

Office of the Minister of Immigration

Chair
Cabinet Business Committee

IMMIGRATION ACT REVIEW: FURTHER DECISIONS ON CLASSIFIED INFORMATION AND MANAGING SECURITY RISKS

PURPOSE

- 1 This Cabinet paper seeks further decisions on the Immigration Act review to:
 - a. complete the immigration and protection classified information system agreed in November 2006 by Cabinet Business Committee (CBC) [CBC Min (06) 20/14 refers], and
 - b. ensure effective management of non-citizens who are liable for deportation as a risk or a threat to national or international security.

EXECUTIVE SUMMARY

- 2 In November 2006, in the context of the Immigration Act review, CBC (with the power to act) decided that "classified information may be used in immigration and protection decision-making with safeguards..." [CBC Min (06) 20/14 refers]. CBC also agreed "that officials should report to the Cabinet Policy Committee on Part 4A prior to finalising the draft Bill for introduction to the House in April 2007". Officials are currently undertaking the review of Part 4A of the Immigration Act 1987 (the 1987 Act) and this will be the subject of a separate report back to Cabinet.
- 3 CBC also decided on a tiered system of monitoring and detention to manage non-citizens in New Zealand who were liable for deportation depending on the level of risk they represented. CBC decided that where a non-citizen has exhausted all appeal rights and has no right to remain in New Zealand, they cannot be securely detained for an ongoing period longer than six months.
- 4 In conducting the review of Part 4A, officials have identified that the November 2006 CBC decisions did not specifically address the use and protection of classified information in the context of appeal to the High Court, Court of Appeal or Supreme Court. CBC's decisions also did not address the use or protection of the information during the District Court's consideration of the need for detention where a non-citizen was liable for deportation and classified information had been used.
- 5 Officials also identified that an implication of the CBC decision for monitoring and detention is that where a non-citizen became liable for deportation as a risk or a threat to national or international security, had exhausted all appeal rights, and had no right to remain in New Zealand, they could not be securely detained

longer than six months [CBC Min (06) 20/14 refers]. This may have serious implications for national or international security.

- 6 The proposals in this paper, therefore, develop a prescriptive system for appeal where classified information has been used in an immigration or protection decision; providing safeguards for non-citizens including a robust appeal process, and providing safeguards for the classified information. The proposals seek to reduce the future possibility of prolonged litigation where classified information is used, as seen in the Zaoui case.
- 7 This paper also seeks to rescind the decision to apply a six month limit on detention in the case of non-citizens who are a risk or a threat, to enable the government to be responsive to any risk they may pose during the deportation process. The proposals seek to mirror the status quo of the 1987 Act being that, where there was an immediate risk or threat to national or international security or to the safety of any person, a non-citizen could be securely detained until deported.
- 8 [Withheld under section 9(2)(f)(iv) of the Official Information Act 1982.]

BACKGROUND

Background to classified information decisions

- 9 In November 2006, in the context of the Immigration Act review, CBC (with the power to act) decided that “classified information may be used in immigration and protection decision-making with safeguards...” [CBC Min (06) 20/14 refers]. The safeguards include that where classified information is used:
 - a. the decision-maker must release a summary of the classified information to the non-citizen “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”, and
 - b. where a non-citizen would have ordinarily have access to an appeal to the Immigration and Protection Tribunal (the Tribunal), the non-citizen would have access to special appeals mechanisms where the Tribunal could access the classified information if required to determine the appeal [CBC Min (06) 20/14 refers].
- 10 Appeal rights to the Tribunal would be available to all residence applicants and protection claimants, along with residents who were liable for deportation. The exception to this would be those non-citizens who were liable for deportation by Order in Council as a risk or a threat to national or international security.
- 11 In the context of the decisions on the classified information system, CBC also agreed that officials should report back on Part 4A prior to finalising the draft Bill for introduction to the House in April 2007. Officials are currently undertaking the review of Part 4A of the Immigration Act 1987 (the 1987 Act) and this will be the subject of a separate report back to Cabinet.

Background to monitoring and detention decisions

12 In November 2006, CBC also decided on a tiered system of monitoring and detention to manage non-citizens in New Zealand who were liable for deportation depending on the level of risk they represented. CBC decided that where a non-citizen has exhausted all appeal rights and has no right to remain in New Zealand, they cannot be securely detained for an ongoing period longer than six months. The exception to this limitation is 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. [CBC Min (06) 20/14 refers].

PROBLEM DEFINITION

The classified information system

13 In conducting the review of Part 4A, officials have identified that the November 2006 CBC decisions did not specifically address the use and protection of classified information in the context of appeal to the High Court, Court of Appeal or Supreme Court. Nor did they address the use or protection of the information during the District Court's consideration of the need for monitoring or detention where a non-citizen was liable for deportation and classified information had been used to make that determination.

