners

Proposal

1027 It is proposed that the Bill waive the requirement to renew a warrant where a non-citizen has been refused entry to New Zealand, but remains in the country for unrelated criminal justice reasons.

Status quo

1028 Where a non-citizen has committed a criminal offence during their travel to, and arrival at the border they may be arrested, charged, remanded in custody, prosecuted, and sentenced to prison under criminal law. These non-citizens may be "refused entry" to New Zealand for immigration purposes while they remain in New Zealand to serve their sentence.

1029 The Department is required to seek and renew a warrant every seven days for the entire duration of a non-citizen's unrelated custody for criminal justice reasons if the non-citizen is to retain refused entry status, and not gain any rights of appeal to which they would not have otherwise been entitled. Refused entry status limits the entitlement to appeal against removal on humanitarian grounds.

Table One: Approximate number of refused entry non-citizens arrested and charged with a criminal offence upon arrival in New Zealand

Year	Number
2004/2005	11
2005/2006	24

Discussion paper and submissions

1030 Approximately 60 percent of 77 submitters agreed to the proposal to waive a warrant in this circumstance but little substantive comment was made. The Auckland District Law Society commented that "warrants in respect of those actually serving a prison sentence should not be required to be renewed while the person is incarcerated". The Auckland Refugee Council Inc

expressed the view that an immigration warrant should not be required at all if a non-citizen is serving a prison sentence.

Comment

1031 This proposal would ensure that a non-citizen who committed a criminal offence travelling to and entering New Zealand did not gain any rights in the immigration system if they remained in the country for unrelated criminal justice reasons. If a non-citizen did not depart after any criminal justice matters were resolved, any immigration monitoring or detention that may be required would comply with the proposals in this chapter.

1032 The Department would continue to facilitate the departure of non-citizens with refused entry status as soon as possible, including the departure of those who have been in custody for criminal justice reasons.

INITIAL PERIOD OF DETENTION WITHOUT A WARRANT OF COMMITMENT

Proposal

1033 It is proposed that that the Bill enables non-citizens to be detained without a warrant of commitment for an initial period of up to 96 hours (four days).

Status quo

1034 The 1987 Act enables a non-citizen to be detained without a warrant for an initial period of either 48 hours or 72 hours. This period was intended to be sufficient to enable the Department to practically arrange a non-citizen's departure where they had no legal entitlement to remain.

Discussion paper and submissions

1035 Forty-nine organisations and 38 individuals made submissions on the proposal to extend the initial period of detention without a warrant. Forty-five percent of submitters supported the proposal, 35 percent did not.

1036 Those who supported the proposal generally did not elaborate on their views while those who expressed concern felt the reasons for extending the period were not robust. For example, the NZLS felt that "the reasons provided to support this proposal are not sufficient to outweigh the rights of detainees to have early access to the legal system".

1037 The Civil Aviation Authority supported the proposal and the Board of Airlines Representatives New Zealand (BARNZ) confirmed the difficulties in ensuring non-citizens had the appropriate travel documentation within 72 hours.

Comment

1038 The Department has increasingly found that the allowed time is not sufficient to facilitate the departure of non-citizens. Particularly as a result of 11 September 2001, the administrative requirements for facilitating departures have become more complex. Factors which influence this include:

- obtaining airline clearances/approvals

- obtaining Police clearances
- arranging Police escorts
- flight availability
- obtaining travel documents, and
- internal and international administrative difficulties.

1039 This proposal will require the Department to either expedite the departure of a non-citizen where they have no legal entitlement to remain in New Zealand, or, expediently make a decision on any need for ongoing monitoring or detention. Where any ongoing risk cannot be managed through a monitoring agreement, the Department would seek intervention from the courts as soon as possible (but no later than 96 hours).

1040 The proposal should significantly reduce the cost associated with the warrant process through reducing the need to obtain warrants for refused entry non-citizens being turned around at the airport. It has the potential to halve the number of warrants for non-citizens being deported from New Zealand.

1041 Emphasising that there is no restriction on a non-citizen seeking a habeas corpus writ may address some concern expressed by submitters, such as the HRC, that detention without a warrant may be arbitrary or contravene New Zealand's national and international human rights obligations.

WHO MAY BE MONITORED OR DETAINED FOR IMMIGRATION PURPOSES

Proposals

1042 It is proposed that the Bill allow non-citizens to be monitored or detained where they fail to comply with the requirements of the immigration system, and represent or are suspected of representing a risk to New Zealand, where:

a. they are refused entry at the border
b. their identity is unknown
c. they are a risk or threat to national or international security
d. they are liable for deportation, or
e. they have been issued with a deportation order.

