

Chair  
Cabinet Policy Committee

## **IMMIGRATION ACT REVIEW: PART 4A REPORT BACK**

### **PURPOSE**

1. This paper:
  - a. reports back on a review of Part 4A of the Immigration Act 1987 (the 1987 Act) as directed by the Cabinet Business Committee (CBC) [CBC Min (06) 20/14]
  - b. compares the classified information system for the new immigration legislation agreed by CBC and Cabinet [CBC Min (06) 20/14 and CAB Min (07) 14/1A] with Part 4A of the 1987 Act, and
  - c. proposes that Part 4A is repealed along with the 1987 Act on enactment of new immigration legislation.

### **EXECUTIVE SUMMARY**

2. Part 4A was inserted into the 1987 Act by the Immigration Amendment Act 1999 (the Amendment Act) to provide for a special regime to protect sensitive security information relevant to immigration matters where that information was used in decision-making. In November 2006 and April 2007, CBC and Cabinet decided that classified information may more generally be used in immigration and protection decision-making with safeguards [CBC Min (06) 20/14 and CAB Min (07) 14/1A].
3. The November 2006 decisions on the classified information system for the new immigration legislation were made without specific consideration of their relationship with or impact on Part 4A. This is because Part 4A was specifically outside the scope of the Immigration Act review [CAB Min (05) 18/7]. The April 2007 decisions for the new legislation were sought as a result of the review of Part 4A, as directed in November 2006.
4. The key question driving this review is whether Part 4A is still required to enable classified security information is used in the immigration decision-making process. The review has also considered whether the new legislation is adequate to manage a non-citizen who may be a risk or a threat to national security. In answering the key question, this review considers the differences between Part 4A and the new classified information system. Where appropriate, the difference in treatment of a non-citizen who is a risk or a threat has been highlighted.
5. The key differences between Part 4A and the new legislation are, under the new legislation:
  - a. immigration decision-making will not cease where classified information is used. The Minister of Immigration (the Minister) may make an immigration decision and a determination officer may make a protection decision using classified information. The decision, along with the use and veracity of any classified information used, can then be reviewed by the Immigration and Protection Tribunal (the Tribunal)

- b. review of the use and veracity of classified information in a decision to deport by Order in Council will occur where judicial review is activated in the High Court. There will be no special review as under Part 4A. This is because, generally, where a non-citizen's deportation is ordered by the Governor-General through an Order in Council as a threat to national security they have no immigration appeal<sup>1</sup>, and
  - c. secure detention will not be automatic where classified information is used but will be available where necessary to manage a non-citizen who represents a risk, including a risk or a threat to national or international security. The courts will consider the circumstances of the case, the level of risk and the need to ensure compliance with immigration law. Where the non-citizen is being deported by Order in Council, the courts will consider if their release would be contrary to the public interest.
6. The new legislation has been designed to give greater ability to use classified information in both immigration and protection decision-making, while giving greater protection to a non-citizen through ensuring that there is a robust process of independent scrutiny. A balance has been sought between the rights of the government to use and protect classified information where it is in the best interests of New Zealand, and the rights of the non-citizen. This will enable fair, fast and firm decision-making where classified information is used.
  7. The classified information system under the new legislation incorporates all the advantages of Part 4A of the 1987 Act, and seeks to overcome its disadvantages, through being a clearly and closely prescribed system. The fair, fast and firm process of the new legislation will enable the government to manage those non-citizens who are a risk or a threat through a tightly legislated process. Lessons learnt from the use of Part 4A to date have been incorporated into the new system.
  8. While the proposed system will in particular allow classified information to be brought to bear in security risk cases, it will also enable classified information to be used more generally in the immigration system. This means that immigration and protection decision can be made using all the available information.
  9. As a result of this review, I propose that Part 4A is repealed along with the 1987 Act on enactment of the new immigration legislation. I note that Mr Zaoui would remain subject to Part 4A provisions until the conclusion of his case.