14 Officials have identified that it is important that in all cases where classified information is used, the safeguards for non-citizens (such as appeal rights) and for the information (to enable it to remain protected) are prescriptive and appropriately balanced. Further decisions on the November 2006 system are, therefore required, regardless of the outcome of the review of Part 4A.

Monitoring or detaining a risk or a threat

15 When the November 2006 CBC decisions on monitoring and detention were made, Cabinet was not asked to specifically consider the management of a non-citizen who was a threat or a risk. In reviewing Part 4A, officials have identified that an implication of the CBC decisions is that where a non-citizen becomes liable for deportation as a risk or a threat to national or international security, has exhausted all appeal rights, and has no right to remain in New Zealand, they could not be securely detained longer than six months where they had not been deported [CBC Min (06) 20/14 refers]. This may have serious implications for national or international security.

16 The November 2006 decisions also did not specifically address the issue of a protected person who becomes liable for deportation as a risk or a threat to national or international security but cannot be deported within a reasonable timeframe due to their protected status.

PROPOSALS: FURTHER DECISIONS ON CLASSIFIED INFORMATION¹

Appeal on points of law to the High Court

¹ The following pages contain a series of detailed proposals followed by a comments section.

- 17 Where classified information is used in a decision that is subject to appeal to the High Court, it is proposed that a specially warranted and security briefed Judge may access the information where necessary.
- 18 It is proposed that the Chief High Court Judge along with up to two other judges nominated by the Chief High Court Judge can be specially warranted and security briefed.
- 19 Where classified information is used in a decision that is subject to appeal on points of law, it is proposed that all appropriate safeguards and protections for the classified information that apply to the Immigration and Protection Tribunal apply to the courts [CBC Min (06) 20/14 refers].
- 20 As per the November 2006 CBC decisions, it is proposed that the non-citizen may have assistance from a special advocate during appeal to the High Court [CBC Min (06) 20/14 refers].
- 21 It is proposed that the procedures and processes for the use of classified information in the High Court also apply during any judicial review.

Appeal to the Court of Appeal and the Supreme Court

- 22 Where classified information is used in a decision that is subject to appeal to the Court of Appeal or (with leave) the Supreme Court, it is proposed that the Judges of those courts be security briefed before accessing the classified information.
- 23 It is proposed that the classified information be available to Judges of the Court of Appeal or Supreme Court where they consider that the information is relevant to them in determining the appeal.
- 24 As per the November 2006 CBC decisions, it is proposed that the non-citizen may have assistance from a special advocate during an appeal to the Court of Appeal or Supreme Court [CBC Min (06) 20/14 refers].
- 25 It is proposed that a non-citizen must lodge an appeal to the Court of Appeal, or seek leave to appeal to the Supreme Court, within 10 days of notification of the High Court decision on their case.

Protecting classified information

- 26 Where classified information is accessed by security briefed Judges of the High Court, Court of Appeal or Supreme Court, it is proposed that the information must always remain protected.
- 27 It is proposed that protection of classified information can include measures to ensure that the information, or any summary of it, can be withdrawn by the owning agency/agencies, for example, if disclosure is proposed by the courts.
- 28 Where the information is withdrawn, it will be deemed to have been unavailable for use in the decision-making process.

29 In order to ensure full arguments in any appeal involving classified information, it is proposed that the relevant agency/agencies that own the information can be party to the proceedings.

30 It is proposed that Cabinet rescind the November 2006 CBC decision that administrative measures associated with classified information process can be provided for in regulations [CBC Min (06) 20/14 refers], and instead:

- a. agree that in all proceedings of the Immigration and Protection Tribunal where classified information may be used, any general practices and procedures that may be necessary to ensure that the information is protected must be agreed between the Chair and the Attorney-General as soon as practicable and revised from time to time

AND, also

- b. agree that in all proceedings of the courts where classified information may be used, any general practices and procedures that may be necessary to ensure that the information is protected must be agreed between the Chief Justice and the Attorney-General as soon as practicable and revised from time to time.

Consideration of monitoring or detention where classified information has been used

31 If the District Court finds it is necessary to consider classified information to order the secure detention of a non-citizen who is liable for deportation, it is proposed that it must transfer the warrant of commitment application to the High Court for consideration by the specially warranted Judge.

32 Where appropriate, it is proposed that the Department of Labour (the Department) may make an application directly to the High Court for the secure detention of a non-citizen who is liable for deportation, to enable the classified information to be considered.

33 There are agreed mechanisms to review the use and veracity of classified information in the decision-making process, either through the Tribunal or judicial review, as opposed to the warrant process. As such, it is proposed that, in a warrant hearing, any classified information presented must be considered prima facie.

Expediting matters before the courts where classified information has been used

34 To ensure that all matters before the courts involving classified information are undertaken as a matter of urgency, it is proposed that the immigration legislation provide guidance to the courts on prioritising review, appeal and warrant hearings. It is proposed that this guidance specifically refer to appeal hearings where the matter involves a risk or a threat to national or international security, emphasising the urgency of dealing with these matters expeditiously.