1043 It is proposed that the Bill contain provisions that require the detention of any non-citizen of 17 years of age or less to be in a place:

a. defined as a residence under the Children, Young Persons and their Families Act 1989
b. approved by the chief executive responsible for the Department responsible for the Children, Young Persons and their Families Act 1989
c. approved by their parent, guardian or the responsible adult nominated to represent the best interests of the non-citizen minor, or
d. agreed by the courts.

Status quo

1044 Under the 1987 Act a non-citizen may be liable for detention where:

- they are refused entry at the border

- a decision on their eligibility for a permit cannot be made at the border
- their identity is unknown
- they have been served with a removal or deportation order and appeal periods have expired, and
- they are a threat to security or are suspected terrorists.

1045 The detention of non-citizen minors is subjected to the same provisions proposed above, although alternatives to detention are sought first.

Discussion paper and submissions

1046 The discussion paper queried if detention should be available both at the border and onshore, primarily for the purposes of detaining protection claimants. This proposal is now considered unnecessary as the fact that a protection claim has been made should not in itself lead to liability for detention.

1047 Not including protection claimants as a category will assist to allay the concerns raised in submissions that New Zealand was seeking further measures to detain protection claimants on the basis of a claim being made. For example the Auckland District Law Society commented that:

> *"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".*

Comment

1048 This proposal reflects the changes proposed in *Chapter Five: Deportation*. It has a foundation drawn from the 1987 Act but would allow non-citizens who are liable for deportation to be detained during an immigration appeal. The ability to detain non-citizens in this circumstance, where required, is considered appropriate as the ability to access an immigration appeal does not necessarily reduce any risk the non-citizen may represent.

1049 It is preferable to manage non-citizen minors outside the warrant process and the proposals to enable departmental monitoring agreements would facilitate this. Where a monitoring agreement is not possible, a formal court-ordered release on conditions is a further alternative to detention.

1050 As with the 1987 Act, the Bill should seek to ensure that specific attention is given to the rights of minors in any use of powers to detain for immigration purposes, for example, where it may be of benefit to the minor to remain with a parent who is being detained for immigration purposes.

POWERS OF DETENTION

Proposals

1051 It is proposed that the Bill incorporate a statutory detention power for designated officers to detain non-citizens who are liable for detention for immigration purposes for:

a. up to four hours, OR

b. until police officers give effect to the detention, OR

c. until the non-citizen is detained in a place of detention.

1052 It is proposed the Bill include provisions to enable the statutory detention power to be used appropriately and lawfully such as the detention provisions available to police officers undertaking immigration detention in the 1987 Act, the powers to use reasonable force in section 39 of the Crimes Act 1961 and the powers to search in the Customs and Excise Act 1996.

1053 It is proposed that this power is activated by Order in Council subject to further Cabinet agreement.

Status quo

1054 Police are required to give effect to immigration detention.

Discussion paper and submissions

1055 Fifty-six organisations and 44 individual submitters commented on this proposal with approximately half supporting a limited power of detention and approximately 40 percent opposed.

1056 Qantas and BARNZ expressed support for the proposal with BARNZ commenting that the power would contribute to a "link in the chain of efficient handling of breaches and suspected breaches" of immigration obligations.

1057 One reason submitters withheld their support was due to concern over the need for adequate training and skills. For example, the NZLS commented that detention "powers must only be exercised by personnel with appropriate training, skills and experience, together with a clear obligation to abide by the relevant provisions of the NZBORA".

1058 Another concern expressed was that all immigration officers would have the power to detain. The Auckland City Council expressed concern about the "creation of new powers for immigration officers".

Comment

1059 There are a range of situations where a non-citizen may be detained for immigration purposes. Requiring the police officers to give effect to detention in all situations limits the ability of the Department to fully and efficiently undertake its role in managing the immigration system, for example:

- When a non-citizen at the airport is refused entry, an immigration officer must call for Police support if detention is required even for a short period prior to their departure being facilitated.
- Where a non-citizen is in New Zealand unlawfully and located during the course of regular departmental business, the Department cannot compel them to remain at a place while police officers arrive to detain them, nor can the Department take them to the Police.
- At a seaport, a non-citizen who is refused entry and consequently liable for detention can abscond prior to the arrival of police officers. Absconding at a port may be easier than at an airport.

1060 Police are committed to working with the Department and being available where immigration detention may be needed. The review provides an opportunity, however, to reconsider the limitations on the Department's ability to effectively and efficiently manage the immigration system where police officers cannot be immediately present for all immigration decisions.

1061 It is intended that the above proposal would also enable designated officers to act as escorts where a non-citizen's departure was being facilitated, or transferred from a place of detention to a warrant hearing. This would assist the Department in managing non-citizens separately from remand or criminal prisoners.

1062 This proposal would create a power of detention similar to powers accorded to officers of other government departments. For example, Corrections officers' have powers of detention under the section 103 of the Corrections Act 2004 (the Corrections Act).

