Office of the Minister of Immigration

Chair
Cabinet Business Committee

IMMIGRATION ACT REVIEW: FURTHER DECISIONS FOR THE IMMIGRATION BILL

PURPOSE

1 This paper seeks further decisions on a number of issues that have arisen during the drafting of the new Immigration Bill (the Bill). It notes some technical decisions that I have made during drafting. It also contains some proposals resulting from a review of the offence and penalty provisions in the Bill.

EXECUTIVE SUMMARY

2 In November 2006, the Cabinet Business Committee (CBC) made policy decisions in relation to the proposed Bill and agreed that "decisions on technical issues that might arise in the course of drafting be delegated to the Minister of Immigration" [CBC Min (06) 20/14]. They also noted that "if issues of substance arise in the course of drafting, these will be referred back". I have been working through the technical issues and taking decisions as required. However, some substantive issues have arisen on which I would like to seek further CBC agreement.

3 As a result of drafting the Bill, and undertaking stakeholder consultation, a review of the offence and penalty provisions in the Bill has also been commenced. This has been in response to feedback that some of the offences could be better positioned and that the penalties are too low.

4 This paper is in three parts. The first part seeks decisions on the substantive issues that have arisen during the drafting of the Bill. The second notes a number of technical decisions that I have made. The third contains some proposals from the review of the offences and penalties.

5 Part One seeks decisions on proposals in relation to:

a. Interim Visas to ensure that they operate consistently with the intent agreed by CBC in November 2006

b. protection claims made during the transition from the Immigration Act 1987 (the 1987 Act) to the new legislation, to ensure maximum fairness

c. the definition of "employment" to ensure that there are no loopholes in employer obligations under the immigration legislation

d. access to address information for compliance purposes to enable information to be sought from the Department of Corrections

e. access to information about non-citizens who are liable for deportation to support the integrity of the immigration system, and

f. the role of the Human Rights Commission (the Commission) in relation to the immigration system.

6 With regard to the role of the Commission, the paper contains three options:

- Option A – maintain the status quo, as agreed by CBC in November 2006, restricting the ability of a person to make a complaint regarding the content or application of immigration law or policy to the Commission on the basis that immigration matters inherently involve different treatment based on personal characteristics, or
- Option B – delay the introduction of the Bill, to enable the Department of Labour (the Department), the Commission and the Ministry of Justice (the Ministry) to further discuss the role of the Commission with regard to the immigration system and assess the implications of any change to that role, or
- Option C – that I lead a process of further engagement with the Commission and the Ministry to discuss the role of the Commission in the immigration system during the Select Committee phase of the Bill, reporting on the results (if any) of that engagement to the Select Committee, or the Committee of the Whole House [Minister of Immigration's preferred option].

7 Part Two asks CBC to note decisions I have made with regard to the provisions for the Department information-match with the Ministry of Social Development (MSD), adding the grant of a temporary visa to the list of information that can be shared. It also notes that I have agreed to carry over the limitation on judicial review of residence class visa decisions where the applicant is offshore. Also, that I have directed the Department not to carry over the provision in the 1987 Act enabling the Police to forcibly inoculate non-citizens who are being deported. This provision would not be consistent with the Bill of Rights Act 1990 (BORA).

8 Part Three contains some of the proposals resulting from the review of offences and penalties. The review is seeking to ensure that the offences and penalties in the Bill are appropriate in terms of the relative seriousness of each offence, and the level of penalty. The review proposes to:

a. increase the general penalty from a fine of $2,000 per offence to $5,000 per offence

b. increase the stage two penalty of a $5,000 fine and/or three months imprisonment to a $10,000 fine and/or three months imprisonment

c. increase the penalty for failing to maintain the confidentiality of a refugee or protected person or claimant from the general penalty to a $10,000 fine and/or three months imprisonment

d. increase the penalty for personation of an immigration officer from the general penalty to a $15,000 fine and/or 12 months imprisonment

e. introduce an offence for aiding and abetting in the provision of false or misleading information and introduce a penalty commensurate with the penalty for committing the offence itself

f. review the "without reasonable excuse" provision for the offence of producing or supplying false or misleading information or documents, and

g. introduce an offence for the failure to allow the collection of biometric information where it is specified for compliance purposes (e.g. to detect fraud or offending), punishable by a penalty of imprisonment for a term of up to 3 months, or a fine not exceeding $10,000, or both; but safeguarded by requiring the Department to obtain a court order to require the information to be provided.

9 After consideration of the proposals in this paper, the Bill will be finalised for consideration by the Cabinet Legislation Committee on 14 June 2007 and Cabinet on 18 June 2007 with a view to introduction on Wednesday 20 June 2007. Where it is agreed that further work be undertaken during the Select Committee phase, I shall report to Cabinet on its progress.

BACKGROUND

10 In November 2006, the CBC (with the power to act) agreed to the Immigration Act review's proposals to draft a new Bill to replace the 1987 Act. CBC also agreed that "decisions on technical issues that might arise in the course of drafting be delegated to the Minister of Immigration" [CBC Min (06) 20/14]. They also noted that "if issues of substance arise in the course of drafting, these will be referred back". In the course of drafting the Bill, I have been working through technical issues and taking decisions as required. However, some substantive issues have arisen on which I would like to seek CBC agreement.