Access to appeal where liable for deportation by Order in Council

35 In November 2006, CBC decided that, where a non-citizen is liable for deportation by Order in Council as a risk or a threat to national or international

security, they have no access to appeal under immigration legislation (regardless of any use of classified information) [CBC Min (06) 20/14 refers].

- 36 There are no limitations on a non-citizen's right to claim protection in this circumstance and judicial review would remain available.

Comment

- 37 In reviewing Part 4A, officials agreed that legislation should prescribe the total system for the use of classified information, from initial decision to appeal to the Supreme Court. The proposals above would develop a prescriptive system for appeal where classified information has been used in an immigration or protection decision. They would provide safeguards for non-citizens and protection for the classified information.
- 38 Experience shows that one of the most important safeguards for classified information is limiting the number of people who have access to it. This safeguard should not, however, limit access to robust appeal for non-citizens where classified information has been used in a decision that impacts on their immigration or protected status. The proposal at paragraph 18 would limit the number of High Court Judges that can access the classified information but mirrors the Terrorism Suppression Act 2002 (the TSA 2002) by enabling it to be considered by more than one Judge if the circumstances require it.
- 39 Enabling any classified information used in a decision to be withdrawn where it may be at risk of release is a key factor in safeguarding the information. Where classified information is withdrawn, a new immigration or protection decision will need to be made. This safeguards the rights of the non-citizen, alongside safeguarding the information, but may result in some unavoidable delays in determining a non-citizen's case.
- 40 In November 2006, CBC decided that any appeal to the High Court must be lodged within 28 days. The proposal at paragraph 25 requires any applications for further appeals to be lodged within 10 days of a decision by the High Court. The 10 day timeframe is intended to ensure that all matters where classified information is used are dealt with expeditiously. It has been agreed by the Ministry of Justice (Justice). It should be noted that there is also an impetus for the non-citizen to lodge any court appeal before they are deported. Deportation, should it be upheld, would occur as soon as possible after a court decision had been made.
- 41 The proposal at paragraph 34 would see the immigration legislation provide direction to the courts on the urgency of matters where classified information was used, and specifically refer to the importance of expediting a review or appeal where the matter was one of risk or threat to national or international security. Officials believe it is appropriate that guidance be given to the courts with the intent, again, to ensure that the matters are resolved expeditiously.
- 42 The proposal to rescind the decision that administrative measures associated with the classified information process be provided for in regulations seeks legislative consistency in establishing general practices and procedures for the protection of classified information. The proposal above mirrors section 40 of the TSA 2002

and is a best practice process for providing general safeguards for classified information.

Consideration of monitoring or detention where classified information has been used

- 43 In November 2006, CBC decided on a tiered system of monitoring and detention to manage non-citizens in New Zealand who were liable for deportation. The decisions require the District Court to consider, among other things, the individual circumstances of the non-citizen's case and the level of risk the non-citizen represents [CBC Min (06) 20/14 refers].
- 44 In most circumstances it is likely that the District Court would be able to make an appropriate decision on release or detention without access to the classified information. Where it could not, the proposal at paragraph 31 would escalate the detention decision to the specially warranted and security briefed Judge of the High Court.
- 45 Agreement to the proposal would ensure that only those specially warranted and security briefed Judges had access to any classified information. It may also improve efficiencies in the classified information system by having all matters considered by the same Judge.

Access to appeal where liable for deportation by Order in Council

- 46 Under the system decided in November 2006, where classified information was used in a decision to deport a non-citizen by Order in Council as a risk or threat to national security, the non-citizen would not have *access to an immigration appeal to the Tribunal* where the use and veracity of classified information could be considered. The non-citizen would, however, have *access to judicial review* in the High Court where the specially warranted and security briefed Judge could access the classified information. They would also have consequential rights of appeal on points of law to the Court of Appeals and (with leave) the Supreme Court. During these appeals, the proposals above would also allow them to access a special advocate.
- 47 The process of judicial review would allow for consideration of the use and veracity of the classified information in the decision-making process. The review would be consistent with the review undertaken by the Tribunal. This would offer the same protections and provide for adequate standards of natural justice for the non-citizen. It would not create an extra or special immigration review mechanism that was not available to those non-citizens deported as a risk or a threat where classified information was not used. It would be consistent with the balance of interests determined to be appropriate by CBC [CBC Min (06) 20/14 refers].

PROPOSALS: MONITORING OR DETAINING A RISK OR A THREAT

48 It is proposed that, in the case of non-citizens liable for deportation by Order in Council as a risk or a threat to national or international security, Cabinet rescind the November 2006 CBC decision 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” [CBC Min (06) 20/14 refers].

