

Chair
Cabinet Business Committee

IMMIGRATION ACT REVIEW: FINAL ISSUES

PURPOSE

1. This paper:
 - a) reports to Cabinet on a review of the classified information provisions in the draft Immigration Bill (the Bill), and
 - b) seeks Cabinet agreement to minor policy changes that will impact on the drafting of provisions in the Bill.

EXECUTIVE SUMMARY

2. In April and May 2007, Cabinet made further decisions on the classified information system and managing security risks, including to repeal Part 4A along with the Immigration Act 1987 (the 1987 Act) on enactment of the new immigration legislation [CAB Min (07) 14/1A, CAB Min (07) 18/3]. On 18 June 2007, Cabinet agreed the Bill for introduction [CAB Min (07) 21/5].
3. Since the Bill was approved for introduction officials from the Department of Labour (the Department), the New Zealand Security Intelligence Service (NZSIS), Department of the Prime Minister and Cabinet (DPMC), Ministry of Justice (Justice) and Crown Law have met to review the classified information provisions.
4. The policy issues about the protection and use of classified information in immigration and refugee and protection decision-making raised by the NZSIS have been resolved. This includes the concerns resulting from the Crown Law litigation assessment.
5. There is one key policy decision resulting from the review of the classified information provisions that is inconsistent with earlier decisions made by CBC and Cabinet [CBC Min (07) 20/14, CAB Min (07) 14/1A, CAB Min (07) 18/3]. Agencies have agreed that where a refugee and/or protection decision is to be made using classified information, the decision should be made by the Immigration and Protection Tribunal (Tribunal), not a Determination Officer.
6. Agencies also agreed that a definition of security should be included in the draft Bill. The concept of security is central to the use of classified information in the exclusion criteria, decision-making, and deportation of persons threatening security. If the definition was not incorporated into the Bill, challenges to what constituted security, in the immigration context, could be made in the courts.

7. Agencies agreed that the definition should:
 - a) be fit for purpose for the operation of the immigration system consistent with the provisions for the use of classified information in the exclusion criteria, decision-making and for deporting persons threatening security, and
 - b) include the concepts of defence, counter-terrorism, trans-national crime and reputational issues for New Zealand.
8. Agencies also agreed that the Bill should clarify the offences for which a person could be charged for unlawful disclosure or retention of classified information. These offences exist under the Crimes Act 1961 and the Summary Offences Act 1981. If Cabinet agrees to the proposals below, the Bill will be updated and ready for introduction, after the next recess, in the week of 16-20 July 2007.

BACKGROUND

9. In November 2006, the CBC (with the power to act) agreed to proposals to draft new immigration legislation to replace the 1987 Act [CBC Min (07) 20/14]. CBC agreed on a new system for the use of classified information in immigration and refugee and protection decision-making.
10. In April and May 2007, Cabinet made further decisions on the classified information system and managing security risks, including to repeal Part 4A along with the 1987 Act on enactment of the new immigration legislation [CAB Min (07) 14/1A, CAB Min (07) 18/3].
11. On 18 June 2007, Cabinet agreed the Bill for introduction [CAB Min (07) 21/5]. However, since that time officials from the Department, the NZSIS, DPMC, Justice and Crown Law have met to review the classified information provisions. The review was conducted in light of concerns over the process for the protection and use of classified information in immigration and refugee and protection decision-making. The concerns raised by the NZSIS included those resulting from a Crown Law "litigation risk" assessment of the provisions.

COMMENT

12. The policy issues about the protection and use of classified information in immigration and refugee and protection decision-making raised by the NZSIS have been resolved. This includes the concerns resulting from the Crown Law litigation assessment. Officials from all agencies have agreed on the re-drafting of some provisions for the Bill.

Refugee and protection decision-making

13. There is one key policy decision resulting from the review of the classified information provisions that is inconsistent with earlier decisions made by CBC and Cabinet [CBC Min (07) 20/14, CAB Min (07) 14/1A, CAB Min (07) 18/3]. Agencies have agreed that where a refugee and/or protection decision is to be made using classified information, the decision should be made by the Immigration and Protection Tribunal (Tribunal), not a Determination Officer.
14. The policy rational for this decision is two-fold. Firstly, it reduces the number of people who may have access to the classified information. This is a safeguard for protecting the information. Secondly, it escalates a refugee and/or

protection decision-maker to that of a District Court Judge of the Tribunal ensuring a decision is made at a higher level.