11 As a result of drafting the Bill, and undertaking stakeholder consultation, a number of further decisions for the Bill are required. A review of the offence and penalty provisions in the Bill has also been undertaken in response to feedback that some of the offences could be better positioned and that the penalties are too low.

STRUCTURE OF THIS PAPER

12 This paper is in three parts. The first part seeks further decisions for the Bill. The second notes a number of technical decisions that I have made. The third contains some proposals relating to the review of the offences and penalties.

PART ONE: FURTHER DECISIONS

A. Interim Visas

13 In November 2006, CBC agreed that:

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

b. that Immigration Instructions would guide whether to grant a visa in the interim, what type of visa should be granted, and what conditions should

apply to the visa and that limited visitor visas would not be included in this provision [CBC Min (06) 20/14].

14 The Interim Visa is intended to enable non-citizens, who are lawfully in New Zealand, to remain lawful during the time taken to make a decision on any further application being considered by the Department. It is intended to reduce the instances of otherwise law-abiding non-citizens having a period of unlawful stay on their record (this may, for example, impact on the grant of citizenship).

15 In order for Interim Visas to work successfully, consistently with the intent, it is proposed that their grant be discretionary, but with reasons provided for decisions. It is also proposed that a person who had a substantive application before the Department, who was granted an Interim Visa to remain lawful during the application process, could not apply for another type of visa.

16 Agreement to these proposals will limit the ability for Interim Visas to be abused by those seeking to extend their time in New Zealand. Abuse could include, for example, making frivolous visa applications at the last minute or through making multiple applications for a range of different visa types.

17 These provisions are seen as important safeguards to the immigration decision-making process and will allow effective enforcement of those decisions. In Australia, for example, the management of the bridging visa process has led to the development of five different bridging visa types. Some are granted by automatic operation of law if a non-citizen makes a substantive application in the required timeframe. Some can be applied for but are granted at the discretion of a Departmental Officer in order to prevent abuse. This is a complex system.

18 The proposals above would limit the complexity of developing a range of different Interim Visa types unnecessarily but retain CBC's intention that those in the application process should not become unlawful.

<u>B. Protection claims treated as subsequent claims if made by declined 1987 Act claimants</u>

19 The Bill will introduce an expanded refugee and protection system that codifies New Zealand's immigration-related obligations under the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the International Covenant on Civil and Political Rights (the ICCPR). In order to manage the transition from the 1987 Act to the new system as efficiently and effectively as possible, it is proposed that where a refugee status claimant was declined under the 1987 Act, and claims protection under the Bill, they will be treated as subsequent claimants[1].

20 Where a protection claim is dismissed by the Department in this transitional period as manifestly unfounded or abusive, or as repeating a previous claim, it is

[1] A subsequent claim for refugee or protection status is made once the previous claim has been finally determined. The circumstances of the subsequent claim must be significantly changed from the previous claim, and this change must not have been brought about by the claimant for the purpose of creating grounds for recognition as a refugee or protected person. The Department can refuse to consider a subsequent claim on the grounds that is manifestly unfounded or abusive, or repeats a previous claim.

proposed that the claimant may appeal against that decision to the Immigration and Protection Tribunal (the Tribunal).

21 This proposal is necessary as it is possible that failed refugee status claimants under the 1987 Act will attempt to prolong their stay in New Zealand by taking advantage of the new provision to lodge a claim for protection under the Bill. Subsequent claims need to indicate a significant change in circumstances and it is anticipated that it would be unusual for a failed refugee status claimant to meet the threshold for protection under the CAT and ICCPR. This proposal, however, enables maximum fairness by granting a right of appeal against the decision not to consider a claim.

C. The definition of "employment"

22 The definition of employment in the 1987 Act is very broad. It extends beyond situations where a person works as an independent contractor or as a self-employed person. The 1987 Act is not clear whether the definition of "employer" therefore has a corresponding extended meaning to include those who engage contractors. Arguably, such employers should not contract persons who are not entitled to work (or to work for that particular person).

23 The lack of clarity creates a potential loophole for employers to avoid the offence provisions by engaging a person without entitlement to work as a contractor. For this reason it is proposed to include a definition of "employer" in the Bill that captures a person who engages an independent contractor.

24 This will mean that these employers may be:

a. subject to powers of entry and inspection, to determine their compliance with the Act, as well as compliance by people working for them, and

b. liable for offences, if they knowingly or without reasonable excuse engage a contractor who is not entitled to work (or to work for that person).

D. Access to address information for compliance purposes

25 In November 2006, CBC agreed to an expanded list of agencies from which the Department could access address information to locate non-citizens unlawfully in New Zealand. This list did not include the Department of Corrections (Corrections) as an agency although they may be able to provide the information.