49 Instead, the Cabinet is asked to agree that where a non-citizen is liable for deportation by Order in Council as a risk or a threat to national or international security, they can be monitored or detained until they are deported (where this is longer than six months).

50 Where a non-citizen is liable for deportation as a risk or a threat, it is proposed the Immigration Bill replicate provisions of Section 79(2) of the 1987 Act providing that, where a warrant is sought by the Department, the courts would:

- a. issue a warrant for secure detention, or
- b. if satisfied that the release of the non-citizen would not be contrary to the public interest, release the non-citizen on conditions.

51 It is proposed that the immigration legislation provide guidance to the court on the conditions that could be imposed on a non-citizen if they were released. These conditions could include that they do any or all of the following:

- a. report to the Department or the Police at set times
- b. reside at an agreed and specified location
- c. do not have access to communication devices
- d. are restricted from associating with named individuals or organisations
- e. provide a guarantor responsible for:
 - i. ensuring compliance with conditions of monitoring, and/or
 - ii. reporting, including any failure to meet those conditions.

52 It is proposed that the mechanisms for reviewing secure detention and/or release on conditions are consistent with the November 2006 CBC decisions for monitoring and detention. 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 [CBC Min (06) 20/14 refers].

53 [Withheld under section 9(2)(f)(iv) of the Official Information Act 1982.]

Comment

- 54 The proposals in this paper seek to rescind the CBC decision to apply a six month limit on detention in the case of a non-citizen who was a risk or a threat to enable the government to be responsive to any risk they may pose during the deportation process. They mirror the status quo of the 1987 Act. Where there was an immediate risk or threat to national or international security or to the safety of any person, a non-citizen could be securely detained under a warrant until deported.
- 55 Where the courts were satisfied that their release would not be contrary to the public interest, a non-citizen could be released on a range of conditions specific to the individual circumstances of their case. The legislation would enable the courts to impose any conditions they thought appropriate, as per the status quo, but would provide guidance on what those conditions might be.
- 56 The proposal at paragraph 51 would mean that the mechanisms for reviewing secure detention and/or release on conditions would be consistent with the November 2006 CBC decisions [CBC Min (06) 20/14 refers]. These decisions require the courts to review a warrant for secure detention at least every 28 days. Where there was a change in the circumstances of the non-citizen during their monitoring or detention, the Department or the non-citizen could apply to the courts for a review.
- 57 The November 2006 CBC decisions and these proposals develop a framework that would enable the management of non-citizens who are a risk or a threat to national or international security that is focused on the immigration system. The proposals would enable the Minister to make a decision on their liability for deportation. The Minister may choose to grant the non-citizen a temporary visa, allowing re-consideration of their case at a later date, or grant a residence visa.
- 58 [Withheld under section 9(2)(f)(iv) of the Official information Act 1982.]
- 59 [Withheld under section 9(2)(f)(iv) of the Official information Act 1982.]

CONSULTATION

- 60 The following agencies were consulted on the November 2006 paper *including the proposals on classified information and monitoring and detention* which Cabinet decided: the Departments of Prime Minister and Cabinet, Internal Affairs and Corrections, the Ministries of Foreign Affairs and Trade, Health, Education, Economic Development, Transport, Justice, and Pacific Island Affairs, the New Zealand Qualifications Authority, the Tertiary Education Commission, the New Zealand Defence Force, Police, Customs Service, and Security Intelligence Service, the Inland Revenue Department, the Office for Disability Issues, Crown Law, the Legal Services Agency and Treasury. Te Puni Kōkiri was also informed of the proposals.
- 61 The chairs of the Refugee Status Appeals Authority, the Removal Review Authority, the Residence Review Board, the Deportation Review Tribunal, the Privacy Commissioner, the Office of the Ombudsmen and the Human Rights Commission were also consulted on the November 2006 paper.

62 The Departments of Prime Minister and Cabinet and Corrections, and the Ministries of Justice and Foreign Affairs, the New Zealand Security Intelligence Service and Crown Law along with the New Zealand Defence Force, Police and Customs Service, were consulted on this Cabinet paper. Treasury was also informed.

63 The heads of the Higher Courts including the Chief Justice, the President of Court of Appeal and the Chief High Court Judge were also consulted on this paper.

FINANCIAL IMPLICATIONS

64 It is difficult to predict the financial implications of using classified information in immigration and protection decision-making. Part 4A of the 1987 Act has only been used once since its enactment in April 1999. In the case of Mr Zaoui, significant costs have been incurred by the Department but have been covered by departmental baselines.

65 It is likely that the first use of the classified information provisions of the new immigration legislation would be tested through the Tribunal (where allowed) and through the courts. This is likely to have financial implications for government although it is difficult to predict to what extent.