15. I propose, therefore, that Cabinet rescind the November 2006 CBC decision that:

“in initial decisions using classified information...all protection decisions involving classified information must be made by senior security-cleared determination officers to ensure that the experts in international law are making the decisions” [CBC Min (07) 20/14]

And instead, agree

“all refugee and protection decisions using classified information must be made by the Immigration and Protection Tribunal”.

Role of the Inspector-General

16. The classified information system in the draft Bill does not provide a role for the Inspector-General of Intelligence and Security (Inspector-General). Agencies agreed this should be made explicit in the Bill. This will ensure the integrity of the classified information system that has been agreed.

Definition of security

17. Agencies agreed that a definition of security should be included in the draft Bill. The concept of security is central to the use of classified information in the exclusion criteria, decision-making, and deportation of persons threatening security.
18. If the definition was not incorporated into the Bill, challenges to what constituted security, in the immigration context, could be made in the courts. This could impact negatively on the goal of firm, fast and fair decision-making in cases of security concern.
19. Agencies agreed that the definition should:
- a) be fit for purpose for the operation of the immigration system consistent with the provisions for the use of classified information in the exclusion criteria, decision-making and for deporting persons threatening security, and
 - b) include the concepts of defence, counter-terrorism, trans-national crime and reputational issues for New Zealand.
20. I propose that, subject to any refinement during drafting, the definition of security in the Bill be:

“security,—

a) means --

- i) the defence of New Zealand
- ii) the protection of New Zealand from acts of espionage, sabotage, and subversion, whether or not they are directed from or intended to be committed within New Zealand
- iii) the identification of foreign capabilities, intentions, or activities within or relating to New Zealand that impact on New Zealand's international well-being, reputation, or economic well-being

- iv) the protection of New Zealand from activities within or relating to New Zealand that—
 - A. are influenced by any foreign organisation or any foreign person; and
 - B. are clandestine or deceptive, or threaten the safety of any person; and
 - C. impact adversely on New Zealand’s international well-being, reputation, or economic well-being
 - v) the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act
 - vi) the prevention, investigation, and detection of organised crime, including trans-national organised crime, and
 - b) in an international security context, includes the safety and stability of the international community, through co-operative measures such as international conventions and other arrangements or agreements between countries”.
21. This definition draws from the definition of security in the NZSIS Act 1969 but is broader than that Act’s definition to be fit for use in matters of national or international security, criminal conduct or significant reputational harm to New Zealand as agreed by CBC and Cabinet [CBC Min (07) 20/14, CAB Min (07) 14/1A, CAB Min (07) 18/3]¹. The Bill will also contain a clause stating that the definition of security in the immigration context does not impact on the definition of security in the NZSIS Act 1969.
22. It is proposed that consistent with the definition above references to “national or international security” in the Bill be re-drafted to refer to “security” only. This would require Cabinet to agree to rescind the CBC decisions to specifically refer to “national and international security” in the Bill in the areas of exclusion, decision-making, deportation, review and appeal, monitoring and detention and classified information [CBC Min (07) 20/14].
23. Agencies note that the proposed definition of “security” is consistent with international understandings of security and is comparable to those used in Australia and Canada – where “security” is defined in legislation, and with the United Kingdom, where it is a matter that has been determined through jurisprudence.

Offence for retaining or disclosing official information

24. The Bill also requires that where classified information is withdrawn by the owning agency, all information must be returned to that agency. For the avoidance of any doubt, the Bill will clarify that a person can be charged with an offence under section 78A of the Crimes Act 1961 where classified information is unlawfully retained.

¹ The definition will specifically exclude any relationship being drawn between it and the definition in the NZSIS Act 1969 to avoid challenges to the basis on which NZSIS provides information to the Minister of Immigration.

25. The penalty for the offence of “Wrongful communication, retention, or copying of official information” under the Crimes Act 1961 is imprisonment for a term not exceeding 3 years.
26. The Bill requires that classified information is not disclosed where it is used in immigration and refugee and protection decision-making. This is the core safeguard for the information. For the avoidance of any doubt, the Bill will clarify that a person can be charged with an offence under the Summary Offences Act 1981 where classified information is unlawfully disclosed.
27. The penalty for the offence of “unauthorised disclosure of official information” under section 20A of the Summary Offences Act 1981 is imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 on conviction.