1063 The detention provisions available to police officers undertaking immigration detention in the 1987 Act, such as the power to request assistance, would be incorporated into the Bill. The Bill would also include new powers to give effect to detention appropriately and lawfully similar to those conferred on other officers who undertake detention, such as the powers to use reasonable force in section 39 of the Crimes Act 1961 and the powers to search in the Customs and Excise Act 1996.

1064 The proposals in *Chapter Three: Decision-making* would ensure that only designated officers with appropriate training and support in, among other things, human rights obligations and health and safety, would exercise powers of detention. The Ministry of Justice recommends the activation of the provision through Order in Council to enable Cabinet to be assured that appropriate training was undertaken and appropriate operational instructions guide the use of the statutory detention power.

SECURE IMMIGRATION DETENTION

Proposals

1065 It is proposed that the provisions in the 1987 Act, which enable the Department to manage open detention at Mangere, be incorporated in the Bill without limiting them to refused entry non-citizens, allowing their application to all non-citizens liable for detention.

1066 It is proposed that the Department develop terms of reference to undertake a whole of government scoping exercise that considers options for undertaking secure immigration detention, supported by appropriate resources.

Status quo

1067 Under the 1987 Act, the chief executive of the Department can designate a place as a place of immigration detention but the Department's power to manage immigration detention is limited to those non-citizens refused entry to New Zealand.

1068 The Department currently manages open immigration detention at Mangere. The use of Mangere is currently limited by resource consent to the management of refugee status claimants.

1069 If a non-citizen requires detention, they will generally be held in either Police facilities (for short durations) or Corrections facilities. While the number of immigration detainees held in these facilities is relatively small, New Zealand's use of them has been criticised nationally and internationally. This criticism is in contradiction to the positive international reputation New Zealand has established for its commitment to human rights.

1070 The Corrections Act contains the ability for all immigration detainees to be accommodated under a separate regime from other prisoners. Resource constraints mean that, in practice, Corrections generally manage immigration detainees as remand prisoners. A completely separate regime would require non-citizens to be in cells for 23 hours of each day.

Discussion paper and submissions

1071 The Ministry of Foreign Affairs and Trade advise that a number of international governments have expressed concern that their citizens have been held in Police and Corrections facilities while their departure from New Zealand is facilitated. The UNHCR submission confirmed that they are not supportive of the practice of using Police or Corrections facilities to detain asylum-seekers. Amnesty International reiterated that it:

> *"does not support the detention of refugees or asylum seekers in penal facilities unless the detainee has been properly charged or convicted of a criminal offence in New Zealand. Often such incarceration is seen and experienced as punishment when no crime has been committed, and the physical and psychological impact is disproportionate to the risk posed, if any, to the community".*

1072 In total, 65 submissions were received on this issue, 42 of which were supportive of a proposal that would see immigration detention occur outside Police and Corrections facilities. For example, the NZLS commented that "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".

1073 Only fifteen submitters were against the proposal. Some of these submitters supported the status quo while almost all the others were unsupportive of any form of immigration detention at all.

Comment

1074 The discussion paper noted that it was not the intention of this review to consider the development of an immigration detention facility. There are a number of ways, however, in which Cabinet could consider addressing concern over the use of Police and Corrections facilities.

1075 The proposal to enable the Department to manage open detention for all non-citizens who are liable for detention, not just refused entry non-citizens, would have two significant implications:

- In the short term, it would enable the Department to manage open detention of all protection claimants at Mangere (where this was appropriate). This also responds to concern expressed in the submissions that protection claimants should not be detained in facilities that are associated with criminality, or where they may be further traumatised.
- In the long term, it would enable immigration detention to be managed outside Police and Corrections facilities should government decide to do so. Combined with the powers to undertake immigration detention in the Corrections Act, it would allow government to consider alternatives for immigration detention.

1076 Actual proposals for managing immigration detention outside Police and Corrections facilities require further scoping. Options the government may wish to consider include the establishment of:

- a secure location at an international airport to enable a non-citizen to be detained for a number of hours prior to their departure from New Zealand. This would be most useful for refused entry non-citizens
- a small facility (potentially adjacent to an international airport) to detain non-citizens for a short number of days prior to their departure from New Zealand. This type of facility may be useful for refused entry non-citizens and also those at risk of absconding prior to their imminent departure from New Zealand, or
- a separate "immigration detention" area in Police or Corrections facilities where immigration detainees can be managed completely separately from those engaging in the criminal justice system.

1077 The costs associated with the above options are yet to be fully explored and would have to be carefully weighed against the current use of Police and Corrections facilities and the harm to New Zealand's international reputation the use of these facilities causes. The harm that may be caused, nationally and internationally, by establishing any sort of dedicated immigration detention facility also needs to be carefully considered given the response to the creation and use of such facilities internationally. A clear national and international communication strategy would be required to emphasise the limited use of immigration detention in New Zealand and the intended benefits of the regime.