26 It is proposed to include Corrections on the list of relevant agencies in the Bill. Corrections support this proposal and it is consistent with the range of other agencies that include:

- Ministry of Social Development
- New Zealand Customs Service, and
- New Zealand Police.

E. Information about those liable for deportation

27 CBC agreed that in the Bill, Immigration Officers would have powers of entry and inspection in relation to employers and education providers in order to:

- check a visa-holder's compliance with conditions relating to employment
- check an employer's or education provider's compliance with the immigration legislation, and
- obtain information about a non-citizen unlawfully in New Zealand.

28 This proposal does not allow for information to be sought about non-citizens who are not unlawful, but who are liable for deportation from New Zealand on other grounds. This is inconsistent with powers of entry and inspection in relation to accommodation providers (where powers may be exercised to locate persons unlawfully in New Zealand as well as those liable for deportation on other grounds).

29 It is proposed to allow Immigration Officers to exercise powers of entry and inspection in relation to employers and education providers in order to obtain information about non-citizens in New Zealand who are liable for deportation. However, it is proposed to limit the use of this power so that it cannot be exercised in relation to persons in "compulsory education" or family members of these persons.[2] This will enable any information sought from education providers to be restricted to those not proving compulsory education, thereby protecting non-citizen children. Importantly, this proposal is consistent with the Cabinet decision to withdraw the United Nation Convention of the Rights of the Child's general reservation on Children Unlawfully in New Zealand [CAB Min (07) 11/8].

F. Role of the Human Rights Commission

30 Section 149D of the 1987 Act restricts the ability of a person to make a complaint regarding the content or application of immigration law or policy to the Human Rights Commission (the Commission) on the basis that immigration matters *inherently involve different treatment based on personal characteristics*. The Commission may, however, perform most of its broader functions under section 4 of the Human Rights Act 1993 including:

a. advocating and promoting respect for, and an understanding and appreciation of, human rights in New Zealand society, and

b. encouraging the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society.

31 Section 149D of the 1987 Act allows, for example, complaints against the Department to be made regarding discrimination that is not based on law or policy such as instances where a non-citizen may have been discriminated against in the decision-making process by an officer of the Department. It also allows the Commission to report to government on issues of discrimination in policy which the Commission thinks the government should reconsider.

32 In November 2006, CBC agreed to retain the existing provision in the Bill. The Commission has stated, however, that the provision is too limiting and has

[2] Unless the family members themselves are unlawful and thereby are an appropriate subject for inquiries in their own right.

provided the Department with an alternative option. The option would allow the Commission to seek declaratory judgments, and to apply to the Human Rights Review Tribunal (HRRT) to remedy a complaint following an inquiry instigated by the Commission.

33 The Ministry of Justice (the Ministry) advise that the Commission has not consulted the Ministry about the option provided to the Department. In principle, the Ministry supports the following approach to the Commission's role in immigration matters:

a. that individuals should not be able to access the publicly funded complaints process under Part 1A of the Human Rights Act 1993 in respect of the content or application of immigration law, which is the status quo position under the 1987 Act, and

b. that the Commission should be able to take significant concerns about human rights implications of immigration law or policy to the HRRT or the High Court.

34 The Ministry advise that the Commission's option appears to go further than the role stated above by apparently reinstating the right for individuals to complain under section 76(2)(a) of the Human Rights Act 1993. This creates the risk of a large number of individual complaints being made to the Commission. The Ministry has not had an opportunity to assess the fiscal or operational risks for the Commission and the Crown from this proposal. The Ministry is therefore not supportive of the Commission's option.

35 The Department advises that the Commission's option may also represent a risk to the effective development and functioning of immigration policy. In real terms, any policy that was developed could be open for the Commission to seek declaratory judgments, and to apply to the HRRT to remedy a complaint. For example, the Commission may seek a judgment based on age restrictions in a particular policy, or on the health criteria to which applicants are subject.

36 The operational impacts of a change to the Commission's functions under the Bill cannot be determined. The key potential risks are that:

a. the Commission may seek to intervene on any (or all) policies developed by the Department and/or

b. applicants may pressure the Commission to exercise its powers to promote their own interests.

37 It is not possible to determine how likely these risks would be in practice. Ultimately, it would be up to the Commission to determine the matters in which it got involved and the Department would have to rely on the good faith of the Commission. The risks are currently mitigated in the Bill through the retention of the status quo.

38 Notwithstanding the substantive arguments above, there may well be a case for further dialogue with the Commission. Dialogue could ensure a strong mutual understanding of roles and to explore, within or close to the current jurisprudence, some potential for finetuning to take some account of the Commission's concerns without creating an inappropriate burden on the immigration system. Given the urgency for the introduction of the Bill it would

seem more appropriate for any further such conversations to take place in parallel with the legislative process.

39 As a way forward, I propose three options:

- Option A – maintain the status quo, as agreed by CBC in November 2006, restricting the ability of a person to make a complaint regarding the content or application of immigration law or policy to the Commission on the basis of that immigration matters inherently involve different treatment based on personal characteristics, or
- Option B – delay the introduction of the Bill, to enable the Department, the Commission and the Ministry to further discuss the role of the Commission with regard to the immigration system and assess the implication of any change to that role, or
- Option C – that I lead a process of further engagement with the Commission and the Ministry to discuss the role of the Commission in the immigration system during the Select Committee phase of the Bill, reporting on the results (if any) of that engagement to the Select Committee or the Committee of the Whole House [Minister of Immigration's preferred option].