INTRODUCTION OF THE IMMIGRATION BILL

28. If Cabinet agrees to the proposals in this paper, the Bill will be updated and ready for introduction, after the next recess, in the week of 16-20 July 2007.

CONSULTATION

29. NZSIS and Justice were consulted on the classified information proposals in this paper. DPMC and Crown Law were informed.

FINANCIAL IMPLICATIONS

30. No financial implications have been identified with the proposals in this paper.

HUMAN RIGHTS IMPLICATIONS

31. The proposals for the use of classified information in immigration decision-making appears to 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 believe that the overall regime, including the proposals in this paper, will be robust and justifiable in NZBORA terms.

LEGISLATIVE IMPLICATIONS

32. Legislation is required to implement the proposals in this paper. Drafting instructions have been provided to the Parliamentary Counsel Office based on the CBC and Cabinet decisions on the Immigration Act review to date [CBC Min (07) 20/14, CAB Min (07) 14/1A, CAB Min (07) 18/3].
33. 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.
34. 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

35. This Regulatory Impact Statement was prepared by DoL and is considered to be adequate.

PUBLICITY

36. 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 on the Department's website along with the suite of Act review paper. 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

37. It is recommended that the Committee:

1. **note** that the Department of Labour, the New Zealand Security Intelligence Service, Department of the Prime Minister and Cabinet, Ministry of Justice and Crown Law have met to review the classified information provisions in the draft Immigration Bill
2. **note** that this meeting was held in response to New Zealand Security Intelligence Service concerns over the process for using classified information and safeguards for the information
3. **note** that the policy issues about the protection and use of classified information in immigration and refugee and protection decision-making have been resolved, consistent with the Cabinet Business Committee and Cabinet decisions on the classified information system bar one
4. **note** that based on the process and timetable agreed by all agencies, the draft Immigration Bill will be updated and ready for introduction, after the next recess, in the week of 16-20 July 2007

Refugee and protection decision-making

5. **rescind** the November 2006 CBC decision that "in initial decisions using classified information...all protection decisions involving classified information must be made by senior security-cleared determination officers to ensure that the experts in international law are making the decisions" [CBC Min (07) 20/14]

And instead,

6. **agree** that all refugee and protection decisions using classified information must be made by the Immigration and Protection Tribunal

Role of the Inspector-General

7. **note** that the classified information system in the draft Immigration Bill does not provide a role for the Inspector-General of Intelligence and Security (Inspector-General) and that this will be made explicit

The definition of security

8. **note** the concept of security is relevant to the:
- a. exclusion criteria
 - b. use of classified information in decision-making, and
 - c. deportation of persons threatening security

9. **agree** that, subject to any refinement during drafting, the definition of security in the Immigration Bill be:

“security,—

a. means --

- i. the defence of New Zealand
 - ii. the protection of New Zealand from acts of espionage, sabotage, and subversion, whether or not they are directed from or intended to be committed within New Zealand
 - iii. the identification of foreign capabilities, intentions, or activities within or relating to New Zealand that impact on New Zealand’s international well-being, reputation, or economic well-being
 - iv. the protection of New Zealand from activities within or relating to New Zealand that—
 - A. are influenced by any foreign organisation or any foreign person; and
 - B. are clandestine or deceptive, or threaten the safety of any person; and
 - C. impact adversely on New Zealand’s international well-being, reputation, or economic well-being
 - v. the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act
 - vi. the prevention, investigation, and detection of organised crime, including trans-national organised crime, and
- b. in an international security context, includes the safety and stability of the international community, through co-operative measures such as international conventions and other arrangements or agreements between countries”

10. **note** that the Immigration Bill will also contain a clause stating that the definition of security in the immigration context does not impact on the definition of security in the New Zealand Security Intelligence Service Act 1969

11. **rescind** the Cabinet Business Committee decisions to refer to “national and international security” in the Bill in the areas of exclusion, decision-making, deportation, review and appeal, monitoring and detention and classified information

And instead,

12. **agree** that consistent with the definition of security in recommendation 9, that references to “national or international security” in the draft Immigration Bill be re-drafted to refer to “security” only