## **PART 4A OF THE 1987 ACT**

10. Part 4A was inserted into the 1987 Act by the 1999 Immigration Amendment Act to provide for a special regime to protect sensitive security information relevant to immigration matters where that information was used in decision-making to manage security concerns. Part 4A was required to protect New Zealand Security Intelligence Service (NZSIS) classified security information due to the general principle of providing non-citizens engaging in the immigration system with potentially prejudicial information (PPI) and reasons for decisions<sup>2</sup>.

---

<sup>1</sup> Section 72 of the 1987 Act.

<sup>2</sup> The provision of PPI and reasons for decisions is required, in most circumstances, by the 1987 Act, the Official Information Act 1982, the Privacy Act 1993, and the principles of administrative law.

11. Part 4A also provided an avenue for a non-citizen to access an independent review of the use of information where classified information was used to determine their immigration status in New Zealand. This process was required because non-citizens have no right to appeal under the 1987 Act where they have to be deported as a risk to national security. The General Policy Statement of the Amendment Act described the intent of Part 4A as enabling:

“classified security information to be considered in immigration decisions without putting the classified nature of that information at risk, while ensuring that the rights of the individual are protected through a process of independent scrutiny”.

#### **Special procedures under Part 4A**

12. Part 4A creates special procedures for using NZSIS classified security information to deport a non-citizen who is a security concern outside the usual immigration decision-making processes. In summary:
- a. the Director of Security may issue a security risk certificate for an identifiable non-citizen who satisfies relevant security criteria
  - b. the Minister can decide to rely on the risk certificate, advising the Department of Labour (the Department) of that decision
  - c. upon receipt of that advice, the Department must:
    - i. ensure that all processing of immigration matters relating to the non-citizen ceases, and
    - ii. arrange for the New Zealand Police (Police) to serve notice of the risk certificate, and
  - d. upon service of the notice, the Police must arrest and detain the non-citizen who then must be brought before a District Court Judge as soon as possible for the issue of a warrant of commitment (warrant) for ongoing detention.
13. A non-citizen who is the subject of a security risk certificate may seek a review by the Inspector-General of Intelligence and Security (Inspector-General) within 28 days of the Director of Security's decision to issue a risk certificate (during which time they cannot be deported, but must be securely detained).
14. Where a review of the certificate is sought, the Inspector-General must determine whether the certificate was properly made, and the subject was properly covered by the certificate, through determining if the classified security information (in summary):
- a. is actually classified
  - b. is credible, and
  - c. is relevant to the security criteria.
15. If the Inspector-General confirms the certificate, the Minister may choose to rely on it. Where the Minister finally relies on a security risk certificate the non-citizen will be issued with a removal or deportation order. Where the non-citizen is being deported as a threat to national security (under section 72 of the 1987 Act), the Governor-General will issue an Order in Council for their deportation.
16. Once the Minister finally relies on a security risk certificate, the non-citizen has no further right of review or appeal under the 1987 Act. Appeal on points of law and judicial review are available in respect of the Inspector-General's decision and the Governor-General's decision to order deportation.

## **CLASSIFIED INFORMATION UNDER THE NEW IMMIGRATION LEGISLATION**

17. In November 2006, in making decisions for the new immigration legislation, CBC (with the power to act) agreed that "classified information may be used in immigration and protection decision-making with safeguards..." [CBC Min (06) 20/14].

18. The safeguards include that:

- a. the decision-maker must release a summary of the classified information to the non-citizen during the PPI process except to the extent that a summary would be likely to prejudice the interests referred to in the definition of classified information
- b. the non-citizen must be informed that "the decision had been made on the basis of classified information, the broad reasons for the decision"
- c. the non-citizen must be advised of any appeal rights that are available and the availability of a special advocate who may access the classified information to represent them during any appeal
- d. where the non-citizen appeals to the Tribunal, the appeal may be heard by up to three specially warranted and security briefed District Court Judges (DCJ) (rather than the Inspector-General acting alone under Part 4A).
- e. during any appeal the DCJs can assess both the immigration and/or protection decision made, along with the use and veracity of the classified information used in the decision-making process, and
- f. the new legislation provides for a clearly and closely prescribed system for judicial review and appeal on points of law to the courts, where security briefed judges may access any classified information used in the decision-making process and the non-citizen can be represented by their special advocate [CBC Min (06) 20/14 and CAB Min (07) 14/1].