1078 The difficulty of securing resource consent for any immigration detention facility would also need to be considered. While the proposal to scope alternative solutions has received a significant level of support, at an individual level, New Zealanders may be resistant to any type of immigration detention facility being built.

DETENTION-RELATED COSTS

1079 The proposals for monitoring and detention will increase the number of non-citizens liable for detention or the length of immigration detention in some circumstances. The Department of Corrections has advised that this is likely to result in a small increase in the prison population and associated costs. This will be taken into account in future forecasts of prisoner numbers as the

total cost is likely to be minimal. Police have advised that the impact of the proposals upon Police resources appears negligible.

REGULATIONS

1080 The proposals in the detention system may require regulations in order to give them effect. To ensure the appropriate powers are available, it is proposed that the Bill enable regulations to be made to support monitoring and detention provisions.

Annex A: Detailed discussion of detention provisions in the 1987 Act

Sections 59 and 60: Police officers may arrest and detain **a non-citizen who has been served a removal order** to facilitate their departure on the first available craft. They may be held for 72 hours after which time a warrant can be issued for up to seven days. They cannot be released on conditions at the first or second warrant application.

The total time a non-citizen may be detained under section 59 must not exceed a consecutive period of more than three months unless section 60(6) applies. S60(6) enables 30 day warrants to be issued for unlawful non-citizens where:

- they claim refugee status after being issued a removal order, or
- their action or inaction has prevented their removal.

Section 75: Police officers may arrest and detain **a non-citizen who is suspected of being a terrorist** prior to the issue of a deportation order. They may be held for 48 hours after which time a warrant can apply until their release is ordered by the courts. They can be released on conditions at the initial warrant application and monitoring and detention cannot continue if the Minister decides not to make a deportation order within 14 days.

Section 78: Police officers may arrest and detain **a non-citizen who is a suspected terrorist or threat to national security** who has been issued a deportation order. They may be held for 48 hours after which time a warrant can apply until the Police officers give effect to their deportation or their release is ordered by the courts.

Sections 97 and 99: Police officers may arrest and/or detain **a non-citizen who has been served with a deportation order**. Prior to arrest and detention, police officers *may* impose reporting conditions. If arrested they can be held for 48 hours. They may be released on conditions at a warrant hearing if they are unlikely to abscond or delay their deportation. The non-citizen may be detained for as long as the court will issue a warrant.

Section 128: Police officers may detain **a non-citizen who has been refused entry** at the border to enable their departure from New Zealand on the first available craft. They may be held for 48 hours after which an initial warrant may apply for up to 28 days. Any subsequent warrants may apply for up to seven days, or for group arrivals, as long as the courts think fit.

Section 128B: Police officers may detain **a non-citizen at the border if their eligibility for a permit is not immediately ascertainable**. They can be held for up to 48 hours after which their initial warrant may apply for up to 28 days. Any subsequent warrants can apply for up to seven days. Release on conditions is not available. This provision is rarely used.

Section 138A: Police officers may arrest and detain a non-citizen who fails to comply with a request from an immigration officer to provide identity details or surrender identity documents where they are suspected of being in New Zealand unlawfully. They must be brought before the courts as soon as possible. The courts may then make any order or direction it considers fit.

Executive summary - Chapter 11 Biometric information

Proposal – Biometric information

I propose that the Bill enable the following biometric information to be required from non-citizens for immediate use and for storage for future use: photographs, fingerprints, and iris scans.

I propose that the Bill enable photographic biometric information to be required from people arriving as New Zealand citizens for immediate use.

I propose that biometric information may be required from non-citizens at the time of application, and/or during a non-citizen's engagement in New Zealand's immigration processes, and may be collected automatically and/or systematically as part of these immigration processes. I further propose that the specific purposes for the collection and storage of biometric information from non-citizens would be to:

a. establish an initial record of an applicant's identity

b. verify an applicant's identity:

   - when determining a further visa application
   - during check-in prior to travel
   - after check-in but prior to boarding a craft to New Zealand
   - during processing at the border
   - when undertaking compliance or fraud investigations
   - if they make a protection claim

c. compare with biometric databases to determine whether an applicant is on an 'alert' list or otherwise known to pose a risk to New Zealand

d. identify instances of possible identity fraud through identifying multiple instances of the person or the identity

e. identify where a travel document has been altered, and/or

f. confirm identity during the deportation process.

I propose that stored biometric information may also be used to confirm the identity of a non-citizen on request from another New Zealand government agency in the context of an approved information matching and identity authentication agreement specifically related to biometric information.