13. **note** that the proposed definition is consistent with international understandings of security and is comparable to those used in Australia, Canada and the United Kingdom

Offence for retaining or disclosing official information

- 14.**note** that for the avoidance of any doubt, the Immigration Bill will clarify that a person can be charged with an offence under the Crimes Act 1961 where classified information is unlawfully retained after it has been withdrawn by the owning agency
- 15.**note** that the penalty for the offence of “unauthorised disclosure of official information” under section 78A of the Crimes Act 1961 is imprisonment for a term not exceeding 3 years on conviction
- 16.**note** that for the avoidance of any doubt, the Immigration Bill will clarify that a person can be charged with an offence under the Summary Offences Act 1981 where classified information is unlawfully disclosed
- 17.**note** that the penalty for the offence of “unauthorised disclosure of official information” under section 20A of the Summary Offences Act 1981 is imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 on conviction

Publicity

- 18.**note** that the Minister of Immigration intends to release this paper on the Department of Labour’s website along with the suite of Act review papers, and
- 19.**note** that some sections may be withheld under the Official Information Act 1982.

Hon David Cunliffe
Minister of Immigration

Regulatory Impact Statement

Adequacy statement

This Regulatory Impact Statement (RIS) was prepared by the Department of Labour (the Department) and is considered by the Department to be adequate.

Status quo and Problem

In the context of the Immigration Act review, in November 2006, the Cabinet Business Committee (CBC) decided that “in initial decisions using classified information...all protection decisions involving classified information must be made by senior security-cleared determination officers to ensure that the experts in international law are making the decisions” [CBC Min (07) 20/14].

It is important that, where it is used, classified information remains protected. An important protection is that the classified information is viewed by a limited number of people. In the refugee and/or protection decision-making process, it is not necessary that a Determination Officer makes an initial decision and sees the classified information.

Objectives

The proposal in the attached Cabinet paper seeks to limit the number of people who may see classified information where it is used in refugee and/or protection decision-making.

Alternative options

The alternative to the preferred option is to retain the status quo agreed by CBC in November 2006 [CBC Min (06) 20/14].

Preferred option

The preferred option is that in initial decisions using classified information, all refugee and/or protection decisions using classified information must be made by the Immigration and Protection Tribunal.

The preferred option reduces the number of people who may have access to the classified information. This is a safeguard for protecting the information. Secondly, the option escalates a refugee and/or protection decision-maker where classified information is used to that of a District Court Judge of the Immigration and Protection Tribunal ensuring a decision is made at a higher level.

Implementation and review

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

Consultation

Stakeholder Consultation

A public discussion paper on the Immigration Act review was released in April 2006. The Department held public meetings in May and June 2006 to outline the proposals, which

were attended by more than 650 people. The Department received 3,985 written submissions in response to the discussion paper, of which 360 were unique.

Submissions were received from a wide range of individuals and organisations including employer organisations, law societies, refugee and migrant groups and communities, immigration consultants, carriers, government agencies, and education providers.

The proposal in the Cabinet paper attached was not specifically consulted upon in the discussion paper which was designed to ensure that a wide cross-section of the public would be able to read and understand the key issues and the options for change. The level of detail involved in a document that addressed every aspect of the immigration legislation would have been too long and technical for people to readily access.

Government Departments/Agencies Consultation

The Department of the Prime Minister and Cabinet, the New Zealand Security Intelligence Service, the Ministry of Justice and Crown Law have been consulted on this paper.

The following government departments and public agencies have been consulted on the draft Bill and were also consulted during the policy development stage: the departments of the Prime Minister and Cabinet, Internal Affairs, and Corrections; the ministries of Defence, Economic Development, Education, Foreign Affairs and Trade, Health, Inland Revenue; Justice, Pacific Island Affairs, Social Development, Transport and Te Puni Kokiri; the New Zealand Customs Service, Police; the New Zealand Security Intelligence Service; the Government Communications Security Bureau; the Treasury; the New Zealand Qualifications Authority; the Office of Ethnic Affairs; Housing New Zealand Corporation; the Privacy Commission.

The chairs of the Refugee Status Appeals Authority, the Removal Review Authority, the Residence Review Board, and the Deportation Review Tribunal were consulted as were the chief judges of the courts. The Office of the Ombudsman and the Human Rights Commission were also consulted.