19. CBC also decided that immigration and protection decision appeal rights would be available in respect of the use of the classified information to those who ordinarily would have access to an appeal to the Tribunal. Non-citizens who were liable for deportation by the Governor-General through Order in Council do not have access to an immigration appeal.

20. In April 2007, as a result of this review, Cabinet made further decisions on the use and protection of classified information for the new legislation in any appeal to the High Court, Court of Appeal or Supreme Court [CAB Min (07) 14/1A]. The new legislation will, therefore, facilitate with appropriate safeguards the use of classified information in immigration and protection decisions concerning national or international security, criminal conduct or significant international reputation issues for New Zealand through a clearly and closely prescribed system from initial decision through to appeal to the Supreme Court.

## **REVIEW OF PART 4A**

21. The November 2006 CBC decisions on the classified information system for the new immigration legislation were made without specific consideration of their relationship with or impact on Part 4A. This is because Part 4A was specifically outside the scope of the Immigration Act review [CAB Min (05) 18/7].

22. The initial intention was that Part 4A be reviewed at the conclusion of the Zaoui case. In November 2006, however, CBC agreed “that officials should report to the Cabinet Policy Committee on Part 4A prior to finalising the draft Bill for introduction” [CBC Min (06) 20/14]. The key question driving this review is whether Part 4A is still required to enable classified security information is used in the immigration decision-making process. The review has also considered whether the new legislation is adequate to manage a non-citizen who may be a risk or a threat to national security.

#### The Zaoui case

23. In considering Part 4A of the 1987 Act, it is important to note that the Zaoui case will not be affected. Mr Zaoui will continue to be dealt with under the provisions of Part 4A.
24. The timing of the Act review (and the review of Part 4A) is challenging as it is unlikely that the Zaoui case will be resolved prior to the introduction of the Immigration Bill. Officials are also unable to advise if the case will be resolved prior to the enactment of the new immigration legislation.
25. Any decision to repeal Part 4A made prior to the introduction of the Immigration Bill, or during the Select Committee process will attract attention. Any change required to Part 4A to align it with the new legislation for incorporation into the Immigration Bill would also be of significant interest. If Part 4A was to be retained in the Immigration Bill, any subsequent repeal after the introduction of the Bill would require an additional legislative process which would also attract attention. There is, therefore, no “ideal” time for the repeal to take place.

#### **PROBLEM DEFINITION**

26. Under Part 4A of the 1987 Act:
- classified information cannot be used in standard immigration decision-making, but is used in a separate process
  - the lengthy, multifaceted decision-making process can be subject to delay because:
    - when the security risk certificate is issued all immigration decision-making must cease
    - immigration decision-making is also put on hold while the Inspector-General alone reviews the certificate and any other appeal or review proceedings focussed on the classified information are considered, and
    - refugee determinations can continue, with appeals in respect of the refugee decision to the Refugee Status Appeal Authority, and to the courts on points of law, along with judicial review.
  - refugee decision-makers are not able to use the NZSIS classified security information, which may prevent proper consideration of whether the subject of a security risk certificate could be excluded from refugee status under the Refugee Convention<sup>3</sup>

---

<sup>3</sup> Refugee status is excluded under Articles 1D, 1E and 1F Refugee Convention for persons to whom there are serious reasons for considering that they committed a crime against peace, humanity or a war crime; or a serious non-political crime outside the country of refuge; or has been guilty of acts contrary to the purposes and principles of the United Nations.