PART TWO: TECHNICAL DECISIONS TO NOTE

G. Information sharing with the Ministry of Social Development

40 The grant date of temporary entry class visas is useful for data-matching purposes in relation to social security matters (because it relates to social security eligibility).

41 Currently, the Bill allows the sharing of immigration information such as a visa expiry date, a deportation date, a Determination Officer's decision on a non-citizen's refugee or protection status, an appeal against a Determination Officer's decision, and the outcome of such an appeal. I have agreed to enable the grant date of any visa to be added to the list of information eligible to be requested for information-matching purposes in relation to social security matters.

42 A new Information Matching Impact Assessment for the information-match is currently being prepared by the Department, which will continue to consult with the Privacy Commission on the operation of this provision as other changes have also been agreed as a part of *The Family Sponsored Stream: Improving The Stream's Management And Ensuring Good Settlement Outcomes* agreed by Cabinet [POL Min (07) 11/20].

H. Judicial review where an applicant is offshore

43 The 1987 Act does not enable the judicial review of refusals to grant residence class visas offshore (including those refused by one of the existing appeals authorities) and I have agreed that this provision be carried over into the Bill. Tribunal appeal will generally be available in respect of refusals to grant residence class visas (which can then be subject to further appeal on points of law to the High Court).

44 This proposal balances the interests of the individual with the interests of the government in determining who may be a resident in New Zealand. It continues the status quo.

I. Forced inoculation

45 Section 141(1)(c) of the 1987 Act allows police officers to require a person about to be deported from New Zealand to undergo any inoculation. This provision was initially inserted into the Act to enable deportation to or through a country that had strict health requirements.

46 There are serious humanitarian concerns about this provision and I am advised that it would be difficult to justify it for a New Zealand Bill of Rights 1990 (BORA) vet. The provision was in the 1987 Act prior to the BORA coming into force. Under section 11 of the BORA, everyone has the right to refuse to undergo medical treatment. The notion of bodily integrity is central to section 11 of the BORA. Inoculation is also very intrusive and contrary to many people's cultural, religious and personal values and beliefs.

47 I am advised that this provision has never actually been used and that the number of transit ports direct from New Zealand has grown. It is difficult to imagine a situation where the ability to inoculate would be the only possible means to achieve deportation. As such, I have directed that this provision not be included in the Bill. There has been strong support for this decision from stakeholder agencies.

PART THREE: REVIEW OF OFFENCES AND PENALTIES

48 Some feedback received during consultation on the Bill has been that the penalties for offences are too low or are inconsistent across the type of offence. In order to address this issue, the Department is in the process of reviewing the offences and penalties in the Bill. The review seeks to ensure that the offences and penalties in the Bill are appropriate in terms of the relative seriousness of each offence and the level of penalty. While a review of the penalties relating to New Zealand's transnational crime obligations was undertaken in 2002, there has been no systematic review of immigration penalties.

49 I propose to make a number of recommendations for offences and penalties detailed below, but I also wish to note that my officials are undertaking further work on offences and penalties relating to knowingly providing false or misleading information. Once this work is completed, a further Cabinet paper will be prepared seeking Cabinet's agreement and advice on these offences and penalties. Where changes are agreed, advice will be provided to the Select Committee.

J. Increase the general penalty

50 The general penalty covers those offences where a specific penalty has not been legislated. It is, in essence, a "catch all" penalty in the Bill. It is proposed to increase the general penalty for a general offence from a fine of $2,000 per offence to $5,000 per offence.

51 This proposal reflects feedback that the penalty for a general offence is too low both in absolute terms and in relation to the seriousness of the offences committed against the immigration system. Having the penalty set at too low a level reduces the incentive to comply. Some examples of general offences include:

a. without reasonable excuse, refusing or failing to produce or surrender any document when required to do so by an immigration officer or determination officer, and

b. after being warned, refusing or failing without reasonable excuse to comply with any requirement of an immigration officer under that section.

K. Increase the stage two penalty

52 It is proposed to increase the stage two penalty of a $5,000 fine and/or three months imprisonment penalty to a $10,000 fine and/or three months imprisonment. Once again, this proposal reflects feedback that generally the penalties are low both in absolute terms and in relation to the seriousness of the offences. It acknowledges that having the stage two penalty set at too low a level reduces the incentive to comply. Some examples of stage two offences include:

a. aiding, abetting, inciting, counselling, or procuring any other person to be or to remain in New Zealand unlawfully or to breach any condition of a visa granted to the other person under this Act, and

b. resisting or intentionally obstructing any immigration officer or determination officer or member of the police in the exercise of the powers of that officer or member under the immigration legislation.