I propose that the Bill contain provision to require biometric information for one time checks, at the border, for those presenting as New Zealand citizens to be used to perform a comparison of the biometric information collected at that time against the biometric template contained within the New Zealand biometric passport and/or to confirm New Zealand citizenship with the Department of Internal Affairs. Biometric information collected about New Zealand citizens would not be retained unless a discrepancy was noted and the information was required as evidence.

I propose that the Bill provide for these powers to come into force by Order in Council once implementation details have been developed in accordance with the State Services Commission's *Evidence of Identity Standard* (EOI Standard) and the Department of

Internal Affairs' *Privacy Guidelines for the use of Biometric Technologies*. It is proposed that implementation details be consulted on with the Justice, the Department of Internal Affairs and the Office of the Privacy Commissioner.

I propose that the consequence of refusal to provide biometric information when required may be an adverse immigration inference. This would mean an individual may be:

a. prevented from continuing with the immigration process, and/or

b. investigated to establish their identity.

I propose that there should be no requirement for a person to provide DNA or other forms of biometric information not included in the earlier proposal. Voluntary provision of other biometric information would continue to be guided by Immigration Instructions and the Privacy Act 1993.

Status quo - The 1987 Act provides a range of powers to require information confirming identity from a non-citizen who wishes to travel to, enter or stay in New Zealand. The 1987 Act does not explicitly enable the Department to electronically scan, store and use biometric information to confirm identity.

Discussion document and submissions - These proposals received around 60 percent support from 102 public submissions (56 organisations and 46 individuals). A further 20 percent did not indicate a clear preference but commented on the safeguards that would need to be in place.

Many submissions (including those opposed) recognised the need to keep abreast of technology and the importance of determining identity. Both supporters and opponents referred to the need to consider privacy and human rights obligations. The Privacy Commissioner suggested that proposals for authorised information matching programmes using biometric information proceed with caution, as such new types of data matching should not be undertaken without transparent and informed debate. The proposals reflect these, ensuring that the safeguards are clearly stated in the Bill.

Comment - The power to collect, use and store biometric information would enable the Department to use technological advances to confirm and verify identity and reduce fraud in the immigration system. The use of biometric information in the immigration context would contribute to lifting non-citizens' identity confirmation to the same standard as is provided for in identity verification standards for New Zealand citizens.

The systematic use of biometric information within an immigration identity management framework would:

a. improve the integrity of the immigration system in terms of:

   - identity confirmation in immigration decision-making and confirmation of a non-citizen's identity if they seek New Zealand citizenship

   - providing greater assurance that identity fraud and persons posing risks to New Zealand will be detected

b. allow for processing immigration applications more quickly and effectively

c. facilitate processing of arrivals at the border, particularly of those deemed "low risk" travellers and New Zealand citizens, and

d. take advantage of technology to automate the current face-to-passport check that is a standard aspect of current border processing.

CHAPTER ELEVEN: BIOMETRIC INFORMATION

PURPOSE

1081 This chapter discusses the recommendations on using specified biometric identity information[18] in the immigration system for identity verification purposes.

STATUS QUO

1082 Applicants for a visa or permit must provide sufficient information to allow an immigration officer to, amongst other things, determine their identity. Immigration officers may demand an arriving person's passport or certificate of identity. The Immigration Act 1987 (the 1987 Act) also allows immigration officers to require evidence of identity where an offence is suspected or where a person is suspected of being in New Zealand unlawfully.

1083 The approach to establish, verify and confirm identity through the use of documents is supported by the use of basic biometric information. All applicants supply photographs and signatures when making an application. Immigration control at the border has long relied on biometric information in passports, such as the photograph, which allows a "face-to-passport" check of arriving passengers. Profiling higher-risk applicants, and examining passports and other identity documentation, allows some false or fraudulent documentation to be detected.

RATIONALE FOR CHANGE

1084 Identifying people is a crucial element in facilitating the entry of migrants and visitors to New Zealand and managing the potential risk of identity fraud. Improvements in document forgery and increasing identity theft has led to more opportunities for individuals or organised groups to circumvent New Zealand's border controls. The Department has identified many cases of individuals lodging multiple refugee claims under different identities and people who had been removed from New Zealand returning under new false identities.

1085 Traditional reliance on paper-based identity documents is becoming increasingly inadequate to manage identity fraud risks to New Zealand. This is particularly true for very high-risk individuals on terrorist, Interpol and other criminal watch lists. Such individuals seldom travel using their own, genuine travel documents.

1086 The Department cannot currently ensure that every person entering New Zealand on a visa is the same person that applied for that visa. The

[18] Biometric information is a record of an individual's biological features that uniquely distinguishes one person from another. It can be used to confirm an individual's identity by comparing a biometric sample from an individual against a biometric reference template for that person. The most common form of biometric information is a photograph scanned into an electronic database. Other internationally acceptable forms of biometric information are fingerprint and iris scans. DNA and age verification tests can also be used as biometric identifiers.