- where the subject of a risk certificate appeals on points of law or undertakes judicial review proceedings in the High Court, there is no structured process for the use and protection of the classified information
  - the NZSIS is not party to the Inspector-General's review or any further appeal or review proceedings in the courts thereby limiting their ability to provide advice to inform the process and limiting the courts in their consideration of the case at hand
  - where a security risk certificate has been issued, the subject of that certificate must be securely detained and there is no statutory assessment as to the most appropriate form of managing the risk they represent, and
  - the current Part 4A process relies on a single Inspector-General's review rather than the expanded Tribunal set out in the new law.
27. Under Part 4A the Inspector-General alone reviews of the use and veracity of the classified information. This process can put significant demands on the Inspector-General, who is unable to engage with peers to discuss the case in the review and decision-making process. Under the new legislation, any appeal to the Tribunal can be heard by up to three DCJs, overcoming this problem and the isolation of the Inspector-General's role under Part 4A.
28. Also of note, the separate process used for classified information under Part 4A will not naturally interface with the new immigration legislation. If Part 4A was retained it would require amendment. Further, maintaining it along with the new classified information system would create a scenario where there would be a choice of two systems for use in the new immigration legislation. This may present additional opportunities for litigation for the subject of the risk certificate including a challenge on the choice of the classified information system used.

#### **COMMENT: SHOULD PART 4A BE REPEALED?**

29. As the classified information system for the new legislation achieves a balance that has been agreed as appropriate by CBC and Cabinet, the key question is, therefore, whether there is a reason for Part 4A of the 1987 Act to be retained. The short answer is no, and I am proposing that Part 4A is repealed along with the rest of the 1987 Act on enactment of the new legislation<sup>4</sup>.
30. The new legislation has been designed to give greater ability to use classified information in both immigration and protection decision-making, while giving greater protection to a non-citizen through ensuring that there is a process of independent scrutiny. A balance has been sought between the rights of the government to use and protect classified information where it is in the best interests of New Zealand on the one hand, and the rights of the non-citizen.
31. The new legislation will enable decision-making within a clearly and closely prescribed system. The new legislation will also enable the government to manage those non-citizens who are a risk or a threat more expeditiously than under Part 4A by reducing multiple decision-making and review and appeal points in the deportation process.

---

<sup>4</sup> Mr Zaoui would remain subject to Part 4A until the conclusion of his case.

32. Senior Officials from key government agencies have been involved in developing the provisions for the new legislation. They include Crown Law, the Department of Prime Minister and Cabinet, the NZSIS, the Ministries of Justice and Foreign Affairs and Trade, and the Department of Labour. Contributions from these Senior Officials have ensured that lessons learnt from the use of Part 4A to date have been incorporated into the new system.

*Table One – comparison between Part 4A process and new legislation*

Part 4A				New legislation		
Appeal available	Judicial review available	1. Classified information (CI) relating to a non-citizen can be considered by the Director of Security when issuing a security risk certificate (SRC) where there are security, terrorism or public order issues	REFUGEE DETERMINATION PROCESS CONTINUES	1. CI available for use in immigration and protection decision-making where it relates to national security, criminal conduct or New Zealand's international reputation	Judicial review ONLY after Tribunal appeal	DETENTION AVAILABLE
		2. Minister can make a preliminary decision to rely on the SRC		2. Ordinary immigration or protection appeal enables the use and veracity of CI to be considered		
		3. Immigration decision-making ceases		3. Appeals on points of law and judicial review only available after Tribunal appeal decided.		
	Judicial review available	4. Non-citizen can seek an Inspector-General review of decision to use CI to make SRC	REFUGEE DETERMINATION PROCESS CONTINUES		Judicial review ONLY after Tribunal appeal	DETENTION AVAILABLE
		5. If SRC deemed properly made, Minister can make final decision whether to rely on SRC				
		6. If SRC is relied upon, deportation proceedings can commence (considering any refugee obligations)				

33. A detailed description of the differences between Part 4A and the new legislation is at Appendix One.

#### Immigration decision-making will not cease

34. Under the new legislation, the Minister may make an immigration decision using any available classified information without the need for a risk certificate to be issued. Except where the non-citizen is being deported by Order in Council, as discussed below, the Tribunal can then review:
- the immigration decision, along with
  - the use and veracity of any classified information used.

35. Under Part 4A, the Director of Security must issue a security risk certificate, and the Minister must make a preliminary decision to rely upon it. This decision ceases immigration decision-making and activates the special review proceedings. This delays the deportation of the non-citizen who is a security concern.