66 It is also difficult to predict the extent of financial implications of extending secure detention beyond six months for non-citizens who are a risk or a threat to national or international security. Under the 1987 Act, the number of non-citizens deported as a security threat or suspect terrorist has been extremely small. There has been no case with which to determine precedent as there has yet to be a case of extended detention for this reason.

67 The Department has requested funding additional to baselines through the budget process to implement the decisions for the new immigration legislation, including the systems of classified information and monitoring and detention, based on the best information available at the time. It should be noted that in November 2006, CBC agreed that all decisions on the Act review were subject to additional funding being agreed through Budget 2007.

68 The Department notes that the Police and the Department of Corrections (Corrections) incur costs related to immigration monitoring and detention. As these proposals mirror the status quo of the 1987 Act there should not be any additional financial implications for these agencies. In this regard, Corrections has noted that any potential savings the agency may have gained from the six month limit on detention could be lost as a result of these proposals.

69 The Legal Service Agency advises that, as noted above, it is difficult to predict the number of cases where a non-citizen will be detained as a risk or a threat and may have access to legal aid. As such, it is not possible to give any meaningful assessment of fiscal impact on legal aid. If the number of cases was minimal, for example, the cost may be covered by baselines.

HUMAN RIGHTS IMPLICATIONS

- 70 Justice advises that the proposals raise a number of issues of prima facie inconsistency with the New Zealand Bill of Rights Act 1990 (NZBORA); most notably, the right to be free from arbitrary detention and the right to natural justice.
- 71 The regime for protecting and managing classified information at both warrant hearings and during appeal will curb the right to natural justice; for example, the right for an individual to know the case against them. However, given the safeguards included in the proposals, the nature of classified information, the necessity to protect that information, and the national security interests that the proposals seek to protect, Justice is confident that by continuing to work closely with the Department during the drafting of the relevant provisions in the Immigration Bill, the prima facie inconsistencies with NZBORA will be considered justifiable in terms of section 5 NZBORA. My recommendation that Cabinet agree to the proposals in this paper are predicated on this assumption.

LEGISLATIVE IMPLICATIONS

- 72 Legislation is required to implement the proposals. Drafting instructions have been provided to the Parliamentary Counsel Office based on the 27 November 2006 CBC decisions on the Immigration Act review [CBC Min (06) 20/14 refers].
- 73 Should Cabinet agree to the proposals in this paper, I would direct the Department to issue further drafting instructions to Parliamentary Counsel in accordance with Cabinet's decisions.
- 74 Consistent with the November 2006 decisions, I propose that decisions on technical issues that might arise in the course of drafting legislation be delegated to me, as Minister [CBC Min (06) 20/14 refers]. If issues of substance arise in the course of drafting, these will be referred back to the Cabinet Policy Committee, following consultation with other relevant Ministers.
- 75 The Bill will be binding on the Crown in keeping with the general principle that the Crown should be bound by Acts unless the application of a particular Act to the Crown would impair the efficient functioning of Government.

REGULATORY IMPACT AND BUSINESS COMPLIANCE COST STATEMENT

76 The Department of Labour confirms that the principles of the Code of Good Regulatory Practice and the Regulatory Impact Analysis (RIA) requirements, including the consultation RIA, have been complied with. The final Regulatory Impact Statement (RIS) was circulated with the Cabinet paper for departmental consultation.

PUBLICITY

77 There has been considerable public interest in the Immigration Act review. Should Cabinet agree to the recommendations in this paper, I propose to release this paper and the RIS on the Department's website. Some sections may be withheld under the Official Information Act 1982.

RECOMMENDATIONS

78 It is recommended that the Committee:

Further decisions on the classified information system

Appeal on points of law to the High Court

1. **agree** that where classified information is used in a decision that is subject to review by or appeal to the High Court, a specially warranted and security briefed Judge may access the information where necessary
2. **agree** the Chief High Court Judge along with up to two other judges nominated by the Chief High Court Judge can be specially warranted and security briefed
3. **agree** that, where classified information is used in a decision that is subject to appeal on points of law, all appropriate safeguards and protections for the classified information that apply to the Immigration and Protection Tribunal apply to the courts [CBC Min (06) 20/14 refers]
4. **agree** that as per the November 2006 Cabinet Business Committee decisions, the non-citizen may have assistance from a special advocate during review or appeal to the High Court [CBC Min (06) 20/14 refers]
5. **agree** that the procedures and processes for the use of classified information in the High Court also apply during any judicial review

Appeal to the Court of Appeal and the Supreme Court

6. **agree** that, where classified information is used in a decision that is subject to appeal to the Court of Appeal or (with leave) the Supreme Court, the Judges of those courts be security briefed before accessing the classified information
7. **agree** that the classified information be available to Judges of the Court of Appeal or Supreme Court where they consider that the classified information is relevant to them in determining the appeal