Department cannot ensure that a person previously removed or deported from New Zealand or who appears on alert lists, and who enters under a new fraudulent identity, is detected. Investigations may reveal identity fraud, but these investigations are time and resource intensive, and are only undertaken where there is suspicion around an application or individual.

REQUIRING THE PROVISION OF BIOMETRIC INFORMATION

Proposals

1087 It is proposed that the Immigration Bill (the Bill) enable the following biometric information to be required from non-citizens for immediate use and for storage for future use:

a. photographs,
b. fingerprints, and
c. iris scans.

1088 It is proposed that the Bill enable photographic biometric information to be required from people arriving as New Zealand citizens for immediate use.

1089 It is proposed that biometric information may be required from non-citizens at the time of application, and/or during a non-citizen's engagement in New Zealand's immigration processes, and may be collected automatically and/or systematically as part of these immigration processes. It is proposed that the specific purposes for the collection and storage of biometric information from non-citizens would be to:

a. establish an initial record of an applicant's identity
b. verify an applicant's identity:
    i. when determining a further visa application
    ii. during check-in prior to travel
    iii. after check-in but prior to boarding a craft to New Zealand
    iv. during processing at the border
    v. when undertaking compliance or fraud investigations
    vi. if they make a protection claim
c. compare with biometric databases to determine whether an applicant is on an 'alert' list or otherwise known to pose a risk to New Zealand
d. identify instances of possible identity fraud through identifying multiple instances of the person or the identity
e. identify where a travel document has been altered, and/or
f. confirm identity during the deportation process.

1090 It is proposed that stored biometric information may also be used to confirm the identity of a non-citizen on request from another New Zealand government agency in the context of an approved information matching and identity authentication agreement specifically related to biometric information. This would improve the Department's ability to respond to legally approved requests for assistance in confirming a non-citizen's identity.

1091 It is proposed that the Bill contain provision to require biometric information for one time checks, at the border, for those presenting as New Zealand citizens to be used to perform a comparison of the biometric information collected at that time against the biometric template contained within the New Zealand biometric passport and/or to confirm New Zealand citizenship with the Department of Internal Affairs (DIA). Biometric information collected about New Zealand citizens would not be retained unless a discrepancy was noted and the information was required as evidence.

1092 As an additional safeguard, it is proposed that the Bill provide for these powers to come into force by Order in Council once implementation details have been developed in accordance with the State Services Commission's *Evidence of Identity Standard* (EOI Standard) and the Department of Internal Affairs' *Privacy Guidelines for the use of Biometric Technologies*. It is proposed that implementation details be consulted on with the Ministry of Justice, the Department of Internal Affairs and the Office of the Privacy Commissioner.

1093 It is proposed that the consequence of refusal to provide biometric information when required may be an adverse immigration inference. This would mean an individual may be:

a. prevented from continuing with the immigration process, and/or

b. investigated to establish their identity.

1094 An individual engaging with the immigration system in New Zealand whose identity is in doubt faces the possibility of some form of monitoring or detention while their identity is established. Information Privacy Principle 3 of the Privacy Act 1993 would require the Department to advise individuals that the Immigration Act authorises the collection of biometric information and the consequences of the individuals not providing that information.

Status quo

1095 Under the status quo the Department relies on documentary evidence of identity to establish individual's right to travel to enter and/or stay in New Zealand. Comparison of an individual with their identity documentation is done through a face-to-passport check on enrolment and on arrival and at various other interactions with the Department within New Zealand and/or during travel to New Zealand. Comparison of individual's with alert list information is based on known names and aliases, or a visual comparison with photographs.

Discussion paper and submissions

1096 Submitters 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, and the United Nations High Commissioner for Refugees. Approximately 60 percent of 102 submitters 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 were opposed to the proposal and approximately 20 percent of

submitters either were unsure or did not express a clear preference either way but commented on the safeguards that would need to be in place.

1097 Approximately fifty percent of 56 organisations indicated clear support for the proposal compared to almost 80 percent of 46 individual submitters. Over a third of organisations that addressed this issue did not indicate support or opposition to the proposal.

1098 Many submitters commented on the increasing use of biometric information internationally, the importance of determining identity, the need for New Zealand to keep abreast of technology and the need to 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 that the use of biometric information needs to be consistent with internationally-agreed standards, in particular the standards of the International Civil Aviation Organisation (ICAO).

1099 Many submitters commented on the safeguards that need to be addressed in the legislation, and both supporters and opponents referred to the need to be consistent with privacy and human rights legislation. The Privacy Commissioner suggested that proposals for authorised information matching programmes using biometric information proceed with caution as such new types of data matching should not be undertaken without transparent and informed debate. A number of submitters also expressed concern about the reliability of the technology used to collect biometric information.