#### Classified information is available in refugee and protection decision-making

36. Under Part 4A classified information could not be used in a refugee status determination. The new legislation will enable classified information to be used when considering a claim for refugee or protection status. The decision-maker will be able to properly consider:
- ALL available information, along with
  - ANY possible ground for exclusion of refugee status.

37. Enabling classified information to be used in immigration decision-making under the new legislation, without the need for a security risk certificate, and in refugee and protection decision-making:
  - a. integrates the multiple decision points and decision-making streams under Part 4A, and
  - b. combines the multiple review and appeals processes into a single appeal to the Tribunal.
38. The new immigration legislation provides protections for the use of the classified information from initial decision making, through judicial review and to appeal to the Supreme Court. It also provides legislative protections for the non-citizen in the decision-making and review and appeal process.
39. Where classified information is used in decision-making, the non-citizen would be then advised that a decision had been made, and given the broad reason. They would, where possible, also be given a summary of the classified information. Any Tribunal review would be undertaken by up to three specially warranted and security briefed DCJs and the non-citizen would have legislated access to a special advocate whose role was clearly prescribed.
40. In the case of a non-citizen who was a risk or a threat, and who claimed protection in New Zealand, the new legislation would enable the multiple streams of Part 4A to be considered in a single decision that assesses any protection obligations against exclusion criteria under the Refugee Convention (considering a if person committed a crime against peace, humanity or a war crime; or a serious non-political crime outside the country of refuge; or has been guilty of acts contrary to the purposes and principles of the United Nations), as well as the deportation itself.
41. The multiple appeals of Part 4A, would be rolled into a single, closely and clearly prescribed, appeal to the Tribunal under the new legislation where both the protection decision, the deportation decision, and the use and veracity of the classified information would be considered. Any further appeal to the High Court would also be closely and clearly prescribed.

#### No independent review specifically on the use of classified information

42. Under Part 4A, the subject of a security risk certificate may access an independent review of the use of classified information where they would otherwise not have access to PPI, reasons for decisions or an appeal against a decision to deport.
43. In November 2007, CBC decided to carry over into the new legislation the provision that a non-citizen being deported by Order in Council has no right of appeal under immigration legislation [CBC Min (06) 20/14]<sup>5</sup>. This decision was confirmed by Cabinet in April 2007 [CAB Min (07) 14/1A]. As per the status quo, under the new legislation, a non-citizen being deported as a risk or a threat to national security would only have access to the High Court to seek a judicial review of the decision to deport.
44. What this means is, in the case of a security risk or threat, classified information could be used under the new legislation without the special appeal mechanism

---

<sup>5</sup> This decision was noted by Cabinet in April 2007 [CAB Min (07) 14/1A refers].



created by Part 4A. Where required, under the new legislation, classified information could be used to deport a non-citizen by Order in Council as a risk or a threat to national or international security with the only review available being a clearly and closely prescribed judicial review to the High Court.

45. If judicial review was activated by a non-citizen being deported by Order in Council, and classified information had been used, the non-citizen would have access to the safeguards that ensured the classified information was subject to independent scrutiny. This process is considered by officials to align with the balance of interests, between the state and the individual, which were agreed for the new legislation by CBC and confirmed again by Cabinet in April 2007.

#### Secure detention will not be automatic

46. Under Part 4A, where a security risk certificate has been issued, the subject of that certificate must be securely detained without any assessment of the level of risk they may represent. Under the new legislation, where a non-citizen is refused entry to New Zealand or liable for deportation from New Zealand they may be monitored by the Department, released on conditions by the courts or securely detained under a warrant.
47. In considering the need for secure detention under a warrant, the courts will consider:
  - a. the circumstances of the non-citizen's case
  - b. the level of risk they represent, and
  - c. the need to ensure compliance with immigration law.
48. Where the non-citizen is being deported by Order in Council as a risk or a threat, the courts will consider if the release of the non-citizen would be contrary to the public interest. Where release was considered contrary to the public interest, the non-citizen could be detained until they were deported from New Zealand. This process will ensure that the government has the appropriate tools to manage risk.
49. Greater flexibility in the monitoring and detention process, without a requirement that a non-citizen is securely detained where classified information is used, is consistent with the greater scope for using classified information in the immigration and protection system. It enables an appropriate response to the management of non-citizens who are refused entry, or are liable for deportation.