8. **agree** that as per the November 2006 Cabinet Business Committee decisions, the non-citizen may have assistance from a special advocate during review or appeal to the Court of Appeal or Supreme Court [CBC Min (06) 20/14 refers]
9. **agree** that a non-citizen must lodge an appeal to the Court of Appeal, or seek leave to appeal to the Supreme Court, within 10 days of notification of the High Court decision on their case

Protecting classified information

10. **agree** that where classified information is accessed by security briefed Judges of the High Court, Court of Appeal or Supreme Court, the information must always remain protected
11. **agree** that protection of classified information can include measures to ensure that the information, or any summary of it, can be withdrawn by the owning agency/agencies, for example; if disclosure is proposed by the courts
12. **note** that if the information is withdrawn, it will be deemed to have been unavailable for use in the decision-making process
13. **agree** that in order to ensure full arguments in any review or appeal involving classified information, it is proposed that the relevant agency/agencies that own the information can be party to the proceedings
14. **rescind** the November 2006 Cabinet Business Committee decision that administrative measures associated with classified information process can be provided for in regulations [CBC Min (06) 20/14 refers], and instead:
 - a. **agree** that in all proceedings of the Immigration and Protection Tribunal where classified information may be used, any general practices and procedures that may be necessary to ensure that the information is protected *must be agreed between the Chair and the Attorney-General* as soon as practicable and revised from time to time

AND, also

- b. **agree** that in all proceedings of the courts where classified information may be used, any general practices and procedures that may be necessary to ensure that the information is protected *must be agreed between the Chief Justice and the Attorney-General* as soon as practicable and revised from time to time

Consideration of monitoring or detention where classified information has been used

15. **agree** that if the District Court finds it is necessary to consider classified information to order the secure detention of a non-citizen who is liable for deportation, it must transfer the warrant of commitment application to the High Court for consideration by the specially warranted Judge
16. **agree** that the Department of Labour may make an application directly to the High Court for the secure detention of a non-citizen who is liable for deportation, to enable the classified information to be considered

17. **note** that there are agreed mechanisms to review the use and veracity of classified information in the decision-making process, either through the Immigration and Protection Tribunal or judicial review, as opposed to the warrant of commitment process
18. **agree** that, in a warrant of commitment hearing, any classified information presented must be considered prima facie

Expediting matters before the courts where classified information has been used

19. **agree** that, to ensure that all matters before the courts involving classified information are undertaken as a matter of urgency, the immigration legislation provide guidance to the courts on prioritising review, appeal and warrant of commitment hearings
20. **agree** that the guidance to the courts specifically refer to appeal hearings where the matter involves a risk or a threat to national or international security, emphasising the urgency of dealing with these matters expeditiously

Access to appeal where liable for deportation by Order in Council

21. **note** that in November 2006, the Cabinet Business Committee decided that, where a non-citizen is liable for deportation by Order in Council as a risk or a threat to national or international security, they have no access to appeal under immigration legislation (regardless of any use of classified information) [CBC Min (06) 20/14 refers]
22. **note** that there are no limitations on a non-citizen's right to claim protection in this circumstance, and judicial review would remain available

Monitoring and detention

23. **rescind**, in the case of non-citizens liable for deportation by Order in Council as a risk or a threat to national or international security, the November 2006 CBC decision 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" [CBC Min (06) 20/14 refers], and instead
24. **agree** that where a non-citizen is liable for deportation as a risk or a threat to national or international security, they can be monitored or detained until they are deported (where this is longer than six months)
25. **agree** that where a non-citizen is liable for deportation as a risk or a threat, the Immigration Bill replicate provisions of Section 79(2) of the Immigration Act 1987 providing that, where a warrant is sought by the Department of Labour, the courts would:

- a. issue a warrant for secure detention, or
 - b. if satisfied that the release of the non-citizen would not be contrary to the public interest, release the non-citizen on conditions
26. **agree** that the immigration legislation provide guidance to the court on the conditions that could be imposed on a non-citizen if they are released and that these conditions could include that they do any or all of the following:
- a. report to the Department of Labour or the New Zealand Police at set times
 - b. reside at an agreed and specified location
 - c. do not have access to communication devices
 - d. are restricted from associating with named individuals or organisations
 - e. provide a guarantor responsible for:
 - iii. ensuring compliance with conditions of monitoring, and/or
 - iv. reporting, including any failure to meet those conditions.
27. **agree** that the mechanisms for reviewing secure detention and/or release on conditions are consistent with the November 2006 Cabinet Business Committee decisions for monitoring and detention and that where there is a change in the circumstances of the non-citizen during their monitoring or detention, the Department of Labour or the non-citizen can apply to the courts for a review [CBC Min (06) 20/14 refers]
28. [Withheld under section 9(2)(f)(iv) of the Official information Act 1982.]