L. Increase the penalty for failing to maintain confidentiality

53 It is proposed to increase the penalty for failing to maintain the confidentiality of a refugee or protected person or claimant from the general penalty to the stage two penalty. (If the proposal to increase the stage two penalty is agreed, this will be a $10,000 fine and/or three months imprisonment).

54 Increasing the penalty for failing to maintain the confidentiality of a refugee or protected person or claimant recognises the serious implications a breach of confidentiality may have. Where the person is a claimant, such a breach may have serious implications for the outcome of their claim. Refugees and protected persons should feel assured that their personal information is protected by the immigration system.

55 This proposal is also consistent with the increased scope of the obligation to maintain confidentially agreed by CBC in November 2006 that, for example, captures the media in reporting on refugees or protected persons or claimants. I consider it is appropriate to increase the penalty to ensure it acts as a deterrent.

M. Increase the penalty for personation

56 Personation of an Immigration Officer is a serious matter. It may have significant impacts on those non-citizens who are vulnerable in the immigration system. They may be given false information or false hope about their status or the status of any application they have before the Department.

57 Under the Bill, Immigration Officers will have powers of search and inspection, and search and entry, along with a limited four hour power of detention. These powers will only be exercised by specially designated and trained officers and it would be a serious matter if they were abused by someone personating an Immigration Officer.

58 The current penalty of $2,000 for personating an Immigration Officer is too low in comparison with similar offences. For example, personation of:

a. a Customs Officer is punishable by imprisonment for a term not exceeding 12 months or a fine not exceeding $15,000

b. an Aviation Security Officer is punishable by imprisonment for a term not exceeding 3 months and/or a $2,000 fine, and

c. a Health and Safety Inspector is punishable by a $250,000 penalty.

59 It is proposed, therefore, to increase the penalty for personation of an immigration officer from the general penalty to a penalty of up to $15,000 fine and/or 12 months imprisonment. This is consistent with the penalty for personation of a Customs Officer.

N. Create a new offence for aiding and abetting

60 There is an offence for aiding and abetting in the Bill with regard to the completion of entry requirements at the border, for example, aiding and abetting someone to lie on their arrival card. There is, however, no offence for aiding and abetting someone to mislead the Department when:

a. applying for visas

b. making an expression of interest

c. varying conditions of a visa

d. making an appeal to the Minister or the Tribunal

e. knowingly surrendering a document that is false or misleading

f. completing a document required as part of border requirements, or

g. failing to comply with responsibilities on arrival in New Zealand.

61 A new offence is therefore proposed to ensure that, where someone does aid and abet, the Department is able to take action against the person. Aiding and abetting offences are necessary to protect the integrity of the immigration system, and those people who may be vulnerable in it and forced to make misleading representations to the Department. With these reasons in mind, it is

considered appropriate that the level of penalty should align with the penalty for the commission of the offence itself.

62 It is proposed to introduce an offence for aiding and abetting in the provision of false or misleading information and introduce a penalty that is proportionate to the penalty for committing the offence itself.

O. Knowingly providing false or misleading information: "reasonable excuse" as a defence

63 Under the 1987 Act it is an offence to "without reasonable excuse" produce or surrender any document or supply information to an Immigration Officer knowing that it is false or misleading in any material respect. "Reasonable excuse" has been broadly interpreted and can vary in each set of circumstances and in different courts with different juries. This has resulted in difficulties for the Department in obtaining a conviction for this offence.

64 An example of such a difficulty occurred in a 2006 court case, where a failed refugee status claimant was being prosecuted for giving multiple versions of false and misleading information throughout her refugee status claim and subsequent appeal. [Withheld under sections 9(2)(g)(i) and 9(2)(h) of the Official Information Act 1982]

65 [Withheld under 9(2)(g)(i) and 9(2)(h) of the Official Information Act 1982]

66 [Withheld under 9(2)(g)(i) and 9(2)(h) of the Official Information Act 1982]

67 [Withheld under 9(2)(g)(i) and 9(2)(h) of the Official Information Act 1982]

68 I wish to note that further work on an appropriate response to this issue is contemplated. Options range from removing the "excuse" defence altogether (and leaving the excuse issue solely as a mitigating factor for the judge to consider when sentencing), to including a more targeted defence. Officials will work on a proposal at a later date that appropriately balances the needs of the State and the interests of the individual.

P. Creation of an offence of refusal to provide biometrics

69 In November 2006, CBC agreed that the consequence of refusal to provide biometric information when required under the immigration legislation may constitute an adverse immigration inference. An adverse inference makes sense where the information is being collected to process an application, because if the person fails to satisfy an Immigration Officer of his/her identity, then the application may be refused.

70 Biometric information includes that agreed by CBC, being a fingerprint, iris scan or photograph of a non-citizen. Where biometric information is being collected as part of an investigation (such as for identity fraud or for an offence), alternative consequences are required. A refusal to provide biometrics and an adverse inference is not enough to enable a determination that fraud has occurred. An adverse inference is not sufficient proof of an offence being committed.

71 If no offence is provided for, there will be no consequence of failing to provide biometric information in this circumstance rendering the power to require it, in

effect, meaningless. A non-citizen can refuse to provide the information knowing that there will be no consequence.