#### **COMMENT: IF PART 4A WAS NOT REPEALED**

50. Officials advise that a decision not to repeal Part 4A would raise difficulties in the maintenance of its workability alongside the new immigration legislation. The Part would require significant amendment to extract its links from the 1987 Act and establish its place relative to the Immigration Bill. Any amendment, however practical and necessary, would attract significant interest and would be likely to itself become subject to detailed debate.
51. A key risk with retaining Part 4A would also be the creation of a scenario where there would be a choice of two classified information systems for use in the new immigration legislation. Where a non-citizen was a risk or a threat to national security, the choice of which system to use would be a decision of the Director of Security, made through a decision on whether or not to issue a security risk

certificate. Arguably, the Director of Security is not the most appropriate decision-maker with regard to immigration matters.

52. A security risk certificate is merely a vehicle to allow classified information to be used under the 1987 Act. As classified information could be used and protected under the new legislation without a certificate, the further use of a security risk certificate under Part 4A would not be required. If the Director of Security was to issue a certificate under Part 4A after the passing of the new legislation, it may present additional opportunities for litigation. The subject of the risk certificate may challenge the choice of the classified information system used, especially as the new legislation provides greater safeguards for their rights.
53. Officials have given thought to any value added to the immigration system by the issuing of a security risk certificate, and the message that it may send to both the non-citizen, and others in the national and international community. As noted above, under the 1987 Act, the certificate is merely a tool. The message about the seriousness of the reason(s) a non-citizen may be deported where they are a risk or a threat is highlighted through the process of the Governor-General issuing an Order in Council.

## **CONCLUSION**

54. The classified information system under the new legislation incorporates all the advantages of Part 4A of the 1987 Act. The fair, fast and firm process of the new legislation will enable the government to manage those non-citizens who are a risk or a threat more expediently than under Part 4A while enabling classified information to be used more generally in the immigration legislation. The new legislation aims to overcome many of Part 4A's disadvantages through being a closely and clearly prescribed system for the use of classified information from initial decision through to appeal to the Supreme Court. Lessons learnt from the use of Part 4A to date have been incorporated into the new system.
55. It is acknowledged that, at the conclusion of the Zaoui case, the use of Part 4A in the immigration system will have been fully tested, from initial decision through to appeal. It is difficult to predict the outcome of the early use of the classified information system under the new legislation – it is also likely that it will be tested. Carefully considered drafting of the new legislation will ensure that the experience gained from the use of Part 4A to date optimally informs the drafting process.
56. I therefore propose that Part 4A is repealed along with the 1987 Act on enactment of the new immigration legislation. I note that Mr Zaoui would remain subject to Part 4A provisions until the conclusion of his case.

## **CONSULTATION**

57. The following agencies were consulted on the November 2006 paper including the proposals on classified information and monitoring and detention which CBC 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.

58. The Chairs of the Refugee Status Appeals Authority, the Removal Review Authority, the Residence Review Board and 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.
59. 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 April 2007 Cabinet paper. The heads of the Higher Courts including the acting Chief Justice, the President of Court of Appeal and the Chief High Court Judge were also consulted and Treasury was informed.
60. The Ministries of Justice and Foreign Affairs, along the New Zealand Security Intelligence Service and Crown Law were consulted on this paper and agree with the recommendations. The Department of Prime Minister and Cabinet was a key stakeholder in the review of Part 4A and has been informed.
61. The Department of Corrections along with the New Zealand Defence Force, Police and Customs Service and Treasury were also informed and raised no concerns with the proposal to repeal Part 4A.

## **FINANCIAL IMPLICATIONS**

62. There are no identified financial implications associated with the proposal to repeal Part 4A of the 1987 Act. As previously noted to CBC and Cabinet, it is difficult to predict the financial implications of using classified information in immigration and protection decision-making under the new legislation [CBC Min (06) 20/14 and CAB Min (07) 14/1A].
63. It is likely that the early use of the classified information provisions of the new immigration legislation will 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. Funding for implementing the Act review, including the new classified information system, through Budget 2007 has been set aside and will be held in contingency [CAB Min (07) 14/1A].