Legislative implications

29. **invite** the Minister of Immigration to issue further drafting instructions to Parliamentary Counsel in accordance with Cabinet's decisions
30. **confirm** that decisions on technical issues that might arise in the course of drafting legislation be delegated to the Minister of Immigration, and

Publicity

31. **agree** to release this Cabinet paper and the Regulatory Impact Statement on the Department of Labour website.

Hon David Cunliffe
Minister of Immigration

REGULATORY IMPACT STATEMENT

EXECUTIVE SUMMARY

In conducting the review of Part 4A of the Immigration Act 1987 (the 1987 Act) officials have identified areas that require further Cabinet direction prior to finalising the draft Immigration Bill. These include:

- a. the use and protection of classified information in the context of an appeal or during consideration of the need for detention (where classified information has been used), and
- b. the length of detention of a non-citizen, liable for deportation as a risk or a threat to national or international security, after all appeal rights have been exhausted.

This paper proposes:

- a. a prescriptive system for appeal where classified information has been used in an immigration or protection decision, and
- b. that where there was an immediate risk or threat to national or international security or to the safety of any person, a non-citizen could be securely detained until deported.

[Withheld under section 9(2)(f)(iv) of the Official Information Act 1982.]

ADEQUACY STATEMENT

This RIS was prepared by the Department of Labour (the Department) and is considered by the Department to be adequate. Initial drafts of the RIS, drafted under previous RIS requirements, were circulated with the Cabinet paper for departmental consideration. The final version of the RIS in the new format was circulated to the Regulatory Impact Analysis Unit.

STATUS QUO AND PROBLEM

In November 2006, in the context of the Immigration Act review, the Cabinet Business Committee (CBC) (with the power to act) decided that “classified information may be used in immigration and protection decision-making with safeguards...” [CBC Min (06) 20/14 refers]. CBC also agreed “that officials should report to the Cabinet Policy Committee on Part 4A prior to finalising the draft Bill for introduction to the House” [CBC Min (06) 20/14 refers].

In the review of Part 4A of the 1987 Act (which is ongoing) officials have identified that the new immigration legislation should prescribe the complete system for the use and protection of classified information, including in any court appeals. The November 2006 CBC decisions did not specifically address the use and protection of classified information in the context of judicial review or appeal to the High Court, Court of Appeal or Supreme Court. Clarity and prescription in the system will assist in reducing the amount and duration of prolonged litigation as seen in the Zaoui case.

Officials have also identified that an implication of the November 2006 CBC decisions on monitoring or detention is that where a non-citizen becomes liable for deportation as a risk or a threat to national or international security, has exhausted all appeal rights, and has no right to remain in New Zealand, they could not be securely detained longer than six months where they have not been deported [CBC Min (06) 20/14 refers]. This may have serious implications for national or international security.

OBJECTIVES

The objectives:

To enable classified information to be used in immigration and protection decision-making to ensure that New Zealand's interests are protected and advanced in decision-making processes, while maintaining an appropriate level of fairness.

To develop a modern monitoring and detention system that manages risk while ensuring the rights of the individual are balanced appropriately against the rights of New Zealand.

ALTERNATIVE OPTIONS

No substantive alternatives were identified.

PREFERRED OPTION

CLASSIFIED INFORMATION - DESCRIPTION

That the new immigration legislation prescribes the complete system for the use of classified information from initial decision to appeal (with leave) to the Supreme Court. The key features would include:

- a. enabling specially warranted and security briefed Judges of the High Court to access any classified information in determining warrants of commitment and appeals on points of law where classified information is used
- b. enabling the Judges of the Court of Appeal and Supreme Court to be security briefed to access any classified information to determine an appeal on points of law brought before them, and
- c. enabling the subject of classified information to have access to a special advocate to represent them in court proceedings.

CLASSIFIED INFORMATION – COSTS AND BENEFITS

The government

The preferred option would enable the government to be assured that the classified information system appropriately balanced the rights of the individual against the rights of the state in immigration and protection decision-making.

It is likely that the first use of the classified information provisions of the new immigration legislation, including those proposed in the Cabinet paper, will be tested

through the Immigration and Protection Tribunal (the Tribunal) (where allowed) and through the courts. This is likely to have financial implications for government although it is difficult to predict to what extent.

Owners of the classified information

Experience shows that one of the most important safeguards for classified information is limiting the number of people who have access to it. The preferred option seeks to ensure that in all cases where classified information is used, the safeguards for the information to enable it to remain protected are prescriptive and appropriately balanced. Protecting the information will assure its owners that the information will not be publicly disclosed where it is used in an immigration and/or protection decision.

Non-citizens

The preferred option would enable the High Court, Court of Appeal and Supreme Court to access any classified information that may be of relevance to an appeal. This would ensure access to robust appeal for non-citizens where classified information has been used in a decision that impacts on their immigration or protected status.

The courts

Enabling the High Court, Court of Appeal and Supreme Court to access classified information would ensure that the Judges of these courts could properly consider any appeal brought forward where classified information is used.