72 While I propose that failure to provide biometric information in this circumstance *be* deemed obstruction, given the special nature of biometric information, I am proposing special safeguards for the offence. I propose to include a provision that requires the Department to seek a court order to require biometric information in the event that it becomes necessary for compliance purposes. This will ensure that the court has the opportunity to consider the appropriateness of the requirement before any prosecution for the obstruction offence could occur.

73 This proposal will not change the CBC decision regarding the requirement to provide biometric information or the type of biometric information required. It will not apply to New Zealand citizens who are only required to provide a photograph at the border to confirm their entitlement to enter New Zealand.

CONSULTATION

74 The Ministries of Justice, Foreign Affairs and Trade, and Social Development have been consulted on this Cabinet paper along with the Department of Corrections and Internal Affairs and the New Zealand Customs Service. The Department of Prime Minister and Cabinet and the Treasury have been informed.

75 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 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 and Special 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.

76 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.

FINANCIAL IMPLICATIONS

77 While there are no direct financial implications associated with this Cabinet paper, it should be noted that funding for implementing the Act review, including establishing the Tribunal was sought through Budget 2007 and has been set aside in contingency [CAB Min (07) 12/1 (27)].

HUMAN RIGHTS IMPLICATIONS

78 The Ministry of Justice advises that proposals in this paper appear to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

79 The Ministry advises that if the safeguards for the biometric offence provisions are not agreed, that the proposal may raise an issue in relation to the right to be free from unreasonable search and seizure under section 21 of the Bill of Rights Act. The Ministry would need to assess further justificatory material from the

Department and the final drafting if the safeguards were not incorporated in order to advise the Attorney-General on consistency with the Bill of Rights Act.

LEGISLATIVE IMPLICATIONS

80 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 and the April and May 2007 decisions on the Immigration Act review [CBC Min (06) 20/14, CAB Min (07) 14/1A, POL Min (07) 11/20].

81 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 the Committee's decisions.

82 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 ANALYSIS

83 A Regulatory Impact Statement (RIS) has been prepared only for Part Three of this paper, the offences and penalties review. This is because the other proposals are of a nature that does not substantially alter the CBC decisions for the new immigration legislation agreed in November 2006 [CBC Min (06) 20/14]. The impacts of the CBC decisions were contained in the RIS that accompanied the November 2006 Cabinet paper.

84 With regard to the proposals in Part Three of this paper, the Department is satisfied that the principles of the Code of Good Regulatory Practice have been fully complied with.

PUBLICITY

85 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. Some sections may be withheld under the Official Information Act 1982.

RECOMMENDATIONS

86 It is recommended that the Committee:

1 **note** that further decisions on the issues related to the Immigration Bill are required for drafting to be finalised to allow introduction by 20 June 2006;

Part One: Further decisions

2 **agree** that, in order for Interim Visas to work successfully, their grant be discretionary, but with reasons to be given for decisions;

3 **agree** that a person who has a substantive visa application before the Department of Labour, who was granted an Interim Visa to remain lawful during the application process, could not apply for another type of visa;

4 **agree** that, where a refugee status claimant was declined under the

Immigration Act 1987, and claims protection under the Immigration Bill, they will be treated as subsequent claimants;

5 **agree** that, where a protection claim is dismissed by the Department of Labour during the transitional period as manifestly unfounded or abusive, or as repeating a previous claim, the claimant may appeal against that decision to the Immigration and Protection Tribunal;

6 **agree** to include a definition of "employer" in the Immigration Bill that captures a person who engages an independent contractor;

7 **agree** that the list of agencies from which the Department of Labour can access address information to locate non-citizens unlawfully in New Zealand include the Department of Corrections;

8 **note** that the Department of Corrections support this proposal;

9 **agree** to allow Immigration Officers to exercise powers of entry and inspection in relation to employers and education providers in order to obtain information about non-citizens in New Zealand who are liable for deportation;

10 **agree** to limit the use of the power of entry and inspection in recommendation eight so that it cannot be exercised in relation to persons in "compulsory education" or the family members of these persons;

11 **note** that recommendations 9 and 10 are consistent with the Cabinet decision to withdraw the United Nation Convention of the Rights of the Child general reservation on Children Unlawfully in New Zealand [CAB Min (07) 11/8];

12 **note** that Cabinet Business Committee agreed that the Immigration Bill carry over section 149D of the Immigration Act 1987, which provides the Human Rights Commission with the power to perform most of its broader functions under section 5 of the Human Rights Act 1993;

13 **note** that the Human Rights Commission believes that section 149D is too restrictive and has proposed an alternative option that would:

13.1 allow the Human Rights Commission to seek declaratory judgements; but

13.2 apply to the Human Rights Review Tribunal to remedy a complaint following an inquiry instigated by the Commission;

14 **note** that the Ministry of Justice was not consulted on the option at recommendation 13 above;

15 **note** that Department of Labour officials advise that the recommendation at 13 above may raise risks;

16 **agree**:

EITHER

Option A

16.1 to maintain the status quo, restricting the ability of a person to make a complaint regarding the content or application of immigration law or policy

to the Human Rights Commission on the basis that immigration matters inherently involve different treatment based on personal characteristics;

OR

Option B

16.2 to delay introduction of the Immigration Bill, to enable the Department of Labour, the Human Rights Commission and the Ministry of Justice to further discuss the role of the Human Rights Commission with regard to the immigration system and assess the implication of any change to that role;

OR

Option C

16.3 that the Minister of Immigration lead a process of further engagement with the Human Rights Commission and the Ministry of Justice to discuss the role of the Human Rights Commission in the immigration system during the Select Committee phase of the Immigration Bill, reporting on the results (if any) of that engagement to the Select Committee or the Committee of the Whole House [Minister of Immigration's preferred option];

Part Two: Technical issues to note

17 **note** that I have agreed:

17.1 to enable the grant date of any visa to be added to the list of information eligible to be requested from the Chief Executive for data-matching purposes in relation to social security matters

17.2 that the Immigration Act 1987 provision limiting the ability to apply for judicial review of decisions to decline residence class visas where the applicant is offshore be carried over into the new legislation, and

17.3 not to carry over Section 141(1)(c) of the Immigration Act 1987 allowing police officers to require a non-citizen about to be deported from New Zealand to undergo any inoculation;

Part Three: Review of offences and penalties

18 **agree** to increase the general penalty for a general offence from a fine of $2,000 per offence to $5,000 per offence;

19 **agree** to increase the $5,000 fine and/or three months imprisonment penalty to a $10,000 fine and/or three months imprisonment (referred to as the stage two penalty in the recommendations below);

20 **agree** to increase the penalty for failing to maintain the confidentiality of a refugee or protected person or claimant from the general penalty to the stage two penalty;

21 **note** that if the proposal to increase the stage two penalty is agreed, the penalty agreed in recommendation 20 above will be a $10,000 fine and/or three months imprisonment;

22 **agree** to increase the penalty for personation of an immigration officer from the general penalty to a $15,000 fine and/or 12 months imprisonment;

23 **agree** to introduce an offence for aiding and abetting in the provision of false or misleading information;

24 **agree** to introduce a penalty for the offence of aiding and abetting in the provision of false or misleading information commensurate with the penalty for committing the offence itself;

25 **note** that further work on the issue of the "reasonable excuse" defence for the offence of knowingly providing of false or misleading information is being contemplated by the Department of Labour;

26 **note** that without an offence provided for, there will be no consequence of failing to provide biometric information in regard to investigating fraud or offences against the immigration legislation, rendering the power to require the biometric information, in effect, meaningless;

27 **agree**:

27.1 to create an obstruction offence with a special safeguard when biometric information is required for compliance purposes; and

27.2 that the special safeguard would require the Department of Labour to seek a court order to require biometric information in the event that it becomes necessary for compliance purposes;

28 **note** that the biometric offence would not apply to New Zealand citizens who are only required to provide a photograph at the border to confirm their entitlement to enter New Zealand; and

Publicity

29 **note** that I propose to release this paper on the Department of Labour's website but that some sections may be withheld under the Official Information Act 1982.

Hon David Cunliffe
Minister of Immigration

REGULATORY IMPACT STATEMENT

EXECUTIVE SUMMARY

The proposals in the attached Cabinet paper seek to ensure that the offences and penalties in the Immigration Bill (the Bill) are appropriate in terms of the relative seriousness of each offence, and the level of penalty.

The penalties for some offences in the Bill are too low or are inconsistent across the type of offence. There are also no offences or penalties provided for in some areas where they may be reasonably expected.

ADEQUACY STATEMENT

This RIS was prepared by the Department of Labour (the Department) and is considered by the Department to be adequate. The Department is satisfied that the principles of the Code of Good Regulatory Practice have been fully complied with.

STATUS QUO AND PROBLEM

The penalties for some offences in the Immigration Bill (the Bill) are too low or are inconsistent across the type of offence. There are also no offences or penalties provided for in some areas where they may be reasonably expected.

Status Quo	**Problem**
<u>The general penalty</u> The general penalty covers those offences where a specific penalty has not been legislated. It is, in essence, a "catch all" penalty in the Bill. The general penalty is a fine of $2,000 per offence.	The general offence is too low both in absolute terms and in relation to the seriousness of the offences. Having the penalty set at too low a level reduces the incentive to comply with obligations.
<u>The stage two penalty</u> The stage two penalty is a $5,000 fine and/or three months imprisonment penalty.	Generally, the penalties are low both in absolute terms and in relation to the seriousness of the offences. Having the stage two penalty set at too low a level reduces the incentive to comply.
<u>The penalty for failing to maintain confidentiality</u> The penalty for failing to maintain the confidentiality of a refugee or protected person is the general penalty.	Increasing the penalty for failing to maintain the confidentiality of a refugee or protected person is in line with the increased scope of the new obligation. Because the obligation has a broader application under the new legislation, the Department considers it is appropriate to increase the penalty to ensure it acts as a deterrent.
<u>The penalty for personation</u> The penalty for personation of an immigration officer is the general penalty.	The penalty for this offence is too low particularly in comparison with similar offences. Personation of: • a Customs Officer is punishable by imprisonment for a term not exceeding 12 months or a fine not exceeding $15,000 • an Aviation Security Officer is punishable by imprisonment for a term not exceeding 3 months and/or a $2,000 fine, and • a Health and Safety Inspector is punishable by $250,000 penalty.