## **HUMAN RIGHTS IMPLICATIONS**

64. The Ministry of Justice advises that the proposals for the use of classified information in immigration decision-making raise *prima facie* issues under section 27(1) of the New Zealand Bill of Rights Act 1990 (NZBORA) – the right to natural justice. Given the safeguards included, the nature of classified information and national security interests, however, officials are confident that the overall regime will be robust and justifiable in NZBORA terms. In this context the proposed repeal of Part 4A does not raise any new issues under the NZBORA. Rather, the more streamlined and integrated system proposed in the Immigration Bill, arguably provides stronger and more transparent human rights protections than the current Part 4A procedures.

## **LEGISLATIVE IMPLICATIONS**

65. If the proposal in this paper is agreed, Part 4A will be repealed along with the rest of the 1987 Act on enactment of the new immigration legislation.

## **REGULATORY IMPACT AND BUSINESS COMPLIANCE COST STATEMENT**

66. The Department confirms that a Regulatory Impact Statement is not required as the proposal in this paper does not result in new legislation.

## **PUBLICITY**

67. There has been considerable public interest in the review of Part 4A. Should Cabinet agree to the recommendations in this paper, I propose to release this paper on the Department's website. Some sections may be withheld under the Official Information Act 1982. Processes for publicising any change will be discussed in consultation with relevant departments.

## **RECOMMENDATIONS**

68. It is recommended that the Committee:

1. **note** that the new immigration legislation will clearly and closely prescribe the decision-making process where classified information is used in the immigration system;
2. **agree** that Part 4A of the Immigration Act 1987 is repealed along with the rest of the Immigration Act 1987 on enactment of the new immigration legislation;
3. **note** that Mr Zaoui would remain subject to the provisions of Part 4A of the Immigration Act 1987 until the conclusion of his case;
4. **agree** to release this paper on the Department of Labour's website; and
5. **note** that, if released, some sections of this paper may be withheld under the Official Information Act 1982.

Hon David Cunliffe  
Minister of Immigration

## APPENDIX ONE – KEY DIFFERENCES BETWEEN PART 4A of the 1987 ACT AND NEW LEGISLATION

Part 4A: Special procedures	New legislation: Classified information system	Comment on the key differences
<b><i>Decision-making using classified information</i></b>		
Enables classified security information (CI) to be considered in immigration decision-making by the Director of Security when issuing a security risk certificate (SRC) where there are security, terrorism or public order issues <sup>6</sup> .	CI will be used in immigration and protection decision-making where there is national or international security, criminal conduct or significant international reputation issues.	The new legislation provides for broader use of classified information in the immigration system than Part 4A.  CI can be used in cases where there is criminal conduct or significant international reputation issues for New Zealand as well as security (including public order) issues.
The Minister of Immigration (Minister) may make a preliminary decision to rely upon SRC.	CI can be used by the Minister to make an immigration decision, or by a specially designated and security-cleared determination officer to make a protection decision.	The new legislation enables CI to be accessed for both immigration and protection decision-making.  The Minister will make an immigration decision, and a determination officer will make a protection determination.
Where a preliminary decision to rely on a SRC is made, all immigration decision-making ceases. Processing of refugee status matters continues but the CI cannot be used.	CI will inform BOTH immigration and protection decision-making and the information will be protected.	Under the new legislation a single immigration or protection decision is made while Part 4A requires separate immigration and protection decision-making.

<sup>6</sup> Section 1(bc) of the New Zealand Security Intelligence Service Act 1969 enables the NZSIS to make recommendations in respect of matters to be decided under the Immigration Act 1987, to the extent that those matters are relevant to security.