Comment

Identity Management Framework

1100 To address the growing problem of identity theft and fraud, the Department is developing a draft identity management framework (IMF). The IMF will provide the basis for a robust, systematic, consistent and integrated approach to capturing and authenticating a person's identity when engaging with the Department. The IMF complements and supports other domestic identity management initiatives such as the State Services Commission EOI Standard and the eAuthentication strategy.[19]

1101 Determining and verifying identity consistent with the EOI Standard would assist in raising the level of identity verification of non-citizens to the same standard as that expected of New Zealand citizens. This is particularly crucial when a non-citizen subsequently seeks New Zealand citizenship.

1102 One proposed element of the IMF is the collection, storage and use of biometric information to link an identity to a person, and to ensure that this

[19] These are domestic strategies developed by the State Services Commission for outlining good practice guidelines for the design of the authentication component of online services where those services require confidence in the identity of the transacting parties and by the Department of Internal Affairs for the process requirements for establishing the identity of individuals seeking government services.

linkage remains in future interactions. The 1987 Act does not enable the Department to electronically scan, store, and use biometric information.

International Comparison

1103 Biometric identity information is increasingly being used in comparable immigration systems and is regarded as essential to a modern immigration system. The United States (US), the United Kingdom (UK), Australia and Canada all have provisions for the collection, storage and use of biometric identification of non-citizens arriving into or departing from those countries, or to establish or authenticate the identity of non-citizens at various stages of immigration processing. In the US this includes taking photographs and fingerprints of arriving temporary entrants at the border. The UK has trialled the use of fingerprints for applicants for British visas from a dozen countries associated with high numbers of suspect claims. The two-year trial saw over 1,400 people who had either previously been rejected as unfounded asylum claimants, or who had an adverse immigration history, being prevented from travelling to the UK. These people would previously have been unlikely to be detected.

1104 This review presents an opportunity to provide for the use of technological developments to check and confirm identity both at the border and in other interactions with the Department.

Benefits of biometric information collection

1105 The systematic use of biometric information within an immigration identity management framework would:

a. improve the integrity of the immigration system in terms of:

    i. identity confirmation in immigration decision-making and confirmation of a non-citizen's identity if they seek New Zealand citizenship

    ii. providing greater assurance that identity fraud and persons posing risks to New Zealand will be detected

b. allow for processing immigration applications more quickly and effectively

c. facilitate processing of arrivals at the border, particularly of those deemed "low risk" travellers and New Zealand citizens, and

d. take advantage of technology to automate the current face-to-passport check that is a standard aspect of current border processing.

1106 Safeguards to ensure that privacy considerations for biometric information are upheld and maintained are contained in the Privacy Act. They include requiring advice to be given to an individual that biometric information is being collected, and about the intended use and storage of the information. The Privacy Act also requires that there be processes by which an individual can access, review, or challenge the biometric information. The Department is required to comply with all the information privacy principles of the Privacy Act.

1107 As additional safeguards, the Bill would set out the specific types of biometric information that may be required. The biometric information types proposed in the Bill are those that have United Nations ICAO developed standards

(photograph/facial, iris, and fingerprint). It would not be responsible to go further than these forms at this time. However, biometric technology is developing rapidly and new technologies may lead to a desire to collect different biometric information. Future legislative amendments would be required to allow this.

Limitations of biometric information

1108 Biometric identity information may generate false connections. People may enrol into the system on a fraudulent identity and if the person who actually owns that identity seeks to enrol, it would appear in the first instance to be a potentially fraudulent multiple entry. These circumstances mean it is vital that the Department always seeks to use documentary evidence to support initial enrolments and to consider that a potentially fraudulent multiple enrolment may be the result of previous fraud.

1109 False matches will also require additional processing by immigration staff. However, the use of this system is likely to allow the Department to focus such additional verification work on potential risks rather than spread verification resource across all applicants and arrivals. Processing people not previously enrolled in the system may cause some delays particularly on arrival to New Zealand. However, the proposed systematic collection of information on all arrivals at international airports is likely to mitigate any delay.

Additional biometric information

1110 Photographs are already collected from visa applicants and it is envisaged that this would be the standard form of biometric information required. The supplemental use of fingerprints and/or iris scans would be limited to cases where:

a. there is doubt raised by the photographic biometric information
b. there is an inability to use photographic biometric information (such as severe disfigurement)
c. there is cultural opposition to the use of photographic biometric information, or
d. an identity has been identified as being of particular concern or risk (such as a person who is to be deported from New Zealand).

1111 The use of additional biometric information in relation to an individual would reduce the chances of a false positive being generated, making it far more likely that there will be certainty of identity in future interactions. Where any check on identity based on biometric information identified a potential discrepancy, this would be treated as any other potential discrepancy – as a cause to ask further questions and seek additional confirmation.