Status Quo	Problem
<u>No offence for aiding and abetting</u> There is no offence for aiding and abetting in the provision of false or misleading information and no penalty commensurate with the penalty for committing the offence itself.	There is no offence for aiding and abetting someone to mislead the Department when applying for visas, making an expression of interest, varying conditions of a visa, making an appeal to the Minister or the Tribunal, knowingly surrendering a document that is false or misleading, or completing a document required as part of border requirements or failing to comply with responsibilities on arrival in New Zealand. A new offence is therefore proposed to ensure that, where someone does aid and abet the offence the Department is able to take action against the person. It is considered to be appropriate that the level of penalty should align with the penalty for the commission of the offence itself.
<u>"Reasonable excuse" for knowingly providing false or misleading information</u> Under the 1987 Act it is an offence to "without reasonable excuse" produce or surrender any document or supply information to an immigration officer knowing that it is false or misleading in any material respect.	The reasonable excuse test currently contained in this penalty has been broadly interpreted and can vary in each set of circumstances and in different courts with different juries. This has resulted difficulties in the Department obtaining a conviction for this offence. Where the "reasonable excuse" defence applies, the Department has an onus to prove beyond reasonable doubt that the accused did not have a reasonable excuse for committing the offence. The question of what is and is not reasonable is left for the jury's determination. [Withheld under section 9(2)(g)(i) of the Official Information Act 1982]
<u>No offence or penalty for failing to provide biometric information for as part of an investigation</u> There is no offence for failing to provide biometric information for as part of an investigation (such as for identity fraud or for an offence) where an adverse immigration inference is not an appropriate penalty.	Where biometric information is being collected as part of an investigation, alternative consequences to an adverse immigration inference are required. A refusal to provide biometrics and an adverse inference is not enough to enable a determination that fraud has occurred. An adverse inference is not sufficient proof of an offence being committed. If no offence is provided for, there will be no consequence of failing to provide biometric information in this circumstance rendering the power to require it, in effect, meaningless. A non-citizen can refuse to provide the information knowing that there will be no consequence.

OBJECTIVES

The proposals in the attached Cabinet paper seek to ensure that the offences and penalties in the Bill are appropriate in terms of the relative seriousness of each offence, and the level of penalty.

ALTERNATIVE OPTIONS

The alternative to the preferred option is to retain the status quo agreed by Cabinet Business Committee in November 2006 in the context of the Immigration Act review [CBC Min (06) 20/14].

PREFERRED OPTION

The preferred option is to:

- Increase the general penalty for a general offence from a fine of $2,000 per offence to $5,000 per offence.
- Increase the stage two penalty of $5,000 fine and/or three months imprisonment penalty to a $10,000 fine and/or three months imprisonment.
- Increase the penalty for failing to maintain the confidentiality of a refugee or protected person or claimant from the general penalty to the stage two penalty.
- Increase the penalty for personation of an immigration officer from the general penalty to a penalty of $15,000 fine and/or 12 months imprisonment.
- Introduce an offence for aiding and abetting in the provision of false or misleading information and introduce a penalty commensurate with the penalty for committing the offence itself.
- Have the penalty for aiding and abetting in the provision of false or misleading information commensurate with the offence itself.
- That the “without reasonable excuse” provision for the offence in the Immigration Act 1987 of producing or surrendering any document or supply information to an immigration officer knowing that it is false or misleading in any material respect will require further work.
- That a failure to allow the collection of biometric information where it is required for compliance purposes (e.g. to detect fraud or offending), require a Court Order if the request to provide biometric information is deemed to be appropriate. A further refusal to provide biometric information should constitute an offence, punishable by a penalty of imprisonment for a term of up to 3 months, or a fine not exceeding $10,000, or both.

The preferred options will assure the Government, the Department and the general community that the offences and penalties in the immigration legislation are appropriate in terms of the relative seriousness of each offence, and the level of penalty, and that the offence and penalty provisions support the goal of the legislation to ensure the integrity of the immigration system.

The preferred options will have no impact on non-citizens and other third parties who comply with their immigration responsibilities. They provide appropriate incentives for compliance.

IMPLEMENTATION AND REVIEW

The Immigration Bill is currently being drafted and is to be introduced to the House in June 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 proposals in the Cabinet paper attached were 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 ministries of Justice, Foreign Affairs and Trade, and Social Development have been consulted on the attached Cabinet paper along with the departments of Corrections and Internal Affairs and the New Zealand Customs Service. The Department of Prime Minister and Cabinet and the Treasury have been informed.

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 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 and Special 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.