Part 4A: Special procedures	New legislation: Classified information system	Comment on the key differences
<b><i>Notification that classified information has been used</i></b>		
<p>New Zealand Police (Police) serve notice of the SRC to the subject.</p> <p>There is no legislative requirement for reasons to be given for the issue of the SRC or a summary of the CI used to be released (but the courts have ordered it in Mr Zaoui's case).</p>	<p>The decision-maker will advise the non-citizen that a decision has been made using CI and give broad reasons for the decision.</p> <p>A summary of the CI will be released where possible.</p>	<p>The new legislation will provide a more transparent process than Part 4A, but still enable protection of the CI.</p> <p>Reasons for the use of CI will be given and a summary of the information will be released where possible.</p>
<b><i>Detention where classified information has been used</i></b>		
<p>Automatic, secure detention is required for a non-citizen who is the subject of a SRC.</p>	<p>Secure detention available to manage the risk of those non-citizens liable for monitoring and detention (including those refused entry and liable for deportation).</p>	<p>The new legislation provides greater flexibility than Part 4A for an appropriate response, depending on the CI and level of risk.</p> <p>Secure detention is an option, considering the circumstances of the case, the level of risk the non-citizen represents, and the need to ensure compliance with immigration law.</p>
<b><i>(Non-court) review of use and veracity of classified information</i></b>		
<p>The Inspector-General of Intelligence and Security (Inspector-General) assesses whether the SRC was properly made.</p>	<p>The non-citizen could appeal to the Tribunal where they would usually have access to appeal.</p>	<p>There are appropriate safeguards under the new legislation to assess the use of CI. The appeal process is closely prescribed enabling faster decision-making. A non-citizen being deported by Order in Council would not have access to the Tribunal (but could seek judicial review).</p>

<p>The Inspector-General would consider if the CI:</p> <ul style="list-style-type: none"> <li>- is CI</li> <li>- is credible information, and</li> <li>- was used appropriately to determine whether the non-citizen met the relevant security criteria.</li> </ul>	<p>In considering the immigration or protection appeal the Tribunal would assess whether the CI:</p> <ul style="list-style-type: none"> <li>- is CI</li> <li>- is relevant to the decision</li> <li>- is credible information, and</li> <li>- whether, overall, the decision had integrity.</li> </ul>	<p>Under the new legislation, the Tribunal would provide an assessment of the CI in the immigration context, while Part 4A enables only a separate assessment of the CI.</p> <p>The Tribunal would consider the use and veracity of any CI used in the context of an immigration or protection decision.</p>
<b><i>Special advocates</i></b>		
<p>There is no legislative requirement for a special advocate to be provided to the subject of a SRC. In the Zaoui case, the Inspector-General has determined, however, that he can authorise the use of a special advocate (outside the legislation).</p>	<p>A non-citizen will have access to a special advocate during any Tribunal or court appeal and during warrant of commitment (warrant) hearings considering the need for monitoring or detention.</p>	<p>The new legislation would clearly prescribe the role of the special advocate, whereas Part 4A is silent on this matter.</p>
<b><i>Court appeal (and judicial review)</i></b>		
<p>Appeals on points of law and judicial review are available in respect of the Inspector-General's review but there are no legislative provisions guiding the use and protection of the CI at that level.</p>	<p>Appeals on points of law and judicial review are available with closely and clearly prescribed legislative provisions guiding the process</p>	<p>Unlike Part 4A, the new legislation would clearly prescribe the process for using CI in court appeals while protecting the rights of the individual and protecting the information.</p> <p>Guidance will be provided on the urgency of considering an appeal where CI has been used.</p>
<p>Review and appeal by appeals authorities and/or appeals on points of law and judicial review are available in respect of any immigration or refugee status determination where processing is recommenced.</p>		<p>The review and appeals process is streamlined as noted above.</p> <p>The new legislation therefore provides a faster process than Part 4A with fewer avenues for appeal and subsequent delay.</p>

<b><i>Parties to the review and appeal process</i></b>		
The NZSIS, as owner of the classified security information, faces argument about its status in the review and appeals process because the legislation is silent on the matter.	The agency which owns the CI can be party to any review or appeal where the information is considered.	Unlike Part 4A, the new legislation would enable the agency to be party to proceedings, providing advice on the use and veracity of the CI in the review and appeals process.