MONITORING AND DETENTION - DESCRIPTION

That the Immigration Bill provides a mechanism for monitoring and/or detaining those non-citizens liable for deportation by Order in Council as a risk or a threat to national or international security until they are deported (if this is longer than six months). Where the non-citizen is not a risk or a threat to the public interest, they could be released on conditions by the courts enabling the use of secure detention to be limited.

MONITORING AND DETENTION – COSTS AND BENEFITS

The government

The preferred option would enable the government to manage any risk a non-citizen liable for deportation as a risk or a threat to national or international security may pose. Where there was an immediate risk to national or international security or to the safety of any person, a non-citizen could be securely detained under a warrant until deported.

It is difficult to predict the extent of the financial implications of extending secure detention beyond six months for non-citizens who are a risk or a threat to national or international security. The proposal mirrors the status quo of the 1987 Act. Under the 1987 Act, the number of non-citizens currently deported as a security threat or suspect terrorist has been extremely small. There has been no case of extended detention for this reason.

The public

The preferred option would ensure that the public interest was taken into account in any decision on the management of a non-citizen who may be a risk or a threat to national or international security. This would ensure that the public would be protected from any risk the non-citizen may pose.

Non-citizens

Enabling the courts to consider the most appropriate form of management of the non-citizen would mean that their case is considered (and reviewed up to every 28 days) by an independent arbitrator.

Regular review of secure detention would ensure the rights of the non-citizen are upheld.

IMPLEMENTATION AND REVIEW

The Immigration Bill is currently being drafted and is to be introduced to the House in early 2007.

CONSULTATION

STAKEHOLDER CONSULTATION

Many submitters indicated strong opposition to the classified information proposals on the grounds that they contravene a person's right to a fair hearing and the principles of administrative and natural justice. These submitters were of the view that all prejudicial information should be fully disclosed to applicants if it is to be used in decision-making. Many submitters considered that:

- a. decision-making and review processes need to be transparent
- b. applicants should have access to special counsel
- c. applicants should be provided with at least a summary of the information to enable them to challenge that information, and
- d. reviews 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.

These concerns were carefully considered in light of the small number of cases likely to be affected, and the range of safeguards proposed. The November 2006 CBC decisions provided for transparent process for the use and review of classified information and included the ability to provide a summary of any information used in an immigration or protection decision. Provisions for special advocates to be used in any appeals process were also developed. The preferred option builds upon these decisions to further address any concerns.

There was a significant amount of feedback on the detention proposals with many submitters expressing the view that detention should be used as infrequently as possible and for the shortest possible time. Concern was expressed that the

detention system be consistent with New Zealand's national and international obligations and that the individual rights of non-citizens be upheld.

The monitoring and detention system proposed has been developed with particular regard to:

- a. 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
- b. 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).

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.

GOVERNMENT DEPARTMENTS/AGENCIES CONSULTATION

Substantial government consultation was undertaken as part of the original Act review work on classified information, review and appeal and monitoring and detention including with the Departments of Prime Minister and Cabinet and Internal Affairs, the Ministries of Foreign Affairs and Trade (MFAT), Health, Education, Economic Development, Transport, Justice, and Pacific Island Affairs, the New Zealand Qualifications Authority, the Tertiary Education Commission, the New Zealand Defence Force, Police, Customs Service, and Security Intelligence Service, the Inland Revenue Department, the Office for Disability Issues, Crown Law, the Legal Services Agency and Treasury. Te Puni Kōkiri was also informed of the proposals. The chairs of the Refugee Status Appeals Authority, the Removal Review Authority, the Residence Review Board, the Deportation Review Tribunal, the Privacy Commissioner, the Office of the Ombudsmen and the Human Rights Commission were also consulted. No significant concerns were raised by agencies consulted on these proposals.

The chairs of the Refugee Status Appeals Authority, the Removal Review Authority, the Residence Review Board, the Deportation Review Tribunal, the Privacy Commissioner, the Office of the Ombudsmen and the Human Rights Commission were also consulted on the November 2006 paper.

The Departments of Prime Minister and Cabinet and Corrections, and the Ministries of Justice and Foreign Affairs, the New Zealand Security Intelligence Service and Crown Law along with the New Zealand Defence Force, Police, and Customs Service, were consulted on the draft Cabinet paper. Treasury was also informed.

The Ministry of Justice raised concerns about the provisions in the Immigration Act 1987 that allowed for ongoing secure immigration detention. A statutory limit has been agreed for most circumstances. The Ministry considers it unlikely that the courts will issue a warrant for ongoing detention under the new legislation where it is apparent that a non-citizen cannot be deported and supports the proposal for further work to be undertaken on mechanisms for managing security risk regardless of a person's immigration status.

No other significant concerns were raised by agencies consulted on these proposals and they support the proposals being made in the Cabinet paper.