Collection at the border

1112 Once the powers come into force through Order in Council, following Cabinet approval, the collection of biometric information from arriving passengers at the border would become a systematic element of the border process. Other agencies do not currently have powers to collect or use biometric information. The New Zealand Customs Service is similarly interested in

establishing the identity of arrivals to New Zealand and is currently involved with the Department in trialling a voluntary system at Auckland airport. It is envisaged that the development of a biometric system to identify arrivals to New Zealand would take into account possible future interoperability between agencies. The Department would seek to avoid duplication of resources and expenditure.

1113 Because the system would provide for checks against identities previously enrolled into the system to ensure there are no duplicates, it is important that the collection of identity information be mandatory and widespread. The more biometric identity information stored in the Department's database, against which a new enrolment can be checked, the higher the chance of detecting duplicate entries. However, this approach would require information to be held for a potentially substantial period of time. In essence, identity information would need to be held for as long as it is reasonable to believe that the identity could be used to gain entry into New Zealand.

1114 In developing the mechanics of biometric information collection, the Department would seek to either adopt the draft *Privacy guidelines for the use of biometric technologies* developed by the DIA, or would work alongside the DIA and the Office of the Privacy Commissioner to develop a new version specific to immigration whilst maintaining the principles of the draft guidelines.

New Zealand citizens

1115 New Zealand passports are the preferred documents for persons seeking travel to New Zealand unlawfully for the purpose of making protection claims, or entering and working unlawfully within New Zealand. Collecting and using biometric information about people arriving in New Zealand on New Zealand passports would mitigate the abuse of New Zealand identity and travel documents. It would also ensure that the New Zealand passport was as secure as identity documentation from other countries in terms of who may gain entry to New Zealand.

1116 The ability to compare the biometric information obtained from a person presenting at the border as a New Zealand citizen with the biometric template contained on the New Zealand biometric passport is one reason why biometric information is included in passports. The information collected on arrival would not be stored other than for evidential purposes if discrepancies arise and investigation reveals fraudulent use of an identity or document.

Access to the Department's biometric database

1117 The Department anticipates that other government agencies may seek access to biometric information held on non-citizens. The sharing of information outside the Department would be limited to any authorised information matching programmes and information matching agreements specifically related to biometric information. This would move such formal authorised information matches into a new area (biometrics) so any future proposal to create such an arrangement would also need to consider the implications of such a change. Authorised information sharing agreements

are currently subject to scrutiny by the Office of the Privacy Commissioner. In addition, personal information may be disclosed to law enforcement agencies on a case-by-case basis under the Privacy Act, Principle 11, to avoid prejudice to the maintenance of the law.

1118 Non-citizens whose biometric information is held in the Department's records must have the ability to access this information. Access to this information must be decipherable. However, typically a biometric template would consist of a series of numbers and letters that is meaningless outside of the biometric technology. In practice this could mean providing access to the physical photograph or original biometric image that generated the biometric template. Non-citizens would also have the ability to request that invalid or incorrect information be corrected, and have that request recorded in the file or alongside the record.

DNA AND OTHER FORMS OF BIOMETRIC INFORMATION

Proposal

1119 It is proposed that there should be no requirement for a person to provide DNA or other forms of biometric information not included in the earlier proposal. Voluntary provision of other biometric information would continue to be guided by Immigration Instructions and the Privacy Act.

Status quo

1120 The Department's operational policies enable DNA or age verification data to be requested in certain circumstances, usually where the basis for a person's application cannot be verified from supporting documentation.

1121 There is no provision in the 1987 Act, however, for immigration officers to request the provision of biometric information to support relationship or age claims by an applicant or protection claimant. Privacy principle 1 of the Privacy Act permits the collection of personal information where collection is necessary to enable an agency to carry out its functions. The collection of DNA or age verification information is permitted under principle 1, without the need for a specific power in immigration legislation.

Discussion paper and submissions

1122 Approximately 60 percent of 102 submitters on this issue agreed that 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*. While submitters supported specific legislation to address this issue, submitters were particularly concerned about the power to request voluntary provision of biometric information such as DNA testing. Some submitters, such as the Federation of Islamic Associations of New Zealand, considered 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.

Comment

1123 There may be some benefit in having the Bill explicitly provide for immigration and determination officers to request the provision of DNA or

age verification testing in order to support applications or claims that cannot be verified through existing documentation. Such a provision would give officers and applicants additional reference as to the lawfulness of such a request, and could potentially provide a means to ensure that such requests met legislative tests of necessity and provided constraints on what can or cannot be implied by a refusal to submit.

1124 However, such a provision is not required because the application would otherwise be declined because of the lack of supporting documentation. As noted, the Privacy Act already permits the collection in such cases.

1125 In addition, there is some concern that creating a specific power to request biometric information for these purposes could result in the collection of that information more frequently than was necessary based on the quality of the documentary evidence submitted.